Actions on the Basis of Race are Impermissible under Title VII Unless the Employer Can Show a Strong Basis in Evidence That if Action Was Not Taken, the Employer Would Be Held Liable under the Disparate-Impact Statute: *Ricci v. DeStefano*

Katlin L. Connelly

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Actions on the Basis of Race Are Impermissible Under Title VII Unless the Employer Can Show a Strong Basis In Evidence that if Action Was Not Taken, the Employer Would Be Held Liable Under the Disparate-Impact Statute: *Ricci v. DeStefano*

Civil Rights—Title VII—Disparate-Impact—Disparate-Treatment—The United States Supreme Court held that race based actions that would otherwise amount to disparate treatment discrimination are impermissible under Title VII, unless the employer can demonstrate a strong-basis-in-evidence that, if the employer did not take the action, liability would arise under the disparate-impact statute. The Appellees did not demonstrate that liability would likely arise and therefore, the Appellees violated Title VII.


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I. THE FACTS OF *RICCI*

Like most emergency personnel services in the United States, the New Haven, Connecticut fire department relied on objective examinations as a means for determining promotions through the ranks of its department. In 2003, the department administered examinations to 118 firefighters to determine who would qualify for promotion to the coveted positions of lieutenant and captain. Because promotions were infrequent and the examinations determined when and to whom promotions would be given, many New Haven firefighters invested considerable time and money in preparing for the examinations.

The results of the examinations revealed that white test-takers had scored higher than minority test-takers. This disparity sparked a debate between firefighters who thought the test was balanced and fair and firefighters who thought the test was racially discriminatory. The City of New Haven decided to discard the test results, prompting several white and Hispanic firefighters, who would have been promoted on the basis of the examination, to file suit.

New Haven did not administer or create the exam; instead it hired a consulting firm, Industrial/Organizational Solutions, Inc. (ISO), to do so. ISO created the examination for the New Haven Fire Department by analyzing the skills necessary to be a captain or lieutenant in the department. It did this by interviewing and observing higher-ranked officers. Additionally, ISO gathered information from minority firefighters to prevent the examination from favoring non-minority test-takers. It also gave test-takers information about how and what to study prior to taking the exam.

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3. Id.
4. Id.
5. Id.
6. Id.
8. Id.
9. Id.
10. Id. at 2664.
11. Id. at 2666.
The examination consisted of one hundred multiple-choice questions and an oral section. For the eight vacancies for the position of lieutenant, seventy-seven candidates took the exam. For the seven vacancies for the position of captain, forty-one candidates took the exam.

After receiving the exam results, the New Haven Civil Service Board (CSB) held five meetings to determine whether the scores should be certified or if they should be discarded on the basis of allegations that the exam questions were not fair to minority test-takers. Though the vote was very close, the CSB ultimately decided that the scores would not be certified.

The seventeen white firefighters and one Hispanic firefighter who passed the exam filed suit against the City of New Haven, Mayor John DeStefano, Chief Administrative Officer Karen DuBois-Walton, City Counsel Thomas Ude, Department of Human Resources Director Tina Burgett, the two members of the CSB who voted that the exams be discarded, and Reverend Boise Kimber, a resident and political leader of New Haven who strongly opposed the test results being counted.

The plaintiffs alleged that New Haven violated Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment by discriminatorily discarding the exam results of white and Hispanic firefighters. New Haven countered

12. *Ricci*, 129 S.Ct. at 2666. There were thirty superior-ranking officers who were picked to assess the examinations. *Id.* These assessors were intensively trained to score the exams. *Id.*

13. *Id.* The racial breakdown of the lieutenant candidates consisted of forty-three whites, nineteen blacks, and fifteen Hispanics. *Id.* Thirty-four of the seventy-seven candidates passed the exam and their racial breakdown consisted of twenty-five whites, six blacks, and three Hispanics. *Id.* The top ten test scores were all eligible for immediate promotion and all ten where white. *Id.* Vacancies that occurred later, would allow for the three black candidates to be eligible for promotion into the lieutenant position. *Id.*

14. *Id.* The racial breakdown of the captain candidates consisted of twenty-four whites, eight blacks, and eight Hispanics. *Id.* Twenty-two of the forty-one passed and their racial breakdown consisted of sixteen whites, three blacks, and three Hispanics. *Id.* The top nine scores were eligible for immediate promotion. *Id.* Their racial breakdown consisted of seven whites and three Hispanics. *Id.*

15. *Id.* at 2667. At these meetings firefighters voiced their positions on whether the exam scores should be used or thrown out, prior to actually knowing who passed the exam and who did not. *Id.* Witnesses and experts also spoke in front of the CSB about the test scores. *Id.*

16. *Id.* at 2671.


19. Although the Plaintiffs alleged a violation of the Equal Protection Clause of the Fourteenth Amendment, the Court decided this case solely on the basis of the Title VII claim. *Ricci*, 129 S. Ct. 2664-65.

that if it did not discard the exam results, it could be liable under Title VII for engaging in a business practice that would have a disparate-impact on minority firefighters.\textsuperscript{21}

II. THE PROCEDURAL HISTORY OF \textit{RICCI}

The district court granted summary judgment in favor of New Haven.\textsuperscript{22} The court concluded that New Haven’s actions did not constitute racial discrimination because all of the candidates took the same exam with the same result—the exams were discarded and no one was promoted.\textsuperscript{23} The court of appeals affirmed the district court’s decision and adopted its rationale.\textsuperscript{24} The United States Supreme Court granted certiorari.\textsuperscript{25}

III. THE UNITED STATES SUPREME COURT OPINIONS IN \textit{RICCI}

The issue that the Court resolved was whether New Haven and the named officials discriminated against the white and Hispanic firefighters who scored higher than other minority firefighters by discarding the exam results, and if so whether this violated Title VII of the Civil Rights Act of 1964.\textsuperscript{26} The Supreme Court reversed the decision of the Second Circuit and held that New Haven’s action in discarding the exam results violated Title VII.\textsuperscript{27}

\textsuperscript{21} Id. at 2673. The Court summarized the disparate-impact provision of Title VII as follows: “Under the disparate-impact statute, a plaintiff establishes 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.” Id. (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)). The Court further indicated the defense an employer can use: An employer may defend against liability by demonstrating that the practice is “job related for the position in question and consistent with business necessity.” Even if the employer meets that burden, however, a plaintiff may still succeed 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.

