No. 11-1024

IN THE

Supreme Court of the United States

CITY OF NEW HAVEN,

Petitioner,

v.

MICHAEL BRISCOE,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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In *Ricci v. DeStefano*, this Court ordered summary judgment against Petitioner City of New Haven on a Title VII disparate-treatment challenge to its refusal to certify the results of promotional exams in its Department of Fire Services. 129 S. Ct. 2658, 2681 (2009). In entering that judgment, the Court adopted the strong-basis-in-evidence standard to "resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII" and directed that, in any subsequent suit, the City "would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." *Id.* at 2676, 2681. These premises were essential to this Court's decision and bind the lower courts as a matter of *stare decisis*. *See* Pet. at 10–17.

Yet the panel brushed that guidance aside as "dicta . . . perhaps attributable to a simple logical error." Pet. App. at 14a. The panel thus held that, notwithstanding *Ricci*, the City *could* face the "whipsaw effect" of disparate-impact liability notwithstanding the strong basis in evidence of disparate-treatment liability. *Id.* at 4a, 20a. In other words, the panel reasoned that this Court did not mean what it plainly said. *See id.* at 14a–20a. By casting doubt on this Court's clear mandate, the panel's decision wrongly and unnecessarily prolonged litigation over promotional exams administered more than eight years ago.

Respondent offers four main arguments against review, all of which rehash the panel's flawed reasons for disregarding this Court's directive. *First*, Respondent argues that the Court did not actually

"foreclose" his disparate-impact challenge to the very certification it required. Opp. at 20. Yet Respondent's contention that the Court did not really mean to extend the strong-basis-in-evidence standard to disparate-impact claims (*id.* at 25–28) suffers from the obvious flaw that the Court said that it was doing precisely that. Moreover, Respondent's wish to develop a different record than that developed in *Ricci* (*see id.* at 9–10, 21–25) ignores (i) the Court's decision to close the record regarding the City's certification of the exams, (ii) the Court's resolution of the exam-weighting issue Respondent seeks to raise, and (iii) that *no* showing could defeat the strong basis in evidence of disparate-treatment liability in view of the Court's express ruling that the City was liable for disparate treatment.

Second, Respondent attempts to avoid the question presented through an irrelevant detour into claim preclusion doctrine. *Id.* at 15–20. The issue is not whether the *Ricci* judgment precludes Respondent's claim, but whether the City's strong-basis-in-evidence defense established in the *Ricci* decision is a proper basis for dismissing his cause of action as a matter of law. *Martin v. Wilks* and Respondent's other cases therefore are inapposite, which explains why this Court did not mention them in *Ricci*.

Third, Respondent's unsuccessful attempt to undermine the circuit split only emphasizes the need for the Court's preservation of the strong-basis-in-evidence standard and its remedial decree in *Ricci*.

Finally, Respondent's argument that joinder procedures were sufficient to prevent the "whipsaw effect" on the City miscomprehends *Ricci*'s substantive ruling, ignores the City's vigorous

presentation of *Respondent's* disparate-impact theory in *Ricci*, and overlooks the practical barriers to joinder.

As the City has established, the panel's departure from this Court's directives warrants summary reversal. But if there is any uncertainty in that result, the Court should grant certiorari to review the important question presented and to clarify the interplay of Title VII's disparate-treatment and disparate-impact requirements.

I. RESPONDENT'S DISPARATE-IMPACT CLAIM FAILS UNDER THE STRONG-BASIS-IN-EVIDENCE STANDARD ADOPTED IN *RICCI*

Respondent posits that "the Court's decision in *Ricci* does not foreclose Respondent's lawsuit" (Opp. at 20), but rests this argument on a convoluted reading of *Ricci*. The Court's order granting summary judgment in *Ricci* rested on three necessary premises. First, the strong-basis-in-evidence standard "resolve[s] any conflict between the disparate-treatment and disparate-impact provisions of Title VII." 129 S. Ct. at 2676. Second, the application of this legal standard to the record warranted judgment for the *Ricci* plaintiffs on their disparate-treatment claim because, based on the Court's exhaustive review, it contained "no evidence" to support disparate-impact liability. *Id.* at 2681. Third, the City "would avoid" disparate-impact liability in this case because the Court's judgment provided a "strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." *Id.*

The Court's premises were binding on the panel as a matter of *stare decisis*, and Respondent's argu-

ments to the contrary fail for at least three reasons. Pet. at 10–17.

