2011

Failing the Test: How Ricci v. Destafano Failed to Clarify Disparate Impact and Disparate Treatment Law

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FAILING THE TEST: HOW *RICCI V. DESTEFANO* FAILED TO CLARIFY DISPARATE IMPACT AND DISPARATE TREATMENT LAW

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I. INTRODUCTION

Forty years ago, the United States Supreme Court announced that an employer could violate Title VII by using facially neutral practices that operate to exclude a protected class[1] and, shortly thereafter, announced the framework for proving intentional discrimination.[2] In subsequent years, the Court recognized that the "preferred means of achieving the objectives of Title VII" is "voluntary compliance."[3] Last year, in *Ricci v. DeStefano*, the Court turned all of these principles on their heads.[4] In *Ricci*, seventeen white candidates and one Hispanic candidate for promotion within the New Haven, Connecticut fire department sued New Haven and a number of city officials for refusing to certify the results of two promotional exams[5] after the Civil Service Board concluded that the examinations had an impermissible disparate impact on African-American and Hispanic candidates.[6] According to the Court, before *Ricci* there were "few, if any, precedents in the courts of

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[1] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

[2] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–06 (1973).

[3] *See, e.g.*, Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

[4] 129 S. Ct. 2658 (2009).

[5] Ricci v. DeStefano, 554 F. Supp. 2d 142, 144 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[6] *Id.* at 150.

appeals" considering what an employer can or must do when the use of an exam to select or promote employees will create an indisputable adverse impact on minorities.[7] As the Court noted, there was no dispute in *Ricci* that the exam results had a "significant" adverse impact on minority firefighters.[8] When faced with these facts, the Court could have applied the well-established framework of *McDonnell Douglas Corp. v. Green*[9] and *Griggs v. Duke Power Co.*,[10] as codified in the Civil Rights Act of 1991,[11] to decide whether reliance on the exam results to promote the firefighters would have violated Title VII.[12] But with little more than a nod to the established framework of either case, the Court instead announced a standard requiring the City to "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[13]

The *Ricci* standard reflects a sharp departure from the standard of proof imposed on employers since *McDonnell Douglas* to defeat disparate treatment claims. Further, *Ricci* changes the standard of proof required to avoid disparate impact claims against an employer who acts proactively, as Congress had intended, to assure compliance with Title VII.[14] While there was much outcry that it would change, or even destroy, disparate impact law when the decision was first announced,[15] what is clear from a review of the

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[7] *Ricci*, 129 S. Ct. at 2672.

[8] *Id.* at 2677.

[9] 411 U.S. 792, 802–06 (1973).

[10] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[11] Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(k)(1)(A)(i)–(ii), (C) (2006).

[12] *See* Civil Rights Act of 1964, 42 U.S:C. §§ 2000e-1 to -17 (2006).

[13] *Ricci*, 129 S. Ct. at 2664.

[14] *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986).

[15] *See, e.g.*, Nan Aron, President, Alliance for Justice, *Ideologically-Charged Decision in* Ricci v. DeStefano *Ignores History, Precedent*, ALLIANCE FOR JUSTICE (June 29, 2009), http://www.afj.org/about-afj/press/06292009.html ("The majority's opinion ignores our nation's history, rejects precedent, overturns the judgment of local government officials and makes it more difficult for employers to take voluntary steps to break down barriers to equal employment."); Jay Dockendorf, *Court Sides with Firefighters in* Ricci *Case*, YALE DAILY NEWS (June 29, 2009), http://www.yaledailynews.com/news/city-news/2009/06/29/court-sides-with-firefighters-in-ricci-case/ (noting that the Ricci decision "raises the amount of evidence that must be present to throw out an employment or promotion test"); Press Release, Wade Henderson, President, Leadership Conference on Civil Rights, *Supreme Court Undermines Workplace Protections in* Ricci v. DeStefano, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS (June 29, 2009), http://www.civilrights.org/press/2009/ricci.html ("Today's unorthodox Supreme Court decision in *Ricci v. DeStefano* creates a new, unjustified standard for anti-discrimination protections in the workplace. The ruling does not eliminate the legal responsibility of employers to find non-discriminatory solutions in hiring, promoting, and compensating employees. However, employers will now face a convoluted minefield when attempting to protect workers from discrimination."); Keith Kamisugi, Ricci *Decision Threatens Constitutional Values of Equal Justice for All*, EQUAL JUSTICE SOCIETY (June 29, 2009), http://www.equaljusticesociety.org/2009/06/ (quoting Barbara Arnwine, executive director of the Lawyers' Committee for Civil Rights Under Law: "We are shocked by the

cases decided since *Ricci* is that disparate impact law is alive and well—as long as disgruntled employees who fail to get jobs or promotions challenge an employer's selection method and file suit.[16] If an employer discards that selection method before it affects an employee's job status, however, the rules have apparently changed. Following *Ricci*, an employer faces at least uncertainty and what appears to be a much higher burden to justify its actions than previously required under either *Griggs* or *McDonnell Douglas*.[17] By imposing the "strong basis in evidence" standard on employers who act to avert disparate impact claims,[18] the *Ricci* decision discourages, if not wholly thwarts, the very type of "voluntary compliance" that Title VII aimed to achieve.[19] Despite the Supreme Court's own admonition that "[Title VII] should not be read to thwart [such] efforts," the *Ricci* decision accomplished just that.[20]

Section II of this article reviews the standard that has applied to intentional discrimination claims since *McDonnell Douglas Corp. v. Green*[21] and the standard, as codified, that has applied since *Griggs v. Duke Power Co.*[22] Section III analyzes the *Ricci* standard and its deviation from both *McDonnell Douglas* and *Griggs*, which has created two separate standards for analyzing disparate impact cases depending on whether the employer or employee questions the use of a selection method. Section IV reviews the lower court decisions that have applied, or refused to apply, *Ricci* in cases in which selection methods prove to have a disparate impact on minority applicants. Section V concludes that in light of the lower courts' inconsistent application of the *Ricci* rule, the Supreme Court created confusion for courts and employers alike. The standards defined by the Supreme Court forty years ago must be restored and applied to all disparate impact cases, regardless of whether an employee challenges the disparate impact of a selection method or whether the employer acts before a disparate impact results. These time-

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decision and we will continue our work to preserve the vital protections of Title VII of the Civil Rights Act of 1964.").

[16] *See infra* text accompanying note 208.

[17] *See Ricci*, 129 S. Ct. at 2664 (concluding that discarding the examination results to avoid the disparate impact was a "race-based action . . . [that] is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute"); *see also infra* Section II for a discussion of the standards defined by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[18] *Ricci*, 129 S. Ct. at 2664.

[19] *See Local No. 93*, 478 U.S. at 515. As noted by Justice Ginsburg in her dissent, the standard announced by the Court places an employer in the position of having to "establish a 'provable, actual violation' *against itself*." *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting) (quoting *Ricci*, 129 S. Ct. at 2676).

[20] *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting) (quoting Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 630 (1987)).

[21] 411 U.S. 792 (1973).

[22] 401 U.S. 424, 431 (1971); *see* 42 U.S.C. §§ 2000e-2(k)(1)(A)(i)-(ii), (C) (2006).

tested standards will best protect all of Title VII's objectives, including the eradication of intentional, as well as unintentional, discrimination in the workplace and an employer's voluntary compliance with all of the statute's goals.

