No. 11-1024

In the Supreme Court of the United States

CITY OF NEW HAVEN, CONNECTICUT
Petitioner,

v.

MICHAEL BRISCOE,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an African-American firefighter who was neither joined as a party to *Ricci* v. *DeStefano*, 557 U.S. 557 (2009), nor given notice of that case pursuant to the procedure for preclusion of subsequent actions set forth in Title VII, is nonetheless precluded by this Court's decision in *Ricci* from raising a disparate-impact challenge to the denial of a promotion based on the examination at issue in that case.

2. Whether a finding of a strong basis in evidence that an employer's failure to certify examination results would subject the employer to disparate-treatment liability may be invoked by the employer to preclude a subsequent lawsuit—by a party who the employer failed to join in or give adequate notice of the first action—alleging that the employer's use of the examination constitutes a disparate-impact violation of Title VII.

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JURISDICTION

The judgment of the court of appeals was entered on August 15, 2011, and a petition for rehearing was denied on November 17, 2011 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 15, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The law has long recognized that failure to join all interested parties in a single action creates the risk of multiple judgments imposing conflicting legal obligations, because of "the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Taylor* v. *Sturgell*, 553 U.S. 880, 898 (2008). Federal law therefore creates several different procedural mechanisms for joining in the same action persons "so situated that disposing of the action in the person's absence" may "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19; see also Fed. R. Civ. P. 20 & 22; 28 U.S.C. §§ 1335, 1397 & 2361.

The Court applied this principle in *Martin* v. *Wilks*, 490 U.S. 755 (1989), holding that white firefighters could bring a subsequent lawsuit under Title

VII challenging hiring decisions by the City of Birmingham that were mandated by a consent decree entered in a prior Title VII action brought by African-American firefighters to which they were not parties. The judgment in the prior action did not bar the subsequent lawsuit because "a person cannot be deprived of his legal rights in a proceeding to which he is not a party." 490 U.S. at 579.

Following the Court's decision in *Martin*, Congress enacted a statute—42 U.S.C. § 2000e-2(n)(1)—specifically to address this issue in the context of potentially conflicting claims of disparate impact and disparate treatment. Section 2000e-2(n)(1) bars subsequent legal challenges to an employment practice that "implements and is within the scope of a litigated or consent judgment or order" by a person given actual notice of the proposed order or judgment and a "reasonable opportunity" to "present objections to such judgment or order by a future date certain."

When a group of white and Hispanic firefighters filed the complaint in *Ricci* v. *DeStefano* challenging under Title VII the decision of petitioner City of New Haven not to certify the results of its 2003 firefighter promotion examination, neither the plaintiffs nor the City attempted to join as parties African-American firefighters such as respondent who were the beneficiaries of the City's decision that the test could not be certified because of the risk of disparate-impact liability. Nor did they invoke the statutory procedure set forth in Section 2000e-2(n)(1) at any stage of that litigation.

Respondent and those situated similarly to him therefore were not parties to the proceedings that produced the factual record in *Ricci*—the record that this Court determined did not contain the requisite

"strong basis in evidence" that the City "would have been liable under the disparate-impact statute" if it had certified the examination results. 129 S. Ct. at 2664.

Having failed to join respondent to *Ricci* as a party and having failed to invoke the Section 2000e-2(n)(1) procedure to preclude future Title VII actions by nonparties such as respondent, the City now asks this Court to save it from what has long been recognized to be the inevitable consequence of such a failure: new lawsuits by absent parties that could produce relief that conflicts with the outcome of the initial action. The City argues that this Court's opinion in *Ricci* should be construed to create a new, and entirely unprecedented, legal exception to the settled rule against nonparty preclusion. Although the City sometimes hints that its legal argument is tied to the specific factual overlap between this case and *Ricci*, its legal theory in fact would apply broadly to every situation in which a nonparty sought to bring a subsequent Title VII action.

There is no justification for the unprecedented change to longstanding preclusion principles that the City seeks. Certainly this Court in *Ricci* did not in a single sentence overrule *sub silentio* the long-settled principle barring nonparty preclusion. And there is no reason to do so here: this litigation is nothing more than a consequence of the City's failure to use existing procedural mechanisms to join respondent to the *Ricci* action. The City—and all other employers—may protect themselves in the future by invoking these mechanisms. Review by this Court is not warranted.

A. The 2003 New Haven Firefighter Promotional Examination.

Respondent Michael Briscoe is an African American firefighter in New Haven, Connecticut. Respondent was one of 77 firefighters who sat for a promotional examination for the rank of fire lieutenant that was administered by petitioner City of New Haven in late 2003. The results of this examination created considerable controversy and were the subject of this Court's decision in *Ricci* v. *DeStefano*, 129 S. Ct. 2658 (2009).

