No. __-___

IN THE

Supreme Court of the United States

CITY OF NEW HAVEN,

Petitioner,

v.

MICHAEL BRISCOE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ricci v. DeStefano*, applying its newly adopted strong-basis-in-evidence standard, this Court ordered summary judgment in a Title VII disparate-treatment lawsuit against Petitioner City of New Haven based on its decision not to certify the results of promotional examinations administered in its Department of Fire Services. *See* 129 S. Ct. 2658, 2681 (2009). The Court further recognized that "[i]f, after the City certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." *Id.* A panel of the Second Circuit nevertheless rejected the Court's interpretation of the strong-basis-in-evidence standard and held that the City could face disparate-impact liability for the very certification that this Court ordered it to undertake. Pet. App. 3a. The question presented is:

> Whether a lower court may disregard this Court's express guidance and create Title VII disparate-impact liability for actions this Court ordered an employer to undertake as a remedy for a Title VII disparate-treatment violation.

PARTIES TO THE PROCEEDING

Petitioner is the City of New Haven, Connecticut, defendant-appellee below.

Respondent is Michael Briscoe, plaintiff-appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The City of New Haven, Connecticut respectfully petitions for a writ of certiorari to review or summarily reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit panel opinion (Pet. App. 3a) is reported at 654 F.3d 200. The Second Circuit's order denying panel rehearing and rehearing *en banc* is unreported. Pet. App. 1a.

JURISDICTION

The Second Circuit panel issued an opinion on August 15, 2011. Pet. App. 3a. The Second Circuit's judgment became final when it denied panel rehearing and rehearing *en banc* on November 17, 2011. *Id.* at 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The panel's decision flagrantly contravenes this Court's guidance in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), and exposes the City to Title VII disparate-impact liability for implementing the very remedies that the Court mandated in that case. In *Ricci*, this Court concluded that the strong-basis-in-evidence test resolves any conflict between Title VII's disparate-treatment and disparate-impact provisions, and determined that the City had "no evidence" to conclude that it would face disparate-impact liability when it had refused to certify the results of a promotional examination in its Department of Fire Services. 129 S. Ct. at 2681. The Court therefore determined that the City's refusal to "certif[y] the test results," out of a concern with the examinations'

disparate impact on minority candidates, violated Title VII's disparate-treatment prohibition. *Id.*

The Court anticipated that the City might face a disparate-impact challenge to its certification of the exam results, and that upholding such a challenge would trap the City in conflicting Title VII obligations. *See id.* Thus, as a necessary premise of its ruling, the Court further directed:

> Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Id.

The Second Circuit panel below acknowledged that this Court in *Ricci* took the "[u]nusual[]" step of ordering a summary judgment that required the City "to certify the results," and even quoted the Court's guidance that the City "would avoid disparate-impact liability" for that action. Pet. App. 5a. Yet the panel brushed aside the Court's guidance as "dicta . . . perhaps attributable to a simple logical error." *Id.* at 14a. The panel thus held that, notwithstanding *Ricci*, the City *could* face disparate-impact liability for certifying the exam results. *Id.* at 4a.

The panel's decision thus squarely contradicts this Court's decision in *Ricci*, and fails to accord that decision binding, *stare decisis* effect. The panel recognized that its decision inflicts a "whipsaw effect" on the City, which "has duly certified the test as ordered by the Supreme Court but now must defend a disparate-impact suit" based on that certification. *Id.* at 20a–21a. In the process of whipsawing the City in an actionable disparate-impact *violation* for complying with a court-ordered disparate-treatment *remedy*, the panel also split with the Third Circuit's rule that "[a] government employer's compliance with a judicial mandate does not constitute an official policy or employment practice" that can trigger Title VII liability. *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 484–85 (3d Cir. 2011). And the questions implicated by the panel's decision are important and recurring: the panel has started a trend away from the strong-basis-in-evidence test that this Court prescribed in *Ricci*, and has threatened to put employers nationwide to the Hobson's choice of either foregoing useful promotional exams entirely or risking conflicting disparate-treatment and disparate-impact liability for using them. The Court should grant certiorari to review or summarily reverse the judgment below.

STATEMENT OF THE CASE

A. The *Ricci* Decision

1. In November and December 2003, the City's Department of Fire Services administered written and oral examinations to firefighters seeking to qualify for promotion to lieutenant and captain. *Ricci*, 129 S. Ct. at 2665-66. Due to concerns with the test results' disparate impact on minority candidates, and

after five hearings involving extensive testimony and evidence, the City's Civil Service Board (the Board) deadlocked on the question whether to certify the results. *See id.* at 2671. Because there was no majority, the City did not certify the results. *See id.*

In 2004, a group of white and Hispanic firefighters who had passed the exams filed the *Ricci* suit against the City and various City officials asserting various claims, including a Title VII disparate-treatment claim. *See id.* The gravamen of *Ricci* was the plaintiffs' contention that the City's decision not to certify the exam results discriminated against them on the basis of race. *See id.* The district court granted summary judgment in the defendants' favor, and a panel of the Second Circuit affirmed. *See Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