\textsuperscript{22} Id. at 2671. The district court reasoned that the respondents’ “motivation to avoid making promotions based on a test with a racially disparate-impact . . . does not, as a matter of law, constitute discriminatory intent.” Id.

\textsuperscript{23} Id. at 2672.

\textsuperscript{24} Ricci, 129 S. Ct. at 2672.

\textsuperscript{25} Id.

\textsuperscript{26} Id. The issue is framed without the inclusion of the Equal Protection allegation because the Court was able to decide this case on the basis of the Title VII issue. For this reason, the Court did not make a determination on the constitutional issue. Id at 2675.

\textsuperscript{27} Id. at 2672.
A. Justice Kennedy's Majority Opinion

The Court began its analysis by asserting that New Haven's action of discarding the results of the firefighter's exam violated Title VII because the evidence indicated that New Haven's action was based upon race, i.e., New Haven made its decision based upon the statistical disparity in scores between white test-takers and minority test-takers. As such, Justice Kennedy, who wrote for the majority, stated that New Haven could avoid liability only by showing justification for this disparate treatment. The Court then analyzed whether trying to avoid liability on the basis of disparate-impact constituted such a justification. To do this, the Court determined that it had to establish an evidentiary standard by which to judge these types of cases.

The majority opinion relied upon Wygant v. Jackson Board of Education, which announced the strong-basis-in-evidence standard. The strong-basis-in-evidence standard is a higher standard of evidence than the prima facie standard, and requires more than just a mathematical basis of discrimination. The Court in Ricci reasoned that applying this evidentiary standard to Title VII would allow violations of either the disparate-treatment or disparate-impact provisions in only certain limited cases. Moreover, the Court determined that this standard gives the employer suitable discretion that will be limited to cases where there is a strong-basis-in-evidence of disparate-impact liability, but not so limited that employers may only act when there is an actual violation of Title VII.

28. Id. at 2673.
30. Id.
31. Id.
33. Ricci, 129 S. Ct. at 2675. Justice Kennedy referred to the significance of the majority opinion in Wygant: "Justice Powell recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmental discrimination based on race on the other." Id. (citing Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)). The majority in Wygant also explained why there is a required strong-basis-in-evidence: "Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees." Wygant, 476 S. Ct. at 277.
34. The strong-basis-in-evidence standard is defined as "requir[ing] more than merely a prima facie demonstration of numerical imbalance, which may exist as a result of societal factors without any discrimination by the government." Petitioners' Reply Brief on the Merits at 11, Ricci, 129 S. Ct. 2658 (Nos. 07-1428, 08-328).
36. Id.
The majority reasoned that by applying this standard, the disparate-impact provision would be consistent with other sections of Title VII, specifically § 2000e-2(l). Section 2000e-2(l) addresses the unlawful use of test scores that are discriminatory by prohibiting any employment practice that utilizes examinations as a means of hiring and/or promotion, and then alters the results of the examination on a discriminatory basis.

Justice Kennedy asserted that promotional examinations like the one given to the New Haven firefighters are important in objectively selecting candidates that have proven their qualifications by their test score. Because there was no strong-basis-in-evidence that the promotional exam was ineffective or that New Haven had to discard the scores to avoid liability on the basis of disparate-impact, the Court reasoned that New Haven acted unlawfully.

Based upon this rationale, the Court adopted the strong-basis-in-evidence standard established in Wygant. Justice Kennedy further clarified that under Title VII, an employer must have a strong-basis-in-evidence that the employer will be liable under disparate-impact before the employer can engage in intentional discrimination to avoid unintentional disparate-impact.

New Haven argued that even under this strong-basis-in-evidence standard, its action of discarding the exam scores was justifiable because of its fear of disparate-impact liability. This argument notwithstanding, Justice Kennedy and the majority of the Court found that there was no evidence on the record to support this conclusion. The majority concluded that New Haven

37. Id.
38. Section 2000e-2(l) provides:
Prohibition of discriminatory use of test scores:
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.
39. Ricci, 129 S. Ct. at 2676. Justice Kennedy stated that “[e]mployment tests can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent.” Id.
40. Id. The majority found that “[r]estricting an employer's ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race) also is in keeping with Title VII's express protection of bona fide promotional examinations.” Id. See 42 U.S.C. § 2000e-2(l).
41. Ricci, 129 S. Ct. at 2676.
42. Id. at 2677.
43. Id. at 2677. The Court stated:
failed to show that there was "no genuine issue as to any material fact" and that they were "entitled to judgment as a matter of law." The majority opined that New Haven could only provide evidence of disparate-impact liability by showing a significant statistical disparity between white test-takers and minority test-takers. The Court held that this statistical disparity alone did not meet the strong-basis-in-evidence standard and that New Haven would have been liable for disparate-impact. To show disparate-impact, the Court stated, the examinations should have been unrelated to work and a business necessity or there must have been an alternative exam that was less discriminatory that New Haven could have adopted but chose not to. Justice Kennedy next addressed these points and analyzed why there was no strong-basis-in-evidence that the exam was defective in either aspect.

The Court determined that since there was no dispute that the exams were work-related and a business necessity, it should base its analysis on the issue of whether there was a strong-basis-in-evidence of a similar, less discriminatory exam that New Haven could have adopted and did not. The respondents raised three arguments in support of their position that there was evidence of an alternative test, none of which the Court found compelling.

The respondents first argued that if had they weighted the written and oral sections of the exam differently, New Haven then could have considered two black candidates for the lieutenant po-

Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record makes clear that there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.

Id.

44. Id. Justice Kennedy explained what must be proved to grant a motion for summary judgment in this case: "The petitioners must demonstrate that there can be no genuine dispute that there was no strong basis in evidence for the City to conclude it would face disparate-impact liability it is certified the examination results." Id.

45. Id.

46. Ricci, 129 S. Ct. at 2678.

47. Id. at 2678. Justice Kennedy determined that "[petitioners] could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt." Id.

