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STANDARDIZING DISPARATE IMPACT: HOW RICCI CIRCUMVENTS TITLE VII AND WHY CONGRESS SHOULD AMEND IT NOW

Brian Pakpour*

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INTRODUCTION

Congress extended Title VII of the Civil Rights Act in 1972, barring public employers from discriminating against employees and potential employees.¹ At the time, it noted a U.S. Commission on Civil Rights (USCCR) report that singled out police and fire departments for imposing barriers greater than any other area of state or local government.² Blacks held almost no positions in the officer ranks.³

The fire department in New Haven, Connecticut, exemplified the report's concerns.⁴ New Haven staffed one black lieutenant out of sixty-one, and not a single black captain or higher officer.⁵ The Firebird Society of New

1. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 80 Stat. 662 (amending Title VII § 701(a) to include "governments, governmental agencies, [and] political subdivisions") (codified as amended at 42 U.S.C. § 2000e-2(a) (2010)).

2. See H.R. REP. NO. 92-238, at 16 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2153, 1971 WL 11301 ("The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated."). The original Civil Rights Act of 1964 proscribed disparate *treatment*—workplace discrimination on the basis of an individual's race, color, religion, sex, or national origin. See Civil Rights Act of 1964 (Pub.L. 88-352, 78 Stat. 241, § 703(k) (emphasis added) (codified at 42 U.S.C. § 2000e-2(a) (2010))).

3. H.R. REP. NO. 92-238, at 16 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2153, 1971 WL 11301.

4. See *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2691 (2009) (Ginsburg, J., dissenting).

5. *Firebird Soc. of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457, 460 (D. Conn. 1975).

Haven, an organization composed of all the black firemen in the department, filed a civil rights action in 1973 challenging, among other things, written examinations with a racially disproportionate *impact*.⁶ The city eventually settled with the firefighters, agreeing to take corrective measures designed to ameliorate the disparate impact of its hiring practices.⁷ And Congress in 1991 codified “disparate impact” as an explicit claim under Title VII section 703.⁸

Thirty years after *Firebird*, the situation in New Haven had changed, but not extensively.⁹ So when the city discovered that its 2003 promotional exam would promote no black applicants, it refused to certify the results.¹⁰ This meant the city would deny promotions to the white firefighters who passed the exam. Certain white firefighters responded in 2004 by suing the city, claiming that steps taken by the department to prevent further discriminatory effects of its selection procedures resulted in reverse discrimination.¹¹ In 2009, the U.S. Supreme Court agreed with them in *Ricci v. DeStefano*, granting the seventeen white firefighters (and one Hispanic) summary judgment.¹² The Court held that New Haven should have certified results of the standardized promotional exam, regardless of its racially disparate impact.¹³ Throwing out the results would be justified only where the city had a “strong basis in evidence” it would lose against a hypothetical claim of such impact.¹⁴

Pre-employment and promotional testing shapes the way American employers hire and promote “qualified, successful, and performance-driven employees.”¹⁵ But study after study

6. *Id.* at 459.

7. *See id.* at 463.

8. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat 1071, 1071 (1991) (codified at 42 U.S.C. § 2000e-2(k) (2010)).

9. *Ricci III*, 129 S. Ct. at 2691 (2009) (Ginsburg, J., dissenting). Despite blacks and Hispanics comprising 60% of the city’s population in 2003, they made up only 18% of the officer ranks. *Id.* Further, only one out of twenty-one captains was black. *Id.*

10. *See id.* at 2664 (majority opinion).

11. *Id.*

12. *Id.* at 2681.

13. *See id.* at 2677.

14. *See id.* (“The racial adverse impact here was significant, and petitioners do not dispute that the [city] was faced with a prima facie case of disparate-impact liability.”).

15. Martin Carrigan, *Pre-Employment Testing – Prediction of Employee Success and Legal Issues: A Revisitation of Griggs v. Duke Power*, 5 J. BUS. &

demonstrates that minorities in general, and blacks in particular, perform measurably worse on these exams than their white peers.¹⁶ Therefore, closing any racial divide in employment existing today requires either new testing procedures, modified analysis of the tests already in use, or throwing out standardized tests altogether, since enforcing results posing a racially disparate impact exacerbates the racial divide.¹⁷

Congress and the U.S. Supreme Court have ruled out tests that result in a racially disparate effect. For example, a unanimous Supreme Court ruled in *Griggs v. Duke Power Co.* against the use of tests “neutral on their face, and even neutral in terms of intent,” if they operate to freeze the status quo of prior discriminatory employment practices.¹⁸ When the Court subsequently lowered this standard in *Wards Cove Packing Co. v. Atonio*,¹⁹ Congress reacted by passing the Civil Rights Act of 1991, instructing the Court in so many words that it preferred the use of the *Griggs* standard when adjudicating Title VII cases.²⁰ Commentators already accept the *Ricci* decision as another swipe by the Court at Title VII disparate impact, foreshadowing the day when the Court may ultimately rule it unconstitutional.²¹ Justice Scalia hinted as much in his short concurrence to the *Ricci* opinion.²² That is

ECON. RES. 35, 42 (2007).

16. See Paul Sackett, et al., *High-Stakes Testing in Higher Education and Employment*, 63 AM. PSYCHOL. 215, 222 (2008).

17. See *infra* Part VI.A.

18. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

19. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659–60 (1989) (lowering the standards of review for such employment practices); see also *infra* Part I.D.

20. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat 1071, 1071 (1991) (“The purposes of this Act . . . [include] codify[ing] the concepts . . . enunciated by the Supreme Court in *Griggs* [] . . . and in the other Supreme Court decisions prior to *Wards Cove* . . .”).

21. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1342–43 (2010) (pointing out that, while the Court dodged a bullet by deciding the case on statutory rather than equal protection grounds, that gesture merely concealed the deeper issue: whether Title VII’s disparate impact doctrine can be consistent with equal protection in the wake of the Court’s previous decisions).

22. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2681–82 (2009) (Scalia, J., concurring) (“I join the Court’s opinion but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the

why Congress needs to act.

Congress should amend Title VII, making it an unlawful employment practice to certify the results of tests causing disparate impacts when those results reasonably follow from the discriminatory effects of the creation or administration of the exams, or the employer is aware, or should be aware, of a reasonable alternative to the tests that produce fewer disparate results.²³

Part I of this Comment will introduce the background of Title VII, its previous amendments, and the Court's application of it.²⁴ Part II will describe the racial disparity of employment test results.²⁵ Part III will brief the facts of *Ricci*, with special emphasis on the New Haven Fire Department's promotional exams, as well as the district court's holding for the city and the Second Circuit's affirmance.²⁶ Part IV will assess the Supreme Court's holding of the case, with attention paid to the credence given the disparate impact of the promotional exams.²⁷ Part V will describe the precise problem that results from the Supreme Court's rationale applied to pre-employment testing, and the consequences of Congressional inaction.²⁸ Part VI will summarize the research demonstrating the traditional adverse impact of employment exams on ethnic minorities, the primary causes of these results, and one widely accepted alternative.²⁹ Finally, Part VII identifies a legislative amendment to Title VII that will hopefully save disparate impact from a Supreme Court motivated to circumvent the Civil Rights Act by forcing employers to accept results of facially neutral, yet racially discriminatory employment tests.³⁰

Constitution's guarantee of equal protection?").

23. *See infra* Part V (explaining the proposed statutory amendment).

24. *See infra* Part I.

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Part V.

29. *See infra* Part VI.

30. *See infra* Part VII.

