No. 10-1558

IN THE

Supreme Court of the United States

IN RE FRANK RICCI, ET AL.,

Petitioners.

On Petition for a Writ of Mandamus to the United States District Court for the District of Connecticut

BRIEF IN OPPOSITION OF RESPONDENT CITY OF NEW HAVEN

RICHARD A. ROBERTS
STACEY L. PITCHER
NUZZO & ROBERTS, LLC
ONE TOWN CENTER
P.O. BOX 747
Cheshire, CT 06410
(203) 250-2000

LAWRENCE D. ROSENBERG
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
ldrosenberg@jonesday.com

Counsel for Respondent City of New Haven

QUESTION PRESENTED

Whether this Court should deny the extraordinary writ of mandamus where it did not address Petitioners' equal protection claims during its previous merits review, the Court's mandate did not order relief on Petitioners' equal protection claims, and Petitioners' challenge to the district court's adherence to the prior dismissal of those claims can be raised on an appeal after final judgment.

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BRIEF IN OPPOSITION OF RESPONDENT CITY OF NEW HAVEN

In *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), a five-justice majority of this Court reversed the district court and the per curiam Second Circuit and mandated that "Petitioners are entitled to summary judgment on their Title VII claim." *Id.* at 2681. The Court expressly did not reach "the question whether respondents' actions may have violated the Equal Protection Clause." *Id.* at 2664–65; *see also id.* at 2676 ("Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII."); *id.* at 2681 ("we therefore need not decide the underlying constitutional question"). The Court thus acknowledged that its decision did not articulate or address the law governing Petitioners' equal protection claims. *See id.* at 2676.

On remand, the district court fully and faithfully implemented this Court's mandate, entering judgment on the Title VII claims in Petitioners' favor and scheduling trial on the remaining issue of damages. *See* Pet. App. 12a. After initially reinstating the equal protection claims unaddressed by this Court, *see id.* at 12a–13a, the district court readopted its prior summary judgment ruling in Respondents' favor on those claims, *see id.* at 5a–7a.

Even though this Court did not "decide the underlying constitutional question" and did not order any relief on Petitioners' equal protection claims, *Ricci*, 129 S. Ct. at 2681, Petitioners now assert that the district court's disposition of those claims

"plain[ly] defi[ed]" the Court's mandate, Pet. at 14. Petitioners request this Court's interlocutory intervention and issuance of the extraordinary writ of mandamus to "reinstate" their equal protection claims "for adjudication on their merits." *Id.* at 22.

Petitioners' position is fatally flawed because the district court could not "def[y]" a non-existent mandate on claims that this Court expressly declined to address, and that the district court and the Second Circuit previously held should be dismissed under the controlling law. *Id.* at 14. Petitioners' real disagreement with the district court's decision is not that it violated this Court's mandate, but that, in their view, it is "inexplicable" because "the Court's holdings on non-constitutional questions clearly imply that the district court got the constitutional question wrong." *Id.* at 14, 17. Thus, Petitioners apparently seek on mandamus a ruling addressing the merits of their equal protection claims that this Court declined to provide in its prior merits review.

The Court therefore should deny the petition because Petitioners have no right, let alone a "clear and indisputable" right, to an interlocutory ruling on a question not addressed by this Court's prior mandate. Instead, Petitioners—like every other plaintiff "some of whose causes of action have been dismissed while others proceed to trial," Pet. App. 65a—must await an appeal from the district court's final judgment. And Petitioners' request that the Court merely direct the district court to "adjudicat[e]" the equal protection claims "on their merits," Pet. at 22, elevates form over substance because, as the district court and the Second Circuit agreed, those claims should be dismissed under the governing law

that this Court on its prior review did not address, much less alter. The petition for a writ of mandamus should be denied.