2. This Court reversed. The Court recognized that it faced "two provisions of Title VII to be interpreted and reconciled, with few, if any, precedents in the courts of appeals discussing the issue." *Ricci*, 129 S. Ct. at 2672. "Our task," explained the Court, "is to provide guidance to employers and courts for situations when these two prohibitions could be in conflict absent a rule to reconcile them." *Id.* at 2674. To reconcile the competing disparate-impact and disparate-treatment provisions, the Court rejected both sides' statutory constructions and sought to "strike[] a more appropriate balance" by importing the "strong basis in evidence" test to the Title VII context. *Id.* at 2674–75. Under that test, an employer may take an action that violates one Title VII prohibition only where it has a "strong basis in evidence" to believe that such

action is necessary to avoid liability under the other. *See id.*

The Court did not accord the City a remand to present additional evidence to justify its actions under the strong-basis-in-evidence test. *See id.* Instead, the Court applied that test to the record before it. *See id.* The Court exhaustively reviewed the evidence regarding the formulation and administration of the promotional examinations that was before the Board when it decided not to certify the examination results. *See id.* at 2678–81. Based on that review, the Court concluded that "there is no evidence—let alone the required strong basis in evidence—that the tests were flawed" or that the City "would face disparate-impact liability if it certified the examination results." *Id.* at 2681. The Court therefore held that "summary judgment is appropriate for petitioners on their disparate-treatment claim" and directed the City to "certif[y] the test results." *Id.*

The Court anticipated that the City might face a disparate-impact challenge to that certification, and that upholding such a challenge would impose conflicting legal obligations on the City. *See id.* The Court thus made clear that "the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." *Id.*

3. Justice Ginsburg authored a dissenting opinion joined by three other justices. The four dissenting Justices noted that the Court's decision not to remand the case for further factual development "den[ied] [the City] any chance to

satisfy the newly announced strong-basis-in-evidence standard." *Id.* at 2702 (Ginsburg, J., joined by Stevens, Souter, & Breyer, J.J., dissenting). The dissenting Justices thus acknowledged that "the Court has seen fit to preclude further proceedings" related to the City's certification of the exam results. *Id.* at 2703 n.10 (Ginsburg, J., joined by Stevens, Souter, & Breyer, J.J., dissenting).

B. Respondent's Disparate-Impact Suit

1. Respondent Michael Briscoe brings the disparate-impact suit that this Court "expressly anticipated" in *Ricci*. Pet. App. 3a. Respondent alleges that the promotional examination at issue in *Ricci* violates Title VII because "the weighting of the written and oral sections of the test" yields a disparate impact on African-American candidates. *Id.* at 6a.

2. The City moved to dismiss the suit because "the Supreme Court's decision in *Ricci* precludes [Briscoe's] Title VII claim." *Id.* at 53a. Respondent opposed that motion on claim preclusion grounds, arguing that *Ricci* could not bar his claim because "one is not bound by the decision to which he was not a party." *Id.* at 39a. In reply, the City pointed out that "this argument misses the mark" because "[t]he plaintiff's claim is not foreclosed by preclusion law." *Id.* at 97a. Instead, "[h]is claim is foreclosed because that is a necessary consequence of the Supreme Court's holding and rationale, as the Supreme Court expressly stated." *Id.*

3. The district court granted the City's motion because "this court is bound by the decisions of the high court" and "[w]hat the [Supreme] Court held in *Ricci* and what it said in doing so squarely forecloses

Briscoe's claims." *Id.* at 43a. The district court quoted this Court's statement that the City "would avoid" disparate-impact liability for certifying the exam results, and explained that "the holding in *Ricci* that the City's action in refusing to certify the 2003 examination results violated Title VII's disparate-treatment prohibition necessarily forecloses a subsequent claim that the results of *the same 2003 . . . promotional examinations* must be rejected because they violated Title VII's disparate-impact prohibition." *Id.* at 39a (emphasis in original). The district court also pointed out that this Court found no evidence that the City faced disparate-impact liability and "could have remanded the case to the lower courts for further evidentiary proceedings." *Id.* at 36a. But "[b]oth the majority opinion and the dissent emphasize that the case was not remanded for further evidentiary proceedings" (*id.* at 42a), and, thus, the City had no chance "to defend its decision to discard the test results and to demonstrate that it could satisfy the strong-basis-in-evidence standard with respect to disparate-impact liability" (*id.* at 37a). The district court reasoned that "Briscoe cannot circumvent" the Court's order in *Ricci* "by filing another lawsuit with respect to the same exams to attempt to create the record that would otherwise have been made on remand." *Id.* at 39a.