I. BACKGROUND OF TITLE VII

A. *The Civil Rights Acts of 1964 and 1972*

Title VII of the Civil Rights Act, ratified in 1964, prohibits employers from failing or refusing to hire or discharging individuals because of their race.³¹ Congress extended this “disparate treatment” provision of Title VII in 1972 to cover public employment.³² At the time, municipal fire departments across the country pervasively discriminated against minorities.³³ Moreover, a U.S. Commission on Civil Rights (USCCR) report singled out police and fire departments for imposing barriers greater than any other area of state or local government, with blacks holding almost no positions in the officer ranks.³⁴ While overt racism was partly to blame, so too was reliance on criteria unrelated to job performance when making hiring and promotion decisions.³⁵

B. *Court Develops the Griggs³⁶ Standard*

The Supreme Court considered the intention of Congress when passing the Civil Rights Act to be clear from the “plain language of the statute,”³⁷ unanimously holding in *Griggs v. Duke Power Co.* that Duke Power’s standardized employment tests did not comport with Congress’ “inescapable” intent that standardized exams be job related.³⁸ Therefore, an employer

31. 42 U.S.C. § 2000e-2(a) (2010). Specifically, the statute makes it illegal to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin,” or “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” See also Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1–2), 78 Stat. 241 (codified at 42 U.S.C. § 2000e-2(a) (2010)).

32. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 80 Stat. 662 (amending § 701(a) to include “governments, governmental agencies, [and] political subdivisions”) (codified at 42 U.S.C. § 2000e(a) (2010)).

33. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting).

34. *Id.* at 2690–91; see also *supra* note 3.

35. *Id.* at 2690.

36. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

37. *Id.* at 429.

38. *Id.* at 436

could not give those tests “controlling force” over its hiring and promoting decisions without violating Title VII.³⁹ Plaintiffs had challenged Duke Power’s company policy that applicants for positions other than those in the labor department be high school graduates and score satisfactorily on two professionally prepared aptitude tests.⁴⁰ Neither test measured the ability to learn to perform a particular job or category of jobs.⁴¹ At the time, evidence demonstrated that blacks performed far worse on these exams than whites.⁴² Further, the 1960 census results showed that, while 34% of white males had completed high school, only 12% of blacks had in North Carolina, where Duke Power was located.⁴³

While each individual took the same test for the same job, the Court understood Title VII as proscribing “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”⁴⁴ The “touchstone” of this analysis is “business necessity.”⁴⁵ In other words, Title VII prohibits any employment practice operating to exclude minorities, unless employers demonstrate it relates to job performance.⁴⁶

Clarifying the *Griggs* standard, the Court in *Albermarle Paper Co. v. Moody* ruled that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer shows that any given requirement signifies a manifest relationship to the employment in question.⁴⁷ Once the employer does this, the complaining party can still prevail by showing that other tests or selection devices would also serve the employer’s legitimate interest in “efficient and trustworthy workmanship,” yet without the undesirable racial effect.⁴⁸

39. *Id.*

40. *Id.* at 427–28.

41. *Id.* at 428.

42. *Id.* at 430.

43. *Id.* at 426, 430 n.6.

44. *Id.* at 431.

45. *Id.*

46. *Id.* at 431.

47. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

48. *Id.* at 425; *see also* *McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 801–02 (1973) (establishing the burden shifting framework for discrimination cases).

C. *EEOC Publishes Uniform Guidelines for Employers*

Following the direction of Congress and the Court, the five government agencies having the primary responsibility for enforcing federal employment laws like Title VII, including the Equal Employment Opportunity Commission (EEOC), issued the “Uniform Guidelines on Employee Selection Procedures,”⁴⁹ which became effective on September 25, 1978.⁵⁰ The agencies adopted the guidelines to provide a uniform set of principles governing use of employee selection procedures “consistent with applicable legal standards.”⁵¹ The guidelines stand for the principle “adopted by the Supreme Court” in *Griggs* and ratified by Congress in the 1972 amendment to Title VII that, “a selection process which has an *adverse impact* on the employment opportunities of members of a race . . . and thus *disproportionately screens them out* is unlawfully discriminatory.”⁵²

The Uniform Guidelines harmonize the use of standardized testing with the goals of Title VII.⁵³ For example, under the Guidelines, “any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race . . . will be considered to be discriminatory and inconsistent with” the guidelines, save for some exceptions.⁵⁴ In addition, where two or more selection procedures are available which serve the employer’s legitimate interest and are substantially equally valid for a given purpose, the employer “should use the procedure which has been demonstrated to have the lesser adverse impact.”⁵⁵ Finally, whenever the employer is made aware that an alternative selection procedure with evidence of less adverse impact and

49. Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996 (Mar. 2, 1979) [hereinafter Q&A]; *see also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 (2010). The Office of Personnel Management, Department of Justice, Department of Labor, and Department of Treasury made up the rest of the agencies responsible for enforcing employment laws. *See* Q&A, 44 Fed. Reg. at 11,996.

50. Q&A, *supra* note 49, at 11,996.

51. Q&A, *supra* note 49, at 11,997.

52. Q&A, *supra* note 49, at 11,997 (emphasis added).

53. *See infra* text accompanying notes 54–56.

54. 29 C.F.R. § 1607.3(A).

55. *Id.* § 1607.3(B).

substantial evidence of validity for the same job in similar circumstances exists, it should investigate it to determine the appropriateness of using it.⁵⁶

D. Wards Cove:⁵⁷ Court Moves in a New Direction

Despite the obvious direction in which Congress aimed, the Court moved in an entirely different one in *Wards Cove Packing Co. v. Atonio*, ruling by a five-to-four majority to alter some of the standards established by *Griggs*.⁵⁸ Whereas, before, employers had the burden of persuading the court that a practice that disproportionately excluded members of a minority group was a business necessity,⁵⁹ the *Wards Cove* Court ruled employers had merely the burden of production.⁶⁰ Also, rather than demonstrating that the challenged practice had a “manifest relationship to the employment in question,”⁶¹ *Wards Cove* permits such practices so long as they serve “in a significant way, the legitimate employment goals of the employer.”⁶² Further, the touchstone of the inquiry was no longer business necessity,⁶³ but “a reasoned review of the employer’s justification for his use of the challenged practice.”⁶⁴ The Court reversed the Ninth Circuit decision for the plaintiffs and remanded the case to the District Court for a ruling based on its new standard.⁶⁵

E. Congress Responds: The Civil Rights Act of 1991

Congress responded to the *Wards Cove* decision almost immediately, passing the Civil Rights Act of 1991 to “improve Federal civil rights laws,” and “to clarify provisions regarding disparate impact actions,” among other purposes.⁶⁶ Finding

56. *Id.*

57. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

58. *See id.* at 650 (reversing the Ninth Circuit’s application of the *Griggs* standard).

59. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

60. *Wards Cove Packing Co.*, 490 U.S. at 659–60.

61. *Griggs*, 401 U.S. at 432.

62. *Wards Cove*, 490 U.S. at 659.

63. *Griggs*, 401 U.S. at 431 (emphasis added).

64. *Wards Cove*, 490 U.S. at 659 (emphasis added).

65. *Id.* at 661. *See Atonio v. Wards Cove Packing Co., Inc.*, CS-74-145-JLQ, 1991 WL 67529 (W.D. Wash. Jan. 23, 1991) *affd in part, vacated in part*, 10 F.3d 1485–86 (9th Cir. 1993).

66. *See Civil Rights Act of 1991*, Pub. L. No. 102-166, § 105, 105 Stat 1071, 1071 (1991) (emphasis added) (codified at 42 U.S.C. § 2000e-2(k) (2010)).

that *Wards Cove* “has weakened the scope and effectiveness of Federal civil rights protections,”⁶⁷ Congress aimed to “codify the concepts of ‘business necessity’ and ‘job related’” enunciated by the Court in *Griggs* “and in the other Supreme Court decisions prior to *Wards Cove*.”⁶⁸ To that end, Congress added “disparate impact” as an explicit claim under Title VII section 703.⁶⁹ Under the new law, plaintiffs may show discrimination by demonstrating an employer utilizes a particular employment practice that causes a *disparate impact* and is unrelated to the position in question.⁷⁰

Additionally, a plaintiff can show disparate impact by demonstrating an alternative employment practice the employer refuses to adopt.⁷¹ Such demonstration shall be in accordance with the law “as it existed on June 4, 1989,” the day before the *Wards Cove* decision.⁷² The obvious intent of Congress therefore was to make perfectly clear its preference for the *Griggs* approach to Title VII claims over that of *Wards Cove*.