48. Id. at 2679.

49. Id. at 2679-80.

50. Id. at 2679.
position and one black candidate for the captain position. The majority countered the respondents' argument by reasoning that there was no evidence to prove that weighing the test scores differently would assess the skills necessary for the job in the same way New Haven originally weighed the scores. Moreover, the Court found that changing the weight of the exam could also have violated Title VII, which prohibits the changing of test scores on the basis of race.

The respondents next argued that a different understanding of the "Rule of Three" would have produced less discriminatory results than New Haven's understanding of it. The respondents suggested that the use of banding the scores would have allowed four black and one Hispanic candidate to be eligible to fill either the lieutenant or captain positions. The Court, however, found that banding is not an equal and valid alternative to scoring the tests because if New Haven scored the tests and then implemented the use of banding to raise the scores of minority test takers, it would have violated Title VII.

Finally, the respondents argued that Chris Hornick, an industrial/organizational psychologist, made statements that in his opinion there could have been less of a disparity in the test results had an "assessment center" evaluated the candidates. The Court however, pointed to other remarks that Hornick made in support of certifying the test results to show that the respondents' reliance on his assessment was weak.

51. Ricci, 129 S. Ct. at 2679. New Haven used a 60/40 (written to oral) weighting as required by its contract with the New Haven Firefighter's Union. Id. Respondents suggested changing the scores to a 30/70 weighing. Id.
52. Id.
53. Id. (citing 42 U.S.C § 2000e-2(c)).
54. Id. at 2679-80. The Court explained the "Rule of Three" as "[t]he rule, in the New Haven city charter, [which] requires the City to promote only from 'those applicants with the three highest scores' on a promotional examination." Id.
55. Id. at 2680. The majority defined "banding" as "[t]he City's previous practice of rounding scores to the nearest whole number and considering all candidates with the same whole-number score as being of one rank." Id.
57. Ricci, 129 S. Ct. at 2680. Justice Kennedy explained the witness's testimony to the CSB:

At the next meeting, on March 11, the CSB heard from three witnesses it had selected to 'tell us a little bit about their views of the testing, the process, [and] the methodology.' . . . Hornick is an industrial/organizational psychologist from Texas who operates a consulting business that 'direct[ly] competes with IOS.

Id.
58. Id. Justice Kennedy continued to explain the respondents' reliance upon Mr. Hornick: "Hornick stated that adverse impact in standardized testing 'has been in existence since the beginning of test' and that the disparity in New Haven's test results was 'some-
The Court found that there was not a strong-basis-in-evidence that the exams were defective because they were not job-related or because other similar and less discriminatory ways to test the candidates' abilities were available to New Haven. The majority determined that its holding in this case demonstrated how Title VII should be applied to solve issues regarding disparate-treatment and disparate-impact provisions of Title VII of the Civil Rights Act.

B. Justice Scalia’s Concurring Opinion

Justice Scalia joined in the Court’s opinion but wrote a separate concurring opinion to assert that this decision was just postponing another question that the Court would eventually have to resolve—whether the Title VII’s disparate impact provisions violate the Fourteenth Amendment’s Equal Protection Clause. Justice Scalia further opined that Title VII effectively conflicts with the Equal Protection Clause of the Fourteenth because at times it requires employers to make race-based or race related decisions. Justice Scalia also stated that because Title VII allows for employers to evaluate the racial implications of their policies and make determinations accordingly, Title VII is not protecting against discrimination but instead allowing for further intentional discrimination, just one step removed. Although Justice Scalia asserted that generally the disparate-impact provisions of Title VII are too broad, he emphasized that the provisions would be better utilized as a means of determining when employers intentionally discriminate, because disparate-impact can be a “signal” that there are discriminatory actions taking place.

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what higher but generally in the range that we've [Hornick's company] seen professionally.” Id.
59. Id. at 2681.
60. Id.
61. Id. at 2681-82 (Scalia, J., concurring). Justice Scalia explained that “[a]s the facts of these cases illustrate, Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and it makes decisions based on those racial outcomes.” Id.
63. Id.
64. Id.
C. Justice Alito's Concurring Opinion

Justice Alito, with whom Justice Scalia and Justice Thomas joined, also wrote a concurring opinion. Justice Alito asserted that he wrote a separate opinion only because he believed the dissent had omitted important facts, which lead them to reach the incorrect conclusion in this case. Additionally, Justice Alito's opinion contended that two questions had to be determined to resolve this case, one objective and one subjective. According to Justice Alito, the objective question to be answered when an employer is subject to a disparate-treatment case is whether the employer has a legitimate reason to make the decision that resulted in disparate-treatment. Likewise, the subjective question that Justice Alito thought determinative was the intent of the employer, that is, whether the reason provided by the employer is an excuse for actual discriminatory action.

Justice Alito also pointed out that the disagreement between the majority opinion and the dissenting opinion pertained to the objective question, that is, the justification given by the employer as to whether its actions would have created a basis of liability for disparate-impact. He went on to illustrate his view of the facts regarding the New Haven administration's discarding of the test scores. Justice Alito asserted that the evidence indicated that New Haven's reason for not certifying the test scores had nothing to do with a violation of the disparate-impact provisions of Title

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65. Id. at 2683. (Alito, J., concurring).
66. Id.
68. Id. Justice Alito explained the questions that he believed to be at issue in this case: The first, objective question is whether the reason given by the employer is one that is legitimate under Title VII. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). If the reason provided by the employer is not legitimate on its face, the employer is liable. The second, subjective question concerns the employer's intent. If an employer offers a facially legitimate reason for its decision but it turns out that this explanation was just a pretext for discrimination, the employer is again liable.

Id.

69. Id.
70. Id. at 2684.
71. Id.
72. Ricci, 129 S. Ct. at 2684-85 (Alito, J., concurring). Justice Alito explained his assertion:

 Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation.

Id.
VII, but rather was the result of appeasing a prominent minority leader in the community, Reverend Boise Kimber, who had political power and lobbied the CSB. Moreover, Justice Alito asserted that the dissent’s argument could not be adopted because it would decide an issue of Title VII that the Court had yet to resolve. That issue was whether and to the extent that an employer can be held liable under Title VII when his subordinates have the intent to discriminate and may have influence over the employer in his making of the decision but do not actually make the decision.