First, Respondent "wrench[es] . . . out of context" this Court's language when he suggests that the Court extended the strong-basis-in-evidence standard "'only'" to disparate-treatment cases, not to disparate-impact cases. Opp. at 21 (quoting *Ricci*, 129 S. Ct. at 2677). The Court's discussion of the scope of the strong-basis-in-evidence standard in that passage of *Ricci* had nothing to do with the *type* of Title VII claim governed by this standard. Instead, it clarified a *contextual* limitation of the holding, explaining that the strong-basis-in-evidence standard "does not prohibit an employer from considering, *before* administering a test or practice," race-conscious factors relating to "how to design that test or practice in order to provide a fair opportunity for all individuals." *Ricci*, 129 S. Ct. at 2677 (emphasis added).

Indeed, Respondent's reading of *Ricci* requires disregard for this Court's plain statement that the strong-basis-in-evidence standard "resolve[s] *any* conflict between the disparate-treatment and disparate-impact provisions of Title VII," as well as its clear language that symmetrical application of this legal standard "gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances." *Id.* at 2676 (emphasis added). The panel thus was not free to ignore the strong-basis-in-evidence standard's application to disparate-impact suits in general, much less this specific disparate-impact suit in particular, merely because the Court, in another portion of its opinion, recognized an unrelated limitation on its holding.

Second, Respondent repeats the panel's erroneous contention that this Court must have been mistaken because extending the strong-basis-in-evidence standard to disparate-impact claims "would impermissibly alter Title VII's carefully drawn requirements for proving a disparate-impact claim." Opp. at 28. In the first place, Title VII does not even purport to address the "interpret[ation] and reconil[iation]" of its competing provisions. *Ricci*, 129 S. Ct. at 2672. It was precisely because the statute failed to resolve this issue that the Court set out in *Ricci* "to provide guidance to employers and courts for situations when these two [Title VII] prohibitions could be in conflict." *Id.* at 2674. Indeed, the Court plainly sought to end the protracted dispute in this case and to provide a safe harbor to employers who faithfully and credibly comply with one of Title VII's mandates.

Respondent's suggestion that the statutory text already supplies the "burden of proof" (Opp. at 27–28) again conflates a disparate-impact claim with a conflict between competing disparate-treatment and disparate-impact theories. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010), and 42 U.S.C. § 2000e-2(k) address a disparate-impact plaintiff's burden of proof, not the "burden of proof applicable to [an employer] resolving a conflict with Title VII's disparate-treatment prohibition." Pet. at 18–19.

Respondent's attempt to take refuge in the panel's concern that "it is difficult to see how a 'strong basis in evidence' can be established for a disparate-treatment claim" (Opp. at 28) fares no better. As this Court made "clear" in *Ricci*, there is plainly a strong basis in evidence where, as here, there has already been a conclusive judicial determination of disparate-

treatment liability. 129 S. Ct. at 2681. And even Respondent concedes that this Court properly concluded that "the record before it" contained a strong basis in evidence that the City would face disparate-treatment liability for failing to certify the exam results. Opp. at 23–25.

Third, Respondent concedes that "*a subsequent disparate-impact claim . . . litigated on the very same factual record before this Court*" in *Ricci* "would fail" under the strong-basis-in-evidence standard, but seeks to escape that concession by asserting that he seeks to develop a different record. *Id.* at 23–24 (emphasis in original). Yet the *only* allegation that Respondent seeks to raise is that the "60% written/40% oral" weighting of the exam's portions is flawed (*id.* at 9–10)—and *Ricci* already forecloses liability based on that allegation.

Indeed, the Court did not accord the City a remand or otherwise provide it "any chance to satisfy the newly announced strong-basis-in-evidence standard." *Ricci*, 129 S. Ct. at 2702 (Ginsburg, J., joined by Stevens, Souter, & Breyer, J.J., dissenting). This preclusion of "further proceedings," *id.* at 2703 n.10 (Ginsburg, J., joined by Stevens, Souter, & Breyer, J.J., dissenting), only made sense if the Court determined that the existing record was the only relevant record on which the City's Title VII liability could be based, and conclusively foreclosed the possibility of disparate-impact liability, *see id.* at 2677–81. Thus, the "*very same factual record [that was] before this Court*" in *Ricci* (Opp. at 23 (emphasis in original)) is controlling here.