One intention of Congress that the Court understood, even before the enactment of the 1991 Civil Rights Act, was that employers should proactively take measures to comply with the statute.⁷³ The Uniform Guidelines set forth by the EEOC explicitly state that, “Congress strongly encouraged employers . . . to act on a voluntary basis to modify

67. *See id.* § 2.

68. *See id.* § 3.

69. *See id.* § 105; *see also* 42 U.S.C. § 2000e-2(k) (2010).

70. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2010) (emphasis added). Specifically, the statute says, “An unlawful employment practice based on disparate impact is established under this subchapter only if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” *Id.*

71. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2010).

72. 42 U.S.C. § 2000e-2(k)(1)(C) (2010). The Court decided *Wards Cove* on June 5, 1989. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

73. *See, e.g.*, *Local No. 93, Intern. Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (“We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII.”); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–418 (1975) (quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)) (Title VII sanctions intended to cause employers “to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”).

employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action.”⁷⁴ For example, when the Santa Clara County Transit District Board of Supervisors adopted a hiring plan that authorized managers to consider as one factor the sex of a qualified applicant in making promotions to positions within a traditionally segregated job classification in which women had been significantly underrepresented,⁷⁵ the Court upheld the plan.⁷⁶

As a result of employers taking proactive steps to avoid disparate impact claims, the number of so-called reverse discrimination suits has risen.⁷⁷ But federal trial and appellate courts have dealt with such suits by upholding the purpose of Title VII.⁷⁸ For example, White and Latino applicants to the police department brought a Title VII class action lawsuit against the County of Nassau in New York State for redesigning its entrance exam to minimize the discriminatory impact on minority candidates.⁷⁹ The Second Circuit rejected the plaintiffs’ disparate treatment claim because there was no evidence the county intended to discriminate against any one class, a prerequisite for a disparate treatment claim.⁸⁰ The court also rejected the plaintiffs’ disparate impact claim because they could not show the exam fell “more harshly upon them,” a prerequisite for a disparate impact claim.⁸¹ While the county expressly admitted it redesigned the test to diminish the adverse impact on black applicants, that desire “in and of itself” did not constitute evidence of discrimination.⁸² It would be a mistake to treat “racial motive as a synonym for a

74. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1608.1(b) (2010).

75. *Johnson v. Transp. Agency*, 480 U.S. 616, 620–21 (1987).

76. *Id.* at 642. “[V]oluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts.” *Id.* at 630.

77. *See Does Affirmative Action Punish Whites?*, MSNBC.COM (Apr. 28, 2009, 7:19:29 PM), http://www.msnbc.msn.com/id/30462129/ns/us_news-life; *see also* 29 C.F.R. § 1608.1(a).

78. *See infra* text accompanying notes 79–83.

79. *See Hayden v. County of Nassau*, 180 F.3d 42, 51–52 (2d Cir. 1999).

80. *Id.*

81. *Id.*

82. *Id.* at 48.

constitutional violation.”⁸³

The Tenth Circuit rejected a similar Title VII claim by white male police officers, who complained that the police department’s expansion of those eligible to participate in an oral examination—which resulted in the addition of one Hispanic male, one Hispanic female, one Native American female, and three white males to the list of those eligible for promotion—discriminated against the plaintiffs on the basis of race.⁸⁴ The department generated the “Promotional List” using a two-stage competition among eligible officers: a written exam and an oral “Assessment Center” exam.⁸⁵ Only those employees who achieved a certain score on the written exam advanced to the Assessment Center portion.⁸⁶ The complaining officers qualified for the Assessment Center stage regardless of whether the department expanded the eligibility list or not.⁸⁷ However, due to their Assessment Center scores, they failed to make the Promotional List.⁸⁸ The Tenth Circuit ruled that, assuming the department expanded the eligibility list solely because it wanted to include more women and minorities in the next stage, plaintiffs could not demonstrate denial of the opportunity to compete on an equal footing with minority candidates.⁸⁹

The circuit courts have thus protected employers from disparate treatment claims when they took reasonable steps to ensure all applicants competed on a level playing field. In deciding *Ricci*, the Supreme Court continued to recognize voluntary compliance as “the preferred means of achieving the objectives of Title VII.”⁹⁰ However, mere “good faith” fear of disparate impact liability will no longer be enough to justify such voluntary compliance if it violates the disparate treatment provision of Title VII.⁹¹

83. *Id.* at 49 (referring to plaintiffs’ additional equal protection claim).

84. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1272–73 (10th Cir. 1998).

85. *Id.* at 1273.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1277 (affirming the district court’s granting of summary judgment for the city).

90. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2674 (2009) (quoting *Local No. 93, Intern. Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986)).

91. *Id.* at 2675.

II. THE RACIALLY DISPARATE IMPACT OF STANDARDIZED EXAMS

While in existence now for nearly a century, standardized pre-employment testing experienced a huge spurt during World War II, as the U.S. military administered cognitive ability and intelligence testing when selecting personnel.⁹² While the Civil Rights Act and the publishing of the Uniform Guidelines in the 1970s shed some doubt on the validity of pre-employment testing, by the late 1980s and 1990s, pre-employment testing had made a comeback.⁹³ That is because these tests are widely believed to be among the most valid predictors of job performance, regardless of the fact that they are associated with large performance differences between blacks and whites, as well as employers hiring proportionately fewer blacks than whites.⁹⁴ The consequences of these policies leave individuals in certain ethnic groups with markedly lower levels of access to better employment opportunities.⁹⁵

It is generally accepted across disciplines to expect a 1.0 standard deviation between black and white performance on standardized testing, no matter the discipline (i.e., education, military, employment, etc.).⁹⁶ Without delving deeper into an examination of standard deviations, an employer planning to hire 25% of those passing a test resulting in a 1.0 standard deviation between whites and blacks might expect to hire or promote approximately 4.7% of the black applicants.⁹⁷ Compare that with a standard deviation of 0.9 and the same hiring ratio might result in a projected minority hiring/promotion rate of 5.8% of black applicants.⁹⁸ Thus, the lower the standard deviation between races, the greater the likelihood such a selection method will produce a diverse workforce.

92. Carrigan, *supra* note 15, at 35, 37.

93. *Id.* at 37.

94. Philip L. Roth et. al., *Ethnic Group Differences in Cognitive Ability in Employment and Educational Settings: A Metaanalysis*, 54 PERSONNEL PSYCHOL. 297, 298 (2001).

95. *Id.* at 298.

96. The standard deviation for blacks is 0.99, 1.02, 1.34, 1.10, and 0.99 for the SAT, ACT, GRE, military tests and employment tests respectively. Sackett, *supra* note 16, at 222.

97. Roth, *supra* note 94, at 300.

98. *Id.*

The effects of the standard deviation played a pronounced role in *Ricci*, where the fire department invited 22% of those applying for the captain position to interview.⁹⁹ Twenty percent of those testing to become captain were black; however only 1% passed and none of them were ultimately selected to interview.¹⁰⁰ The fire department invited 13% percent of those applying for the lieutenant promotion to interview.¹⁰¹ Twenty-five percent of those testing to become lieutenant were black, however less than 1% passed and none were invited to interview.¹⁰²

III. BACKGROUND OF *RICCI V. DESTEFANO*

A. *The Dispute*

In suing the city and those responsible for refusing to certify the 2003 fire department promotional test results, seventeen white candidates and one Hispanic candidate claimed the defendants intentionally discriminated against them in favor of nonwhite candidates because of political pressure exerted by the mayor, thereby violating Title VII's disparate treatment provision.¹⁰³ Defendants replied they only desired to avoid violating Title VII's disparate impact provision and comply with the spirit of that law.¹⁰⁴

B. *Administering the Exam*

In 2003, the New Haven Fire Department administered written and oral examinations for promotion to Lieutenant and Captain.¹⁰⁵ Forty-one applicants took the Captain's

99. *Ricci v. DeStefano (Ricci I)*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 150–51.

104. *Id.* at 152–53.