The district court further noted that Respondent could have intervened in the two years that *Ricci* was pending before the district court, but opted not to do so despite "the practical reality that all of the New Haven firefighters who took the 2003 promotional exams, including Briscoe, were acutely aware of the pendency of the *Ricci* litigation." *Id.* at 40a. The district court refused to accept "Briscoe's suggestion

that he was entitled to stand by for five years, while the case progressed to the Supreme Court and back, before seeking to assert his interest, through filing this lawsuit, in having the 2003 exams invalidated on the basis of disparate impact." *Id.*

The district court also rejected Respondent's claim preclusion argument. Noting that the argument is "appealing and true as far as it goes," the district court explained that it "does not survive analysis when viewed in light of the fact that the Supreme Court in *Ricci* specifically anticipated and explicitly foreclosed subsequent disparate impact suits, such as Briscoe's, against the City based on the 2003 exams." *Id.* at 39a–40a. Thus, the district court reasoned that the issue was not whether Respondent's disparate-impact claim was barred by claim preclusion, but whether such a claim remained viable under this Court's decision. *Id.* The district court explained that on the latter question, "this court is bound by the high court" (*id.* at 40a), which "in *Ricci* acted to foreclose, with respect to the 2003 exams, the disparate impact theory that lies at the heart of Briscoe's pleadings, and that the City unsuccessfully urged upon the Supreme Court" as the justification for its decision not to certify the exam results (*id.* at 43a).

C. The Panel's Reversal

A panel of the Second Circuit reversed. The panel recognized that "[t]his appeal raises a disparate-impact issue that was expressly anticipated" by this Court in *Ricci*. Pet. App. 4a. The panel acknowledged that this Court took the "[u]nusual[]" step of "revers[ing] the challenged judgment rather than vacating it, which prevented the [C]ity from

adducing evidence to satisfy the newly imposed 'strong basis' standard." *Id.* at 5a. "Instead, the city was ordered to certify the results." *Id.* The panel even quoted the Court's statement that the City "would avoid" disparate-impact liability for certifying the test results. *Id.*

The panel, however, held that the statement was not binding in this case because it was "dicta . . . perhaps attributable to a simple logical error." *Id.* at 14a. The panel also rejected this Court's guidance that the strong-basis-in-evidence test applies to disparate-impact claims, reasoning that it "has no actual logical relationship to the holding" and cannot be "reconcile[d]" with "long-standing, fundamental principles of Title VII law." *Id.* The panel made no mention of the Court's determination, after an exhaustive review of the record, that "no evidence" supported disparate-impact liability based on certification of the exam results. *Ricci*, 129 S. Ct. at 2681.

The panel stated that it "cannot reconcile all of the indications from the Supreme Court in *Ricci*," and therefore concluded that *Ricci* did not foreclose Respondent's disparate-impact claim. Pet. App. 22a. Turning to Respondent's claim preclusion argument, the panel held that the *Ricci* judgment could not bar Respondent's claim because he was not a party to that case. *Id.* at 8a–12a.

The panel thus reinstated Respondent's disparate-impact suit despite its recognition that "[t]he *Ricci* opinion anticipated this case, and discounted the idea that the city would suffer the whipsaw effect that our analysis justifies." *Id.* at 20a. The panel stated, "We are sympathetic to the effect that this outcome has on

the city, which has duly certified the test as ordered by the Supreme Court but now must defend a disparate-impact suit." *Id.* at 21a.

The City timely petitioned for panel rehearing or rehearing *en banc*. The Second Circuit denied that petition on November 17, 2011. *Id.* at 1a. This timely petition followed.

REASONS FOR GRANTING THE PETITION

This Court's intervention is necessary to conform the Second Circuit's decision to the binding, *stare decisis* ruling in *Ricci*, and to resolve the circuit split and the important and recurring questions occasioned by the panel's holding. The panel disregarded the Court's express guidance that the City "would avoid disparate-impact liability" in this anticipated case. *Ricci*, 129 S. Ct. at 2681. In the process of "whipsaw[ing]" the City into an actionable disparate-impact *violation* for complying with a court-ordered disparate-treatment *remedy* (Pet. App. 20a), the panel split from the Third Circuit's rule that compliance with a judicial order cannot trigger Title VII liability. And the panel's decision has initiated a trend away from the strong-basis-in-evidence test that this Court prescribed in *Ricci*, and threatens to force employers either to abandon useful promotional examinations or to face Title VII liability in a great number of cases. The Court should grant review or summary reversal.