D. Justice Ginsberg’s Dissent

Justice Ginsburg, with whom Justice Stevens, Justice Souter, and Justice Breyer joined, wrote the dissent. The dissent argued that the majority opinion failed to acknowledge the evidence of numerous flaws with the examination and that better examinations have been used in other cities without the same racially disproportionate result. Likewise, Justice Ginsburg believed that in reaching its decision the majority opinion failed to properly apply the benchmark decision of Griggs. Justice Ginsburg asserted that the majority failed to apply the explanation rendered by the Court in Griggs, which she stated, explained the enforcement of Title VII, which is centered on the concept of disparate-impact.

The dissent further disagreed with the majority’s application of the strong-basis-in-evidence standard, stating that it makes voluntary adherence to the disparate-impact provision of Title VII difficult. Justice Ginsburg provided two arguments in support of her opinion that the strong-basis-in-evidence standard is “unimpressive.” First, the dissent argued that the majority’s rationale for the heightened standard is counter-intuitive. Justice

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73. Id. at 2688.
74. Id. Justice Alito explained: “Adoption of the dissent’s argument would implicitly decide an important question of Title VII law that this Court has never resolved—the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate employees who influence but do not make the ultimate employment decision.” Id.
75. Id. at 2689 (Ginsburg, J., dissenting).
76. Id. at 2690.
77. Ricci, 129 S. Ct. at 2690 (Ginsburg, J., dissenting). Referring to the decision of Griggs, Justice Ginsburg added that the case “explained the centrality of the disparate-impact concept to effective enforcement of Title VII.” Id.
78. Id. (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
79. Id. at 2702.
80. Id.
81. Id.
Ginsburg argued that the majority justified the standard because, without it, an employee's legitimate expectation as to what result would occur after taking the exam would not be fulfilled.\(^{82}\) Justice Ginsburg argued that an employee's expectation is dependent upon the authority of the exam itself.\(^{83}\) Second, the dissent argued that the majority placed too much emphasis on the strong-basis-in-evidence standard by stating that without this standard an employer could potentially create a quota situation, in which the employer could tip the balance of the test results in favor of a more racially auspicious result.\(^{84}\) The dissent favored instead a reasonableness standard that would require an employer to show good cause in evidence.\(^{85}\)

The dissent further argued that the majority should have remanded the case for further proceedings to allow the respondents to meet the strong-basis-in-evidence standard.\(^{86}\)

By applying what the dissent believed to be the correct standard, Justice Ginsburg would have held that the respondents had cause to believe that they would be liable under the disparate-impact provision of Title VII.\(^{87}\) That is, the respondents could show that their promotion process was defective and it was not justified by a business necessity.\(^{88}\) The dissent reasoned that because of the racial disparity in the results, the CSB had cause to further evaluate the City's promotional process of the examination. After further evaluation, the dissent argued that the CSB would have found that the City did not consider other alternative methods of the process.\(^{89}\) The dissent also argued that there are inherent problems with the method of written test taking for this specific job and that the weighting of the exam was not sufficiently and deliberately thought out; rather, it was merely an arrange-

\(^{82}\) Ricci, 129 S. Ct. at 2702 (Ginsburg, J., dissenting).

\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id. The dissent explained its reasoning: "The employer must have good cause to believe that the method screens out qualified applicants and would be difficult to justify as grounded in business necessity." Id.

\(^{86}\) Id. at 2703. "When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance." Id. (citing Johnson v. California, 543 U.S. 499 (2005); Pullman-Standard v. Swint, 456 U.S. 273 (1982)).

\(^{87}\) Ricci, 129 S. Ct. at 2703 (Ginsburg, J., dissenting).

\(^{88}\) Id. "The pass rate for minority candidates was half the rate for nonminority candidates, and virtually no minority candidates would have been eligible for promotion had the exam results been certified." Id.

\(^{89}\) Id.
ment between New Haven and the firefighter's union. Moreover, Justice Ginsburg asserted that New Haven failed to look into other available alternatives to the exam process, further justifying its fear of disparate-impact liability.

At the conclusion of the dissenting opinion, Justice Ginsburg responded to Justice Alito's concurring opinion, which alleged that the decision not to certify the test results had more to do with satisfying a popular political figure in New Haven (Reverend Boise Kimber) and less to do with the CSB's actual decision. Justice Ginsburg responded by attempting to debunk Justice Alito's allegations and asserted that the concurring opinion placed too much emphasis on Reverend Kimber's role in the decision making process.

In the very last sentences of Justice Ginsburg's dissent, she discussed her opinion that the majority's decision was regrettable and that the majority's rationale was inconsistent with the Court's ruling in Griggs. In sum, dissent asserted that a race-based violation of Title VII did not exist in this case.

IV. TITLE VII OF THE CIVIL RIGHTS ACT AND PRECEDENT LEADING TO RICCI

A. Disparate Treatment Liability

In July of 1965, Title VII of the Civil Rights Act went into effect to forbid the disparate treatment of employees. Title VII man-

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90. Id. at 2704. Justice Ginsburg explained the problem with written tests for firefighters: "Relying heavily on written tests to select fire officers is a questionable practice, to say the least. Successful fire officers, the City's description of the position makes clear, must have the ability to lead personnel effectively, maintain discipline, promote harmony, exercise sound judgment, and cooperate with other officials." Id.

91. Id. at 2706
93. Id. at 2709. Justice Ginsburg asserted her further disagreement with Justice Alito's concurring opinion: "In any event, Justice Alito's analysis contains a more fundamental flaw: It equates political considerations with unlawful discrimination." Id.

94. Id. at 2710. The dissent finally asserted their difference of opinion:
It is indeed regrettable that the City's noncertification decision would have required all candidates to go through another selection process. But it would have been more regrettable to rely on flawed exams to shut out candidates who may well have the command presence and other qualities needed to excel as fire officers. Yet that is the choice the Court makes today. It is a choice that breaks the promise of Griggs that groups long denied equal opportunity would not be held back by tests "fair in form, but discriminatory in operation."