105. *Id.* at 145. The city contracted with I/O Solutions (IOS), a company that specializes in these kinds of exams, to design the test. *Id.* The company first interviewed a random sample of current New Haven Fire Department Lieutenants, Captains, and Battalion Chiefs to determine the basic information concerning the structure of the department, the tasks required of individuals at each rank, and the materials the department generally utilizes for training. *Id.* at 147. Based on those interviews, IOS developed a written “job analysis questionnaire” (JAQ) that asked all incumbents in the positions for Lieutenant and Captain “to provide information about how important they feel a specific task, knowledge area, skill or ability is” *Id.* The JAQ asked how

exam, of whom twenty-five were white, eight black, and eight Hispanic.¹⁰⁶ Twenty-two of the applicants passed, of whom sixteen were white, three black, and three Hispanic.¹⁰⁷ However, because only nine individuals would be considered for the seven vacancies the city needed to fill, and the top nine scores came from seven whites and two Hispanics, the Fire Department did not consider any blacks for a captain position.¹⁰⁸

Seventy-seven applicants took the Lieutenant's exam, of whom forty-three were white, nineteen black, and fifteen Hispanic.¹⁰⁹ Thirty-four passed, of whom twenty-five were white, six black and three Hispanic.¹¹⁰ However, because only ten individuals would be considered for the eight lieutenant vacancies the city needed to fill, and the top ten scores came from ten whites, the Fire Department did not consider any blacks or Hispanics for promotion.¹¹¹

C. New Haven Assesses the Results

New Haven's Civil Service Board (CSB) held several hearings in 2004 before deciding whether to certify the results of the exam.¹¹² Alarmed by the results, the city's Corporate Counsel Thomas Ude characterized them to the CSB as demonstrating "a very significant disparate impact" ¹¹³ He later testified that the results of previous exams in the department and in other departments had not produced this level of disparity, making these results

important each task was to successful performance on the job and how frequently it was necessary to perform it. *Id.* The importance and frequency of a task were merged into a metric called "criticality or essentiality." *Id.* Tasks above a certain threshold in this metric were designated for testing on the written and oral portions of the exam. *Id.* Upon completion, the test was assessed by two "independent reviewers," neither of whom worked in the state. *Id.*

106. *Id.* at 145.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 145.

112. *Id.*

113. *Id.* at 145. Interpreting the disparate impact statute for the CSB, Ude informed the board that, even if they believed the test was job-related, it could still be rejected if it had a disparate impact on a minorities and less discriminatory alternatives for selecting candidates for promotion existed. *Id.* at 145-46.

“different” from results in the past.¹¹⁴

While none of the firefighters knew where they placed on the exam, several testified before the CSB in favor and against certifying the results.¹¹⁵ Frank Ricci, the plaintiff in the subsequent case, spoke in favor of certifying the results, arguing that he studied eight to thirteen hours a day to prepare for the exam, incurring over \$1000 in costs, including purchasing the books and paying an acquaintance to read them onto tape because he is dyslexic and learns better by listening.¹¹⁶ Another firefighter argued the test was fair since every question on it came from the materials applicants were instructed to study.¹¹⁷ Several firefighters argued against certifying the results, some on the ground that the questions “were not relevant to knowledge or skills necessary for the positions.”¹¹⁸ Another firefighter mentioned the study materials were difficult to obtain.¹¹⁹

Donald Day, a representative of the Northeast Region of the International Association of Black Professional Firefighters, argued against certification on several grounds.¹²⁰ First, black and Hispanic firefighters ranked sufficiently high to have a realistic opportunity for promotion on previous promotional examinations in 1996 and 1999.¹²¹ Day also compared New Haven’s results with that of Bridgeport, Connecticut’s department, which had more diversity in its ranks.¹²²

Attempting to understand whether the test itself was flawed, the CSB heard testimony from Christopher Hornick, Ph.D., who runs a consulting business that competes with the company the city hired to generate the exam.¹²³ While not referring to the test itself, Hornick testified that the results of

114. *Id.* at 150.

115. *Id.* at 146.

116. *Id.*

117. *Id.*

118. *Id.* For example, one question asked whether to park a fire truck facing “uptown” or “downtown,” terms that have no reference in New Haven. *Id.*

119. *Id.* The only books that fire houses kept on hand were the “Essentials to Fire Fighting” series, not the books included on the syllabus to be studied for the exam. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (referring specifically to the fact Bridgeport weighed the written portion of the exam significantly less than New Haven, 30% rather than 60%).

123. *Id.* at 148.

the exam exhibited “relatively high adverse impact.”¹²⁴ He also told the committee that his company finds “significantly and dramatically less adverse impact” in most of the tests he designs.¹²⁵ While whites normally outperform nonwhites on the majority of standardized testing procedures,¹²⁶ the degree of adverse impact resulting from the New Haven tests “surprised” Hornick.¹²⁷ When pressed to explain the disparity, Hornick referred to several characteristics of the exam that combined to produce the disparity.¹²⁸ First, New Haven depended far more on the written portion of the exam than other departments.¹²⁹ He also pointed to the fact that no one within the New Haven Fire Department reviewed the test, which typically results in questions that have scant relevance to the specific department tested.¹³⁰ Yet, Hornick suggested the CSB should certify the results anyway.¹³¹

Hornick also testified about alternatives to the exam New Haven employed.¹³² One alternative is an “assessment center process,” which is essentially an opportunity for candidates to demonstrate their knowledge of standard operating procedures, and how they would address a particular problem rather than verbally regurgitating it on a written exam.¹³³ Hornick testified that such “situation judgment tests,” once customized to particular organizations, “demonstrate dramatically less adverse impacts.”¹³⁴ Such an approach has been endorsed in the past by the Tenth Circuit.¹³⁵

Finally, Dr. Janet Helms, a professor of counseling psychology and director of the Institute for the Study and Promotion of Race and Culture at Boston College, testified

124. *Id.*

125. *Id.*

126. *Id.* Vincent Lewis, a Fire Program Specialist for the U.S. Department of Homeland Security, and a retired firefighter from Michigan, also testified to the CSB that, while the test asked relevant questions and he would not change a thing, the disparate impact was probably the result of a “general pattern that usually whites outperform [nonwhites] on testing.” *Id.* at 149.

127. *Id.* at 148.

128. *Id.*

129. *Id.*

130. *Id.* at 148–49.

131. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2680 (2009).

132. *Ricci I*, 554 F. Supp. 2d at 149.

133. *Id.*

134. *Id.*

135. *See* *Byers v. City of Albuquerque*, 150 F.3d 1271, 1273 (10th Cir. 1998); *supra* Part I.E.

generally about the differences in performance on standardized tests between whites and nonwhites.¹³⁶ According to Helms, experts know “for a fact” that, regardless of what kind of written test given in this country, they can just about predict how many people will pass who are members of “underrepresented groups.”¹³⁷ In fact, the results in New Haven’s case were indicative of those predictions.¹³⁸ As for New Haven’s test, Helms suggested one problem might be that 67% of the respondents in the survey that determined which questions were relevant to the job were white, so the questions ultimately chosen may have skewed toward their job knowledge as “most of the literature on firefighters show that the different [racial and gender] groups perform the job differently.”¹³⁹ Another reason for the difference could have resulted from disparities in opportunities for training and “informal mentoring” available to minorities.¹⁴⁰ Helms testified that minority test takers often score lower because they are not expected to perform well.¹⁴¹ She also mentioned that minority test takers often deviate from the traditional methods of performing tasks.¹⁴² Finally, Helms believed that socioeconomic disparity infected the scores, most likely a result of requiring costly books to prepare for the exam.¹⁴³

D. District Court Grants Summary Judgment for City

Applying the *McDonnell Douglas* three-prong burden-shifting framework,¹⁴⁴ District Court Judge Janet Bond

136. *Ricci I*, 554 F. Supp. 2d at 149.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under that test, plaintiffs first must establish a prima facie case of discrimination on account of race. *Ricci I*, 554 F. Supp. 2d at 151. To do so, they must prove (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 the protected class. *Id.* at 151–52. This proof thus shifts the burden to the defendant to produce evidence that the plaintiff was terminated for a legitimate, nondiscriminatory reason. *Id.* at 152. “This burden is one of production, not persuasion.” *Id.* (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000)). “It involves no credibility assessment.” *Id.* (quoting *Reeves*, 530 U.S. at 142). Defendant’s

Arterton held that, since the city's motivation when refusing to certify the results was a "good faith" attempt to comply with Title VII, it had no discriminatory intent, and thus the plaintiffs could not prevail on their Title VII claim.¹⁴⁵

Specifically, the District Court noted that the department's test resulted in textbook disparate impact, citing the EEOC's Uniform Guidelines.¹⁴⁶ Under the Guidelines' "four-fifths rule," a selection that yields "a selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact."¹⁴⁷ The four-fifths result would have been only 48% on the lieutenant's exam, while on the captain's exam it would have been even less, both far below the 80% threshold imposed by the EEOC.¹⁴⁸

E. Second Circuit Affirms District Court Decision

In what became the most discussed circuit court opinion of 2008,¹⁴⁹ the Second Circuit affirmed the District Court's

burden is satisfied if the proffered evidence, "taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *Id.* (quoting *Schnabel v. Abramson*, 232 F.3d 83, 88 (2d Cir. 2000)). If the employer articulates a neutral reason for the plaintiff's termination, the burden shifts back to the plaintiff to show pretext, or that the employer's proffered explanation has no support. *Id.* at 152.