I. THE PANEL'S DECISION FLAGRANTLY DISREGARDS THIS COURT'S GUIDANCE IN *RICCI*

The Court should grant certiorari because the panel's decision expressly departs from this Court's guidance in *Ricci*. "Principles of *stare decisis* . . . demand respect for precedent." *CBOCS West, Inc. v. Humph-*

ries, 553 U.S. 442, 457 (2008). "Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends." *Id.* Thus, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

A lower court therefore is "bound by the decree[s]" of this Court. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 428 (1978) (per curiam); *see also Agostini v. Felton*, 521 U.S. 203, 238 (1997) (this Court's decisions are "binding precedent" on the lower courts). A lower court is bound "not only [by] the result" of this Court's opinion, "but also [by] those portions of the opinion" and the "rationale . . . necessary to that result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66–67 (1996). The other federal courts of appeals thus uniformly recognize that they are bound by this Court's holdings and all premises necessary to its holdings, even where they may disagree with the Court's reasoning.[1]

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[1] *See, e.g.*, *Rossiter v. Potter*, 357 F.3d 26, 31 (1st Cir. 2004); *United States v. Extreme Associates, Inc.*, 431 F.3d 150, 156 (3d Cir. 2005); *United States v. Cheek*, 415 F.3d 349, 352–53 (4th Cir. 2005); *United States v. Rodriguez*, 602 F.3d 346, 358 (5th Cir. 2010); *Henderson v. Collins*, 262 F.3d 615, 623 (6th Cir. 2001); *United States v. Bukowski*, 435 F.2d 1094, 1101 (7th Cir. 1970); *Helseth v. Burch*, 258 F.3d 867, 870 (8th Cir. 2001) (en banc); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008); *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006) (per curiam); *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C.

These principles binding lower courts to this Court's guidance comport with the well-established requirements of the mandate rule. Under that rule, this Court's mandate is "controlling as to matters within its compass," and a lower court is "bound to carry the mandate . . . into execution." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). This Court thus grants certiorari to review or summarily reverse lower court decisions that misapprehend or refuse to apply its holdings or reasoning. *See, e.g.*, *Cavazos v. Smith*, 132 S. Ct. 2 (2011) (per curiam); *Brousseau v. Haugen*, 543 U.S. 194 (2004) (per curiam); *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam); *Calderon v. Coleman*, 525 U.S. 141 (1998) (per curiam); *Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam); *Hutto*, 454 U.S. at 375; *Nat'l Hockey League v. Metro. Hockey League*, 427 U.S. 639 (1976) (per curiam).

A. *Ricci* Forecloses Disparate Impact Liability Based On The City's Certification Of The Examination Results

As the district court emphasized, "[w]hat the [Supreme] Court held in *Ricci* and what it said in doing so squarely forecloses" disparate-impact liability against the City in this case. Pet. App. 43a. In *Ricci*, this Court ordered a summary judgment that required the City to certify the exam results as a disparate-treatment remedy. *See* 129 S. Ct. at 2681. That order rested on three necessary premises. *First*, the strong-basis-in-evidence test "resolve[s] any

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Cir. 2003); *DaimlerChrysler Corp. v. United States*, 361 F.3d 1378, 1384 (Fed. Cir. 2004).

conflict between the disparate-treatment and disparate-impact provisions of Title VII." *Id.* at 2676; *see also id.* at 2681. *Second*, the application of the strong-basis-in-evidence test to the record before the Board warranted judgment for the *Ricci* plaintiffs on their disparate-treatment claim because, based on this Court's exhaustive review, it contained "no evidence" to support disparate-impact liability. *Id.* at 2681. *Third*, because "no evidence" in the relevant record supported disparate-impact liability, the City "would avoid" such liability in this case. *Id.*

The Court could have vacated the judgment and remanded the case for further factual development under the strong-basis-in-evidence test. Instead, however, it "[saw] fit to preclude further proceedings" related to the exams, *id.* at 2703 n.10 (Ginsburg, J., joined by Stevens, Souter, & Breyer, J.J., dissenting), and ordered certification of the exam results based on the record before it, *see id.* at 2681. That remedy "den[ied] [the City] any chance to satisfy the newly announced strong-basis-in-evidence standard." *Id.* at 2702 (Ginsburg, J., joined by Stevens, Souter, & Breyer, J.J., dissenting). That remedy therefore made sense only if the Court determined that the record before the Board—which the Court fully reviewed in *Ricci*—was the only relevant record on which the City's Title VII liability could be based, and conclusively foreclosed the possibility of disparate-impact liability. *See id.* at 2677–81. In other words, the Court's denial of a remand in *Ricci* was appropriate because there was no possibility that additional evidence could provide a strong basis to conclude that certification of the exam results would expose the City to disparate-impact liability and, thus, justify its refusal to certify. *See id.*

B. In Conflict With This Court's Express Guidance, The Panel's Decision Permits Disparate-Impact Liability Based On The City's Certification Of The Examination Results

The panel acknowledged that this Court ordered a summary judgment in *Ricci* that required the City to certify the exam results. Pet. App. 5a. But reasoning that it "cannot reconcile all of the indications from the Supreme Court in *Ricci*," the panel failed to give this Court's decision binding, *stare decisis* effect. *Id.* at 22a. In fact, the three necessary premises that underlay the *Ricci* decision reconcile all of this Court's "indications," and the panel contravened each one.

