No. 11-1024

In the
Supreme Court of the United States

CITY OF NEW HAVEN,
CONNECTICUT,
Petitioner,

v.

MICHAEL BRISCOE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an employer may be subjected to a disparate-impact lawsuit where a court, in a previously litigated disparate-treatment lawsuit, has already held that the entity lacked a strong basis in evidence of being held liable for a disparate-impact.

2. Whether a disparate-impact cause of action is constitutional under the Equal Protection Clause.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) and Center for Equal Opportunity (CEO) respectfully submit this brief amicus curiae in support of Petitioner City of New Haven.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in this Court in numerous cases relevant to this case. PLF addressed unjustified applications of disparate-impact theory in *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658 (2009), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF also participated as amicus curiae in nearly every major racial discrimination case heard by this Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the*

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). PLF also participated in the Fifth Circuit and in support of the recently granted petition for certiorari in *Fisher v. Univ. of Texas at Austin*, No. 11-345, 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012).

CEO is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color-blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in numerous cases concerning equal protection, such as *Ricci*, 129 S. Ct. 2658, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Parents Involved in Cmty. Schs.*, 127 S. Ct. 2738; *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306; *Alexander*, 532 U.S. 275; *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Three years after this Court's landmark decision in *Ricci*, 129 S. Ct. 2658, holding that an employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability before it can engage in intentional discrimination, the City of New Haven returns to this Court. Like *Ricci*, the results of New Haven's 2003 firefighter promotional exams are alleged to violate Title VII of the Civil

Rights Act of 1964 (Title VII). Here, however, the issue is whether New Haven's certification of the promotional exam, which this Court ordered it to undertake (*id.* at 2681), can subject it to disparate-impact liability under Title VII.

Most, including New Haven, thought the question was already settled by *Ricci*. This Court found that New Haven *would not* be subjected to disparate-impact liability for certifying the test results. *See id.* Yet, the Second Circuit dismissed this language as "dicta," and required New Haven to return to the trial court to face the plaintiff's disparate-impact suit. *See Briscoe v. City of New Haven*, 654 F.3d 200, 209-10 (2d Cir. 2011).

The lower court's decision impales New Haven with a Morton's Fork:[2] either scrap the test results, thereby subjecting itself to disparate-treatment liability, or certify the test results, thereby subjecting itself to disparate-impact liability. This result follows neither from *Ricci* nor from Title VII. With respect to the former, *Ricci* gives lower courts clear, unequivocal guidance on how to treat a disparate-impact claim brought after a court's final decision that an employer lacked a strong basis in evidence of disparate-impact liability. With respect to Title VII, its core prohibition is against intentional discrimination. *Ricci*, 129 S. Ct. at 2672. Disparate-impact is only useful as a tool to root out intentional discrimination, not as a stand-alone action to be used to achieve proportional quotas. *Id.* at 2682 (Scalia, J., concurring). Over-reliance on statistical imbalance, however, has inverted Title VII.

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[2] A Morton's Fork is "a choice between two equally unpleasant alternatives." *Moore v. Czerniak*, 574 F.3d 1092, 1166 (9th Cir. 2009) (en banc), *rev'd and remanded by Premo v. Moore*, 131 S. Ct. 733 (2011).

See generally Watson v. Ft. Worth Bank & Trust, 487 U.S. 977 (1988) (discussing the problems with discrimination claims based solely on statistical evidence).

To prevent this situation from recurring, this Court should decide the question it avoided in *Ricci*: whether Title VII's disparate-impact provisions are unconstitutional. This case highlights the conflict between disparate-impact doctrine and the constitutional guarantee of equal protection. Title VII's disparate-impact provisions, 42 U.S.C. § 2000e-2(a), (k)(1)(A), which were codified in 1991, lead government entities and private employers to do exactly what the Constitution forbids: classify and treat individuals differently on account of their race.

Given the frequency of constitutionally questionable practices and the difficulty of implementing objective practices that easily withstand a disparate-impact challenge, this case provides this Court with an opportunity to simplify the doctrine in this area of the law, consistent with constitutional values, and declare disparate-impact liability to be unconstitutional under the Equal Protection Clause. Disparate-impact requires both employers and the courts to make suspect racial classifications. While statistical disparities are inevitable in the workforce, the specter of disparate-impact liability forces employers to use racial classifications, racial balancing, and racial quotas to combat these disparities in order to avoid potentially catastrophic lawsuits. So long as disparate-impact claims remain viable, individuals throughout the country are sure to have their right to equal protection violated again and again.