STATEMENT

1. In November and December 2003, the New Haven Fire Department 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 New Haven Civil Service 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.*

2. In 2004, Petitioners—a group of firefighters who had passed the tests—filed suit against Respondent City of New Haven and individual Respondents Mayor John DeStefano, Jr., Karen Dubois-Walton, Thomas Ude, Jr., Tina Burgett, Boise Kimber, Malcolm Weber, and Zelma Tirado. *See id.* Petitioners asserted claims under Title VII, 42 U.S.C. §§ 1983 and 1985, and Connecticut state law. *See id.*

Following discovery, the district court granted summary judgment to Respondents on the Title VII and Sections 1983 and 1985 claims, and declined to exercise supplemental jurisdiction over the remaining state-law claim. *See* Pet. App. 63a. The district court concluded that Respondents' decision not to certify the test results due to concern with their disparate impact was not actionable under Title VII. *See id.* at 34a–65a. The district court further concluded that the equal protection claims "lack[ed] merit . . .with respect to both the racial classification

and disparate treatment arguments." *Id.* at 57a. Invoking established Second Circuit law, the district court held that Petitioners could not demonstrate an unlawful race-based classification because "all applicants took the same test," the test was "administered and scored in the same manner for all applicants," and "the result was the same for all because the results were discarded and nobody was promoted." *Id.* at 57a–58a. The district court also held that Petitioners "cannot show that [Respondents] acted out of an intentionally discriminatory purpose" because "'the intent to remedy the disparate impact of [the tests] is not equivalent to an intent to discriminate against non-minority applicants.'" *Id.* at 59a (quoting *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999)).

3. A panel of the Second Circuit affirmed in a one-paragraph per curiam opinion adopting the district court's reasoning. 530 F.3d 87 (2d Cir. 2008) (per curiam). The Second Circuit denied rehearing en banc. 530 F.3d 88 (2d Cir. 2008).

4. After granting certiorari as to the Title VII and the equal protection claims, this Court ruled only on the Title VII claim. 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." *See 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. The Court mandated that, under that test, "Petitioners are entitled to summary judgment on their Title VII claim." *Id.* at 2681.

The Court further announced that "[i]n light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause" or "decide the underlying constitutional question." *Id.* at 2664–65, 2681. The Court acknowledged that it did "not decide" the legal standard applicable to the equal protection claims. *Id.* at 2676.

5. On remand, the district court implemented this Court's mandate, granting judgment to Petitioners on the Title VII claims, ordering the certification of the promotional examination results and the promotion of Petitioners, and scheduling trial on the remaining issue of damages. *See* Pet. App. 12a. Even though it recognized that "the United States Supreme Court in *Ricci* ruled only on [Petitioners'] Title VII claim," the district court initially vacated its summary judgment on the equal protection claims and "reinstated" those claims "for further proceedings." *Id.* at 13a. The district court also reinstated Petitioners' state-law claim for intentional infliction of emotional distress. *See id.*

On reconsideration, the district court readopted its summary judgment on the equal protection and conspiracy claims because this Court had not addressed those claims on its prior review. *See id.* at 5a–7a. The district court also "restored" its prior dismissal of the state-law claim. *Id.* at 9a.

6. In addition to seeking certification for interlocutory appeal under 28 U.S.C. § 1292(b), Petitioners sought a writ of mandamus from the Second Circuit "directing the district court to reinstate certain of their claims below." *Id.* at 64a. The Second Circuit denied relief, holding that "Petitioners have not demonstrated that exceptional circumstances warrant the requested relief" because "as is generally true of plaintiffs some of whose causes of action have been dismissed while others proceed to trial, their ability to appeal from the final judgment in the case is an adequate remedy." *Id.* at 64a–65a. The petition for a writ of mandamus to this Court followed.[1]

REASONS FOR DENYING THE WRIT

I. MANDAMUS IS AN EXTRAORDINARY REMEDY THAT THIS COURT RARELY GRANTS

"Issuance by the Court of an extraordinary writ . . . is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20(1). "To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." *Id.*

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[1] Respondents do not address the district court's disposition of Petitioners' § 1985 and state-law claims because "only the dismissal of petitioners' equal protection § 1983 claims is addressed in th[e] petition." Pet. at 9 n.4.

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947); *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam) ("It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations."). "The traditional use" of mandamus in the federal courts has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Accordingly, only "a judicial usurpation of power," *Will v. United States*, 389 U.S. 90, 95 (1967), or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S. at 95.

A petitioner seeking the drastic remedy of mandamus must satisfy three conditions. *First*, the petitioner must "have no other adequate means to attain the relief he desires." *Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). *Second*, the petitioner must discharge "the burden of showing that his right to issuance of the writ is clear and indisputable." *Id.* *Third*, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380–81 (2004); *see also Kerr*, 426 U.S. at 403.