Moreover, as Respondent recognizes (*see id.* at 9–10), the Court already *rejected* the argument that the

60-40 weighting of the exams was "arbitrary." *Ricci*, 129 S. Ct. at 2679. "In fact, because that formula was the result of a union-negotiated collective-bargaining agreement," the Court "presume[d] the parties negotiated that weighting for a rational reason." *Id.* The Court also determined that there was "no evidence" that any alternative weighting would be "equally valid," and that "[c]hanging the weighting formula . . . could well have violated Title VII's prohibition of altering test scores on the basis of race." *Id.*; *see also* 42 U.S.C. § 2000e(l). Respondent identifies no reason to cast aside this determination and to reopen the weighting issue now.

Finally, Respondent fails to recognize that his purported ability to develop a different record is legally irrelevant. The City's defense to Respondent's claim arises from "the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability." 129 S. Ct. at 2681. And *no* showing regarding the weighing of the exams would alter, much less defeat, that record—or the Court's ruling that the City was in fact liable for disparate treatment.

Ricci thus warrants summary reversal of the panel's decision. To the extent that there is any ambiguity in that result, the Court should grant certiorari to clarify the symmetrical application of the strong-basis-in-evidence standard.

II. THE APPLICATION OF THE STRONG-BASIS-IN-EVIDENCE STANDARD DOES NOT RESULT IN CLAIM PRECLUSION

Respondent principally attempts to avoid the showing that the City's strong-basis-in-evidence defense requires dismissal of his suit by invoking claim prec-

lusion doctrine. *See* Opp. at 15–28. Respondent, in fact, even goes so far in his attempt to change the subject that he rewrites the questions presented to invoke "preclusion." Opp. Quest. Pres. 1–2. But *stare decisis* requires that the Court's precedent "must be followed," *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam), which is not the same as precluding a particular party from bringing a claim, and the City has already agreed that Respondent's claim "is not foreclosed by preclusion law." Pet. App. at 97a. The reason is plain: *Ricci*'s directive that the City "would avoid" disparate-impact liability did *not* rest on claim preclusion but on substantive Title VII law. Pet. at 10–17.

Respondent's extended discussion of *Martin v. Wilks*, 490 U.S. 755 (1989), *superseded by statute at* 42 U.S.C. § 2000e-2(n)(1), and other preclusion cases (Opp. at 1–3, 15–28) is entirely beside the point. *Martin* merely reiterated, in the context of a forward-looking consent decree, the unremarkable rule that "[a] judgment or decree . . . does not conclude the rights of strangers to those proceedings." 490 U.S. at 762. *Martin* thus did not address whether the non-parties actually had a "right[]" to relief or whether the defendant had a valid defense on the merits. *Id.*

Ricci is precisely the opposite because it had nothing to say about Respondent's *procedural* rights, but instead determined, as a matter of law, that the City had a *substantive* defense to *any* disparate-impact claim. *See* 129 S. Ct. at 2681. Respondent's conflation of claim preclusion and the strong-basis-in-evidence standard apparently stems from the Court's emphasis of the *Ricci* judgment as the strong basis in evidence for the City's defense in this case. *See id.*

But the Court's commonsense conclusion that a judgment establishing liability provides a strong basis in evidence of such liability does not transform the strong-basis-in-evidence defense into a violation of the rule against non-party preclusion. Indeed, the two rules are so distinct that this Court had no reason to discuss preclusion doctrine in *Ricci*. The panel's failure to accord *stare decisis* effect to the Court's application of the strong-basis-in-evidence standard thus warrants summary reversal or review to clarify the proper relationship between preclusion doctrine and conflicting disparate-treatment and disparate-impact obligations.

III. RESPONDENT'S EFFORT TO DISPUTE THE EXISTENCE OF A CIRCUIT SPLIT FAILS

The panel's decision also warrants this Court's review because, wholly apart from its contravention of the strong-basis-in-evidence standard, it sanctioned disparate-impact *liability* based on the disparate-treatment *remedy* this Court required the City to undertake. Pet. at 10–23. In so doing, the panel split with the Third Circuit's holding that "[a] government employer's compliance with a judicial mandate does not constitute an official policy or employment practice of the employer" under Title VII. *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 484–85 (3d Cir. 2011). Respondent attempts to give short shrift to this circuit split, but neither of his arguments is persuasive.