Id. (quoting Griggs, 401 U.S. 424).
95. Id. at 2710.
96. Id. at 2696.
dated that employers could not intentionally treat an individual employee differently on the basis of race. The disparate treatment provisions of Title VII held employers liable if they refused to hire, terminated, or discriminated against any employee or potential employee on the basis of his race, color, religion, sex, or national origin. Moreover, disparate treatment provisions of Title VII also held employers liable if they took actions that adversely affected an individual's employment on the basis of his race, color, religion, sex or national origin. Both of these provisions of Title VII must also be linked to the employer's intent to discriminate against an employee on the basis of race in order for that employer to be held liable for disparate treatment liability.

In response to The Civil Rights Act of 1964, specifically, Title VII, employers in general had to abolish any type of rules, practices or procedures that would prevent minorities from obtaining employment that was typically reserved for whites. It was not until the Griggs decision, however, that Title VII was interpreted to cover both disparate treatment liability and disparate impact.

B. The Evolution of the Disparate-Impact Proof Structure

The Civil Rights Act of 1964 did not explicitly prohibit disparate-impact discrimination. Nevertheless, in 1971, the Court in the landmark case of Griggs v. Duke Power Co., construed Title VII to prohibit not only disparate treatment discrimination, but also business practices that may be facially non-discriminatory but have an adverse impact or disparate-impact on the basis of race, color, religion, sex, or national origin. Pursuant to Ward's Cove Packing Co. v. Atonio, and prior to the enactment of the Civil Rights Act of 1991, the plaintiff had the burden of persuasion at all times. The burden of production, however, shifted to the Defendant employer once the plaintiff established a prima facie case, at which time, the Defendant employer

97. Id.
99. Id.
100. Id.
103. Disparate-Treatment is defined as, “[t]he practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age, or disabi-
had to produce evidence of a business necessity in a disparate-impact situation.\textsuperscript{106} Once the employer made this showing, the plaintiff had the burden to persuade the trier of fact that the practice at issue was not a business necessity, and that there existed an equally effective non-discriminatory practice.\textsuperscript{107}

With the enactment of The Civil Rights Act of 1991, the proof structure of disparate-impact cases changed due to Congress amending Title VII. The Civil Rights Act of 1991 codified disparate-impact by asserting that a plaintiff must show that there existed prima facie evidence by establishing that his employer used an employment practice that caused a disparate-impact on the basis of race.\textsuperscript{108} Plaintiff’s employer in the alternative may defend, by showing that the alleged employment practice is job related and is a business necessity.\textsuperscript{109} Additionally, if the plaintiff could show that there existed a valid alternative employment practice that was not discriminatory and the employer refused to adopt that alternative, disparate-impact liability under Title VII existed.\textsuperscript{110} In employment determinations, the use of an examination can provide the potential for disparate-impact results.\textsuperscript{111}

\textbf{C. Disparate Impact Liability}

The Court in \textit{Griggs} was the first to apply the Civil Rights Act of 1964 to the issue of whether an employer may use an employment exam to determine job placement and promotions.\textsuperscript{112} In \textit{Griggs}, a group of black employees filed suit against Duke Power Company for requiring a high school education or passing a general intelligence test as a condition of achieving employment or being promoted.\textsuperscript{113} The evidence revealed that employees at Duke Power Company, who had neither completed high school nor taken the intelligence test, still performed their jobs at a competent level.\textsuperscript{114} The Court inferred that the implementation of these new

\begin{thebibliography}{114}
\bibitem{106} Id. at 2121.
\bibitem{107} Id. at 2122.
\bibitem{108} \textit{Ricci}, 129 S. Ct. at 2673.
\bibitem{109} Id.
\bibitem{110} Id.
\bibitem{111} \textit{48 AM. JUR. PROOF OF FACTS 3d} § 75 (2009).
\bibitem{112} \textit{Griggs}, 401 U.S. at 425.
\bibitem{113} Id. at 426.
\bibitem{114} Id. at 431. "The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company." Id. at 432.
\end{thebibliography}
requirements for job promotion were not a business necessity.\textsuperscript{115} The \textit{Griggs} court analyzed the legislative intent of Congress in passing the Civil Rights Act and determined that the Act prohibits not just overt discrimination but also employment practices that are discriminatory in operation.\textsuperscript{116} Moreover, the \textit{Griggs} court found that the "touchstone" of the Act was the business necessity aspect.\textsuperscript{117} The business necessity aspect is proven when the employment practice is shown to exclude a group of people on the basis of race, the employer cannot show that it is related to business necessity, and the practice is prohibited.\textsuperscript{118}

By applying Title VII and the Court's interpretation of it, Chief Justice Burger and the majority determined that the company, who wanted to use exams for employment promotion, failed to fulfill the requirement of a business need.\textsuperscript{119} The Court concluded that under the provisions of Title VII, the employer could not require a high school education or certain tests as a condition for employment or promotion when the conditions were not a business necessity.\textsuperscript{120} Additionally, these conditions made it more difficult for black employees to be qualified at a substantially higher rate than white employees.\textsuperscript{121}

In 1975, the Court again analyzed the Civil Rights Act in the case \textit{Albemarle Paper Co. v. Moody}.\textsuperscript{122} In \textit{Albemarle}, black employees filed suit against their employer, alleging that certain employment policies, practices, customs, or usages violated of the

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\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. at 429-30. "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." \textit{Id.} at 431.
\item \textsuperscript{117} \textit{Griggs}, 401 U.S. at 431.
\item \textsuperscript{118} Id. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." \textit{Id.}
\item \textsuperscript{119} Id. at 432.
\item \textsuperscript{120} Id. at 436. The Court stated: Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications the controlling factor, so that race, religion, nationality, and sex became irrelevant. What Congress has commanded is that any tests used must measure the person for the job and no the person in the abstract. \textit{Id.}
\item \textsuperscript{121} Id.
\item \textsuperscript{122} 422 U.S. 405 (1975).
\end{itemize}
Civil Rights Act. The issue before the Court in Albermarle was the standard of proof that an employer must establish to show that employment examinations were discriminatory on the basis of race in effect, but not intentionally, and how they were a business necessity.