In *Ricci*, Justice Scalia recognized that the Court "merely postpone[d]" the day when the constitutionality of the disparate-impact provisions would be decided. *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). This Court now has another opportunity to right the wrong recognized by Justice Scalia. This Court should grant certiorari and strike down disparate-impact liability as a violation of the Equal Protection Clause.

ARGUMENT

I

THE COURT SHOULD GRANT CERTIORARI TO AFFIRM ITS HOLDING IN *RICCI*

This case was not supposed to happen after this Court's decision in *Ricci*. *Ricci* heralded a new doctrine in disparate-impact theory, where New Haven could avoid disparate-impact liability by showing that it lacked a strong basis in evidence for believing it could be subjected to such a suit. *See generally*, Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald a New Disparate Impact*, 90 B.U. L. Rev. 2181, 2204-21 (2010). Certiorari is needed to preserve this commonsense defense.

The *Ricci* Court described in detail New Haven's efforts to ensure that the promotional exams it administered, the same exams which are at issue here, were devoid of any discriminatory biases. *See Ricci*, 129 S. Ct. at 2665-71. Despite New Haven's best efforts to ensure the exams contained no biases, white candidates performed better than most black and Hispanic candidates on both the captain and lieutenant examinations. *Id.* at 2666. This

performance disparity raised a prima facie case of disparate-impact liability. *Id.* at 2677. However, this Court found that the City had no basis to believe it would be subjected to disparate-impact liability, since "the examinations were job-related and consistent with business necessity," and there was no evidence of a "less-discriminatory testing alternative that the City . . . would necessarily have refused to adopt." *Id.* at 2678-79.

Nevertheless, New Haven was purportedly fearful of a disparate-impact lawsuit, and discarded the test results. *Id.* at 2671. This Court held that New Haven's decision to discard the test results was intentional discrimination—i.e., disparate-treatment—against one Hispanic and 16 white firefighters in violation of Title VII. *Id.* at 2681. This Court's decision rested on the idea that New Haven "lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results." *Id.* at 2681.

Ricci anticipated the potential conflict that would arise if New Haven, upon certifying the test results, would be subjected to a disparate-impact suit. Namely, that any entity found liable for disparate-treatment, because it lacked a strong basis in evidence that it would be liable under disparate-impact, could nevertheless still be subjected to a disparate-impact lawsuit for the same underlying action. Accordingly, this Court provided guidance to the lower courts facing such a scenario.

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability

> based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Ricci, 129 S. Ct. at 2681.

Instead of heeding this Court's unequivocal guidance, the Second Circuit held that New Haven could be subjected to a disparate-impact lawsuit, based on the exact same test that this Court *ordered* New Haven to certify. *See Briscoe*, 654 F.3d at 209-10; *Ricci*, 129 S. Ct. at 2681. The lower court's sleight of hand was accomplished by characterizing, in nine separate passages, this Court's straightforward language as nonbinding dicta. *Briscoe*, 654 F.3d at 205-09. But the language was not dicta; it was essential to the final disposition of the case. Further, it squarely addresses the situation of what an entity should do "when a disparate-impact violation would not otherwise result." *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

The lower court's decision places municipalities in an unwinnable situation. Where a city undertakes extreme measures to ensure that its job-related written examination is bereft of racial bias, and where that examination, through no fault of a city, results in a disproportional racial result, a city cannot *legally* act. It cannot discard the results—that decision violates Title VII's disparate-treatment canon. It cannot certify the results—that decision, according to the Court below, subjects a city to Title VII disparate-impact liability.

The lower court recognized that its decision resulted in this "whipsaw effect." *Briscoe*, 654 F.3d at 209. Further, the lower court held that "[a]ny

employer that intentionally discriminates—thinking there is a strong basis in evidence of disparate-impact liability—*will face the same issue* if it loses a disparate-treatment suit." *Id.* (emphasis added). But this Court rejected that scenario. This Court found that New Haven should not be subject to disparate-impact liability where there is not a strong basis in evidence of a disparate-impact violation.[3] Unfortunately, the Second Circuit disagrees. Certiorari is needed to ensure that employers are not subjected to disparate-impact lawsuits for failing to engage in action that resulted in disparate-treatment.