The exam was designed by a professional testing company and was part written and part oral. *Id*. at 2665. The written portion was multiple-choice, testing candidates' knowledge of material in textbooks that candidates could purchase in advance. *Id*. at 2665-66. The oral portion required candidates to describe—step-by-step and in detail—how they would respond to complex scenarios that supervisory fire lieutenants might face. *Ibid.*

The written portion counted for 60% and the oral portion for 40% of each candidate's final score. *Ibid.* This 60/40 weighting formula was required by a 1986 agreement between the City and the firefighters' union. *Id*. at 2679.

The weighted results revealed stark racial disparities. White candidates passed the exam at almost twice the rate of black candidates. *Id.* at 2666, 2678. All ten candidates whose scores would make them eligible for immediate promotion to open lieutenant positions were white. *Ibid.*

In light of this racial disparity (and similar racial disparities from the captain's promotional exam), the New Haven Civil Service Board ("CSB") conducted

several public hearings in early 2004 to consider whether to accept the results of the exams. *Id.* at 2667-2671. The City was concerned that accepting the results would lead to disparate-impact liability under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e *et seq.*). See 129 S. Ct. at 2669-2670.

The CSB did not act on a request to conduct a validation study to determine whether the tests were appropriately job-related. 129 S. Ct. at 2667, 2679. Instead, the CSB selected three "outside" witnesses to "'tell [the Board] a little bit about their views of the testing, the process, [and] the methodology.'" *Id.* at 2668. As this Court later observed, "[o]f the outside witnesses who appeared before the CSB, only one, Vincent Lewis, had reviewed the examinations in any detail, and he was the only one with any firefighting experience." *Id.* at 2678.

At the time that these hearings took place, respondent did not know if he was one of the few black candidates who scored high enough to qualify for future promotion. The City did not disclose individual scores or rankings to those who had taken the exam. 129 S. Ct. at 2666.[1]

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[1] During the course of discovery in the *Ricci* litigation, the City disclosed individual scores to the *Ricci* plaintiffs but obtained protective orders to prohibit disclosure of scores to non-parties such as respondent. Ct. App. J.A. 163-74. The City advised the district court that disclosure of test scores to non-*Ricci* plaintiffs would occasion "harassment and embarrassment" to candidates. *Id.* at 172.

B. The *Ricci* Litigation.

The Civil Service Board ultimately declined to certify the results of the exams, and a group of 18 candidates—led by a white firefighter, Frank Ricci—filed a lawsuit to require certification. They contended that the City's decision not to certify the results violated Title VII's prohibition against disparate treatment on the basis of their race, 42 U.S.C. § 2000e-2(a). 129 S. Ct. at 2671.

Respondent was not a party to the *Ricci* litigation. Neither the City nor the plaintiffs sought to join him as a party pursuant to Fed. R. Civ. P. 19 and 20. In addition, the parties in *Ricci* did not invoke the specific procedures of Section 2000e-2(n) that would have made a judgment in the *Ricci* action binding on non-parties such as respondent. Pet. App. 12a.

Beyond relying on the statements of various witnesses before the CSB, the City did not develop a record before the district court to substantiate its decision not to certify the exam results. For example, the City did not adduce expert testimony or other evidence to call into question the propriety of its insistence that the test developers use the 60/40 weighting formula that the City had agreed to in the 1986 union contract. See Pet. App. 28a.

The district court in *Ricci* granted summary judgment in favor of the City, concluding in relevant part that the City's "'motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent' under Title VII." 129 S. Ct. at 2671. The court of appeals affirmed. *Id.* at 2672.

This Court reversed. It "conclude[d] that race-based action like the City's in this case is impermiss-

ible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." 129 S. Ct. at 2664. The Court described its holding in limited terms: "We hold *only* that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." *Id.* at 2677 (emphasis added).

Based on a close review of the factual record (*id.* at 2665-2671), this Court concluded that "the record makes clear there is no support for the conclusion that [the City and other defendants] had an objective, strong basis in evidence to find the tests inadequate * * * in violation of Title VII." 129 S. Ct. at 2677. Among other things, the Court rejected the argument that a different weighting of the scores (such as a 30-written/70-oral weighting) would have been an equally valid alternative for the City to adopt, noting in part that "because that formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason." *Id.* at 2679. It also noted the absence of evidence in the record before it to justify a different weighting formula. *Ibid.*

Thus, the *Ricci* Court concluded that "[o]n the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results." *Id.* at 2681. It ruled that the

Ricci plaintiffs were therefore entitled to summary judgment on their claim of disparate treatment. *Ibid.*

In the penultimate paragraph of its opinion, the *Ricci* Court expressed views about the City's future exposure to disparate-impact liability as a result of the City's certification of the test results:

> Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. *If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.*

Id. at 2681 (emphasis added).