In Ricci, the Court clarified that it was the employer's burden to provide evidence that showed that its practice had an important connection to the employment, thereby proving the business necessity requirement established in Griggs. The Albermarle Court established that employees must provide evidence that the employer could have reasonably implemented a valid and equal alternative to the discriminatory employment practice and did not. The Court vacated the appellate court's decision and remanded the case to the district court for further proceedings, in which the district court was to look to the newly established guidelines the Supreme Court had established.

In a similar 1982 case, Connecticut v. Teal, the Court again applied Title VII of the Civil Rights Act. In Teal, black employees alleged that a promotional written examination required by their employers, a state agency, was discriminatory on the basis of race. The issue before the Court was whether an employer may offer a "bottom-line" form of defense when an employer is sued under Title VII. The Court reasoned that a statistical disparity alone does not justify an employment action that created a dispa-

123. Albermarle, 422 U.S. at 408-09.
124. Id. at 413.
125. Ricci, 129 S. Ct. at 2673.
126. Id. Justice Stewart, on behalf of the majority in Albermarle, established that:
The appropriate standard of proof for job relatedness has not been clarified until today. Similarly, the respondents have not until today been specifically apprised of their opportunity to present evidence that even validated tests might be a "pretext" for discrimination in light of alternative selection procedures available to the Company. We also note that the Guidelines authorize provisional use of tests, pending new validation efforts, in certain very limited circumstances.
Albermarle, 422 U.S. at 436.
127. Albermarle, 422 U.S. at 436.
129. Teal, 457 U.S. at 442-43.
130. Id. at 442. Justice Brennan on behalf of the majority defined the "bottom-line" defense as follows:
Under that theory, as asserted in this case, an employer's acts of racial discrimination in promotions-eftected by an examination having disparate impact would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the 'bottom-line' result of the promotional process was an appropriate racial balance.
Id.
rate-impact.\textsuperscript{131} Moreover, Justice Brennan asserted that a non-discriminatory “bottom-line” and an employer’s efforts to create a racially balanced staff does not justify intentional acts of discrimination on the basis of race.\textsuperscript{132} The Court held that this “bottom-line” approach does not stop employees from asserting a prima facie case of disparate-impact liability and it does not provide employers with a valid defense of their actions.\textsuperscript{133}

\textbf{D. The Strong-Basis-In-Evidence Standard}

In another discrimination case, \textit{Wygant v. Jackson Board of Education}, the Court applied the strong-basis-in-evidence standard.\textsuperscript{134} In \textit{Wygant}, non-minority schoolteachers filed suit against their school board.\textsuperscript{135} The teachers alleged that a provision of a collective bargaining agreement conferred special protection for minority teachers in the event of a layoff.\textsuperscript{136} The issue the Court had to resolve was whether a school board can extend protection against layoffs on the basis of race.\textsuperscript{137} The Court reasoned that before an employer or governmental entity engages in certain actions on the basis of race, there must be convincing evidence of prior discrimination to justify that action.\textsuperscript{138}

Justice Powell emphasized the necessity of a strong-basis-in-evidence standard when an employer takes an action on the basis of race and non-minority employees challenge that action in court.\textsuperscript{139} The strong-basis-in-evidence standard is a higher stan-

\textsuperscript{131} Id. at 454.
\textsuperscript{132} Id. The Court asserted that “a nondiscriminatory ‘bottom-line’ and an employer’s good-faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action had been intentionally discriminatory.” Id.
\textsuperscript{133} Id.
\textsuperscript{134} \textit{Wygant}, 476 U.S. 267.
\textsuperscript{135} Id. at 271.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 269-70.
\textsuperscript{138} Id. at 277. Justice Kennedy, in the \textit{Ricci} decision, asserted: “In announcing the strong-basis-in-evidence standard, the \textit{Wygant} plurality recognized the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other.” \textit{Ricci}, 129 S. Ct. at 2662.
\textsuperscript{139} \textit{Wygant}, 476 U.S. at 277. Justice Powell reasoned:

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. In this case, for example, petitioners contended at trial that the remedial program—Article XII—had the purpose and effect of instituting a racial classification that was not justified by a remedial purpose. In such a case, the trial court must make a factual determination that the employer had a strong-basis-in-evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the em-
Accordingly, the strong-basis-in-evidence standard requires convincing evidence and more than just a mathematical basis of discrimination. The Court held that the school board did not sufficiently justify their actions in accordance with the strong-basis-in-evidence standard in determining lay-offs on the basis of race and, therefore, their policy of providing protection to minority teachers against the layoffs was unlawful.

Another case which applied the strong-basis-in-evidence standard to an issue of discriminatory actions taken by an employer or government entity was City of Richmond v. J.A. Crosson Co. Like the decision in Wygant, the Court in Crosson had to determine a discriminatory issue pursuant to the Equal Protection Clause of the Fourteenth Amendment. In this case, the City of Richmond enacted a Business Utilization Plan that required general contractors, who were hired by the city, to employ a certain amount of minority subcontractors. There was no prior evidence that contractors had discriminated against minority subcontractors, nor that Richmond itself had engaged in discriminatory practices. However, the evidence that was introduced to justify the Business Utilization Plan was a statistical study, which analyzed Richmond's minority construction contracts as applied to the general population of minorities in Richmond.

The issue before the Court was whether Richmond had demonstrated a strong-basis-in-evidence of prior discrimination in the construction business, sufficient to justify its actions on the basis of race. The Court reasoned that a general statement indicating that there has been past discrimination did not justify Richmond's employees to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.

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140. See Petitioners' Reply Brief on the Merits, supra note 34.
141. Id.
142. Id. at 283-84.
144. Crosson, 488 U.S. at 476-77.
145. Id. at 477-78.
146. Id. at 480.
147. Id. at 479-80. The statistic introduced was "a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE [minority] members . . . ." Id.
148. Id. at 500.
actions of passing legislation on the basis of race.\textsuperscript{149} Therefore, the Court held that Richmond had failed to demonstrate a strong-basis-in-evidence that would justify their decision that was premised upon the basis of race.\textsuperscript{150}

It should be noted that the Court in \textit{Wygant} and \textit{J.A. Crosson Co.} applied the strong-basis-in-evidence standard. It was not until the \textit{Ricci} decision that the Court established that in cases involving disparate-impact liability pursuant to Title VII, employers have to demonstrate justification and business necessity at a higher standard—the strong-basis-in-evidence standard.