II. THE STANDARD FOR PROVING DISPARATE TREATMENT AND DISPARATE IMPACT CLAIMS UNDER *MCDONNELL DOUGLAS* AND *GRIGGS*

It is well accepted that Congress has "prohibited employers from taking adverse employment actions 'because of' race."[23] It is also true that "Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of 'practices that are fair in form, but discriminatory in operation.'"[24] Although the *Ricci* Court acknowledged these truths, it did not apply the rules that have been established to resolve issues related to them.[25]

Following *McDonnell Douglas*, a disparate-treatment plaintiff must establish "that the defendant had a discriminatory intent or motive" for taking a job-related action.[26] Once a plaintiff establishes a prima facie case of discrimination, "the burden shifts to the defendant . . . [to] produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[27] This burden "is one of production, not persuasion,"[28] and an employer may rebut a prima facie case "simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision."[29] If the defendant satisfies this burden of production, the burden shifts back to the plaintiff to show that "the employer's proffered explanation is unworthy of credence."[30]

Consistent with the *McDonnell Douglas* framework, the *Ricci* defendants responded to the plaintiffs' allegation of intentional

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[23] *Ricci*, 129 S. Ct. at 2676 (quoting 42 U.S.C. § 2000e-2(a)(1)).

[24] *Id.* (quoting *Griggs*, 401 U.S. at 431).

[25] *See id.* at 2699 (Ginsburg, J., dissenting) (noting that the Court's characterization of the issue "shows little attention to Congress'[s] design or to the *Griggs* line of cases Congress recognized as path-marking").

[26] *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)). The *Ricci* Court acknowledged the standard, but did not discuss the burden shifting test that the *McDonnell Douglas* Court defined. *See Ricci*, 129 S. Ct. at 2672.

[27] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[28] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

[29] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988); *see also Burdine*, 450 U.S. at 254.

[30] *Burdine*, 450 U.S. at 256; *see also Reeves*, 530 U.S. at 142 (quoting *Burdine*, 450 U.S. at 256); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507–08 (1993) (quoting *Burdine*, 450 U.S. at 256) ("The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision' . . . .").

discrimination by proffering "a good faith attempt to comply with [the disparate impact provision of] Title VII as their legitimate nondiscriminatory reason for refusing to certify the exams."[31] To support this defense, the defendants relied on the well-settled law of *Griggs v. Duke Power Co.*[32] and the standard of proof that is required to establish disparate impact.[33]

In *Griggs*, the United States Supreme Court unanimously held that selection methods that are neutral on their face but have a disparate impact on minorities are, "discriminatory in operation."[34] If an employee plaintiff establishes disparate impact, the defendant employer may avoid liability under Title VII only by proving that the test is related to job performance.[35] According to the Court, "the touchstone is business necessity."[36] Therefore, "[i]f an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."[37] Four years after its decision in *Griggs*, the Supreme Court reemphasized that in order to use any selection method that disparately impacts a protected class, an employer must prove a "manifest relationship" between that method and the job.[38] Even in cases where an employer can make this showing, an employee may nevertheless establish a claim by showing that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest."[39]

Because "the Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact,"[40] Congress amended the Act[41] to reflect the prohibition on disparate impact

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[31] Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[32] General Elec. Co. v. Gilbert, 429 U.S. 125, 154–55 (1976), *superseded by* 42 U.S.C. § 2000e(k) (noting that the United States Supreme Court and "every Court of Appeals now have firmly settled that a prima facie violation of Title VII . . . is established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class").

[33] *Ricci*, 554 F. Supp. 2d at 151–52.

[34] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[35] *Id.* at 432 (requiring employer to demonstrate that its challenged practice has "a manifest relationship to the employment in question"); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[36] *Griggs*, 401 U.S. at 431.

[37] *Id.*

[38] *Albemarle Paper Co.*, 422 U.S. at 425 (quoting *Griggs*, 401 U.S. at 431). Lower courts have consistently respected and reinforced this standard. *See, e.g.*, Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1261 n.9 (6th Cir. 1981) (requiring the employer to establish "an overriding and compelling business purpose" before allowing a selection method to stand); Williams v. Colo. Springs, Colo., Sch. Dist., 641 F.2d 835, 841 (10th Cir. 1981) (requiring the employer to establish that the selection method is "of great importance to job performance"); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (employer must prove that the selection method "must not only directly foster safety and efficiency of a plant, but also be *essential* to those goals" (emphasis added)).

[39] *Albemarle Paper Co.*, 422 U.S. at 425.

[40] Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009).

[41] Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(l) (2006).

discrimination as defined by the Court in *Griggs* and *Albemarle Paper Co. v. Moody*.[42] As amended, the statute allows the plaintiff to establish a prima facie violation by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[43] An employer may defend against liability by proving that the practice is "job related for the position in question and consistent with business necessity."[44] If the employer makes this showing, a plaintiff may still prevail "by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[45] Although it noted this three-step process,[46] the *Ricci* Court did not apply it; instead it created a standard that reflects neither *Griggs*, nor *McDonnell Douglas*.[47] Concluding that Title VII's disparate impact provisions and its disparate treatment provisions "point in different directions" requiring a "rule to reconcile them," the *Ricci* Court broke new ground.[48]

III. *RICCI*'S NEW RULE

The *Ricci* Court held that an employer cannot discard a selection method that has an indisputable disparate impact on minority candidates "unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[49] This rule, contrary to the Court's goal of reconciling Title VII's disparate impact and disparate treatment provisions, "sets [them] at odds"[50] and, ultimately, allows an employer to escape liability only if it can "establish 'a provable, actual violation' *against itself*."[51]

The *Ricci* case arose when the City of New Haven's Civil Service Board (CSB) "refused to certify the results of two promotional exams for the positions of Lieutenant and Captain in the New Haven Fire Department."[52]

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42 *See id.* at 2673.

43 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

44 *Id.*

45 *Ricci*, 129 S. Ct. at 2673 (citing 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (C)).

46 *Id.*

47 *Id.* at 2674.

48 *Id.*

49 *Id.* at 2664.

50 *Id.* at 2699 (Ginsburg, J., dissenting).

51 *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting) (quoting *Ricci*, 129 S. Ct. at 2676).

52 Ricci v. DeStefano, 554 F. Supp. 2d 142, 144 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009). Seventy-seven candidates, including 43 whites, 19 blacks and 15 Hispanics, completed the lieutenant examination. *Id.* at 145. Eight lieutenant positions were vacant at the time of the examination and, according to the City's selection rules, "the top 10 candidates were eligible for an immediate promotion" and "all 10 were white." *Ricci*, 129 S. Ct. at 2666. Forty-one candidates, "including 25 whites, 8 blacks and 8 Hispanics," completed the captain examination and, of those, "16 whites, 3

Seventeen white candidates and one Hispanic candidate who took the promotional exams sued the City of New Haven and certain named officials for this refusal because they would have been either eligible for promotion or automatically promoted had the test scores been used as planned.[53] The plaintiffs' lawsuit contained a variety of constitutional, statutory, and common law claims;[54] however, the United States Supreme Court considered only the Title VII and Equal Protection Clause claims on the parties' cross motions for summary judgment.[55] Although the Court did not reach the constitutional claim,[56] it squarely faced the statutory one and considered it in light of the parties' motions for summary judgment.[57]

In their motion, the plaintiffs argued that by discarding the test results "the City and the named officials discriminated against the plaintiffs based on their race," and clearly violated Title VII.[58] This is a straightforward claim of disparate treatment that, if proven, is expressly prohibited by Title VII.[59] In a disparate treatment case, it is well settled that a plaintiff alleging disparate treatment "must establish 'that the defendant [employer] had a discriminatory intent or motive' for taking a job-related

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blacks and 3 Hispanics passed." *Id.* "Seven captain positions were vacant at the time of the examination" and, according to the selection rules, seven whites and two Hispanics were eligible for immediate promotion. *Id.*

[53] *Ricci*, 554 F. Supp. 2d at 144. The New Haven city charter, as well as federal and state law, governed the promotion and hiring process when New Haven undertook to fill the vacancies at issue in this case. *Ricci*, 129 S. Ct. at 2665. The charter defined a merit system pursuant to which the City was required to "fill vacancies . . . with the most qualified individuals, as determined by job-related examinations." *Id.* Relying on the examination results, the CSB was required by the charter to certify a "ranked list of applicants who passed the test." *Id.* Pursuant to the charter's "rule of three," vacancies would then be filled "by choosing one candidate from the top three scorers on the list." *Id.*

[54] *Ricci*, 554 F. Supp. 2d at 144. Plaintiffs originally filed federal claims under "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Equal Protection Clause, the First Amendment, and 42 U.S.C. § 1985 . . . [and a state] claim of intentional infliction of emotional distress." *Id.* The United States District Court for the District of Connecticut granted the defendants' motion for summary judgment on the federal claims but declined to exercise jurisdiction over the state claim. *Id.* at 145. The Second Circuit Court of Appeals adopted the district court's reasoning in a per curiam opinion. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[55] *Ricci*, 129 S. Ct. at 2664, 2672; *see also* Ricci v. DeStafano, 129 S. Ct. 894 (2009) (granting certiorari on the Title VII and Equal Protection claims and consolidating with Ricci v. DeStafano, 129 S. Ct. 893 (2009)).