C. The Present Litigation

Following this Court's decision in *Ricci*, the district court ordered certification of the exam results. Pet. App. 36a. Respondent had in the interim learned that he scored first on the oral examination out of all of the seventy-seven candidates. Ct. App. J.A. 6 (Amended Compl. ¶16). Because of a weaker performance on the written portion of the exam, however he was ranked twenty-fourth overall and was not eligible for promotion. *Ibid.*[2]

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[2] The City never advised respondent how he had scored on the exam. Respondent learned what his score was as a result of the decision of the *Ricci* plaintiffs—notwithstanding the district court's protective order—to include this information in the appendix to their petition for a writ of certiorari.

Had the two parts of the examination been weighted differently—for example, 40% written/60% oral (rather than 60% written/40% oral)—respondent would have been reached for promotion. Ct. App. J.A. 6 (Amended Compl. ¶ 17). Had the exam been weighted 30% written/70% oral, respondent would have ranked fourth overall, and three of the first twelve positions would have been occupied by African-American candidates—in contrast to the absence of all African-American candidates under the 60/40 weighting scheme used by the City. *Id.* at 6-7.

Respondent promptly filed the instant suit against the City alleging that the examination resulted in a disparate impact in violation of Title VII.[3] Respondent's complaint alleges that "[a]t civil service hearings and in the *Ricci v. DeStefano* litigation the City criticized the work of its hired [test company] consultant, but it never addressed, much less questioned, the job relatedness of its own choice of the 60/40 weighting." Ct. App. J.A. 2.

The complaint further alleges that the 60/40 weighting formula was not job-related. In contrast to the oral exam "which was intended both to test job knowledge and to be particularly valuable for assessing the managerial and leadership skills of candidates for the supervisory position of lieutenant," the "written test had little or no value in selecting fire department supervisors," as it rewarded those who

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[3] Respondent also separately moved to intervene in the *Ricci* case after its remand to the district court, seeking to "forestall any argument by the City that the resolution of his underlying claim should be dictated by the choice to file a separate suit," but Judge Arterton denied his intervention motion on timeliness grounds. Pet. App. 7a n.1; Ct. App. J.A. 194.

"crammed" for the exam with rote memorization and those with "test-taking skills rather than essential fire knowledge." Ct. App. J.A. 4-5 (Amended Comp. ¶ 13).

Respondent made clear that his lawsuit does not seek to undo any promotions based upon the certification of the test results that was ordered by the district court following this Court's ruling in *Ricci*. Pet. App. 6a. Instead, he seeks eligibility for promotion to lieutenant (with retroactive pay and seniority), without displacing any of the *Ricci* plaintiffs from their positions, and he seeks to enjoin the City from continuing to use the 60/40 weighting formula for future promotional exams. *Ibid.*

The district court dismissed respondent's complaint. Pointing to the penultimate paragraph of this Court's opinion (see page 8, *supra*), the district court stated that "the holding in *Ricci* that the City's action in refusing to certify the 2003 examination results violated Title VII's disparate-treatment prohibition necessarily forecloses a subsequent claim that the results of *the same 2003 NHFD promotional examinations* must be rejected because they violated Title VII's disparate-impact prohibition." Pet. App. 39a (emphasis in original). "Whatever the effect the Supreme Court's decision in *Ricci* may have on future Title VII cases, Briscoe's claims in this case have to do with the *Ricci* case itself: the 2003 examination he criticizes is the same examination the Supreme Court considered in that case. What the Court held in *Ricci* and what it said in doing so squarely forecloses Briscoe's claims." Pet. App. 43a.

The district court concluded that "[t]o the extent that Briscoe wished to advance or emphasize an argument different than that relied upon by the City *

* * he should have timely intervened in *Ricci* to do so." Pet. App. 42a.

D. The Court of Appeals Decision

The court of appeals unanimously reversed. In an opinion written by Chief Judge Jacobs and joined by Judges Winter and Cabranes, the court concluded that *Ricci* does not foreclose respondent's claim, because respondent was not a party to the *Ricci* litigation.

The court of appeals began its analysis with the general principle "'that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party,'" emphasizing that the law "avoids 'impos[ing] * * * the burden of voluntary intervention in a suit to which he is a stranger.'" Pet. App. 8a (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940), and *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 441 (1934)).