In 1991, Congress enacted the Civil Rights Act of 1991, and amended Title VII thereby codifying the concepts that the Court established in \textit{Griggs} pertaining to disparate-impact liability.\textsuperscript{151} These concepts include "business necessity" and "job related" as applied to the disparate-impact provisions of Title VII.\textsuperscript{152} Moreover, the Civil Rights Act of 1991 added Section 106, which pertains to the "Prohibition Against Discriminatory Use of Test Scores."\textsuperscript{153}

V. THE JUDICIAL, SOCIAL AND POLITICAL EFFECTS OF \textit{RICCI}

Since the passage of the Civil Rights Act of 1964, the United States has made tremendous advancements pertaining to racial equality—judicially, socially, and politically.\textsuperscript{154} Unfortunately, advancements in the area of equal employment have not been realized without a feeling of apprehension from workers who believe they have been disadvantaged because they are a non-minority. The \textit{Ricci} case demonstrated this precise feeling as perceived by the firefighters of New Haven, Connecticut.\textsuperscript{155} Moreover, the judi-

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\item \textsuperscript{149} \textit{Crosson}, 488 U.S. at 500. "None of these 'findings,' singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.' There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry." \textit{Id.} (quoting \textit{Wygant}, 476 U.S. at 277 (plurality opinion)).
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} 42 U.S.C. § 2000e (1964).
\item \textsuperscript{152} \textit{Id.}
\item \textsuperscript{153} \textit{Id.} The new subsection that the provisions of 1991 added is:
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\item (1) It shall be 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.
\end{itemize}
\item \textsuperscript{154} Lauren Klein, \textit{Ricci v. Destefano: "Fanning the Flames" or Reverse Discrimination in Civil Service Selection,} 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 391 (2009).
\item \textsuperscript{155} \textit{Ricci}, 129 S. Ct. at 2658.
\end{itemize}
\end{footnotesize}
cial, social, and political implications surrounding the *Ricci* decision involve an interesting development of race relations in the United States.

A. The Judicial Implications of Ricci

In terms of judicial implications, from the district court level to the appellate level, and on to the Supreme Court level, the court's rationale evolved in an interesting way. With the *Ricci* decision, the Supreme Court's narrow majority established a new precedent by articulating a new strong-basis-of-evidence standard in determining cases pursuant to Title VII's disparate impact provisions.\textsuperscript{156} Notwithstanding the fact that the Court established a new standard, it is not surprising that the Court applied a strict scrutiny approach given previous decisions. The strong-basis-in-evidence standard is consistent with the Supreme Court's decisions in *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Crosson Co.*

The decisions of the district court and court of appeals regarding this case found in favor of the respondents by applying a different standard than the standard established at the Supreme Court level. The district court applied the test established in *McDonnell Douglas Corp. v. Green*,\textsuperscript{157} due to Ricci's allegations of intentional discrimination.\textsuperscript{158} The *McDonnell Douglas* test consists of four factors that establish a prima facie case of discrimination: (1) membership in a protected class; (2) qualification for the position; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination on the basis of membership in a protected class.\textsuperscript{159} The district court found that Ricci satisfied all of these requirements.\textsuperscript{160}

After the prima facie case was established, New Haven had to provide evidence to prove that the reasoning behind their alleged discriminatory actions were in fact justified in a nondiscriminatory manner.\textsuperscript{161} At this point, New Haven raised the justification that, in discarding the test results, they were attempting to comply with Title VII's disparate-impact provisions. The district court held that New Haven was justified in refusing to certify the re-

\textsuperscript{156} *Id.* at 2664.
\textsuperscript{157} 411 U.S. 792 (1973).
\textsuperscript{159} *Ricci*, 554 F.Supp.2d at 151-52 (citing *McDonnell Douglas*, 411 U.S. at 802).
\textsuperscript{160} *Id.*
\textsuperscript{161} *Id.*
suits.\textsuperscript{162} To this, Ricci argued that the justification given by New Haven was prohibited under the same provisions of the Civil Rights Act that New Haven used to justify their actions—Title VII. The district court responded to Ricci’s argument by citing the holdings in \textit{Hayden v. County of Nassau}\textsuperscript{163} and \textit{Kirkland v. N.Y. State Dep’t of Correctional Services}.\textsuperscript{164} These cases established that, under Title VII, employers are allowed to voluntarily comply and react to disparate-results by utilizing “race-normed adjustments” that would increase the number of minorities on staff.\textsuperscript{165} Therefore, the district court in \textit{Ricci} determined that an employer’s intention to voluntarily comply with Title VII’s disparate-impact provisions are not the same as discriminating against non-minority job candidates.\textsuperscript{166}

\textbf{B. The Social Implications of Ricci}

In terms of social implications, because the Supreme Court in \textit{Ricci} reversed the district court and the Second Circuit’s decision and established a new standard, in effect, the \textit{Ricci} decision will likely make it very difficult to voluntarily comply with Title VII. If an employer’s business practice has a disparate effect on minorities it is going to be difficult for employers to correct this impact because of the heightened strong-basis-in-evidence standard. Therefore, employers must change the way they react when test results reveal a racial disparity. This is not necessarily a bad thing; this could essentially make the employer more mindful of its potential course of action when held to a higher standard during litigation.