[56] *Ricci*, 129 S. Ct. at 2681 (granting summary judgment on plaintiffs' Title VII claim and concluding it "need not decide the underlying constitutional question").

[57] *Id.* at 2664–65.

[58] *Id.* at 2664 (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (2006)).

[59] *Id.* at 2672 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)) (explaining Title VII's disparate treatment provision making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

action."[60] To do this, the plaintiff must prove that "an employer has 'treated [a] particular person less favorably than others because of' a protected trait."[61]

The *Ricci* district court explicitly applied the *McDonnell Douglas* framework.[62] After a thorough review of the evidence presented by both sides, the district court noted that "the evidence shows that race was taken into account in the decision not to certify the test results";[63] however, the court then emphasized, in reliance on established Second Circuit law, that "[t]he intent to remedy the disparate impact of . . . [a promotional exam] is not equivalent to an intent to discriminate against non-minority applicants."[64] The district court also noted that there was "a total absence of any evidence of discriminatory animus towards plaintiffs."[65] Reviewing the evidence, the district court outlined the reasons the City offered for refusing to certify the test results, including

> that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that it would subject the City to public criticism; and that it would likely subject the City to Title VII lawsuits from minority applicants that, for political reasons, the City did not want to defend.[66]

Based on all of these reasons, the district court decided that "[n]one of the . . . expressed motives could suggest to a reasonable juror that defendants acted 'because of' animus against non-minority firefighters who took the Lieutenant and Captain exams."[67]

The Supreme Court disagreed, however, and concluded based on the same evidence that "[t]he City rejected the test results *solely* because the

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[60] *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)). As the Supreme Court previously established, a party alleging intentional discrimination must establish a prima facie case of discrimination on account of race, which may be done by proving (1) membership in a protected class; (2) qualification for the position; (3) a rejection despite qualification; and (4) continued efforts by the employer to find a person of the same qualifications. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[61] *Ricci*, 129 S. Ct. at 2672 (quoting *Watson*, 487 U.S. at 985–86).

[62] Ricci v. DeStefano, 554 F. Supp. 2d 142, 151–54 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[63] *Id.* at 158.

[64] *Id.* at 158–59 (quoting Hayden v. County of Nassau, 180 F.3d 42, 51 (2d Cir. 1999)); *see also Ricci*, 129 S. Ct. at 2695–96 (Ginsburg, J., dissenting).

[65] *Ricci*, 554 F. Supp. 2d at 158; *see also id.* at 162 (noting in response to plaintiffs' constitutional claim that "[n]othing in the record in this case suggests that the City defendants or CSB acted 'because of' discriminatory animus toward plaintiffs or other non-minority applicants for promotion").

[66] *Id.* at 162.

[67] *Id.*

higher scoring candidates were white."[68] In summary fashion, the Court concluded that the City's decision not to certify the test results was "express, race-based decision-making [that] violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[69] The only way for an employer to avoid liability for this violation, according to the Court, is to establish a "strong basis in evidence" that it will be liable for disparate impact if it uses the test results.[70]

By requiring this of the defendant, the Court ignored the teaching of *McDonnell Douglas*.[71] When a prima facie case of discrimination has been made, the *McDonnell Douglas* framework shifts the burden to defendant to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[72] While the Supreme Court did not mention it, the district court noted that the defendant's burden "is one of production, not persuasion; it can involve no credibility assessment."[73] Importantly, as the Supreme Court has previously held, an employer may rebut a prima facie case "simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision."[74] The defendant's burden is satisfied if the proffered evidence, "taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action."[75] The district court applied this standard, concluding that "defendants proffer[ed] a good faith attempt to comply with Title VII as their

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[68] *Ricci*, 129 S. Ct. at 2674 (emphasis added). Disagreeing with the district court's conclusion that "'motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent,'" the Supreme Court stated that, "[w]hatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race." *Id.* at 2673–74 (quoting *Ricci*, 554 F. Supp. 2d at 160).

[69] *Id.* at 2673 (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)).

[70] *Id.* at 2681. As noted by Justice Ginsburg in her dissent and discussed more fully below, the "strong basis in evidence" standard is "drawn from inapposite equal protection precedents . . . ." *Id.* at 2700 (Ginsburg, J., dissenting). According to Justice Ginsburg, "equal protection doctrine is of limited utility" in Title VII cases. *Id.* More specifically, Ginsburg pointed out that, "[t]he cases from which the Court draws its strong-basis-in-evidence standard are particularly inapt; they concern the constitutionality of absolute racial preferences." *Ricci*, 129 S. Ct. at 2701 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499–500 (1989); Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277 (1986)).

[71] *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142 (2000) (relying on *McDonnell Douglas* and repeating the defendant's burden as one of "production, not persuasion").

[72] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[73] Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009) (quoting *Reeves*, 530 U.S. at 142).

[74] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988); *see also Burdine*, 450 U.S. at 254–55.

[75] Schnabel v. Abramson, 232 F.3d 83, 88 (2d Cir. 2000) (quoting Carlton v. Mystic Transp., Inc., 202 F.3d 129, 136 (2d Cir. 2000)).

legitimate nondiscriminatory reason for refusing to certify the exams."[76]

The Supreme Court did not apply this standard, but instead began "searching for a standard"[77] that would give "effect to both the disparate-treatment and disparate-impact provisions" of Title VII.[78] Because the *Ricci* defendants offered compliance with Title VII's disparate impact provision as the "legitimate non-discriminatory reason" for their decision not to certify the exam results,[79] which the Court labeled "race-based decisionmaking,"[80] the Court defined its task as one "to provide guidance to employers and courts for situations when these two prohibitions could be in conflict absent a rule to reconcile them."[81]

In searching for an appropriate standard, the Court relied on cases concerning "the constitutionality of absolute racial preferences."[82] In *Wygant v. Jackson Board of Education*, the Court invalidated a school district's plan to lay off nonminority teachers while retaining minority teachers with less seniority.[83] In *City of Richmond v. J.A. Croson Co.*, the Court rejected a program requiring all contractors receiving city construction contracts to set aside at least 30% of every job for minority contractors.[84] In both of these cases, the Court held that mandatory preferences can pass constitutional muster "only where there is a 'strong basis in evidence' that the remedial actions were necessary."[85] These cases are easily distinguished from *Ricci*, which included "no racial preference, absolute or otherwise,"[86] and where the Court did not reach the constitutional issue alleged.[87]

As noted by Justice Ginsburg in her dissent, the Equal Protection Clause is different than Title VII, prohibiting intentional discrimination without disparate impact concerns.[88] Indeed, the Supreme Court has "never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII . . . ."[89] Noting that Title VII plaintiffs may state a claim "solely on the racially differential impact of the challenged hiring or promotion practices,"[90] the Supreme Court has previously held that "[t]his is not the constitutional rule."[91] As long as a classification is "rationally based, uneven effects upon