145. *Ricci I*, 554 F. Supp. 2d at 160 (granting defendant's motion and denying plaintiff's motion for summary judgment).

146. *Id.* at 153.

147. *Id.* (citing Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2010)).

148. *Id.* at 153–54.

149. U.S. President Barack Obama nominated Judge Sonia Sotomayor from the Second Circuit to replace David Souter as Supreme Court Justice the year after Sotomayor served as part of the *per curiam* opinion affirming the District Court decision in *Ricci*. See, e.g., *EDITORIAL: A Judge Too Far; Nominating Sotomayor reveals the president's true colors*, THE WASHINGTON TIMES, May 27, 2009, at A18, available at <http://www.washingtontimes.com/news/2009/may/27/a-judge-too-far/> ("The Supreme Court is expected to rule on *Ricci v. DeStefano* before the Senate votes on Judge Sotomayor's nomination. It would be an extraordinary rebuke were a current nominee to be overruled on such a controversial case by the very justices she is slated to join."). Conservative members of the media and the U.S. Senate later used the fact the decision was reversed by the Supreme Court as evidence Judge Sotomayor was too extreme for a Supreme Court appointment, typically without mentioning the fact the case was reversed by a mere 5-4 margin. See, e.g., Sarah Pavlus, *Conservative Media Claim Supreme Court Decided Ricci "9-0" against Sotomayor*, MEDIA MATTERS FOR AMERICA (June 29, 2009, 7:55 pm),

“well reasoned” opinion.¹⁵⁰ More specifically, the Second Circuit ruled that, because the CSB was merely trying to fulfill its Title VII obligations when “confronted” with test results showing a disproportionate racial impact, its actions were justified.¹⁵¹

IV. SUPREME COURT: EMPLOYER’S GOOD FAITH BELIEF IT
WOULD SUFFER LITIGIOUS CONSEQUENCES NOT ENOUGH TO
JUSTIFY TOSSING TEST RESULTS FOR ALL

A. *Reverses District Court Holding for City*

Reversing the Second Circuit’s decision, the Supreme Court held that once the process by which promotions will be made has been established and employers have made their selection criteria clear, they may not then invalidate the test results absent “a strong basis in evidence” of an impermissible disparate impact.¹⁵²

Unlike the district court, the Supreme Court, per Justice Kennedy writing for a five-to-four majority, rejected the city’s contention that an employer’s “good-faith belief” that its actions are necessary to comply with Title VII’s disparate impact provision should be enough to justify “race-conscious conduct.”¹⁵³ Justice Kennedy foresaw a parade of horrors resulting from such a principle, namely encouraging race-based action at the slightest hint of disparate impact, thereby amounting to a “de facto quota system,” in which employers discard test results with the intent of obtaining the “preferred racial balance.”¹⁵⁴

<http://mediamatters.org/research/200906290036>; Anita Sinha & Daniel Farbman, *Sotomayor, Ricci and the Preferential Treatment Myth*, COMMONDREAMS.ORG, <http://www.commondreams.org/view/2009/07/17-5> (last visited Feb. 25, 2012) (“Republican senators on the Judiciary Committee have brought up the Ricci case everyday this week during Sotomayor’s confirmation hearings, and called on Mr. Ricci to testify yesterday against Judge Sotomayor. Their argument seems to be: Sotomayor has been a beneficiary of unfair preference over [w]hite men like Mr. Ricci, and she will continue to prefer people like her (i.e.,] people of color) over [w]hites from her seat on the Supreme Court.”).

150. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

151. *Id.*

152. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2677 (2009).

153. *Id.* at 2674–75.

154. *Id.* at 2675.

The Court also rejected Ricci's contentions that avoiding disparate impact lawsuits never justifies throwing out test results, or that an employer must already be in violation of Title VII in order to take such an action.¹⁵⁵

B. Reintroduces the Strong Basis in Evidence Standard

In determining a standard that "strikes a more appropriate balance" between the city's and Ricci's arguments, the Court settled on a "strong basis in evidence" standard, borrowing from its Fourteenth Amendment Equal Protection jurisprudence.¹⁵⁶ The Court has held in equal protection cases such as *Wygant v. Jackson Board of Education* and *Richmond v. J.A. Croson Co.*, that certain government actions to remedy past racial discrimination, which are themselves based on race, are constitutional only where there is a "strong basis in evidence" that the remedial objectives are necessary.¹⁵⁷ The majority ruled this standard will limit an employer's discretion to cases in which there is a strong basis in evidence of disparate impact liability, while allowing employers to act only where there is a provable, actual violation.¹⁵⁸

Title VII permits an employer who wants to consider, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of race.¹⁵⁹ However, once the promotion process has been established and employers have made their selection criteria clear, they may not then invalidate the test results absent a strong basis in evidence of an impermissible disparate impact.¹⁶⁰

The Court agreed with the district court that the city had a prima facie case of disparate impact on its hands.¹⁶¹ The Supreme Court held, however, that anyone who brought a disparate impact claim in this case would not be able to prove the exams were not job related and consistent with business

155. *Id.* at 2674.

156. *Id.*

157. *Id.* at 2675 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)); see also *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277 (1986).

158. *Ricci III*, 129 S. Ct. at 2676.

159. *Id.*

160. *Id.* at 2677.

161. *Id.* at 2677–78.

necessity, or that there existed an equally valid, less discriminatory alternative that served the city's needs but that the city refused to adopt.¹⁶² In doing so, the Court gave little, if any, credence to the testimony of Dr. Hornick concerning the adverse impact of the results and how another test might change that.¹⁶³ It treated Dr. Helms's testimony about how the test may have been deficient with similar disinterest.¹⁶⁴

But “[t]he Supreme Court did not provide detailed guidance as to how the strong basis in evidence standard should be applied.”¹⁶⁵ Since the Court's *Ricci* decision, the Second Circuit has taken the most explicit approach in outlining the Court's “strong basis in evidence” standard, holding that a strong basis in evidence of disparate-impact liability is “an objectively reasonable basis to fear such liability.”¹⁶⁶ Elaborating on this standard, the Second Circuit held that the employer's decision, evaluated at the time an employer takes a race-conscious action, must rely “on real evidence, not just subjective fear or speculation.”¹⁶⁷ The court will uphold such a decision so long as there exists “actual proof of a *prima facie* case” of disparate impact, and “objectively strong evidence of non-job-relatedness or a less discriminatory alternative.”¹⁶⁸

While the city's demonstration of less discriminatory alternatives was arguably not *objectively strong*, this standard introduced by the Second Circuit appears nowhere in the statute as written by Congress.¹⁶⁹ Title VII requires an

162. *Id.* at 2678 (citing 42 U.S.C. § 2000e-2(k)(1)(A), (C) (2010)).

163. *Id.* at 2680; *see supra* Part III.C.

164. *See Ricci III*, 129 S. Ct. at 2681; *Ricci v. DeStefano (Ricci I)*, 554 F. Supp. 2d 142, 149 (D. Conn. 2006); *supra* Part III.C.