The court determined that none of several recognized exceptions to the general rule of nonparty preclusion apply in this case. Pet. App. 9a (citing specific exceptions discussed in *Taylor* v. *Sturgell*, *supra*). For example, respondent "did not agree to be bound by the determination of the issues in *Ricci,*" and he "was not adequately represented by the city in *Ricci*, because their interests are widely divergent." Pet. App. 9a.

Discussing this Court's decision in *Martin* v. *Wilks*, *supra*, the court of appeals observed that "[t]he unavailability of nonparty preclusion is a recurring problem in Title VII litigation." Pet. App. 10a. The court of appeals recognized that in *Martin*, this Court "upheld 'the general rule that a person cannot be deprived of his legal rights in a proceeding

to which he is not a party,'" in concluding that a group of white firefighters was not foreclosed from seeking Title VII relief against a city employer by the terms of a prior consent decrees to which the white firefighters were not parties. Pet. App. 11a (quoting *Martin*, 490 U.S. at 759).[4]

Accordingly, the court of appeals held that "under well-settled Supreme Court precedent, Briscoe's claim is not precluded by *Ricci*." Pet. App. 12a. With respect to the City's reliance on language from the penultimate paragraph in *Ricci* suggesting that the City could not face future disparate-impact liability, the court of appeals stated that "[w]e are skeptical that the Court would use one sentence in *Ricci* to silently revise preclusion principles that were unanimously reaffirmed just over a year before in *Taylor* [v. *Sturgell*]." Pet. App. 12a.

The court of appeals then proceeded to reject the City's argument "for a broad, two-way reading of *Ricci*'s 'strong basis in evidence' standard." Pet. App. 12a-13a. According to the City's "two-way" reading of *Ricci*, a "strong basis in evidence" could justify not only an employer's disparate treatment of employees if necessary to avoid disparate-impact liability (the issue presented on the facts of *Ricci*), but also an

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[4] The court of appeals similarly concluded that respondent was not bound in accordance with the special provisions of Title VII that Congress enacted in the wake of *Martin* "by which litigants can bind certain nonparties who would otherwise stay on the sidelines." Pet. App. 11a (citing 42 U.S.C. § 2000e-2(n)(1)). The court of appeals noted that "[t]he city does not contend that it adequately represented Briscoe's interests" as would be required, Pet. App. 11a n.5, and that "the city has abandoned the argument it made below that the *Ricci* proceedings satisfied § 2000e-2(n)." Pet. App. 12a.

employer's use of a practice that creates a disparate *impact* prohibited by the terms of Title VII if necessary to avoid disparate-*treatment* liability. And the latter rule would apply even to potential disparate-impact plaintiffs who were not parties to the lawsuit in which the "strong basis in evidence" was found. Pet. App. 13a-14a.

The court of appeals rejected this reading of *Ricci* on several grounds. *First*, apart from the penultimate paragraph of *Ricci*, the Court noted several other passages in *Ricci* that reflected "a holding limited to formulation of a standard for disparate-treatment liability," not disparate-impact liability. Pet. App. 15a-16a & nn. 7-10 (quoting specific portions of the *Ricci* opinions). The court of appeals concluded that "the Court's precise formulation of its holding * * * supersedes any dicta arguably to the contrary." Pet. App. 16a.

Second, "the question that *Ricci* answers for disparate-treatment claims has already been answered for claims of disparate impact" by specific statutory provisions of Title VII. Pet. App. 17a. The statute makes clear that "[c]onduct that is 'job related' and 'consistent with business necessity' is permissible even if it causes a disparate impact." *Id.* at 18a (quoting 42 U.S.C. § 2000e-2(k)(1)). Chief Judge Jacobs concluded that if the Court in *Ricci* had intended to "muddle that which is already clear" in the statute, then "[w]e would expect that any holding that is meant to shape the contours of a disparate-impact claim would cite and quote the statute, and discuss the interplay between the text and the new principle." Pet. App. 18a.