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76 *Ricci*, 554 F. Supp. 2d at 152.
77 Ricci v. DeStefano, 129 S. Ct. 2658, 2675 (2009).
78 *Id.* at 2676 (2009).
79 *Ricci*, 554 F. Supp. 2d at 152–53.
80 *Ricci*, 129 S. Ct. at 2673.
81 *Id.* at 2674.
82 *Id.* at 2701 (Ginsburg, J., dissenting).
83 476 U.S. 267, 278 (1986).
84 488 U.S. 469, 511 (1989).
85 *Ricci*, 129 S. Ct. at 2675 (quoting *Croson*, 488 U.S. at 500).
86 *See id.* at 2701 (Ginsburg, J., dissenting).
87 *Id.* at 2664 (majority opinion).
88 *Id.* at 2700 (Ginsburg, J., dissenting).
89 Washington v. Davis, 426 U.S. 229, 239 (1976).
90 *Id.* at 238–39
91 *Id.* at 239.

particular groups within a class are ordinarily of *no constitutional concern.*"[92] Even in Title VII cases involving plans that required mandatory placement of minorities or women, "the Court has never proposed a strong-basis-in-evidence standard."[93] As suggested by Justice Ginsburg, affirmative action plans can survive challenge as long as they are "not unreasonable."[94] In failing to apply well established disparate impact precedent,[95] the Court imposes a far greater burden on employers than has ever been imposed before. The Court justified its decision to impose this burden in this way: "Allowing employers to violate the disparate-treatment prohibition based on a *mere* good-faith fear of disparate-impact liability would encourage race-based action at the *slightest hint* of disparate impact."[96]

Even if fear of this outcome was well-founded, there was no threat of it in the *Ricci* case because the City of New Haven had more than the "slightest hint" of disparate impact[97] and had a record that "solidly establishe[d] that the City had good cause to fear disparate-impact liability."[98] There was no dispute in *Ricci* that promoting the New Haven firefighters according to the examination results would have had a disparate adverse impact on African-American and Hispanic candidates.[99] Confronted by this undisputed evidence, the Supreme Court had no choice but to conclude that "the City was faced with a prima facie case of disparate-impact liability."[100] Given "the degree of adverse impact reflected[,] . . . [the defendants] were compelled to take a hard look at the examinations to determine whether certifying the results would have had an *impermissible* disparate impact."[101]

The definition of "impermissible" in this context has been well established by *Griggs* and its progeny.[102] As stated by the *Ricci* Court, "If an

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92 Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) (emphasis added).

93 *Ricci*, 129 S. Ct. at 2701 n.6 (Ginsburg, J., dissenting).

94 *See id.* (quoting Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 637 (1987)).

95 *Id.* at 2675 (majority opinion).

96 *Id.* (emphasis added).

97 *Id.* at 2677 (noting that the "racial adverse impact here was significant").

98 *Id.* at 2707 (Ginsburg, J., dissenting).

99 *See Ricci*, 129 S. Ct. at 2677–78. Citing the percentage pass rates for African-American, Hispanic, and Caucasian candidates, the *Ricci* majority noted that "[t]he pass rates of minorities, which were approximately one-half the pass rates for white candidates, fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII." *Id.*

100 *Id.* at 2677. The district court noted that even the Caucasian and Hispanic "plaintiffs d[id] not dispute that the results showed a racially adverse impact on African-American candidates for both the Lieutenant and Captain positions, as judged by the EEOC Guidelines." Ricci v. DeStefano, 554 F. Supp. 2d 142, 153 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

101 *Ricci*, 129 S. Ct. at 2678 (emphasis added).

102 Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Port Auth. Police Asian Jade Soc'y of N.Y. & N.J. Inc. v. Port Auth. of N.Y. & N.J., 681 F. Supp. 2d 456 (S.D.N.Y. 2010) (finding employer's practices for

employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."[103] This language is absolute, allowing an employer no leeway to use a selection method if it is not related to the job and "plac[ing] on the employer the burden of showing that any given requirement . . . ha[s] a manifest relationship to the employment in question."[104] In light of the *Ricci* facts, making this showing "would have been no easy task."[105] Even if a selection method is related to job performance, a plaintiff may still prevail by "show[ing] that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest."[106] The *Ricci* Court recognized these principles, but did not apply them.[107]

In granting summary judgment in favor of the plaintiffs, the Court ignored "substantial evidence of multiple flaws in the tests" and "better tests used in other cities, which have yielded less racially skewed outcomes."[108] While acknowledging evidence that suggested that the test questions "were based on the Department's own rules and procedures and on 'nationally recognized' materials that represented the 'accepted standard[s]' for firefighting,"[109] the Court also acknowledged evidence directly contrary that indicated the exam questions were not related to the job.[110] The Court noted that witnesses testifying in hearings held by the City to decide whether to use or discard the exam results, "described the test question[s] as outdated or not relevant to firefighting practices in New Haven."[111] Additionally, the Court noted the testimony of Christopher Hornick, an industrial/organizational

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promotion to sergeant had a disparate impact on Asian-American officers); Howe v. City of Akron, No. 5:06CV2779, 2009 WL 3245428 (N.D. Ohio Oct. 2, 2009) (finding that plaintiffs established a prima facie case of disparate impact resulting from firefighter exams for promotion which employer could not justify as serving a legitimate job-related purpose).

[103] *Ricci*, 129 S. Ct. at 2673 (alteration in original) (quoting *Griggs*, 401 U.S. at 431).

[104] *Griggs*, 401 U.S. at 432.

[105] *Ricci*, 129 S. Ct. at 2696 (Ginsburg, J., dissenting) (citing *Ricci*, 554 F. Supp. 2d at 153–56).

[106] *Albemarle Paper Co.*, 422 U.S. at 425.

[107] *Ricci*, 129 S. Ct. at 2672–73.

[108] *Id.* at 2690 (Ginsburg, J., dissenting).

[109] *Id.* at 2667 (majority opinion) (alteration in original) (quoting testimony of Frank Ricci).

[110] *Id.* at 2668–69.

[111] *Id.* at 2667. Specifically, the Court noted the testimony of Gary Tinney, who stated that the source materials "came out of New York . . . . Their makeup of their city and everything is totally different than ours." *Id.* (alteration in original). There was additional testimony from other witnesses, not noted by the Supreme Court, supporting the possibility that the exam questions were not related to the job. *See, e.g.*, *Ricci*, 129 S. Ct. at 2695 (Ginsburg, J., dissenting) (quoting New Haven's counsel who testified that "the questions themselves would appear to test a candidate's ability to memorize textbooks but not necessarily to identify solutions to real problems on the fire ground"); Ricci v. DeStefano, 554 F. Supp. 2d 142, 146 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009) (quoting James Watson who testified that "I think this test was unfair. We don't use a lot of things that were on that test.").

psychologist who had twenty-five years of experience in developing and analyzing hiring and placement exams; Mr. Hornick explained that, "'[b]y not having anyone from within the [D]epartment review' the tests before they were administered—a limitation the City had imposed to protect the security of the exam questions—'you inevitably get things in there' that are based on the source materials but are not relevant to New Haven."[112]

Without explaining why it was relevant to its decision whether to grant summary judgment, the Court questioned Hornick's reliability by suggesting that he criticized New Haven's examinations because he owned a business that competed with the testing service hired to develop the tests.[113] Justices Alito, Scalia, and Thomas, who concurred in the Court's decision, more directly questioned Hornick's credibility by suggesting that the City "rewarded Hornick for his testimony by hiring him to develop and administer an alternative test."[114] As pointed out by Justice Ginsburg in her dissent, such a conclusion is "misleading,"[115] because "there [was] scant cause to suspect that maneuvering or overheated rhetoric . . . prevented the [defendants] from evenhandedly assessing the reliability of the exams and rendering an independent, good-faith decision on certification."[116] Justice Alito also questioned the City's motivation in wanting to discard the exam results, suggesting that the "real reason was . . . to placate a politically important racial constituency."[117] Even if this was true, which was never determined, it would not have proven discrimination.[118] As Justice Ginsburg observed: "[P]oliticians routinely respond to bad press . . . , but it is not a violation of Title VII to take advantage of a situation to gain political favor."[119]

Despite the conflicting evidence, as well as the Court's suspicions of the credibility of important witnesses in the case—a matter traditionally left to be resolved by the trier of fact[120]—the Court concluded that there was "no genuine dispute that the examinations were job-related and consistent with business necessity."[121] Addressing the third *Griggs* element, the Court also concluded that there was no genuine dispute—in fact that there was "no evidence" at all—that there were "equally valid and less discriminatory tests . . . available to the City."[122] While a trier of fact could certainly decide, if

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[112] *Ricci*, 129 S. Ct. at 2668–69 (alteration in original).