The petition for a writ of mandamus should be denied here because Petitioners have an adequate remedy through a post-judgment appeal, have no

clear and indisputable right to a ruling on mandamus that this Court declined to make on its prior review, and have failed to demonstrate extraordinary circumstances that would justify issuance of the writ.

II. PETITIONERS HAVE AN ADEQUATE REMEDY THROUGH AN APPEAL AFTER FINAL JUDGMENT

A. Petitioners Will Lose No Legal Rights By Awaiting A Post-Judgment Appeal

It is well established "that the extraordinary writs cannot be used as substitutes for appeals . . . even though hardship may result from delay and perhaps unnecessary trial." *Bankers Life & Cas. Co.*, 346 U.S. at 383. This rule reflects Congress' adoption of a strong policy "against piecemeal appeals" and in favor of delaying appellate review "until after final judgment has been rendered by the trial court." *Will*, 389 U.S. at 93, 96. Thus, "[o]rdinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed." *Roche*, 319 U.S. at 27–28; *see also* Sup. Ct. R. 20.1 (authorizing mandamus only where "adequate relief cannot be obtained in any other form or from any other court").

Petitioners possess such a statutory method of appeal because they may "seek review" of the district court's adherence to dismissal of their equal protection claims "on direct appeal after a final judgment has been entered." *Allied Chem. Corp.*, 449 U.S. at 36; *see also* 28 U.S.C. § 1291. As the Second Circuit pointed out, "as is generally true of plaintiffs some of whose causes of action have been dismissed while others proceed to trial, their ability to appeal from the final judgment in the case is an adequate

remedy" that forecloses mandamus relief. Pet. App. 65a. Indeed, if Petitioners ultimately prevail on their challenge to the dismissal of their equal protection claims—which they should not, *see infra* Part III—the appellate court can provide Petitioners "the relief [they] desire[]," *Allied Chem. Corp.*, 449 U.S. at 36, by "reinstat[ing] those claims," Pet. at 22. Thus, because Petitioners will not lose any legal rights in the absence of mandamus, the petition should be denied. *See, e.g.*, *id.*; *Bankers Life & Cas. Co.*, 346 U.S. at 382 (denying mandamus where district court's "decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power . . . and is reviewable upon appeal after final judgment"); *Roche*, 319 U.S. at 27–30 (denying mandamus to correct alleged error in striking pleas in abatement to a criminal indictment because "any error . . . is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari").

Petitioners identify a handful of cases holding that mandamus may be available where a lower court fails "'to execute'" this Court's mandate, or "disobeys and mistakes [the mandate's] meaning." Pet. at 11 (quoting *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425 (1978) (per curiam)). As explained below, those cases all involve a lower court's express defiance of a clear requirement of a mandate, and are inapposite here because the district court fully implemented this Court's mandate, which did not address Petitioners' equal protection claims.

B. The District Court Fully Implemented This Court's Mandate

Petitioners do not dispute that they can raise their challenge to the district court's dismissal of the equal protection claims on a direct appeal after final judgment. Instead, Petitioners offer five arguments why the Court should disregard the rule that the availability of a post-judgment appeal forecloses mandamus relief, none of which is persuasive.

1. Petitioners contend that "the Court's cases addressing a district court's noncompliance with the Court's mandate" demonstrate that "once this Court has directed the course of proceedings on remand, the requisites for mandamus relief are satisfied if the district court deviates from that course." Pet. at 19. According to Petitioners, "[i]n particular, the Court has not scrupled to determine that appellate remedies are inadequate, even if readily at hand, when district courts refuse to respect and follow the Court's mandates." *Id.*

The fundamental flaw in this argument is that it assumes Petitioners' contention that the district court "refuse[d] to respect and follow the Court's mandate[]." *Id.* That contention is plainly wrong. The cases that Petitioners invoke all involved a district court's refusal to implement relief expressly *required* by a mandate from this Court. For example, in *Vendo Company* (cited at Pet. at 11, 18, 19), this Court suggested that mandamus may be available to correct a district court's refusal to undo an injunction that the Court had reversed. *See* 434 U.S. at 425–28. And both *United States v. Haley*, 371 U.S. 18 (1962) (per curiam) (cited at Pet. at 11, 12, 19), and *In re Potts*, 166 U.S. 263 (1897) (cited at Pet. at 19–20),

involved a district court's attempt to revisit issues that had been definitively resolved by this Court's prior decision in the case. *See, e.g.*, *Haley*, 371 U.S. at 19–20; *In re Potts*, 166 U.S. at 266–68.