Third, the court of appeals pointed to practical difficulties with "how a 'strong basis in evidence' can

be established for a disparate-treatment claim," in that "it is hard to see how one can adduce a 'strong basis in evidence' that oneself will later act with 'discriminatory intent or motive.'" Pet. App. 19a (citation omitted). By contrast, "disparate-impact liability involves quantitative metrics that resonate with an objective 'strong basis in evidence' standard." *Ibid.*

Fourth, *Ricci*'s "strong basis in evidence" standard was borrowed from constitutional equal protection law, which "neatly extends to statutory claims for intentional discrimination" under a disparate-treatment claim. Pet. App. 20a. "In contrast, neutral laws with 'a disproportionately adverse effect upon a racial minority' are outside the purview of the Equal Protection Clause." *Ibid.* (citation omitted). Thus, "[w]e cannot expect that *Ricci*'s express holding would apply symmetrically to two doctrines that by nature are asymmetrical." *Ibid.*

The court of appeals acknowledged that the City "now must defend a disparate-impact suit" after having been required by this Court to certify the test results. Pet. App. 21a. But, the court observed, the City of Birmingham faced the same consequence as a result of this Court's decision in *Martin*. *Ibid.* And "solutions already exist" to prevent "this outcome," because "an employer can seek to join all interested parties as required parties" under Fed. R. Civ. P. 19, or can avail itself of Title VII's special preclusion procedures under 42 U.S.C. § 2000e-2(n). *Ibid.*

The court further noted that, although "we hold that Briscoe's claim can proceed, the *Ricci* plaintiffs of course remain entitled to the full fruits of the Supreme Court judgment that they obtained" and that, consistent with respondent's stated intention throughout the litigation, "we limit Briscoe's equita-

ble relief insofar as it may interfere with the relief—present and future—afforded to the *Ricci* plaintiffs by the the certification of the exam results." Pet. App. 22a.

The City's petition for panel rehearing and rehearing *en banc* was denied with no judge noting a dissent.[5]

ARGUMENT

The Second Circuit's Unanimous Ruling Is Compelled By This Court's Holdings In *Martin* And *Taylor* And Is Fully Consistent With The Decision In *Ricci*.

The Second Circuit correctly held that under *Martin* v. *Wilks*, *supra*, respondent is entitled to his day in court, and that nothing in this Court's *Ricci* opinion overturns that settled principle. Moreover, there is no conflict among the lower courts and the question presented is not important—it can arise only when an employer fails, as the City did here, to invoke well-established procedures to bind all affected parties to the outcome of a Title VII case. Review by this Court is not warranted.

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[5] In contrast, six judges dissented from the Second Circuit's denial of rehearing *en banc* in *Ricci*, including both active members of the panel in this case, Chief Judge Jacobs and Judge Cabranes. (The third panel member, Senior Judge Winter, was not eligible to participate in the *en banc* vote.) 129 S. Ct. at 2672 (citing *Ricci* v. *DeStefano*, 530 F.3d 88 (2d Cir. 2008), denying rehearing *en banc*, 530 F.3d 87 (2008)). Indeed, Judge Cabranes's opinion in *Ricci*, joined by Chief Judge Jacobs, expressly suggested that this Court grant review. *Ricci* v. *DeStefano*, 530 F.3d 88, 94 (2d Cir. 2008) (Cabranes, J., dissenting from denial of rehearing *en banc*).

A. A Nonparty To A Title VII Suit Is Not Bound By the Resulting Judgment.

Because of "'our deep-rooted historic tradition that everyone should have his own day in court,'" *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996) (quoting *Martin*, 490 U.S. at 762), this Court has repeatedly declared that "a person who was not a party to a suit generally has not had a 'full and fair opportunity' to litigate the claims and issues settled in that suit." *Taylor*, 553 U.S. at 892-893 (quoting *Montana* v. *United States*, 440 U.S. 147, 153 (1979)). "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase National Bank*, 291 U.S. at 441. "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Ibid*.

More recently, the Court has observed that its decisions "emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Taylor*, 553 U.S. at 898. Because preclusion doctrine involves "crisp rules with sharp corners," *id.* at 890 (internal quotation marks omitted), the Court in *Taylor* rejected "virtual representation" based on "identity of interests and some kind of relationship between parties and nonparties," *id*. at 901. Observing that nonparties are only bound through "discrete exceptions" in "limited circumstances," the Court unanimously declined to adopt a new exception for "virtual representation" that is "at odds with the constrained approach to nonparty preclusion our decisions advance." *Id*. at 899.

Similarly, in *Smith* v. *Bayer Corp*., 131 S.Ct. 2368 (2011), the Court relied on the axiom that "[a] court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions. * * * *The importance of this rule and the narrowness of its exceptions go hand in hand*." *Id.* at 2379 (citation omitted; emphasis added). The Court in *Smith* was not swayed by arguments that more liberal nonparty preclusion rules would reduce the burden of relitigation on the parties or the courts. "[T]his form of argument flies in the face of the rule against nonparty preclusion," and "[w]e have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment." *Id.* at 2381.

In *Martin* v. *Wilks*, *supra*, the Court applied its "longstanding principles" of nonparty preclusion in the context of Title VII litigation to hold that employees are not precluded from suing their employer for racial discrimination by the terms of prior Title VII consent decrees to which the employees were not parties.