[113] *See id.* at 2668 (describing Hornick's business as one that "directly competes" with the testing service hired by New Haven).

[114] *Id.* at 2687 (Alito, J., concurring).

[115] *Id.* at 2708 n.18 (Ginsburg, J., dissenting).

[116] *Id.* at 2708.

[117] *Id.* at 2684 (Alito, J., concurring).

[118] *See Ricci*, 129 S. Ct. at 2709 (Ginsburg, J., dissenting).

[119] *Id.* (alteration in original) (quoting Henry v. Jones, 507 F.3d 558, 567 (7th Cir. 2007)).

[120] *See, e.g.*, Anderson v. City of Bessemer City, 470 U.S. 564, 565 (1985); Bose Corp. v. Consumers Union, 692 F.2d 189, 195 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

[121] *Ricci*, 129 S. Ct. at 2678.

[122] *Id.* at 2681.

given the chance, that there were no "equally valid and less discriminatory tests," the Court's conclusion that there were none is belied by the evidence noted by the Court itself.[123] Deciding that defendants "lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative," the Court nevertheless acknowledged that the defendants raised "three arguments to the contrary."[124]

First, the Court noted testimony given at the City's hearings held to decide whether to certify the exam results revealing "that a different composite-score calculation" would have had less of an impact on minority candidates.[125] Under the contract between the City and the New Haven firefighters' union, a candidates' total score was based on both a written and an oral component, with the written exam results counting for 60% of the total score and the oral exam for 40% of the total.[126] More than one witness testified that reducing the weight given to the written component and increasing the weight given to the oral component could have lessened the impact on minority candidates.[127] The evidence also indicated that at least one other jurisdiction, similar to New Haven, had done just that and obtained a much higher minority representation in its fire department.[128]

No witness contradicted this testimony, but the Court decided nevertheless that there was no better alternative, concluding that, "because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason."[129] It is important to note that the collective-bargaining agreement

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[123] *See id.* at 2679.

[124] *Id.*

[125] *Id.*

[126] Ricci v. DeStefano, 554 F. Supp. 2d 142, 145 (D. Conn. 2006), *aff'd per curium*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658 (2009).

[127] *Id.* at 146–47 (citing statements made to the CSB by Donald Day, a representative of the Northeast Region of the International Association of Black Professional Firefighters, and Ronald Mackey, the Internal Affairs Officer for the Northeast Region of the International Association of Black Professional Firefighters).

[128] *See id.* at 146; *see also Ricci*, 129 S. Ct. at 2705 (Ginsburg, J., dissenting). Justice Ginsburg recognized that a national survey of municipalities indicated that of those that relied on written exams, "the median weight assigned to them was 30 percent—half the weight given to New Haven's written exam." *Id.* (citing Phillip E. Lowry, *A Survey of the Assessment Center Process in the Public Sector*, 25 PUB. PERSONNEL MGMT. 307, 309 (1996)).

[129] *Ricci*, 129 S. Ct. at 2679. The Court also expressed concern that changing the weighting formula "could well have violated Title VII's prohibition of altering test scores on the basis of race." *Id.* (citing Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(*l*) (2006)). The statute provides: "It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(*l*). There is no authority to suggest, however, that the statute prohibits changing the weight of component parts of a test and the Court did not cite to any. *See Ricci*, 129 S. Ct. at 2679. In fact, arguing to change the relative weights of the written and oral components is not the same as "arguing . . . that the results of the exams given should have been altered." *See id.* at 2705 n.15 (Ginsburg, J., dissenting).

that established this formula was "two-decades-old."[130] Additionally, even if the 60:40 weighting was "rational," it does not mean that it is "consistent with business necessity"[131] as *Griggs* requires.[132] In fact, "it is not at all unusual for agreements negotiated between employers and unions to run afoul of Title VII."[133] A review of the case law and Equal Employment Opportunity Commission Guidelines reinforces the idea that a written test is not the best way to measure the ability to do the job of a firefighter and, therefore, should have limited weight in selecting candidates for the job.[134]

In addition to acknowledging testimony explaining that changing the weighting might have alleviated the disparate impact of the test results, the Court noted an argument that a different grouping of candidates with similar scores would have "produced less discriminatory results."[135] Complying with the city charter, the City was required to promote only "those applicants with the three highest scores" on a promotional exam.[136] If the City rounded scores to the nearest whole number and ranked candidates according to those rounded numbers, a larger number of black and Hispanic candidates would have been eligible for the open positions.[137]

The Court also considered testimony presented at the City's hearings suggesting the possibility of using "assessment centers" at which candidates are asked to perform actual job tasks, which would more accurately evaluate candidates' ability to do the jobs in question and have less of a disparate impact on minorities than the written or oral exams.[138] As one witness explained, "assessment centers, where candidates face real-world situations

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[130] *Id.* at 2704 n.11 (Ginsburg, J., dissenting).

[131] *Id.*

[132] *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (noting that the Civil Rights Act forbids giving "controlling force" to testing procedures and selection mechanisms unless "they are demonstrably a reasonable measure of job performance").

[133] *Ricci*, 129 S. Ct. at 2704. (citing Peters v. Mo.-Pac. R.R. Co. 483 F.2d 490, 497 (5th Cir. 1973)).

[134] *See id.* A fire officer's job "involves complex behaviors, good interpersonal skills, the ability to make decisions under tremendous pressure, and a host of other abilities—none of which is easily measured by a written, multiple choice test." *Id.* (quoting Firefighters Inst. for Racial Equal. v. City of St. Louis, 616 F.2d 350, 359 (8th Cir. 1980)); *see also id.* at 2704 n.12 (quoting Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 512 (8th Cir. 1977) ("there is no good pen and paper test for evaluating supervisory skills")); Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,007 (Mar. 2, 1979) (explaining that "[p]aper-and-pencil tests . . . generally are not close enough approximations of work behaviors to show content validity.").

[135] *Ricci*, 129 S. Ct. at 2679.

[136] *Id.* (quoting NEW HAVEN, CONN., CODE OF ORDINANCES, tit. I, art. XXX, § 160 (1992)) (describing the "rule of three" as requiring the City to promote only from "those applicants with the three highest scores").

[137] *See id.* at 2679–80 (referring to respondents' argument). The Court noted that a state court had interpreted the city charter as prohibiting this "banding" process but acknowledged, nevertheless, that the state court's interpretation of the city charge "may not eliminate banding as a valid alternative under Title VII." *Id.* at 2680.

[138] *Id.*

and respond just as they would in the field, allow candidates 'to demonstrate how they would address a particular problem as opposed to just verbally saying it or identifying the correct option on a written test.'"[139] Even though nearly two-thirds of municipalities that were surveyed in 1996 used assessment centers as part of their assessment processes,[140] the Court concluded there was "no evidence" that other "equally valid and less discriminatory tests were available to the City."[141]

In addition to rejecting proof of availability and success of the "assessment center process," the Court decided that "each argument fails."[142] The Court admitted that some of the testimony was "contradictory" and questioned the credibility of witnesses, which should have compelled it to remand the case.[143] Instead, the Court reduced what seemed ripe for consideration by a trier of fact to nothing more than "a few stray" statements and granted summary judgment in favor of the plaintiffs in the case.[144] By granting summary judgment, the *Ricci* Court departed from the "ordinary course" of remanding a case when a new rule is announced and deprived the lower courts of the opportunity to apply the rule in the first instance.[145] Accordingly, with little guidance, the lower courts considering disparate impact cases after *Ricci* have had to define the meaning and reach of the Supreme Court's rule.