The strong-basis-in-evidence has the potential to act as a deterrent against employers from making quick and insufficiently planned decisions, potentially unduly influenced by many different factors. This deterrent would, in effect, protect against similar allegations that were asserted in \textit{Ricci}, including that the City of New Haven had been unduly influenced by an outspoken political leader, who lobbied the Board to discard the test results.\textsuperscript{167} Essentially, the Court’s establishment of the strong-basis-in-evidence standard will not likely have an effect, either good or bad, on em-

\begin{footnotesize}
\footnotesize\textsuperscript{162} Id.
\footnotesize\textsuperscript{163} 180 F.3d 42, 51 (2d Cir. 1999).
\footnotesize\textsuperscript{164} 711 F.2d 1117 (2d Cir. 1983).
\footnotesize\textsuperscript{165} \textit{Ricci}, 554 F.Supp.2d at 157.
\footnotesize\textsuperscript{166} Id.
\footnotesize\textsuperscript{167} \textit{Ricci}, 129 S. Ct. at 2684-85.
\end{footnotesize}
ployer's reactions to disparate results. Now that the nation's highest court has made a determination about the level at which evidence must be analyzed under Title VII, the only way that this precedent can be overturned is with another Supreme Court case addressing this same issue or by legislation enacted by Congress.

The Court has ruled in accordance with already established precedent. The Court in Wygant asserted that "[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination." When there is a question of racial discrimination of any kind, the Court ought to apply strict scrutiny. Although the dissent's argument regarding the difficulty or near impossibility of an employer's voluntary compliance with Title VII are compelling, they are not justified. It is understandable and important for employers to feel that they should be able to voluntarily comply with Title VII when the threat of disparate impact liability arises. But when there is an allegation of a violation of Congressionally passed legislation, which, as in this case, is essential to the notion of Equal Protection, employers should bear the heavy burden of being strictly scrutinized. Employers should be held accountable for the actions they take regarding how employment decisions are made, especially when those decisions have racial implications.

C. The Political Implications of Ricci

The Ricci case also received special attention due to its political implications, specifically, the Supreme Court's reversal of the Second Circuit Court of Appeals decision, which was written by President Obama's new appointment to the high court, Justice Sonia Sotomayor. Although Justice Sotomayor and the Second Circuit Court of Appeals basically issued a one-paragraph per curiam opinion adopting the reasoning of the district court, the political and legal effects were nonetheless apparent. Since the Ricci decision was handed down almost a month prior to Justice Sotomayor's confirmation, many political and legal analysts speculated at the possibility of this decision being a hurdle in

169. A per curiam opinion is "[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion." BLACK'S LAW DICTIONARY 1201 (9th ed. 2009).
170. Ricci, 129 S. Ct. at 2672.
the newly selected Justice's appointment process.\textsuperscript{171} With the exception of several allegations by members of Conservative groups,\textsuperscript{172} the Senate Judiciary Committee proceedings came and went with minimal mention of the \textit{Ricci} decision and Justice Sotomayor was confirmed to the Supreme Court on July 28, 2009.\textsuperscript{173}

It is interesting that in Justice Sotomayor's confirmation process that many had speculated at the potential for controversy surrounding her decision, and more importantly, the reversal of the Second Circuit's opinion in \textit{Ricci}. Understandably, on the surface, it does 'look bad' for a higher Court to reverse the decision of a lower court. However, the Second Circuit and Justice Sotomayor issued a one paragraph \textit{per curiam} opinion that adopted the reasoning of the district court.\textsuperscript{174} Additionally, in the \textit{Ricci} decision, the opinion of the Second Circuit and Justice Sotomayor was reversed because the Supreme Court set a new precedent by establishing a strong-basis-in-evidence standard as applied to disparate-impact provisions of Title VII. Accordingly, the Second Circuit and Justice Sotomayor did not necessarily apply the facts of \textit{Ricci} incorrectly or inconsistently with already established precedent and/or law. Rather, the Second Circuit did not apply the strict scrutiny that the Supreme Court went on to apply. Instead the court ruled consistently with Second Circuit jurisprudence by concluding that New Haven satisfied their burden of proof. That burden of proof was a "good faith belief" that there

\textsuperscript{171} The \textit{Wall Street Journal} released an article on May 29, 2009 which stated that "[t]he ruling \textit{[Ricci v. DeStefano]} is now turning into perhaps the most contentious of the 4,000 Judge Sotomayor made in 17 years on the federal bench, and it is likely to come up in her Supreme Court confirmation hearings." Suzanne Sataline et al., \textit{A Sotomayor Ruling Gets Scrutiny}, \textit{Wall, St. J.}, May 29, 2009, at A-3, available at http://online.wsj.com/article/SB124354041637563491.html. See also Rachel Martin, \textit{POLITICS: Ricci v. DeStefano ruling to impact Sotomayor's fate?}, June 28, 2009, http://www.necn.com/Boston/Politics/2009/06/28/Ricci-v-DeStefano-ruling-to/1246220543.html ("This week the Supreme Court will offer a ruling on a case that was controversial long before the nation ever heard of Supreme Court nominee Sonia Sotomayor, but now it has become a flashpoint for critics as the judge faces upcoming Senate confirmation hearings.")

\textsuperscript{172} Martin, supra, note 148. An example of an allegation made by a conservative group regarding Justice Sotomayor included: "Citing a 2001 speech as an example, conservatives say Sotomayor allows personal feelings to impact her rulings. At the time, she said that a Latina woman would 'more often than not reach a better conclusion than a white male who hasn't lived that life.'" \textit{Id.}


existed a disparate impact, thereby justifying New Haven's decision to throw out the exams.\textsuperscript{175}

\section*{D. A Far Reaching Decision}

The judicial, social, and political implications surrounding this case all set the stage for many interesting questions about the future of race relations. Judicially speaking, a new precedent in an evidentiary standard pursuant to Title VII's disparate-impact was established by the Court. Additionally, in terms of social implications, this case involved the changing of a standard that will affect the actions of employers when they encounter disparate-results in the workplace by limiting their ways of voluntarily complying with Title VII. Finally, the political implications surrounding the \textit{Ricci} decision involved the United States' first African-American president's first Supreme Court nomination, who is the first Hispanic and third woman in history to ever sit on the bench of the highest Court in the United States.\textsuperscript{176} All of the racial implications surrounding the \textit{Ricci} case have further sparked the ongoing conversation of race relations in the United States of America, potentially making this case the focal point for future discussions of affirmative action.

\textit{Katlin L. Connelly}

\textsuperscript{175} \textit{Ricci}, 554 F. Supp. 2d at 152.
\textsuperscript{176} Davis, supra, note 173.