Like this case, *Martin* involved conflicting Title VII claims brought at different times and in different lawsuits by different groups of firefighters. Initially, a group of black firefighters brought suit against the City of Birmingham to challenge discriminatory hiring and promotional practices, and the parties entered into court-ordered consent decrees establishing future goals for hiring and promoting black firefighters. *Id.* at 759. A group of white firefighters then filed suit against the City of Birmingham to challenge enforcement of the decrees. *Id*. at 758.

The City of Birmingham "argued that [its promotional] decisions were unassailable because they

were made pursuant to the consent decrees." *Id.* at 760. This Court rejected that argument. Speaking through Chief Justice Rehnquist, the Court concluded that "a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 759. It did not make a difference that the challenged action was required by a prior court order or decree.

The Court also addressed the contention that, because the white firefighters "were aware that the underlying suit might affect them" and "failed to timely intervene," this meant that "their current challenge to actions taken under the consent decrees constitutes an impermissible 'collateral attack.'" *Id.* at 762. The Court ruled that "a party seeking a judgment binding on another cannot obligate that person to intervene; *he must be joined*." *Id.* at 763 (emphasis added). It further noted that "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Id.* at 765.

The *Martin* Court thus placed squarely on the parties themselves the burden of anticipating potential non-parties whose interests might be affected—and joining those persons so that the judgment would bind them. "The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted." *Ibid.*

The court of appeals correctly concluded that prohibiting respondent from pursuing his claim would be "inconsistent with well-settled principles of nonparty preclusion" recognized in *Martin*, *Taylor*,

and numerous other decisions of this Court. Pet. App. 8a, 10a, 12a.

The City complains that the decision "traps the City in a legal conundrum" (Pet. 16) and "put[s] employers nationwide to the Hobson's choice of either foregoing useful promotional exams entirely or risking conflicting disparate-treatment and disparate-impact liability for using them." Pet. 3.

This Court *Martin* rejected similar contentions that mandatory joinder would be "burdensome," that "adverse claimants may be numerous and difficult to identify," and that "[j]udicial resources will be needlessly consumed in relitigation of the same question." *Martin*, 490 U.S. at 766-767. "We think that the system of joinder presently contemplated by the Rules best serves the many interests involved in the run of litigated cases, including cases like the present ones." *Id.* at 768; accord Pet. App. 21a ("[t]he City of Birmingham faced the same issue in *Martin*").

As the court of appeals correctly concluded, "solutions already exist" to prevent a "whipsaw effect," because "an employer can seek to join all interested parties as required parties" under *Martin* or avail itself of Title VII's special nonparty notice-and-hearing procedures in order to foreclose any future cycle of claims. Pet. App. 20a.[6]

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[6] The City also complains that "[t]he panel made no mention of the [*Ricci*] Court's determination, after an exhaustive review of the record, that 'no evidence' supported disparate-impact liability based on certification of the exam results." Pet. 9. But the lack of such evidence in the then-existing record is irrelevant to whether a judgment may bind a nonparty and foreclose that nonparty from adducing new evidence in a future case.

Respondent's lawsuit thus could not be precluded by the results of the *Ricci* litigation, because respondent was not a party to that case.[7]

B. This Court's Decision In *Ricci* Does Not Foreclose Respondent's Lawsuit.

The City does not even try to explain how its position is consistent with the fundamental principle barring nonparty preclusion just discussed. Rather, it states:

> [T]he panel's thorough analysis of preclusion law, its discussion of joinder law, and its reliance on *Martin v. Wilks* * * * were misplaced: while those authorities demonstrate that Respondent, as a nonparty, was not bound by the *Ricci* judgment, they in no way suggest that the panel was not bound by the *Ricci* decision.

Pet. App. 21. This passage appears to suggest that, because the City's argument rests on an assertion

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Nor is there merit to the complaint that the court of appeals "held that the certification of the exam results necessary to *remedy* a disparate-treatment violation would also *create* disparate-impact liability." Pet. 15. The court of appeals held only that while the City in *Ricci* failed to demonstrate a strong basis in evidence that the examination violated the disparate-impact standard, and therefore could not justify a race-conscious action, *respondent* is entitled to an opportunity to prove an actual disparate-impact violation, because he was neither joined in nor given proper notice of the *Ricci* action.

[7] Moreover, to the extent that Title VII allows a judgment to bind nonparties in certain circumstances, see 42 U.S.C. § 2000e-2(n), the City now does not dispute that it failed to comply with these statutory requirements. Pet. App. 11a-12a (City abandoned its argument that respondent had received the requisite statutory notice).

about what the *Ricci* opinion means, as opposed to a simple argument that a nonparty's claim is precluded, the settled principles regarding nonparty preclusion are wholly irrelevant.