IV. THE MEANING AND REACH OF *RICCI*

Following *Ricci*, one candidate for promotion within the New Haven fire department challenged the City's use of the exam results that the City had originally discarded in that case.[146] In *Briscoe v. City of New Haven*, an African-American firefighter in New Haven claimed that the City violated

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[139] *Id.* at 2669 (quoting the testimony of Christopher Hornick).

[140] *Ricci*, 129 S. Ct. at 2705 (Ginsburg, J., dissenting) (citing Phillip E. Lowry, *A Survey of the Assessment Center Process in the Public Sector*, 25 PUB. PERSONNEL MGMT. 307, 315 (1996)).

[141] *Id.* at 2681 (majority opinion).

[142] *Id.* at 2679.

[143] *Id.* at 2663; *see, e.g.*, Davis v. City of Dallas, No. 3:08-CV1123-B, 2010 WL 300348, at *11 (N.D. Tex. Jan. 25, 2010) (denying summary judgment on disparate impact claim in light of "[m]aterial issues of fact"). Specifically, with regard to the *Ricci* Court's decision not to remand, the United States District Court for the District of Connecticut observed that the "Court did not have to direct the entry of summary judgment on the *Ricci* plaintiffs' disparate-treatment claim." Briscoe v. City of New Haven, No. 3:09-cv-1642(CSH), 2010 WL 2794212, at *7 (D. Conn. July 12, 2010) (considering a disparate impact case brought by one of the firefighters denied promotion because of the selection process the Court directed New Haven to use). "It could have remanded the case to the lower courts for further evidentiary proceedings, to be conducted in light of the Court's 'strong basis in evidence' formulation." *Id.*

[144] *Ricci*, 129 S. Ct. at 2680.

[145] *Id.* at 2702 (Ginsburg, J., dissenting) (citing Johnson v. California, 543 U.S. 499, 515 (2005); Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982)).

[146] *Briscoe*, 2010 WL 2794212, at *1.

the disparate-impact provision in Title VII by weighting the written portion of the fire department promotional examinations as 60% of the total score and the oral portion of the exam as 40% of the score. The plaintiff argued that the weighting "has a disparate impact on minority applicants, is not job related and is not justified by business necessity, and is likely to have an adverse impact greater than is required by business necessity."[147] Additionally, the plaintiff claimed that a different type of exam or a different weighting of the portions of the exam "would be equally good or better at identifying the best-qualified candidates for promotion, and would have less disparate impact on racial minorities."[148] Relying on the *Ricci* Court's directive that it must use the exam results to select candidates for promotion, the City moved to dismiss the complaint.[149] Acknowledging that there was evidence to suggest that alternatives with less disparate impact may have been available to the City and that the *Ricci* Court "might have taken a different course,"[150] the *Briscoe* court nevertheless acknowledged "the practical consequences of the *Ricci* decision" and dismissed the complaint.[151] The court was careful to limit the reach of its decision, however, emphasizing "the narrow boundaries of [its] opinion."[152] Foreclosing only challenges to the particular exams at issue in *Ricci*, the Briscoe court noted that "the Supreme Court did not necessarily vindicate the exams or the 60/40 weighting as being demonstrably free of disparate impact, nor did it certify that the future use of similar exams would not constitute disparate impact, nor did the Supreme Court mandate that these exams continue to be used in the future."[153]

Consistent with the *Briscoe* court's understanding of *Ricci*'s limited reach, other lower courts faced with disparate impact challenges have cited *Ricci* but have nevertheless continued to adhere to the rule established in *Griggs* that a selection method is "prohibited" if it has a disparate impact on minority candidates and is not related to job performance or is not the best way to make the selections because another way has less of an impact on minority candidates.[154] One court expressly refused to apply the *Ricci* standard to a challenge to New York City's method of selecting firefighters,

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147 *Id.* at *3.

148 *Id.* The plaintiff noted that the 60:40 weighting "was arbitrarily chosen, without any pretense that it was job related; [and] it was contrary to standard practice among similar public safety agencies, where the norm is to weight the oral component 70 percent . . . ." *Id.*

149 *See id.* at *3–4.

150 *Id.* at *7.

151 *Briscoe*, 2010 WL 2794212, at *8.

152 *Id.* at *11.

153 *Id.* at *10.

154 *See, e.g*, Walker v. E. Allen Cnty. Schs., No. 1:08 CV32 PPS, 2010 WL 1652958, at *2–3 (N.D. Ind. Apr. 23, 2010); Hayes v. City of Lexington, No. W2008-02431-COA-R3-CV, 2009 WL 3787226, at *2 (Tenn. Ct. App. Nov. 12, 2009); *see also* Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(k)(1)(A)(i)-(ii), (C) (2006); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

applying the *Griggs* standard instead.[155] In *United States v. City of New York*, the United States government, the Vulcan Society,[156] and three applicants for employment sued the City of New York and the New York City Fire Department for relying on written examinations to select entry-level firefighters, claiming that the examinations had a disparate impact on African-American and Hispanic candidates.[157]

Despite the fact that the *Ricci* Court faced precisely the same disparate impact concerns, although raised by the employer rather than the job candidates, the United States District Court for the Eastern District of New York made a particular point of referencing—and rejecting—the notion that the standard announced in *Ricci* applied to the case.[158] The judge stated: "I reference *Ricci* not because the Supreme Court's ruling controls the outcome in this case; to the contrary, I mention *Ricci* precisely to point out that it does not."[159] Trying to distinguish the case before it from *Ricci*, the court stressed that the issue before it was whether the plaintiffs had shown that New York City's use of particular exams "*actually had* a disparate impact upon [African-American] and Hispanic applicants for positions as entry-level firefighters."[160] After carefully reviewing the statistical evidence that African-American and Hispanic applicants were disadvantaged by the exams and evaluating the causal relationship between the use of the exams and the disparity, the court concluded that plaintiffs had established a prima facie case of disparate impact.[161]

Following the framework established in *Griggs*, the court then examined the employer's "business necessity defense" that the selection method was "a reasonable measure of job performance."[162] Recognizing that the burden is on the City to prove the relationship between the job and the selection method,[163] the court stated that "the City must provide evidence of what the important abilities of a firefighter are, and must demonstrate the

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[155] United States v. City of New York, 637 F. Supp. 2d 77, 86 (E.D.N.Y. 2009).

[156] The Vulcan Society is a fraternal organization of African-American firefighters "first constituted in the 1940s in response to what was then quite blatant and open discrimination against firefighters of color." United States v. City of New York, 683 F. Supp. 2d 225, 234 n.1 (E.D.N.Y. 2010); *accord* Carroll v. City of Mount Vernon, 707 F. Supp. 2d 449, 452 n.4 (S.D.N.Y. 2010).

[157] *City of New York*, 637 F. Supp. 2d at 80. In *Ricci*, the plaintiffs were candidates for officer-level positions, while the plaintiffs in *United States v. City of New York* were candidates for entry-level positions, but both cases rest on the allegations that the tests used to select candidates had a disparate impact on African-American and Hispanic candidates. *See id.*; Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).

[158] *City of New York*, 637 F. Supp. 2d at 83.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 99.

[162] *Id.* (quoting Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 382 (2d Cir. 2006)).