II

CERTIORARI IS WARRANTED BECAUSE OVER-RELIANCE ON STATISTICAL IMBALANCE HAS ALLOWED DISPARATE-IMPACT TO OVERTAKE INTENTIONAL DISCRIMINATION AS TITLE VII'S CORE PROHIBITION

A. Intentional Discrimination, Not Disparate Impact, Is Title VII's Core Prohibition

As this case perfectly demonstrates, Title VII's disparate-treatment and disparate-impact provisions can and do conflict. This Court should take this case to resolve the conflict in favor of the true intent of Title VII—prohibiting invidious and pernicious intentional discrimination on the basis of race. Such

[3] Of course, the Court will need to take care to ensure that no litigant is denied its day in court to challenge actual discriminatory practices. *See Martin v. Wilks*, 490 U.S. 755 (1989).

action is urgently needed as employers, in an effort to avoid disparate-impact liability, are engaging in deliberate statistics-based racial balancing in violation of Title VII's disparate-treatment provisions.

"Disparate-treatment is often thought to reflect most directly the text of Title VII, which prohibits an employer from taking an adverse action against an employee 'because of such individual's race, color, religion, sex, or national origin.'" Seiner & Gutman, *supra*, at 2185 (quoting 42 U.S.C. § 2000e-2(a)(1)). "Title VII's *principal* nondiscrimination provision held employers liable only for disparate treatment." *Ricci*, 129 S. Ct. at 2672 (emphasis added). Accordingly, Title VII is hierarchical. "Disparate treatment is the core prohibition of Title VII, with disparate impact playing a lesser role." Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 Nw. U. L. Rev. Colloquy 201, 205 (2009).

By not certifying the test results, New Haven *did* intentionally discriminate against Hispanic and white firefighters in violation of Title VII's disparate-treatment provisions. *See Ricci*, 129 S. Ct. at 2681. And by certifying the test results, New Haven, according to the court below, faces disparate-impact liability. *Briscoe*, 654 F.3d at 209-10. This Catch-22 is not how Title VII should operate. At its core, Title VII is intended to root out intentional discrimination based on race. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII."). As one scholar notes:

> The focus of a [Title VII] suit ought to be on whether people of different races are treated differently *because* of their race. That is the commonsense and dictionary meaning of "discrimination," and that is what the 1964 act clearly said and meant. The question of intent, rather than incidental effect, ought to be at the heart of every lawsuit.

Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, Briefly, Vol. 5, No. 12, at 10 (Dec. 2001).[4] Where an entity faces the situation present here—either intentionally discriminate, or adopt a result that, according to statistical evidence, has a disproportionate effect on a particular race—Title VII must favor the action that eliminates intentional discrimination.

While disparate-impact may be proper as an "evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment," *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring), it should not be an end in itself. All too often, over-reliance on statistical evidence obfuscates disparate-impact's utility as a tool for uncovering intentional discrimination. That is precisely what happened in *Ricci*, where nothing but statistical imbalance led "employers to discard the results of lawful and beneficial promotional examinations even where there [was] little if any evidence of disparate-impact discrimination." *Ricci*, 129 S. Ct. at 2675. As the Court rightly recognized, if disparate-impact is used as a sword to achieve statistical

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[4] *Available at* http://aei.org/files/2001/12/01/Briefly-Disparate-Impact.pdf (last visited Mar. 14, 2012).

balance, it results in "a *de facto* quota system, in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'" *Id.* (quoting *Watson*, 487 U.S. at 992).

Using disparate-impact as a vehicle for achieving perfect proportional representation turns Title VII on its head. "It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson*, 487 U.S. at 992. The tendency of certain people to gravitate towards certain jobs does not mean that employers are discriminating. *Id.* (O'Connor, J., plurality op.) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."). Yet, that is precisely what the plaintiff here is attempting to achieve. Disparate-impact is not being used as a tool to smoke out intentional discrimination, instead it is being used as a mechanism to *justify* intentional discrimination.

B. The Practical Effects of Elevating Disparate Impact to the Level of Intentional Discrimination Violate Title VII's Fundamental Purpose

Despite the inevitability of statistical disparities in certain workforces, disparate-impact liability requires employers to be on the lookout for any statistical disparity. Because of the prospect of a catastrophic disparate-impact lawsuit, employers must take proactive means to remedy what are most likely chance disparities in their workforce. "By pushing [employers] to substitute quota-driven decisions for

merit-based, color-blind ones, disparate impact lawsuits [result in] . . . the institutionalization of race-consciousness." Clegg, *supra*, at 11.