That is simply wrong. The City's interpretation of the *Ricci* opinion would produce precisely what the principle regarding nonparty preclusion prohibits: it would bar a nonparty from asserting a claim based on determinations made in a case to which he was not a party. That would be extraordinary in any situation; as the court of appeals observed, it would be especially extraordinary because these rules of nonparty preclusion were neither discussed nor questioned by the Court in *Ricci*.

1. Ricci *Does Not Announce A New Rule Precluding Nonparties From Bringing Disparate-Impact Actions.*

The court of appeals correctly rejected the argument that this Court "would use one sentence in *Ricci* to silently revise preclusion principles" that were well-recognized both before *Ricci* (in *Martin* and *Taylor*) and after *Ricci* (in *Smith*). Pet. App. 12a.

To begin with, rather than wrenching two sentences out of the context of the Court's entire opinion—as the City does—it is important to understand the context in which the Court made the statements on which the City relies.

The *Ricci* opinion's substantive analysis is divided into two parts. Part II.B. addresses the appropriate legal standard, and concludes its analysis as follows:

> We hold only that, under Title VII, before an employer can engage in intentional discrimi-

> nation for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

129 S.Ct. at 2677.

In Part II.C., the Court applied that legal standard to the factual record developed in summary judgment proceedings in the district court. The Court concluded that the plaintiffs in *Ricci* had "met their obligation to demonstrate that there is 'no genuine issue as to any material fact' and that they are 'entitled to judgment as a matter of law,'" because on the record before the Court there was "no genuine dispute that there was no strong basis in evidence for the City to conclude it would face disparate-impact liability if it certified the examination results." *Id.* at 2677.

Following the conclusion of that factual analysis, the Court ended its opinion with four paragraphs summarizing its decision (with those four summary paragraphs separated from the factual analysis by three centered stars). It first recognized the City's attempt to create a fair decisionmaking process and noted the effort expended by applicants in preparing for the examination. The Court next restated the City's dilemma once the results were known:

> Confronted with arguments both for and against certifying the test results—and threats of a lawsuit either way—the City was required to make a difficult inquiry. But its hearings produced no strong evidence of a disparate-impact violation, and the City was

> not entitled to disregard the tests based solely on the racial disparity in the results

Id. at 2681.

Then the Court made the statement that is the basis for the City's claim of preclusion:

> Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Id. at 2681.

Viewed in context, as it must be, the statement cited by the City is an explanation of what would happen *if a subsequent disparate-impact claim were litigated on the very same factual record as the one before this Court*. In that situation, the disparate-impact claim would fail—because, as the Court had just explained in detail, the facts did not establish "strong evidence" of a disparate-impact violation—and failure to certify the test results would on those facts establish a "strong basis in evidence" of disparate-treatment liability.

By tying that observation regarding a future lawsuit against "the City" to "our holding today"—a holding that rested squarely on the particular factual record developed in the *Ricci* case—and by referring to "*the* strong basis in evidence" (emphasis added), a

second reference to the particular factual record in *Ricci*—the Court made clear that its observation applied only to a claim grounded in the same factual record as *Ricci*, and that it was not adopting a brand-new general legal principle endorsing nonparty preclusion.

That interpretation is the only one consistent with the Court's own description of its legal ruling. The Court ended the portion of its opinion addressing the applicable legal standard by stating that it held "only that" to justify actions that otherwise would produce disparate-treatment liability "the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." 129 S.Ct. at 2677; see also Pet. App. 15a ("[A]ll other indications in the opinion are of a holding limited to formulation of a standard for disparate-treatment liability.").

Moreover, given the posture of the *Ricci* case, there was no occasion for the Court to address in general the circumstances in which the threat of disparate-treatment liability could preclude a disparate-impact claim. That is because *Ricci* involved only a disparate-treatment claim, and the question before the Court involved only when the threat of disparate-impact liability could preclude a disparate-treatment claim. The Court's observation therefore related solely to the logical consequences of its holding based on the factual record before it, and was not the statement of a general principle regarding issues that were not presented, briefed, or argued in the case.

The City at some points appears to argue that the present action is precluded because it involves the same examination that was before this Court in

Ricci—in other words, that its legal argument rests on the unusual fact that this case involves the same subject matter as a prior case decided by this Court.