First, the panel dismissed this Court's extension of the strong-basis-in-evidence test to disparate-impact claims on the assertion that it has "no actual logical relationship to the holding." *Id.* at 14a. Yet even the panel conceded that this Court "broadly describes [*Ricci*] as resolving *any* conflict between disparate-treatment and disparate-impact claims." *Id.* at 15a n.7 (emphasis in original); *see also Ricci*, 129 S. Ct. at 2672, 2674, 2676, 2681. And there is more than ample logic for this Court's reasoning. The Court set out in *Ricci* "to provide guidance to employers and courts for situations when these two [Title VII] prohibitions could be in conflict." *Ricci*, 129 S. Ct. at 2674. Symmetrical application of the strong-basis-in-evidence test "gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances." *Id.* at 2676.

Second, the panel did not even mention this Court's determination, after a full review of the record before the Board, that there was "no evidence" of a disparate-impact violation—or its concomitant decision not to remand *Ricci* for further factual development. *Id.* at 2681. This Court's adoption of that premise established, as a matter of *stare decisis*, that the record before the Board was the only relevant record for adjudicating the City's Title VII liability and did not establish a disparate-impact violation. The panel's condoning of a reopening of that record and a potential finding that it *does* support disparate-impact liability simply cannot be squared with *Ricci*.

Third, the panel tossed aside the Court's statement that the City "would avoid" disparate-impact liability as "dicta" reflecting "a simple logical error," and sanctioned liability based on the very certification that this Court ordered in *Ricci*. Pet. App. 14a. The panel missed this Court's plain logic: where the Court ordered the City to certify the exam results because it had "no evidence" to fear disparate-impact liability, such certification cannot in fact *expose* the City to such liability. *See Ricci*, 129 S. Ct. at 2681. The panel thus itself committed the "logical error" when it held that the certification of the exam results necessary to *remedy* a disparate-treatment violation would also *create* disparate-impact liability. Pet. App. 14a.

The panel was bound to follow and to accord *stare decisis* effect to all of these premises "necessary to the

result" of *Ricci*. *Seminole Tribe*, 517 U.S. at 67.[2] It is simply impermissible for the panel to reject any of these premises—let alone all three—and to effectively overrule this Court's decision in *Ricci*.

Yet the panel did just that, even though it acknowledged that this Court "anticipated this case . . . and discounted the idea that the city would suffer the whipsaw effect that our analysis justifies." Pet. App. 20a. Indeed, the panel's holding traps the City in a legal conundrum: it "has duly certified the test as ordered by the Supreme Court" to remedy a disparate-treatment violation "but now must defend a disparate-impact suit" based on that very certification. *Id.* at 21a.

But the harm that the panel's decision inflicts does not end with compelling the City to invest its scarce resources in defending a suit that this Court has stated should not go forward. The panel's decision also threatens to wreak havoc on the City's personnel

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[2] Even if the panel were correct that one or more of these premises were "dicta"—which it is not—it still was bound to follow them because, as other circuits have recognized, lower courts are "bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, the dicta is of recent vintage and not enfeebled by any subsequent statement." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991); *Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007); *Surefoot LC*, 531 F.3d at 1243; *see also, e.g.*, *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004); *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997); *McBride v. CSX Transp., Inc.*, 598 F.3d 388, 405 (7th Cir. 2010); *United States v. Montero-Camango*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc); *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006); *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 662 (D.C. Cir. 1996).

decisions and to expose it to conflicting judgments. The City already has awarded the sixteen vacant lieutenant and eight vacant captain positions that would have been filled had the 2003 promotional exams been certified originally. That action was necessary to remedy the Title VII violation this Court found in the City's failure to certify the examinations and promote consistent with their results in the first place.

The panel's decision, however, opens the possibility that the City could be ordered to grant *additional* relief to firefighters under the diametrically opposed disparate-impact theory that the already-certified exam and resulting promotions are invalid. Indeed, in addition to the present case, the City has been sued by a group of other firefighters seeking relief based on the same disparate-impact theory advanced by Respondent here. *See Tinney v. City of New Haven,* No. 3:11-cv-01546 (D. Conn. filed 10/7/2011). Just as Respondent argues here, the *Tinney* plaintiffs urge that the City is obligated to promote them because the certification of promotional exam results compelled by this Court's order visits a disparate impact on them. While the City opposes such relief, the plaintiffs' arguments raise the prospect of inconsistent obligations to promote different parties to now-filled vacancies arising from this Court's judgment in *Ricci* and from judgments in these other cases. Accordingly, the panel's world of dueling Title VII claims and multiple remedies based on a single exam clouds rather than "clarifies" the law, as this Court intended to do in *Ricci*. 129 S. Ct. at 2681.