Here, the district court actually granted Petitioners *all* of the relief that this Court ordered. Indeed, the *only* relief mandated by this Court was that "Petitioners are entitled to summary judgment on their Title VII claim." *Ricci*, 129 S. Ct. at 2681. The district court indisputably implemented that mandate when it entered judgment in Petitioners' favor on the Title VII claims, ordered the certification of the promotional examination results and the promotion of Petitioners, and scheduled a trial on the remaining issue of damages. *See* Pet. App. 12a–14a. Thus, Petitioners' cases regarding district courts' "deviat[ions]" from the express requirements of this Court's mandates, Pet. at 19, are inapposite.

By contrast—as Petitioners recognize, *see id.* at 4–7—this Court expressly declined to address "the question whether respondents' actions may have violated the Equal Protection Clause" and did not order *any* relief on the constitutional claims, *Ricci*, 129 S. Ct. at 2664–65; *see also id.* at 2676 ("Our statutory holding does not address the constitutionality of the measures taken here."); *id.* at 2681 (declining to "decide the underlying constitutional question"). Even Petitioners' own cases acknowledge that the lower court "may consider and decide any matters left open by the mandate of this court"—and that the lower court's "decision of such matters *can be reviewed by a new appeal only*." *In re Potts*, 166 U.S. at 266 (emphasis added) (cited at Pet. at 19–20); *see also Sprague v. Ticonic Nat'l*

Bank, 307 U.S. 161, 168 (1939) ("While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues."). Thus, far from supporting Petitioners' request for the extraordinary writ of mandamus, Petitioners' cases actually underscore that review of the district court's disposition of the equal protection claims must await "a new appeal" after final judgment. *In re Potts*, 166 U.S. at 266.

2. Ignoring this Court's avoidance of the equal protection claims, Petitioners attempt to recast the question as whether the district court's dismissal of those claims is "[]explicable" in light of the Court's Title VII ruling. Pet. at 14; *see also id.* at 17 (contending that mandamus is warranted because "the Court's holdings on non-constitutional questions clearly imply that the district court got the constitutional question wrong"). But the premise of this argument—that the law governing Petitioners' Title VII and equal protection claims is interchangeable, *see id.* at 14, 17—is belied by this Court's statements that it "do[es] not regard as identical the constraints of Title VII and the Federal Constitution." *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.").

Moreover, the Court's avoidance of Petitioners' equal protection claims means that it did not address, much less alter, the governing law that the district court and the Second Circuit agreed required

dismissal of those claims. Petitioners thus seek on mandamus a ruling on the merits of their equal protection claims that this Court expressly declined to make on its prior review. *See Ricci*, 129 S. Ct. at 2664–65, 2676, 2681. "[A] new appeal" after final judgment, not mandamus, is the mechanism to secure any ruling on a question "left open by the mandate of this court." *In re Potts*, 166 U.S. at 266; *see also Will*, 389 U.S. at 104 ("Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." (quoting *Bankers Life & Cas. Co.*, 346 U.S. at 382, 383)).

3. Petitioners argue that the district court defied this Court's mandate by treating the reversal on the Title VII claims as an affirmance-in-part on the equal protection claims. *See* Pet. at 14–18. But this argument is plainly inconsistent with the Court's repeated, express statements that it was not addressing or deciding the equal protection claims. *See Ricci*, 129 S. Ct. 2664–65, 2676, 2681. And even under Petitioners' erroneous theory that this Court effectively vacated the district court's *judgment* on the equal protection claims, the Court certainly did *not* address the merits of those claims, much less decide them in Petitioners' favor. *Id.* at 2681. Thus, whereas the district court was compelled to—and did—enter judgment for Petitioners on their Title VII claims, at minimum it was free to "consider and decide" the constitutional claims not decided by this Court, subject only to a subsequent post-judgment appeal. *In re Potts*, 166 U.S. at 266; *see also In re Parsons*, 150 U.S. 150, 155 (1893) ("We cannot by

writ of mandamus compel the court below to decide a matter before it in a particular way.").