165. *NAACP v. N. Hudson Reg'l Fire & Rescue*, 707 F. Supp. 2d 520, 532–33 (D.N.J. 2010).

166. *United States v. Brennan*, No. 08-5171-CV(L), 2011 WL 1679850, at *37 (2d Cir. May 5, 2011) (emphasis in the original). The Second Circuit goes even further than *Ricci*, holding the employer must also have a strong basis in evidence that, at the remedial stage following a finding of liability, a court would impose a remedy “equivalent to or broader than what the employer has done voluntarily.” *Id.* at *34.

167. *Id.* at *37.

168. *Id.* (emphasis in the original).

169. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2010); *see also NAACP*, 707 F. Supp. 2d at 532–33 (applying the *Ricci* standard to job relatedness and business necessity without adding the phrase “objectively strong” to the test); *supra* Part I.E.

employer, in response to a claim of disparate impact, only to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”¹⁷⁰ Therefore, the “objectively strong” qualifier can be supported only by the Supreme Court’s “strong basis in evidence” standard, which itself is found nowhere in Title VII.

V. PROBLEM: REFUSING TO APPRECIATE THE DISPARATE EFFECTS OF STANDARDIZED TESTING EXACERBATES THE CONSEQUENCES

To understand why the city of New Haven could find the tests it used unrelated to job performance, as well as why it favored an alternative such as an assessment center approach, one must fully appreciate the racial disparity exhibited by standardized testing and how assessment centers close the gap.¹⁷¹ The Supreme Court never fully investigated this phenomenon once it dismissed Dr. Hornick’s testimony concerning alternative approaches as tinged with a competitive agenda,¹⁷² and Dr. Helms’ testimony tinged with professional indifference, as she had not even analyzed the test itself.¹⁷³

Despite such a poor demonstration by the city, a more thorough analysis of standardized testing calls for a different approach than a “strong basis in evidence” standard, especially in light of how these tests adversely impact racial minorities as compared to viable alternatives. Ignoring the racial disparity resulting from standardized employment tests, the Court exacerbates the divide. Unless Congress acts,

170. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2010).

171. Indeed, the Supreme Court failed to do this in any substantive way. However, neither did the city. While the city called several witnesses to testify at its hearings considering whether to certify the results, the only witness discussing an alternative approach ran a consulting business that competed with the company hired by the city. *Ricci v. DeStefano (Ricci III)*, 129 S. Ct. 2658, 2680 (2009). Further, the only witness discussing the statistical racial disparity admitted before testifying she did not even look at the test itself. *Id.* at 2681. Therefore, if the Supreme Court did not hit disparate impact out of the park, it is not for lack of a proverbial softball lobbed to it by the New Haven Civil Service Board.

172. *Id.* at 2680 (“Hornick’s primary concern—somewhat to the frustration of CSB members—was marketing his services for the future, not commenting on the results of the tests the City had already administered.”).

173. *See id.* at 2681.

the consequences of racial disparity in test scores will inevitably increase as generations of individuals within those racial groups grow up in households in which it is more challenging to obtain gainful employment.

VI. WHY WHITES OUTPERFORM MINORITIES ON
STANDARDIZED TESTS AND HOW ALTERNATIVES CAN AVOID
THE PROBLEM

A. *Reasons for the Racial Disparity of Exam Results*

There are several reasons minorities perform differently on standardized tests.¹⁷⁴ Preparing for and taking standardized tests begins in grade school.¹⁷⁵ However, research demonstrates that two-thirds of black and 70% of Hispanic schoolchildren attend what are in essence de facto segregated schools.¹⁷⁶ In fact, the percentage of black children now enrolled in integrated public schools is at its lowest level since 1968,¹⁷⁷ and racial segregation in American public schools is particularly pronounced in the northeast (where New Haven is located) and midwest sections of the country.¹⁷⁸ Such segregation in schools is associated with high levels of poverty which, in turn, are associated with poor resources and decreased educational opportunities.¹⁷⁹ As a rule, the poorest schools are the ones with the highest

174. See *infra* Part VI.A.

175. Alfie Kohn, *Standardized Testing and Its Victims*, EDUC. WK., Sept. 27, 2000, at 60.

176. *Gutter v. Bollinger*, 137 F. Supp. 2d 821, 857 (E.D. Mich. 2001). By “de facto segregation,” I mean that the schools have become or remain segregated not as a result of laws facially designed to keep populations racially distinct, but effectually so.

177. Sarah Karnasiewicz, *Apartheid America: Jonathan Kozol Rails Against a Public School System That, 50 Years After Brown v. Board of Education, is Still Deeply – and Shamefully – Segregated*, SALON.COM (Sept. 22, 2005, 12:22 AM), <http://www.salon.com/life/feature/2005/09/22/kozol>.

178. *Gutter*, 137 F. Supp. 2d at 857. Segregation in the schools has been shown to have a relationship with segregation in housing. See, e.g., Manny Fernandez, *Study Finds Disparities In Mortgages by Race*, N.Y. TIMES, Oct. 17, 2007, at A20 (finding that home buyers in predominantly black and Hispanic neighborhoods in New York City were more likely to get their mortgages in 2006 from a subprime lender, subjecting them to higher interest and penalties than home buyers in white neighborhoods with similar income levels). Such segregation is the result of several housing discrimination phenomena such as “red lining,” in which banks discriminate against black applicants for mortgages by denying access or increasing the costs. *Id.*

179. *Gutter*, 137 F. Supp. 2d at 857.

minority population.¹⁸⁰ If de facto public school segregation was the only factor working against them, minority applicants for promotion in the New Haven Fire Department would not be expected to perform well on the standardized exams. But it is not. Further, such a factor would not explain the disparity of results among black applicants from integrated or relatively high quality schools.

There are other reasons. Dr. Helms alluded, in her testimony to the CSB, that the questions for these exams are typically written by white people and tested on them before official use.¹⁸¹ Meanwhile, inner-city segregation has led to the creation and use of a “Black English Vernacular,” making it extremely difficult for blacks who use it regularly to easily transition between standard English school work and books to the Black-English Vernacular that they use in their homes and with their friends.¹⁸² So long as employers use language as a screening device for jobs, such as in standardized tests written by whites using Standard American English, there will be serious obstacles to minority applicants looking to advance in the New Haven Fire Department and elsewhere.¹⁸³ While this might explain the score disparity for many students, it still would not explain the disparity for black students raised in homes or neighborhoods where they do not speak using a different vernacular.

Various other reasons account for the test score disparity that Dr. Helms referred to, such as the fact that mentoring opportunities in organizations like fire departments are more easily available to whites because whites already hold those positions.¹⁸⁴ Also, the differences between how whites and blacks might perform a specific task would result in different answers on an exam.¹⁸⁵

180. *Id.*

181. *Ricci v. DeStefano (Ricci I)*, 554 F. Supp. 2d 142, 156 (D. Conn. 2006) (“[A]pproximately [two-thirds] of those interviewed [to assess the exam] were white [which] could have unintentionally introduced a bias into the test instrument.”).

182. Douglas S. Massey & Nancy A. Denton, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 163–64 (Harvard Univ. Press 1998).

183. *Id.* at 165.

184. *Ricci I*, 554 F. Supp. 2d at 149.

185. *Id.*

But one phenomenon that has typified minority performance on standardized exams, and one Dr. Helms referred to in her testimony,¹⁸⁶ is known as “stereotype threat,” the impact of one’s consciousness of her race, gender, etc., when taking a standardized exam on which she is not expected to successfully perform.¹⁸⁷ For example, research conducted in the 1960s found that black participants performed better on IQ tests when administrators presented the exams as tests of eye-hand coordination rather than tests of intelligence, since participants considered the former a “nonevaluative” and thus a non-threatening test.¹⁸⁸ A similar test found that black students performed better on IQ tests when they believed their performance would be compared to other blacks as opposed to whites.¹⁸⁹

Claude Steele coined the term “stereotype threat” in 1995 after conducting a study where he administered the Graduate Record Examination (GRE) to white and black students.¹⁹⁰ Researchers told one half of each racial group the test measured “intellectual ability,” while telling the other half it measured “problem-solving” tasks nondiagnostic of ability.¹⁹¹ The white students demonstrated no difference in performance between the two groups, but blacks from the “intelligence” group performed far worse than the other group.¹⁹² The end result: stereotype threat conditions impair standardized test performance among the people who are

186. *Id.* (“[T]est takers may score lower if they are expected not to perform well . . .”).

187. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995) (“Our reasoning is this: whenever African American students perform an explicitly scholastic or intellectual task, they face the threat of confirming or being judged by a negative societal stereotype—a suspicion—about their group’s intellectual ability and competence. This threat is not borne by people not stereotyped in this way. And the self-threat it causes—through a variety of mechanisms—may interfere with the intellectual functioning of these students, particularly during standardized tests.”).

188. Irwin Katz et al., *Effects of Task Difficulty, Race of Administrator, and Instructions on Digit-Symbol Performance of Negroes*, 2 J. PERSONALITY & SOC. PSYCHOL. 53, 53 (1965).

189. Irwin Katz, *Effect upon Negro Digit Symbol Performance of Comparison with Whites and with Other Negroes*, 69 J. ABNORMAL & SOC. PSYCH. 77, 77 (1964).

190. See Steele & Anderson, *supra* note 187, at 799.

191. *Id.*

192. *Id.* at 801.

subject to negative stereotyping.¹⁹³ This phenomenon would explain racial disparity across cultural subgroups of one race or gender since it relies not on one's upbringing or environment, but rather on one's identity.¹⁹⁴

B. Assessment Centers as an Alternative Approach

When New Haven considered whether to throw out its 2003 standardized test results, Dr. Hornick testified that “we know that” written tests are not as valid as other procedures.¹⁹⁵ Besides the racial disparity of standardized test results, there is also the real danger that departments could place the wrong individuals into positions in which they dictate the outcomes of significant life or death situations.¹⁹⁶ Hornick suggested an “assessment center” as one example of a test that would produce a less disparate impact.¹⁹⁷ Fire departments and police departments have turned to alternatives such as assessment center testing because of a history of hiring individuals that may perform well on standardized tests but “couldn't lead themselves out of [a] building, let alone lead men and women toward accomplishing organizational objectives.”¹⁹⁸ An assessment center is a testing process in which candidates participate in a series of systematic, job related, real-life situations while being observed and evaluated by experts in their field.¹⁹⁹ Assessors observe candidates individually and in groups performing exercises or scenarios that simulate conditions and situations they would encounter in real life.²⁰⁰ For example, one part of the El Paso Fire Department's exam is called the “Incident Scenario,” which examines one's ability to command and control an emergency scene.²⁰¹ The applicant

193. Claude M. Steele & Joshua Aronson, *Stereotype Threat Does Not Live by Steele and Aronson (1995) Alone*, 59 AM. PSYCH. 47, 48 (2004).

194. See generally *supra* note 188.

195. *Ricci v. DeStefano (Ricci I)*, 554 F. Supp. 2d 142, 148 (D. Conn. 2006).

196. See Larry F. Jetmore, *Assessment Center Promotional Testing*, POLICEONE.COM, <http://www.policeone.com/police-jobs/articles/2083870-Assessment-center-promotional-testing> (last accessed Feb. 26, 2012).

197. *Ricci I*, 554 F. Supp. 2d at 149.

198. Jetmore, *supra* note 196.

199. *Id.*

200. *Id.*

201. *Achieving Success Through the Promotional Process: An Introduction to the Fire Service Assessment Center Process*, Slideshow Presentation of the El Paso Fire Department (2008), http://www.ci.el-paso.tx.us/fire/_documents

presents the scenario to four assessors, discussing and justifying her actions and decisions.²⁰²

Many conclude the assessment center method most closely approximates real-life behavior because it focuses on relevant job-related simulations.²⁰³ In just about every profession, there are some individuals who grasp the esoteric knowledge of the business, and others who manifest a supreme ability to practice it, and they are not always the same people.²⁰⁴ Relying on a standardized test for fire or police department promotions merely exacerbates the life or death consequences of such a practice. While one might know whether to park the truck “uptown or downtown,” that does not mean that she knows—looking up at a building full of smoke, but short on exits—the fastest way to carry one’s family to safety.²⁰⁵ Conversely, an assessment center test measures a candidate’s capability to impact and influence others, resolve conflict situations, project professional proficiency during task performance, demonstrate inherent and learned leadership skills, and project one’s leadership style authoritatively.²⁰⁶

Further, those departments employing assessment center tests without resorting to a racially adverse method of selecting those who they ultimately promote from the results see a dearth of litigious challenges.²⁰⁷ While it is difficult to settle on one reason for this, it is likely because participants

/An%20Introduction%20To%20The%20Fire%20Service%20Assessment%20Center.pdf (“You are Battalion Chief on B7. P41 arrives on scene and reports heavy smoke and fire involving two mobile home residential structures. They indicate that they are making an initial ‘quick attack’ on the Division B structure. You are second on the scene and observe two structures fully involved with occupants and neighbors frantically helping P41. Residential structures on Divisions B and D are being exposed to heat, fire and smoke.”).

202. *Id.*

203. JOHN L. COLEMAN, POLICE ASSESSMENT TESTING: AN ASSESSMENT CENTER HANDBOOK FOR LAW ENFORCEMENT 6 (4th ed. 2010).

204. *See id.* at 8 (“Most police officers can identify an acquaintance who appears to possess a superior intelligence or knowledge level but can’t seem to translate that know-how into performance as a supervisor.”).

205. *See id.* at 7 (“Organizational police management is beginning to realize that its most performance-skilled or productive workers will not always be the better person to promote into a leadership position. The value of the assessment process is that it takes these employees and placed them in an actual work-simulated situation to test their performance.”).

206. *Id.* at 14.

207. *Id.* at 35.

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recognize that the assessment center provides a fair opportunity to demonstrate their skills and abilities.²⁰⁸ In addition, participants accept the process as fair and relevant because each person performs in situations similar to those they will actually confront when promoted.²⁰⁹

VII. PROPOSAL: CONGRESS SHOULD AMEND TITLE VII

Standardized testing pervades nearly every walk of life and serves as a litmus test for obtaining gainful employment, among many other pursuits.²¹⁰ Naturally, mechanically applying standardized test results to a diverse group of applicants whose scores reflect culturally inherent score variations will have the result, intended or not, of favoring some races over others. Therefore, if Congress still embraces the purpose of Title VII it expounded when passing the 1991 amendment to the Civil Rights Act,²¹¹ it should amend Title VII, adopting the following language:

An unlawful employment practice based on disparate impact is established where (a) a complaining party demonstrates that an employer **certifies the results** of a particular test or examination that causes a disparate impact on the basis of race, color, religion, sex, or national origin, and (b) such results can **reasonably be assumed** to follow from the discriminatory effects of the creation or administration of the exam, or (c) the employer is aware, or should be aware, of **reasonable alternative(s)** to that test or examination that would produce less disparate results.

A. *Certifying the Results*

The administration of a promotional exam like the one in *Ricci* follows a definable order: (Step 1) research how the exam will be administered; (Step 2) create the exam; (Step 3) determine how it will be graded or weighted; (Step 4) determine how many promotions are available; (Step 5) issue the requirements or instructions for the exam to those

208. *Id.* at 7.

209. *Id.*

210. See Mike Littwin, *GOP Sympathy Card: Jack of Hypocrisy*, DENVERPOST.COM (July 17, 2009, 1:00AM), http://www.denverpost.com/littwin/ci_12856807; see also Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1158 (1991).