C. The Panel's Refusal To Extend The Strong-Basis-In-Evidence Test To Disparate-Impact Claims Is Unjustified

The panel was bound by this Court's statement that the strong-basis-in-evidence test "resolve[s] *any* conflict between the disparate-treatment and disparate-impact provisions of Title VII," *Ricci*, 129 S. Ct. at 2676 (emphasis added), and that "it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability," *id.* at 2681. The panel, however, rejected this Court's express application of the strong-basis-in-evidence test to disparate-impact claims, saying that there "was no way to reconcile" it with "long-standing, fundamental principles of Title VII law." Pet. App. 20a. The four reasons offered by the panel for flatly contradicting this Court's statement are unpersuasive.

First, the panel contended that "the question that *Ricci* answers for disparate-treatment claims has already been answered for claims of disparate impact" because Title VII permits conduct resulting in a disparate impact that is "job related" or "consistent with business necessity." *Id.* at 17a–18a. The panel also suggested that the strong-basis-in-evidence test is inapplicable to disparate-impact claims because the "disparate-impact parameters are statutory, unlike the contours of a disparate-treatment claim, which are predominantly supplied by case law." *Id.* at 18a. These arguments, however, wrongly conflate the *legal standard* for a disparate-impact claim with the *burden of proof* applicable to resolving a conflict with Title VII's disparate-

treatment prohibition. *Ricci* was not concerned with the elements of Title VII claims, but rather with the evidentiary showing required before an employer may violate one Title VII provision "in the name of compliance with the other." 129 S. Ct. at 2676. Nothing in Title VII purports to answer that question differently from the Court's answer in *Ricci*—and the panel's recitation of the well-established elements of a disparate-impact claim provide no basis to conclude otherwise.

Second, the panel asserted that "it is difficult to see how a 'strong basis in evidence' can be established for a disparate-treatment claim," and criticized the City's "narrow argument that a court judgment satisfies this burden." Pet. App. 19a. But regardless of how the standard might apply in any other case, this Court plainly stated in *Ricci* that it is satisfied for *this* disparate-impact suit. *See* 129 S. Ct. at 2681. The panel's concern about a hypothesized future case simply cannot justify its departure from the Court's guidance for this anticipated suit.

Third, the panel reasoned that because the strong-basis-in-evidence test "was borrowed from equal protection case law," it "neatly extends to statutory claims for intentional discrimination," but not to disparate-impact claims. Pet. App. 20a. Yet, in importing the strong-basis-in-evidence test, this Court clarified that Equal Protection jurisprudence may be "relevant" to interpreting Title VII even where the constitutional and statutory constraints are not "parallel in all respects." *Ricci*, 129 S. Ct. at 2675. Thus, the mere fact that disparate-impact claims do not require intentional conduct, does not render inapposite authorities construing the Equal

Protection Clause. *See id.*

Finally, the panel posited that "extending the express holding in *Ricci* to a disparate-impact claim would seem to be unnecessary" because "[a]n employer seeking to protect itself from the interplay between disparate-impact and disparate-treatment liability needs only the guidance from the express holding of *Ricci*." Pet. App. 20a. The panel's statement in this regard contradicts the panel's assertion that *Ricci* did *not* resolve whether the strong-basis-in-evidence test applies to cases such as this one. *Id.* at 14a, 20a. The panel also nowhere explained how an employer can "protect itself from the interplay" between Title VII's prohibitions if—as the panel would have it—a single action may be a necessary disparate-treatment *remedy*, but at the same time an actionable disparate-impact *violation*. *Id.* at 20a. And, in all events, the panel ignored its own advice because it disregarded *Ricci*'s "guidance" that the City could not face disparate-impact liability for its court-ordered certification of the exam results. *Id.*

D. The Panel's Claim Preclusion Holding Does Not Justify Its Disregard Of This Court's Guidance

Even though the district court *rejected* Respondent's claim preclusion argument (Pet. App. 39a), the panel mischaracterized the district court's decision as "ascrib[ing] preclusive effect" to *Ricci* (*id.* 8a). The panel therefore attempted to support its reversal of the district court's judgment and its reinstatement of Respondent's disparate-impact claim through an extended discussion of preclusion doctrine. *Id.* at 8a–12a. But, as the City has

explained throughout this case, that discussion "misses the mark" because Respondent's claim "is not foreclosed by preclusion law." *Id.* at 97a.

Indeed, the issue is not whether *Respondent* is bound by the *Ricci judgment*. Instead, the issue is whether the district court and the Second Circuit are bound "by the decisions of the high court" as a matter of *stare decisis* (*id.* at 40a), or may disregard them as purported "logical error" (*id.* at 14a). Thus, the panel's thorough analysis of preclusion law, its discussion of joinder principles, and its reliance on *Martin v. Wilks*, 490 U.S. 755 (1989), *superseded in part by statute at* 42 U.S.C. § 2000e–2(n)(1), (Pet. App. 8a–12a, 21a) were misplaced: while those authorities demonstrate that Respondent, as a non-party, was not bound by the *Ricci* judgment, they in no way suggest that the panel was not bound by the *Ricci* decision.