[163] *Id.*

extent to which those abilities were tested on its examinations."[164] While this is exactly what the *Griggs* framework dictates—and what *United States v. City of New York* ultimately required, as discussed below—when the defendants in *Ricci* attempted to justify discarding the test results in that case by showing that the selection methods they developed could not meet this standard because there were other tests that measured abilities that were more closely related to job performance and produced less disparate impact than New Haven's tests, the Supreme Court announced that the proffered evidence was not enough.[165] Requiring a "strong basis in evidence" to believe that the tests were inadequate, the Court decided that there was "no support" for the defendants' decision to disregard the tests.[166]

Instead of trying to distinguish the issue in *Ricci* from the issue it faced, the district court in *United States v. City of New York* simply announced that the case before it was "entirely separate" from the one that confronted the *Ricci* Court.[167] By distancing itself from *Ricci* in this way, the court was able to apply the *Griggs* standard to the candidates' challenge to the selection method at issue in the case, while avoiding the question of why the Supreme Court decided not to apply *Griggs* when the employer discarded the test results before that challenge could have been made.[168]

After *Ricci*, few employers will likely discard a test that has a disparate impact on candidates for employment, given what an employer must now prove to avoid liability.[169] In two recent cases, however, employers faced challenges by candidates for hire or promotion who, like the plaintiffs in *Ricci*, claimed that they were rejected only because their employers were trying to avoid the disparate impact of their selection methods.[170] While the courts in these cases cited *Ricci*, they did not interpret the "strong basis in evidence" standard but decided instead that the Court's holding did not apply.[171] In *NAACP v. North Hudson Regional Fire & Rescue*, for example,

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[164] *City of New York*, 637 F. Supp. 2d at 119.

[165] Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009).

[166] *Id.*

[167] *City of New York*, 637 F. Supp. 2d at 83.

[168] *See id.* at 83–84.

[169] *See Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting) (noting that "an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic.").

[170] *See* Carroll v. City of Mount Vernon, 707 F. Supp. 2d 449, 453–54 (S.D.N.Y. 2010) (challenge by white applicant alleging that city refused to promote him to "'appease and acquiesce in the protests of . . . [African Americans] . . . who objected to the promotion because the candidates . . . were white . . . .'" (quoting Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 6–7, Carroll v. City of Mount Vernon, 707 F. Supp. 2d 449 (S.D.N.Y. 2010) (No. 07 CV 11577(CS)))); NAACP v. N. Hudson Reg'l Fire & Rescue, 707 F. Supp. 2d 520, 523–24 (D.N.J. 2010) (challenge by Hispanic candidates brought when court enjoined employer from hiring them from selection list).

[171] *See Carroll*, 707 F. Supp. 2d at 455–56 (deciding that *Ricci* does not apply where city was deciding whether the promotion of a white candidate would violate a consent

the United States District Court for the District of New Jersey noted that a claim against a fire department's use of a residency requirement based on its apparent disparate impact on African-American candidates is "distinguishable" from the *Ricci* case because "in *Ricci* the defendant City alleged that the examinations had a discriminatory impact," and in the case before it, African-American candidates "allege that the hiring scheme has a discriminatory impact."[172] In *NAACP v. North Hudson Regional Fire & Rescue*, however, the court had previously issued a preliminary injunction barring the fire department from hiring from the eligibility list until it added the qualified candidates who had been rejected because of where they lived.[173] The six Hispanic firefighter candidates who would have been hired from the original list moved to intervene in the case.[174] The court granted their request to intervene,[175] which set up exactly the same claim that the Supreme Court faced in *Ricci*. The fire department appealed the district court's preliminary injunction and the Court of Appeals for the Third Circuit "*sua sponte* . . . remanded the matter to the District Court for further proceedings in light of the [*Ricci*] decision."[176]

On remand, the district court complied with the appellate court's instructions and evaluated its previous order to enjoin the fire department "in light of *Ricci*'s mandate."[177] The problem the court faced, however, was that "[t]he Supreme Court did not provide detailed guidance as to how the strong basis in evidence standard should be applied."[178] Because it was faced with the decision whether to vacate the preliminary injunction, the district court surmised that "the *Ricci* standard *could* be formulated as presenting the question whether the [p]laintiffs have established a strong basis in the evidence that they are likely to succeed on the merits of their disparate impact case."[179]

Without explaining how it would have interpreted the "strong basis in evidence" standard or why it did not apply it, the court simply applied the well-established *Griggs* standard to analyze the disparate impact claim.[180] Explicitly applying the *Griggs* framework, the *North Hudson* court began with the first step: "Essentially, a *prima facie* case of disparate impact discrimination involves a threshold showing that some employment practice

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decree); *N. Hudson Reg'l Fire & Rescue*, 707 F. Supp. 2d at 531 (explaining that *Ricci* is not "fully controlling," but must be taken into account).

172 *N. Hudson Reg'l Fire & Rescue*, 707 F. Supp. 2d at 526.

173 *Id.* at 524.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 531.

178 *N. Hudson Reg'l Fire & Rescue*, 707 F. Supp. 2d at 532–33. As Justice Ginsburg stated in her dissent in *Ricci*: "One is left to wonder what cases would meet the standard . . . ." Ricci v. DeStefano, 129 S. Ct. 2658, 2700 (2009) (Ginsburg, J., dissenting).

179 *N. Hudson Reg'l Fire & Rescue*, 707 F. Supp. 2d at 533 (emphasis added).

180 *See id.*

causes a significant statistical disparity."[181] Next, the court noted that "the burden of production shifts to the defendant, who is given an opportunity to assert that that the practice (1) is required by business necessity, or (2) otherwise significantly furthers the legitimate employment goals of the employer."[182] Noting that the plaintiffs' statistical evidence did, in fact, show a statistical disparity, the district court proceeded to the second step in the *Griggs* analysis.[183] Continuing to adhere strictly to *Griggs*'s three-prong framework, the court noted that "the burden shifts to the [d]efendants to show that the residency requirement is 'job related for the position in question and consistent with business necessity.'"[184] Because the fire department had proffered proof that the residency requirement resulted in "the avoidance of more costly litigation, the fostering of communication between protective services workers and the community they serve, and the increased probability of having workers able to respond quickly in the case of an emergency,"[185] the district court concluded, without deciding the issue, that the fire department "may have a valid business necessity defense."[186] In light of this possibility, the court concluded that "the [p]laintiffs are not likely to succeed on the merits of their claims."[187] After reviewing all of the other factors a moving party must prove when requesting a preliminary injunction, the court decided to vacate the preliminary injunction and allow the plaintiffs' disparate impact claim to proceed.[188]

In *Carroll v. City of Mount Vernon*, a white firefighter employed by the City of Mount Vernon in New York claimed, as the *Ricci* plaintiffs had claimed, that the City did not promote him "in order to appease and acquiesce in the protests of and objections by the Vulcans . . . who objected to the promotion because the candidates . . . were white."[189] In that case, a white fighter qualified for promotion after taking a civil service exam and

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[181] *Id.* (citing *Ricci*, 129 S. Ct. at 2677).

[182] *Id.* (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(k)(1)(A)(i)–(ii), (C) (2006); Albemarle Paper Co. v. Moody, 422 U.S. 405, 434–35 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[183] *Id.* at 538.

[184] *Id.* at 538–39 (quoting *Ricci*, 129 S. Ct. at 2673).

[185] *N. Hudson Reg'l Fire & Rescue*, 707 F. Supp. 2d at 541.

[186] *Id.* at 533.

[187] *Id.*

[188] *Id.* at 546. As explained by the court: "To prevail on a motion for a preliminary injunction, the moving party must prove 'that (1) it has a likelihood of success on the merits, (2) it will suffer irreparable harm if the injunction is denied, (3) granting preliminary relief will not result in even greater harm to the nonmoving party, and (4) the public interest favors such relief.'" *Id.* at 531–32 (quoting Rogers v. Corbett, 468 F.3d 188, 192 (3d Cir. 2006)). The court noted also that it could "order the 'extraordinary remedy' of a preliminary injunction only if the moving party establishes all four factors in its favor." *Id.* at 532 (quoting P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, 428 F.3d 504, 508 (3d Cir. 2005)).