Sadly, in trying to prevent an employer's illegal practice from being upheld, disparate-impact claims often lead to Title VII liability for legitimate practices that merely have an unequal effect. *See generally* Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 222-25 (1992) (discussing over enforcement of Title VII in terms of statistical error). Decades of disparate-impact challenges "have failed to produce tests without disparate impact, which was presumably the larger original goal." Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 755 (2006).

Because of the threat of disparate-impact liability, "employers are now required to mount the extensive research and preclearance programs necessary to validate a test tailor-made to their own situation," and such "job testing requires heavy expenditures in verification." Epstein, *supra*, at 215. In *Ricci*, this Court noted that New Haven hired a consultant to develop and administer examinations for its firefighter promotional process at a cost of $100,000. *Ricci*, 129 S. Ct. at 2665. But no matter how expensive or well-developed, professionally developed tests do not protect an employer from a disparate-impact suit. *See Watson*, 487 U.S. at 987.

As a result, "Title VII makes it more costly to employ black workers; it also makes it more costly to fire them because the firm may have to incur the expense of defending a Title VII disparate-treatment

suit when a black employee is discharged." Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. Pa. L. Rev. 513, 519 (1987). The threat of disparate-impact in particular "makes it more costly for a firm to operate in an area where the labor pool contains a high percentage of blacks, by enlarging the firm's legal exposure." *Id.* Consequently, Title VII may have the unintended effect of discouraging employers from hiring minorities. For example, in *Terry Props., Inc. v. Standard Oil Co. (Ind.)*, 799 F.2d 1523 (11th Cir. 1986), the defendant sought to build a plant in a location with fewer than 35% minority workers "because it had previously experienced difficulty meeting affirmative action goals in communities with proportionately larger minority populations." *Id.* at 1527.

New Haven did not discriminate against applicants when it administered (or certified) the promotional exams. Indeed, the lengths that it undertook to ensure that its tests were free of any bias are well documented. *See Ricci*, 129 S. Ct. at 2665-71. Only by placing form over substance—by making disparate-impact the primary prohibition of Title VII—can the plaintiff's claim be allowed to proceed. Title VII does not countenance such a result, and (as we explain below) the Equal Protection Clause forbids it. Legal rules leaving public employers with "little choice" but to adopt race-conscious measures would be "far from the intent of Title VII." *Watson*, 487 U.S. at 993 (plurality opinion). "Allowing the evolution of disparate impact analysis leading to this result would be contrary to Congress' clearly expressed intent." *Id.* The Court should grant the writ of certiorari to ensure that Title VII's core prohibition against intentional discrimination retains its primacy.

III

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DISPARATE-IMPACT DOCTRINE IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE

This Court should grant the writ of certiorari in order to subject the disparate-impact provisions of Title VII to strict scrutiny. To avoid claims of disparate-impact, employers must intentionally design hiring practices that achieve a desired racial balance. Such action violates the equal protection components of the Fifth and Fourteenth Amendments, because employers are consciously considering race by ensuring that their policies and practices do not result in a disparate-impact.

Distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "Where the government proposes to ensure participation of some specified percentage of a particular group merely because of its race," such a preferential purpose must be rejected as facially invalid. *Bakke*, 438 U.S. at 307 (plurality opinion). Accordingly, all racial classifications by government are "inherently suspect," *Adarand*, 515 U.S. at 223 (citation omitted), and "presumptively invalid." *Reno*, 509 U.S. at 643. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

"Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson*, 543 U.S. at 505 (quoting *Adarand*, 515 U.S. at 227). Before resorting to a race-conscious measure, the government must "identify [the] discrimination [to be remedied], public or private, with some specificity," and must have a "strong basis in evidence" upon which to "conclu[de] that remedial action [is] necessary." *Croson*, 488 U.S. at 500, 504. The government's use of racial classifications is not entitled to the presumption of constitutionality that normally accompanies governmental acts. "[B]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* at 500-01. The burden is on the government to demonstrate "extraordinary justification." *Reno*, 509 U.S. at 643-44. The government "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Bakke*, 438 U.S. at 305 (plurality opinion) (citations omitted). It requires governmental specificity and precision, *Croson*, 488 U.S. at 500, 504. Absent a prior determination of specific necessity, supported by convincing evidence, the government will be unable to narrowly tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified. *Croson*, 488 U.S. at 510.