Moreover, the panel did not consistently embrace its theory that *Ricci* imposes no limitations on Respondent's suit. The panel, in fact, recognized that "[i]n order to give effect to . . . the Supreme Court's order to certify the results," it had to "limit Briscoe's equitable relief insofar as it may interfere with the relief—present and future—afforded to the *Ricci* plaintiffs by the certification of the exam results." Pet. App. 22a. The panel did not even attempt to explain the inconsistency in its reasoning that *Ricci* limited Respondent's remedies, but did not foreclose his suit notwithstanding the Court's guidance that the City "would avoid disparate-impact liability" here. *Ricci*, 129 S. Ct. at 2681. This inconsistency highlights the panel's flawed logic in disregarding

this Court's plain guidance in *Ricci* and only further underscores that this Court should grant review.

II. THE PANEL'S DECISION SPLITS WITH A DECISION OF THE THIRD CIRCUIT

The Court should also grant certiorari because, in departing from this Court's express guidance, the panel's decision splits with a recent decision of the Third Circuit on the linchpin question whether compliance with a court-imposed remedy under one Title VII provision can constitute a violation of the other provision. The plaintiffs in *NAACP v. North Hudson* challenged a consolidated municipal fire department's use of a residency requirement in its hiring and promotions, arguing that the requirement had a disparate impact on African-American candidates. *See* 665 F.3d at 469–70. A group of Hispanic firefighters intervened and asserted that discontinuing the residency requirement would effectuate a disparate-treatment violation against them. *See id.* They therefore argued that the district court could not enjoin the City from using the requirement as part of any disparate-impact remedy. *See id.*

The Third Circuit rejected that argument. *See id.* at 484–85. The Third Circuit recognized that "there can be no doubt that removing the residency requirement will adversely affect Intervenors" because "[t]hey will lose their high rankings on [the department's] candidate hiring list and find it significantly more difficult to secure a firefighter position." *Id.* at 484. But the Third Circuit concluded that the department "has no basis for believing it will be held liable to Intervenors . . . under a disparate-treatment theory" because "this Court, rather than [the department], is responsible for eliminating the residen-

cy requirement." *Id.* Thus, the Third Circuit held, "[a] government employer's compliance with a judicial mandate does not constitute an official policy or employment practice of the employer" that can trigger Title VII liability. *Id.* at 484–85.

The panel's decision here cannot be reconciled with the Third Circuit's rule. In direct conflict with that rule, the panel here held that the City could face Title VII liability as a direct consequence of "compliance with a judicial mandate," *id.*, to certify the exam results. This split on whether a government employer is immune from Title VII liability for complying with a court order or can be "whipsaw[ed]" into an actionable disparate-impact *violation* by implementing a court-ordered disparate-treatment *remedy* (Pet. App. 20a) warrants this Court's review.

III. THE PANEL'S DECISION IMPLICATES IMPORTANT AND RECURRING QUESTIONS

Finally, the Court should grant certiorari because the panel's disregard of this Court's plain guidance and sanctioning of potential liability against an employer for actions that the Court ordered it to undertake raise important and recurring questions.

First, the panel's decision has initiated a trend away from the Court's express guidance that the strong-basis-in-evidence test "resolve[s] *any* conflict between the disparate-treatment and disparate-impact provisions." *Ricci*, 129 S. Ct. at 2676 (emphasis added). Indeed, even though it split with the panel here on the ultimate question whether compliance with a judicial remedy under one Title VII provision can trigger liability under the other provision, the Third Circuit in *NAACP v. North*

Hudson erroneously agreed with the panel here, when it stated that there is "no reason to extend *Ricci*'s 'strong basis in evidence' defense to the NAACP Plaintiffs' disparate-impact suit." 665 F.3d at 484. Thus, even though this Court in *Ricci* made clear that the strong-basis-in-evidence test applies symmetrically, the Second and Third Circuits have now held to the contrary. Accordingly, lower courts now lack clarity as to whether, and when, to apply the strong-basis-in-evidence test in a Title VII suit.

Moreover, the panel's decision erodes the possibility in this context of "voluntary compliance," which is "the preferred means of achieving the objectives of Title VII." 129 S. Ct. at 2674. Voluntary compliance requires that employers be able to "self-examine and self-evaluate their employment practices" according to the governing Title VII standards. *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 515 (1986). Employers, however, now have no hope of conducting any meaningful evaluation of practices that may implicate both of Title VII's prohibitions. Under *Ricci*, employers knew that they could escape liability for violating one of those prohibitions if they had a strong basis in evidence to fear liability under the other. *See* 129 S. Ct. at 2676. But under the panel's holding—as endorsed by the Third Circuit—employers now may face disparate-impact liability *notwithstanding* strong evidence of disparate-treatment liability. Pet. App. 14a; *NAACP*, 665 F.3d at 484. Indeed, the panel itself recognized that "[a]ny employer that intentionally discriminates—thinking there is a strong basis in evidence of disparate-impact liability—will face the same issue if it loses a disparate-treatment suit." Pet. App. 21a. And the

panel declined to articulate *any* standard under which the prospect of disparate-treatment liability could excuse a disparate-impact violation (*id.* at 14a–22a), leaving employers with *no* guidance as to how to voluntarily conform practices to Title VII's two major prohibitions.