4. Petitioners argue that the Congressional policy against piecemeal appeals has no application here because "denial of mandamus relief" to redress an alleged violation of this Court's mandate "would in fact *encourage* a piecemeal approach." Pet. at 20 (emphasis in original). This argument makes no sense, and in fact ignores that post-judgment appellate review is available to Petitioners here. Indeed, after the district court enters its final judgment in this case, any losing party will have the right to appellate review. *See* 28 U.S.C. § 1291. But by seeking mandamus now, Petitioners have deviated from Congress' preferred approach of resolving all issues in a single post-judgment appeal, instead serving up a piecemeal proceeding on the single issue of the district court's disposition of their equal protection claims, to be followed by a later appeal on all other issues that the parties may seek to raise. Thus, it is Petitioners who "*encourage* a piecemeal approach," Pet. at 20 (emphasis in original), by seeking to circumvent the post-judgment final appeal procedure that Congress has prescribed for the federal courts.

5. Petitioners finally argue—with no citation to authority—that the Court should grant the writ because they are "faced with the prospect of imminently undergoing a trial limited to damages on their Title VII claim only, followed by an appeal over the issues presented in this petition" and the possibility of another remand to the district court. *Id.* at 21. Petitioners ignore, however, that the upcoming trial on the Title VII claims will yield a

developed factual record that may aid the appellate courts' review of the equal protection claims. Moreover, any cost or inconvenience attendant to having to litigate the case to final judgment "is one which [this Court] must take it Congress contemplated in providing that only final judgments should be reviewable." *Roche*, 319 U.S. at 30. Mandamus simply may not issue to reduce Petitioners' litigation burden or to "prevent judicial inconvenience and hardship occasioned by appeal being delayed until after final judgment." *Bankers Life & Cas. Co.*, 346 U.S. at 383.

III. PETITIONERS HAVE NOT ESTABLISHED A CLEAR AND INDISPUTABLE RIGHT TO MANDAMUS OR EXTRAORDINARY CIRCUMSTANCES

A. Petitioners Have Not Shown A Judicial Usurpation Of Power Or Clear Abuse Of Discretion

A party demonstrates "a clear and indisputable right" to mandamus against a lower court, *Kerr*, 426 U.S. at 403, only where the decision below effects "a judicial usurpation of power" such as through an unlawful exercise of jurisdiction, *Will*, 389 U.S. at 95, or a "clear abuse of discretion," *Bankers Life & Casualty Co.*, 346 U.S. at 383. Petitioners' failure to establish either prerequisite dooms the petition. *See Kerr*, 426 U.S. at 403.

Petitioners, in fact, raise "no question of the jurisdiction of the district court" over their equal protection claims, *Roche*, 319 U.S. at 26—and, given that they *invoked* the district court's jurisdiction over those claims, could not credibly do so. Petitioners also make no plausible argument that the district

court committed "a clear abuse of discretion," *Bankers Life & Casualty Co.*, 346 U.S. at 383, because their entire theory is that the district court *lacked* discretion and "def[ied]" this Court's mandate, Pet. at 14. As explained, however, Petitioners' mandate-defiance theory ignores this Court's avoidance of the constitutional question and the express terms of the mandate, which plainly did not address Petitioners' equal protection claims. *See supra* Part II.B; *see also In re Potts*, 166 U.S. at 266 (lower court "may consider and decide any matters left open by the mandate of this court"); *Sprague*, 307 U.S. at 168 ("While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.").

Nor are Petitioners entitled to mandamus on their contention that the district court's decision is "inexplicable" because, in their view, "the Court's holdings on non-constitutional questions clearly imply that the district court got the constitutional question wrong." Pet. at 14, 17. Even if the district court's decision were "erroneous"—which it is not—mandamus would not be available because that decision "was made in the course of the exercise of the court's jurisdiction to decide issues properly before it." *Bankers Life & Cas. Co.*, 346 U.S. at 382. It therefore "involved no abuse of judicial power, and any error which [the district court] may have committed" is not reviewable by this Court on mandamus, but instead "by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari." *Roche*, 319 U.S. at 27; *see also Bankers Life & Cas. Co.*, 346 U.S. at 382.

B. The District Court's Dismissal Of The Equal Protection Claims Was Correct

Petitioners cannot establish a "clear and indisputable right" to mandamus for the independent reason that the district court's adherence to its dismissal of the equal protection claims was correct.