[189] Carroll v. City of Mount Vernon, 707 F. Supp. 2d 449, 453–54 (S.D.N.Y. 2010) (alterations in original) (internal quotation marks omitted).

ranking high enough on a list "derived from the results of that examination (the '2004 list')."[190] After the plaintiff was invited to interview for an open position, the city's mayor received a letter from the President of the Vulcan Society raising an objection to the City's filling the vacancies with individuals from the 2004 list because appointment from that list would have violated a federal consent decree.[191] The consent decree reflected the City's earlier agreement to promote African-American firefighters to officer ranks so that the proportion of African Americans in those ranks would represent the proportion of African-American firefighters in the department as a whole.[192] Counsel for the Vulcan Society sent a separate letter to counsel for the City reiterating the Society's concern that appointing a candidate from the 2004 list would violate the consent decree.[193] That letter also included a threat that, "if any such promotions are made, the private plaintiffs will take any and all remedial steps, including application to the Court . . . ."[194] When the plaintiff appeared at the Mayor's office for his interview, he encountered several members of the Vulcan Society who were gathered to protest the appointment of any Caucasian candidates from the 2004 list.[195]

The crux of the plaintiff's complaint was that instead of promoting him, the City deferred its decision about his promotion until it received advice from its legal department on what action to take.[196] During this waiting period, the 2004 list was replaced according to its terms by a newer list and the plaintiff was ranked too low to be eligible for promotion from that list.[197] The plaintiff blamed the City's failure to promote him on its "acquiescence to racially motivated protest or objections" and relied on *Ricci* to argue that this acquiescence "constitute[d] racial discrimination within the meaning of Title VII."[198]

The court, however, disagreed and noted that "*Ricci* is distinguishable."[199] To draw the distinction between *Ricci* and the case before it, the court noted, "The [d]efendants in this case were not trying to avoid disparate-impact liability when they held up Plaintiff's potential promotion. They were presumably trying to determine whether the

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190 *Id.* at 451.

191 *Id.*

192 *Id.* at 451 n.5.

193 *Id.* at 451–52.

194 *Id.* (internal quotation marks omitted).

195 *Carroll*, 707 F. Supp. 2d at 452.

196 *Id.*

197 *Id.*

198 *Id.* at 457 (internal quotation marks omitted). In addition, "Plaintiff assert[ed] that the Mayor's Chief of Staff informed Plaintiff . . . that although everything 'looked good' for Plaintiff's promotion, he would not be promoted because the Vulcan Society had challenged and opposed the promotion of a Caucasian candidate." *Id.* at 452. The court noted that the defendant disputed the truth of the plaintiff's assertion but the court assumed that the plaintiff's assertions were true for purposes of the summary judgment motions before it. *Id.*

199 *Carroll*, 707 F. Supp. 2d at 456.

promotion would violate the Consent Decree."[200] According to the court, "if *Ricci* is read narrowly to apply only where an employer acts to avoid disparate-impact liability, it is not controlling in this case."[201] Moreover, according to the court, even if *Ricci* was read broadly "to mean that an employer cannot take 'race-based' action in an effort to avoid any sort of liability," it still would not apply.[202] Without explaining what sort of case *Ricci* would apply to, the court simply refused to apply *Ricci* to find race-based animus in Mount Vernon's concern "that promoting another white firefighter would exacerbate racial disparities between the officer and firefighter ranks."[203] Although this concern was also at the center of New Haven's decision to discard the test results in *Ricci*,[204] and that "the [d]efendants' passive conduct here may have resulted in the same effect as New Haven's in *Ricci* because of the passage of time,"[205] the *Carroll* court decided that the defendants were "prudent" to heed the Vulcan Society's opposition and did not make an employment decision "because of race."[206]

The question, therefore, remains: To what kind of case does the *Ricci* standard apply? Many courts deferentially acknowledge *Ricci* but, being left "to wonder what cases would meet the standard,"[207] continue to apply the well-established *Griggs* framework to disparate impact claims.[208] Until the

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200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.* at 457.

204 Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) (noting that the "public debate that turned rancorous" ended with the City's decision to take "the side of those who protested the test results").

205 *Carroll*, 707 F. Supp. 2d at 457.

206 *Id.* (quoting *Ricci*, 129 S. Ct. at 2674).

207 *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting).

208 *See, e.g.*, Meditz v. City of Newark, No. 08-2912 (WJM), 2010 WL 1529612, at *4 (D.N.J. Apr. 15, 2010) (holding that plaintiff failed to make a prima facie case of disparate impact resulting from the city's residency requirement and that even if he had, deciding that the city had provided the court with "numerous business justifications"); Avalos v. Cintas Corp., No. 06-12311, 2010 WL 1417804 (E.D. Mich. Apr. 5, 2010) (finding no disparate impact resulting from any specific employment practice); Stewart v. Laubach, No. 05-3007-SAC, 2010 WL 1337281 (D. Kan. Mar. 30, 2010) (granting summary judgment to defendant employer because plaintiff failed to identify any hiring practice that disparately impacted any group and defendant had a legitimate business purpose for failing to hire plaintiff); Davis v. City of Dallas, No. 3:08-CV1123-B, 2010 WL 300348 (N.D. Tex. Jan. 25, 2010) (denying summary judgment on disparate impact claim because of questions of fact as to whether the city's performance review procedures had a disparate impact on minorities and whether the city had a legitimate business reason for using them); Port Auth. Police Asian Jade Soc. of N.Y. & N.J. v. Port Auth. of N.Y. & N.J., 681 F. Supp. 2d 456 (S.D.N.Y. 2010) (finding employer's practices for promotion to sergeant had a disparate impact on Asian-American officers); Howe v. City of Akron, No. 5:06CV2779, 2009 WL 3245428 (N.D. Ohio Oct. 2, 2009) (finding that plaintiffs established a prima facie case of disparate impact resulting from firefighter exams for promotion which employer could not justify as serving a legitimate job-related purpose); Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79, 691 F. Supp. 2d 372 (S.D.N.Y. 2009) (granting summary judgment on disparate treatment

Ricci standard is overruled, changed by statute, or at least clarified by the Supreme Court, employers can anticipate "costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic."[209] Lower courts have been reluctant to adopt the *Ricci* rule,[210] indicating without a doubt that the decision has not clarified the law for employers as the Supreme Court had promised it would.[211]

V. CONCLUSION

When the *Ricci* decision was announced, Justice Ginsburg accurately predicted its fate: "The Court's order and opinion, I anticipate, will not have staying power."[212] As the developing case law makes clear, when job candidates challenge selection methods that disparately impact minorities, *Griggs* and its progeny continue to provide the framework to decide the claims. It is also clear that the *Griggs* framework offers the appropriate guide where selection methods are discarded, either by an employer or a court, before disparate impact can result. As long as the Court's "strong basis in evidence" standard remains, without further definition from the Court or refinement by Congress, employers will find complying with Title VII "a hazardous venture."[213] To guide employers and ensure that the objectives of Title VII are met, the *Griggs* framework must be restored and applied to all disparate impact cases, whether an employee challenges the disparate impact of a selection method or the employer acts before a disparate impact is felt. This time-tested standard will best protect all of Title VII's objectives and encourage, rather than thwart, an employer's voluntary compliance with all of the statute's goals.

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claim because plaintiffs failed to prove causal connection between any disparity and selection methods).

[209] *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J., dissenting).

[210] *See* NAACP v. N. Hudson Reg'l Fire & Rescue, 707 F. Supp. 2d 520, 526 (D.N.J. 2010); *Carroll*, 707 F. Supp. 2d at 457; United States v. City of New York, 637 F. Supp. 2d 77, 86 (E.D.N.Y. 2009).

[211] *Ricci*, 129 S. Ct. at 2681.

[212] *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

[213] *Id.* at 2701.