First, Respondent argues that "no conflict exists" because the Third Circuit (erroneously) agreed with the panel that the strong-basis-in-evidence standard does not apply to disparate-impact claims. Opp. at 30–31. But the panel's initiation of a trend away

from the Court's symmetrical application of the strong-basis-in-evidence standard clouds the law for lower courts and employers, and underscores the need for this Court to reconfirm its standard. Pet. at 23–28.

Second, Respondent acknowledges a facial conflict between the Third Circuit's rule and the panel's rule, but argues that the Third Circuit limited its holding to disparate-treatment cases and left employers exposed to disparate-impact liability based on compliance with court orders. Opp. at 31–32. Respondent offers no explanation as to how such compliance is not "an official policy or employment practice" for disparate-treatment purposes, but *is* such a policy or practice for disparate-impact cases. 665 F.3d at 485; *see* Opp. at 31–32. And Respondent again overrelies on *Martin v. Wilks* (Opp. at 32) because that case involved only an application of *procedural* preclusion law, not the question whether an entity can face conflicting *substantive* liability for a court-ordered action.

IV. RESPONDENT'S OWN ARGUMENTS ESTABLISH THE IMPORTANCE OF THIS CASE

This case presents important and recurring questions because the panel's decision interjects uncertainty into the lower courts' and employers' application of Title VII, threatens to impose a practical bar on the use of promotional exams, and exposes employers to the risk of duplicative litigation and inconsistent obligations. Pet. at 23–28.

Respondent attempts to contradict this showing with a trio of arguments, all of which fail. *First*, Respondent's main thrust is that employers can avoid these results "by joining persons whose interests will

be affected." Opp. at 33. But joinder is not the panacea that Respondent advertises. Respondent again misdiagnoses the problem as claim preclusion because *no* joinder of *any* party was required to bind the panel to the Court's directive that the City "would avoid" liability in this case under the strong-basis-in-evidence standard, *see* 129 S. Ct. at 2681, any more than joinder was required to bind the panel to the Court's recitation of the elements of a Title VII claim, *see id.* at 2672–73. Indeed, requiring joinder here was unnecessary to the Court's objective to establish a clear, bright-line rule, applicable in this and all future cases, for "resolv[ing] any conflict between the disparate-treatment and disparate-impact provisions of Title VII." *Id.* at 2676.

Moreover, Respondent's joinder argument overlooks the history of this litigation and practical realities. In *Ricci*, the City's and Respondent's interests were perfectly aligned because the City "urged" the very "disparate impact theory that lies at the heart of Briscoe's pleadings" (Pet. App. 43a)—so it is unclear what salutary purpose, if any, joining Respondent would have served. Even now, Respondent seeks only to pursue an exam-weighting theory that the Court in *Ricci* rejected and that, in all events, would not have significantly altered the City's strong-basis-in-evidence defense to disparate-impact liability. And joinder would have made *Ricci* even more complex, ratcheting up even further the cost of time and resources for the courts and the parties in a case where the mutually exclusive disparate-treatment and disparate-impact theories were already vigorously litigated.

Second, Respondent's argument that the panel decision actually clarifies the law for employers (Opp. at 33–34) is facially implausible. Employers now have *no* definitive guidance as to whether, as this Court stated in *Ricci*, they have a strong-basis-in-evidence defense to disparate-impact suits or, as the panel held, they do not. An employer thus cannot "protect itself from the interplay between disparate-impact and disparate-treatment liability" by looking "only" to *Ricci*. *Id.* at 34. At least in the Second and Third Circuits, an employer's conclusion that this Court meant what it said and extended the strong-basis-in-evidence standard to disparate-impact cases could expose it to liability.

Finally, Respondent's argument that the panel decision "leaves disparate-impact law undisturbed" ignores the panel's departure from this Court's direction that the strong-basis-in-evidence standard resolves all conflicts between disparate-treatment and disparate-impact obligations. Respondent's attempt to rewrite *Ricci* into approval of the disparate-impact theory that had "no evidence" to support it and that the City "would avoid" in this case should be rejected. 129 S. Ct. at 2681.

CONCLUSION

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

Respectfully submitted,

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