1. The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). In granting summary judgment on the equal protection claims, the district court invoked the rules of law prescribed by the Second Circuit in *Hayden*, 180 F.3d 42. *See* Pet. App. 57a–60a. The Second Circuit affirmed that ruling and adopted the district court's reasoning. 530 F.3d 87. And while this Court reversed the judgment on the Title VII claims, it did not "decide[] upon a rule of law" governing Petitioners' equal protection claims. *Arizona*, 460 U.S. at 618; *see also Ricci*, 129 S. Ct. at 2664–65, 2676, 2681. Accordingly, on remand, the rules initially invoked by the district court remained the law of the case and "continue[d] to govern" those claims. *Arizona*, 460 U.S. at 618. The district court's adherence to its summary judgment thus was appropriate. *See id.*

The law of the case doctrine further prescribes the "indisputable" rule that a court of appeals' mandate is "controlling as to matters within its compass" and that a district court on remand is "bound to carry the mandate . . . into execution." *Sprague*, 307 U.S. at 168. Here, the Second Circuit's mandate on Petitioners' direct appeal ordered dismissal of all of Petitioners' claims. 530 F.3d 87. On certiorari, this

Court ordered the entry of summary judgment in Petitioners' favor on the Title VII claims, but left undisturbed the Second Circuit's mandate dismissing Petitioners' equal protection claims. *See Ricci*, 129 S. Ct. at 2664–65, 2676, 2681. Thus, the Second Circuit's mandate remained "controlling" as to the equal protection claims, and the district court's recognition that it was "bound to carry" the mandated dismissal of those claims "into execution" was correct. *Sprague*, 307 U.S. at 168.

2. Furthermore, the district court's summary judgment on the equal protection claims was proper under established equal protection jurisprudence that this Court in its prior review did not address, let alone alter. This Court consistently has held that an equal protection violation requires a "racial classification[]" that fails strict scrutiny, *Johnson v. California*, 543 U.S. 499, 505 (2005), or an adverse action coupled with a "racially discriminatory intent or purpose," *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

Applying these principles, the Second Circuit in *Hayden* rejected an equal protection challenge to a municipal police department's "deliberate[] designing of an entrance exam which would minimize the adverse impact on black candidates." 180 F.3d at 47. The Second Circuit held that no invidious classification could be shown from the city's mere

"desire" to "design an entrance exam which would diminish the adverse impact on black applicants." *Id.* at 48 (citing *Arlington Heights*, 429 U.S. at 264–65). Moreover, because a "racial motive" by a state actor is not "a synonym for a constitutional violation," *id.*, the city's "intent to remedy the disparate impact of the prior exams [was] not equivalent to an intent to discriminate against non-minority applicants" under the Equal Protection Clause, *id.* at 51 (citing *Feeney*, 442 U.S. at 279; *Arlington Heights*, 429 U.S. at 268–71). Thus, the equal protection claim failed as a matter of law on both elements of invidious classification and discriminatory purpose. *See id.* at 48–51.

The First Circuit reached a similar conclusion in *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998), where it affirmed dismissal of an equal protection challenge to a preference system for allocating low-income housing units expressly designed to increase the number of minority tenants. *See id.* at 14–15. The First Circuit confirmed that the "racial classification" element "normally refers to a government standard, preferentially favorable to one race or another, for the distribution of benefits," not to an action aimed at assuring fair representation of "*all* applicants regardless of race." *Id.* at 16 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995)) (emphasis in original). And because "[e]very antidiscrimination statute. . . reflect[s] a concern with race," a motive to prevent a disparate impact on a minority group does not amount to the discriminatory purpose necessary "for a constitutional violation." *Id.* (citing *Arlington Heights*, 429 U.S. at 270–71).

The district court thus properly applied this Court's holdings when it concluded that Petitioners had failed to establish the essential elements of their equal protection claims. *See* Pet. App. 57a–59a. *First*, Respondents did not employ *any* constitutionally-infirm classification because "all applicants took the same test," the test was "administered and scored in the same manner for all applicants," and "the result was the same for all because the test results were discarded and nobody was promoted." *Id.* at 57a–58a; *see also Hayden*, 180 F.3d at 48–51. *Second*, there was no discriminatory purpose because Respondents acted out of an intent "to remedy the disparate impact of [the tests]," *Hayden*, 180 F.3d at 51, not "because of" some "adverse effects" their actions might have upon Petitioners, *Feeney*, 442 U.S. at 279; *see also Hayden*, 180 F.3d at 50; Pet. App. 59a. For each of these reasons, Petitioners' equal protection claims fail as a matter of law, and the district court's entry of summary judgment on those claims was warranted.