Second, the panel's holding could ultimately impose a practical bar to employers' use of promotional exams. This Court recognized in *Ricci* that such exams "can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent." 129 S. Ct. at 2676. Yet the panel's holding would leave employers with no choice but to forego them in order to avoid the prospect of being "whipsaw[ed]" in conflicting Title VII obligations. Pet. App. 20a. Otherwise, employers would have to be prepared to promote *two* applicants to every available position: one to avoid a disparate impact and another to avoid disparate treatment.

This outcome is particularly troubling for the numerous employers nationwide, including state and local governments, who are *required* to use promotional exams by collective bargaining agreements or state or local law. *See, e.g.*, Iowa Code Ann. §§ 400.1, 400.8–400.9 (requiring competitive examinations for "cities having a population of eight thousand or over and having a paid fire department or paid police department"); N.J. Const. art. VII, § I ("Appointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained . . . by examination, which . . . shall be competitive."); Ohio Const. art. XV,

§ 10 ("Appointment and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations."); *see also* Tex. Loc. Gov't Code Ann. § 174.006 ("A state or local civil service provision prevails over a collective bargaining contract . . . unless the collective bargaining contract specifically provides otherwise."); Conn. Gen Stat. § 7-474(g) (permitting collective bargaining with respect to "(1) [t]he necessary qualifications for taking a promotional examination; (2) the relative weight to be attached to each method of examination; and (3) the use and determination of monitors for written, oral, and performance examinations").

These legal requirements ordinarily have been considered part and parcel of fair, merit-based hiring practices, particularly in the public sector where employers seek the most qualified candidates to fill positions crucial to public safety and welfare. *See* Conn. Gen. Stat. § 7-409 ("The purpose of this part is to provide means for selecting and promoting each public official and employee upon the sole basis of his proven ability to perform the duties of his office or employment more efficiently than any other candidate therefore."). Under the panel's holding, however, these requirements ensnare employers in an inescapable trap of dueling Title VII obligations.

Moreover, employers subject to promotional examination requirements frequently find themselves as defendants in Title VII suits brought by disappointed job applicants. *See, e.g.*, *Lewis v. City of Chi.*, 130 S. Ct. 2191 (2010); *Adams v. City of Chi.*, 469 F.3d 609 (7th Cir. 2006); *Gulino v. N.Y.*

State Educ. Dep't, 460 F.3d 361 (2d Cir. 2006); *Isabel v. City of Memphis*, 404 F.3d 404 (6th Cir. 2005); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 220 F.3d 898 (8th Cir. 2000); *Fudge v. City of Providence*, 766 F.2d 650 (1st Cir. 1985); *Wilmore v. City of Wilmington*, 699 F.2d 667 (3d Cir. 1983). Many of these suits tax substantial costs and resources from employers and can run for several years—even when the employer ultimately prevails. *See, e.g.*, *Allen v. City of Chi.*, 351 F.3d 306 (7th Cir. 2003) (involving five years of litigation over a city's affirmative action plan).

The panel's holding opens the floodgates to such litigation because it endorses the imposition of disparate-treatment *and* disparate-impact judgments—and, thus, the extension of remedial relief to several different groups of plaintiffs—based on a single exam. And the panel's holding extends such litigation even beyond the normal course of years because it allows disparate-impact suits to be brought after entry of a disparate-treatment judgment. There simply is no basis, much less any good reason, to impose these open-ended litigation costs on employers, particularly at this time of economic uncertainty among private-sector employers and chronic underfunding in the public sector. *See, e.g.*, United States Department of Labor, Bureau of Labor Statistics, *available at* http://www.bls.gov/cps/ (reporting 8.3% nationwide unemployment) (last visited Feb. 6, 2012); Elizabeth McNichol et al., Center on Budget and Policy Priorities, States Continue To Feel Recession's Impact at 1 (Jan. 9, 2012) ("Already, 29 states have projected or have addressed shortfalls totaling $44 billion for fiscal year 2013."), *available at* http://

http://www.cbpp.org/cms/index.cfm?fa=view&id=711 (last visited Feb. 6, 2012). Indeed, the inevitable paralysis caused by the panel decision's whipsaw effect can exacerbate these budget shortfalls as public employers are forced to pay costly overtime to current supervisory employees instead of filling vacant supervisory positions.

The panel's decision thus clouds what this Court's decision in *Ricci* made clear, to the detriment of lower courts and employers throughout the country seeking to implement Title VII's commands.

CONCLUSION

The Court should grant certiorari to review or summarily reverse the judgment below.

Respectfully submitted,

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