The federal government is not only prohibited from discriminating on the basis of race, it is also prohibited from enacting laws mandating that employers discriminate on the basis of race. *See Ricci*,

129 S. Ct. at 2682 (Scalia, J., concurring). Disparate-impact "not only permits but affirmatively requires" race-conscious decisionmaking "when a disparate-impact violation would otherwise result." *Id.* The danger is that "disparate-impact provisions place a racial thumb on the scales, often requiring" state or municipal governments "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.*; *see also* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53, 61-70 (discussing the conflict between equal protection and disparate-impact); Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1344-45 (2010) (same). Indeed, this Court has long recognized the quota-inducing danger of the disparate impact approach. *See Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989) ("The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof.").

Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid." *Bakke*, 438 U.S. at 307. For instance, had New Haven altered the weights assigned to the written and oral components of its examination, it could have changed the test results so that more minorities would have received higher passing scores and promotions. *Ricci*, 129 S. Ct. at 2703-05 (Ginsburg, J., dissenting) (arguing that New Haven could simply have adjusted how it weighted different aspect to avoid disparate-impact liability). In doing so, New Haven would have reduced or eliminated a racial

disparate-impact and escaped liability for any such claims.

However, in altering the results to achieve a predetermined outcome, New Haven would have engaged in race-conscious decisionmaking, perhaps even rigging the results to achieve racial quotas. *See* Marcus, *supra*, at 64 (describing the City's ability to determine the likely racial outcome of alternative testing protocols). Such conduct is impermissible, because this Court has never approved a governmental racial classification that aids individuals perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. *Bakke*, 438 U.S. at 307 (citations omitted). Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. *Id.* at 308-09; *see also* Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century*, 14 Harv. J.L. & Pub. Pol'y 137, 139 (1991) (The proper application of the Equal Protection Clause "restrains those who would use the coercive power of government to redistribute rights and opportunities and thereby serves its intended function as a mighty bulwark for *individual* liberty.") (emphasis added).

As a consequence of the disparate-impact provisions of Title VII, employers engage in acts that blatantly violate the Equal Protection Clause. "An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired

demographic mix, and identify whatever business necessities best justify the mechanism." Marcus, *supra*, at 64. This problem is not only felt by white employees. *See Frank v. Xerox Corp.*, 347 F.3d 130, 133 (5th Cir. 2003) (Xerox instituted a "Balanced Workforce Initiative" to ensure that "all racial and gender groups were proportionally represented." This policy led to favoring white employees in Houston where the black employees were "over-represented."). In *Watson*, this Court noted that "preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution." 487 U.S. at 993 (plurality opinion) (citing *Wygant*, 476 U.S. 267). The Court warned that "[i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Id.*

The conflict between disparate-impact and equal protection extends to cases involving private employers, not just government employers. "[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties —e.g., . . . whether private, State, or municipal— discriminate on the basis of race." *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) (citations omitted). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 435-36 (1975), the Court held that a private employer's pre-employment tests did not comply with guidelines of the Equal Employment Opportunity Commission, and the employer had failed in its burden of showing that its pre-employment tests were job related. Concurring in the judgment, Justice Blackmun warned that a "too-rigid" enforcement of the guidelines would

force the employer to either commission "an impossibly expensive and complex validation study," or "engage in a subjective quota system of employment selection." *Id.* at 449 (Blackmun, J., concurring). "This, of course, is far from the intent of Title VII." *Id.*

Courts have recognized that by subjecting public and private employers to disparate-impact claims, employers must engage in surreptitious and unconstitutional race-conscious decisionmaking to avoid liability. Lower courts have applied strict scrutiny to invalidate race-conscious schemes that pressured employers or contractors to use race, even when they did not require strict quotas. *See Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998) (race conscious goals require strict scrutiny). And simple requirements that regulated businesses use "good faith efforts" to achieve racial balance in a fashion reminiscent of disparate-impact law also trigger strict scrutiny. *See*, *e.g.*, *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999) (race-conscious requirement that public housing units be developed in predominantly nonminority residential areas triggered strict scrutiny; remanding to lower court to determine whether requirement was constitutional); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1996) (requirement that contractor make race-conscious efforts triggered strict scrutiny and was unconstitutional). The time for subjecting disparate-impact to strict scrutiny is long overdue.

CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation and the Center for Equal

Opportunity respectfully request that this Court grant the writ of certiorari.

DATED: March, 2012.

Respectfully submitted,

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