3. Apart from Petitioners' failure to establish essential elements of their equal protection claims, the seven individual Respondents are immune from liability on those claims. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right is clearly established only where "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that

what he is doing violates that right. . . . [T]he unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the law at the time the action occurred "was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

Even now, Petitioners' asserted equal protection right is not established, let alone clearly established. Prior to this Court's previous decision here, the district court and the Second Circuit agreed that Petitioners have no cognizable constitutional claim under the controlling law. *See* Pet. App. 55a–60a; *Ricci*, 129 S. Ct. at 2671–72. This Court declined to reach the constitutional question and thus also did not recognize a constitutional right, clearly established or otherwise, implicated by the individual Respondents' actions. *See Ricci*, 129 S. Ct. at 2664–65, 2676, 2681. And even if Petitioners were correct that the Court meant to resolve the constitutional question—despite its plain statements to the contrary—the Court's decision in 2009 could not clearly establish the law in 2003, when the actions at issue in Petitioners' suit were taken. *See, e.g.*, *Harlow*, 457 U.S. at 818. Thus, the individual Respondents are entitled to qualified immunity, and the district court's dismissal of the equal protection claims was proper for this reason as well. *See, e.g.*, *id.*

Moreover, three individual Respondents are entitled to judgment on Petitioners' equal protection claims for additional reasons. Respondent Kimber is

a reverend, not a state actor, and his private lobbying of city officials not to certify the test results is not "fairly attributable to the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). Respondent Ude is entitled to absolute immunity because he was providing legal advice in his capacity as Corporation Counsel. *See Butz v. Economou*, 438 U.S. 478, 514 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976). And Respondent Mayor DeStefano is entitled to judgment because he was not personally involved in the alleged violation of Petitioners' rights, and therefore did not cause a deprivation of a constitutional right. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961).

In short, there are several independent bases to support the district court's dismissal of Petitioners' equal protection claims.

4. In all events, and apart from the infirmities in Petitioners' equal protection claims, the district court properly granted summary judgment to Respondent City of New Haven. "[A] municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (emphases in original). Given the unique circumstances of a one-time tie vote on the discrete certification question implicated here, municipal liability is inappropriate under *Monell*, and Respondent City of New Haven is entitled to judgment on the equal protection claims.

C. Petitioners Have Identified No Extraordinary Circumstances Justifying Issuance Of The Writ

Finally, the Court should deny the writ because Petitioners have failed to establish "that exceptional circumstances warrant the exercise of the Court's discretionary powers." Sup. Ct. R. 20(1). Petitioners' sole argument in this regard is that mandamus is "prudentially warranted because without it petitioners will be forced to try a rump case limited to statutory damages, only to appeal and then try separately" their equal protection claims. Pet. at 14. But as the Second Circuit noted, these circumstances are no different than those faced by other plaintiffs "some of whose causes of action have been dismissed while others proceed to trial." Pet. App. 65a. That Petitioners believe that the dismissal was erroneous, and must endure the delay of awaiting an appeal from a final judgment, are not exceptional circumstances warranting mandamus. *See, e.g.*, *Roche*, 319 U.S. at 27–29.

Prudential considerations, in fact, militate in favor of denying the petition. In the first place, Petitioners may receive the relief they seek through the damages trial on their Title VII claims—so their constitutional claims may never require this Court's resolution. *See Ricci*, 129 S. Ct. at 2672 (declining to reach constitutional question where "[a] decision for petitioners on their statutory claim" provided the relief sought). Moreover, the trial on the Title VII claims will yield a developed factual record that may aid the appellate courts' review of the equal protection claims. And in all events, given the unsettled state of the governing law, *see id.* at 2676, this Court would benefit from a reasoned Second

Circuit decision on the equal protection claims. These considerations only underscore that interlocutory extraordinary-writ review of the decision below should be denied.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted,

RICHARD A. ROBERTS
STACEY L. PITCHER
NUZZO & ROBERTS, LLC
ONE TOWN CENTER
P.O. BOX 747
Cheshire, CT 06410
(203) 250-2000

LAWRENCE D. ROSENBERG
Counsel of Record
JOHN M. GORE
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
ldrosenberg@jonesday.com

Counsel for Respondent City of New Haven

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