211. See *supra* Part I.E.

interested in applying; (Step 6) administer the exam; (Step 7) analyze the results; (Step 8) certify the results; (Step 9) use the results to award promotions.²¹²

While the Supreme Court in *Ricci* took exception to the fact that the city's actions to adjust the outcome of the exam occurred after its administration,²¹³ this contradicted previous federal decisions. Circuit and district courts have consistently upheld the actions of cities to change the test before its administration in order to accommodate minority applicants (Step 2).²¹⁴ The Supreme Court itself upheld the action of the Santa Clara County Transportation Authority when it circumvented its own test results to promote a female road dispatcher over a male one with a higher score (Step 9).²¹⁵ This is the latest in the process a city could intervene in order to ensure equal hiring opportunities, but the Supreme Court upheld the action as consistent with the Court's agreement that Congress preferred employers to self-regulate under Title VII.²¹⁶ As the Court observed then, it would be "ironic indeed" if a law triggered by the need to address the country's concern over centuries of racial injustice and intended to improve the lot of those who suffered as a result, was subsequently used to prohibit voluntary, race-conscious efforts to address it.²¹⁷

By imposing the "strong basis in evidence" standard on employers who attempt to do exactly that, however,²¹⁸ the Supreme Court clearly no longer fears such an irony. Therefore, Congress should amend the statute via clause (a)

212. See, e.g., *Ricci v. DeStefano (Ricci I)*, 554 F. Supp. 2d 142 (D. Conn. 2006).

213. *Ricci III*, 129 S. Ct. 2658, 2677 (2009).

214. See, e.g., *Hayden v. County of Nassau*, 180 F.3d 42, 50–51 (1999) ("[D]esigning the police officers' entrance exam to mitigate the negative impact on minority candidates . . . does not demonstrate that the County designed the . . . exam because of some desire to adversely affect [white and Latino applicants]."); see also *Carrabus v. Schneider*, 119 F. Supp. 2d 221, 226 (E.D.N.Y. 2000) (holding that designing exam to generate higher numbers of minority candidates in the top levels of grading lists insufficient to establish county was motivated by a desire to adversely affect white applicants).

215. See *Johnson v. Transp. Agency*, 480 U.S. 616, 642 (1987).

216. *Id.* at 630 ("[V]oluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and . . . Title VII should not be read to thwart such efforts.").

217. *Id.* at 645 (quoting *Local No. 93 Intern. Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 516 (1986)).

218. *Ricci III*, 129 S. Ct. at 2677.

in order to clarify that employers may intervene even when tests have already been administered if the result of such an action treats all applicants similarly, i.e., that the results not certified are the results of all applicants, not just the test results of one race. It is a contradiction to allow employers to alter how test results will be interpreted or scored so that more minority candidates may be promoted, but not allow them to refuse certifying the results when such an action poses a less discriminatory effect, such as when the results of *all applicants* are discarded. Clause (a) protects such non-discriminatory post-exam actions taken by employers to ensure fair administration of its promotional procedures.

B. A Presumption of Discrimination

Clause (b) of the new statute is intended to send a message to the Court that its “strong basis in evidence” standard circumvents the intent of Congress when it passed the 1991 revisions to the Civil Rights Act. If Congress had desired such a strict plaintiff’s burden for proving disparate impact when it passed the 1991 amendment, it could have done so, instead of embracing the *Griggs* reasoning and thus placing the burden on the employer of demonstrating “business necessity” and “job relatedness.”²¹⁹ Clause (b) is also more consistent with the EEOC’s own guidelines, which warn employers that disparate impact plaintiffs may prove a *prima facie* case of discrimination via the certification of test results demonstrating a violation of its four-fifths rule.²²⁰ A “strong basis in evidence” standard does not just circumvent this presumption but places the employer in a position of uncertainty. While the four-fifths rule is quite simple to apply, the Court made no effort to describe exactly what a strong basis in evidence is, let alone how to apply it.²²¹

C. Responsibility to Utilize Reasonable Alternatives

Finally, clause (c) clarifies the evidence of a reasonable alternative required to demonstrate disparate impact. As previously noted, the city in *Ricci* stood as somewhat of a

219. See *supra* Part I.E.

220. See *supra* Part I.D.

221. See generally *Ricci III*, 129 S. Ct. at 2675–81 (introducing the “strong basis in evidence” standard and ruling the City of New Haven did not meet it without ever suggesting steps it could have taken to do so).

straw man for the Court since it did not put forth the best possible case, especially when it came to researching a reasonable alternative to standardized testing.²²² The majority dismissed this part of the city's argument, especially when it came to the administration of an assessment center approach.²²³ The Court noted that Dr. Hornick's "brief mention of alternative testing methods, standing alone, does not [demonstrate] assessment centers were available to the city at the time of the examinations and that they would have produced a less adverse impact."²²⁴

While the Court may quickly dispatch the city's less than exemplary showing of reasonable alternatives, clause (c) allows a complainant, or an employer taking a proactive approach, to demonstrate such alternatives do exist with a reasonable amount of evidence. For example, one would need to demonstrate that neighboring employers experience less disparate results based on a different, although well-known employment exam that is equally valid. This way, the burden of production demonstrating such alternatives does not become one where parties need demonstrate overwhelming proof of less adverse impact, or no adverse impact of alternative tests. Both of those standards would make it so difficult for disparate impact plaintiffs, few would survive summary judgment, despite the fact they bring otherwise strong cases.

CONCLUSION

Since *Ricci*, the Court has continued its assault on Title VII disparate impact. Its rationale in *Wal-Mart Stores, Inc. v. Dukes*²²⁵ may further blockade the courthouse door from disparate impact claimants, at least in the class action context. The Court concluded that female employees failed to establish the existence of a common question to certify its class claiming sex discrimination at Wal-Mart.²²⁶ The Court held that such claims may only proceed to trial by

222. See *supra* Part V.A; *supra* note 142.

223. *Ricci III*, 129 S. Ct. at 2680.

224. *Id.*

225. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

226. *Id.* at 2552. In order to certify a class of plaintiffs under the Federal Rules of Civil Procedure, there must be "questions of law or fact common to the class . . ." FED. R. CIV. P. 23(a)(2).

demonstrating “some glue” holding together the alleged reasons for the employer’s various decisions to hire or not hire, or promote or not promote all the class members.²²⁷

Depending on where the Court demands to see the “glue” it mentions, it could decide that plaintiffs could not attack a standardized employment exam as a class because they could not demonstrate each individual’s performance on the exam was the result of stereotype threat, or some other cause common to the entire class. In that case, the Court could decide that individual assessments of test performance will outweigh the benefits of class treatment.

While the Court held that employees “clearly would satisfy” the commonality and typicality requirements for class actions under the Federal Rules by demonstrating that employers use a biased testing procedure,²²⁸ it also expressed deep skepticism for the “social framework” research of plaintiff’s sociological expert, Dr. William Bielby, who testified that Wal-Mart had a “strong corporate culture” making it vulnerable to gender bias.²²⁹ Because Dr. Bielby could not specify how regularly stereotypes played a meaningful role in employment decisions at Wal-Mart, the Court could “safely disregard what he ha[d] to say.”²³⁰

This treatment of Dr. Bielby’s research bore a striking resemblance to the majority’s treatment of Dr. Helms in *Ricci*,²³¹ in that the Court simply dismissed the findings so it never needed to appreciate the sociological consequences of them in light of its later decision. It is difficult to see how a plaintiff’s expert explaining stereotype threat to the Court would fair any better.

Ricci v. DeStefano is not the first time the Supreme Court attempted to circumvent the obvious intent of Title VII.²³² Such end runs around the statute have in the past been met with legislative rebuke.²³³ If Congress still wants to protect “flexibility in modifying employment systems and practices to

227. *Wal-Mart*, 131 S. Ct. at 2552.

228. *Id.* at 2553 (quoting the Court’s decision in *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)). *See also* FED. R. CIV. P. 23(a).

229. *Wal-Mart*, 131 S. Ct. at 2553.

230. *Id.* at 2554.

231. *See supra* Part V.B.

232. *See supra* Part I.D.

233. *See supra* Part I.E.

comport with the purposes of [T]itle VII,²³⁴ and encourage and protect voluntary action to improve opportunities for minorities “in order to carry out the Congressional intent embodied in [T]itle VII,”²³⁵ then the time has come to clarify Title VII once again.

Congress should amend the statute, making it an unlawful employment practice to certify the results of a test that causes a disparate impact when those results reasonably follow from the discriminatory effects of the creation or administration of the exam, or the employer is aware, or should be aware, of a reasonable alternative to the test that produces less disparate results.

234. 29 C.F.R. § 1608.1(c) (2010).

235. *Id.*