But the legal arguments that the City advances provide no basis for limiting the scope of its argument. If the sentence of the *Ricci* opinion had the meaning that the City asserts, then it would apply generally to *every* individual who sought to assert a disparate-impact claim following a finding—in a case to which that individual was not party—of a strong basis in evidence that the employer would have faced disparate-treatment liability if it failed to take the challenged employment action.

As we next discuss, this broad, and entirely novel legal rule, is not only inconsistent with this Court's settled principle against nonparty preclusion already discussed, but also with fundamental principles of Title VII jurisprudence.

2. The City's Novel Exception To Disparate-Impact Liability Is Inconsistent With Common Sense And The Text Of Title VII.

The court of appeals correctly recognized that construing this Court's opinion in *Ricci* as the City urges would produce a legal rule at odds with fundamental legal principles, and basic common sense, as well as with the text of Title VII.

The City argues for a legal rule applicable in the converse of the factual situation of *Ricci*: where *Ricci* involved an employer arguing that the threat of disparate-impact liability should permit it to take actions resulting in disparate treatment, the rule for which the City contends involves the standard for determining when a threat of disparate-treatment

liability permits employment actions that have an unlawful disparate impact. In particular, the City argues that a factual finding in one case of a strong-basis-in-evidence that furnishing a disparate-impact remedy would make the employer liable for disparate treatment should immunize that employer from liability in a subsequent disparate-impact suit brought by a nonparty.

First, this legal principle suffers from precisely the same flaw as the City's principal argument: it rests on nonparty preclusion. An individual would be barred from bringing a disparate-impact claim because of a factual finding entered in a case to which he was not a party. That violates the fundamental principle that everyone is entitled to his or her own day in court.

Indeed, such a rule would carry a serious risk of collusive lawsuits between an employer and one set of employees designed to produce factual findings that would preclude the competing claims of a second group of employees. Once an employer made a weak record that fails to satisfy *Ricci*'s "strong basis in evidence" rule and a court then invalidated the employer's corrective measure on the ground that it discriminates in violation of Title VII's disparate treatment prohibition, the employer would be forever immunized—even from the claims of non-parties or those who had no notice of the litigation—from any challenge to the employment requirement on disparate impact grounds.

There simply is no warrant for construing this Court's *Ricci* opinion to endorse a legal rule that carries such significant adverse consequences.

Second, the City's interpretation conflicts with the structure of Title VII. The statute prohibits disparate treatment without identifying any exceptions or circumstances under which disparate treatment might be permissible. See 42 U.S.C. § 2000a. By contrast, Title VII explicitly identifies the circumstances under which an employer may engage in employment practices that create a disparate impact—namely, when those practices are job-related and consistent with business necessity and where there is no equally valid non-discriminatory alternative. See 42 U.S.C. § 2000e-2(k); *Lewis* v. *City of Chicago, Ill.*, 130 S. Ct. 2191, 2198 (2010).

Accordingly, as the court of appeals observed, "[c]larification was needed, which *Ricci* supplied" for the scope of disparate-treatment liability, but "the question that *Ricci* answers for disparate-treatment claims has already been answered for claims of disparate impact" by the above-described terms of the disparate-impact statute. Pet. App. 17a-18a; see also Pet App. 20a (the "strong basis in evidence" standard was derived by the Court from its Equal Protection precedent, which is more analogous to a statutory claim of disparate treatment than a statutory claim of disparate impact).

The City counters that *Ricci* was concerned only with the burden of proof ("strong basis in evidence"), not the "legal standard" or elements governing a disparate-impact claim. Pet. 18-19. But the City overlooks this Court's decision in *Lewis*, which made clear that the disparate-impact statute not only "set[s] forth the essential ingredients of a disparate impact claim" but also "does indeed address the burden of proof – not just who bears it * * * but also what it consists of." *Lewis*, 130 S. Ct. at 2198. In-

deed, the disparate-impact statute bears the following statutory title: "*Burden of proof in disparate impact cases*." 42 U.S.C. § 2000e-2(k). The City's "converse" application of the *Ricci* rule would impermissibly alter Title VII's carefully drawn requirements for proving a disparate-impact claim.

Third, the court of appeals noted the sheer impracticality of engrafting an additional exception to Title VII disparate-impact liability in cases when an employer has a strong basis in evidence to fear disparate-treatement liability. "[I]t is difficult to see how a 'strong basis in evidence' can be established for a disparate-treatment claim," in that "it is hard to see how one can adduce a 'strong basis in evidence' that oneself will later act with 'discriminatory intent or motive.'" Pet. App. 19a. The court acknowledged that this showing might be made in the context of an employer already subject to a prior disparate-treatment remedial court order, but that this context itself is "plagued" by the counter rules of "nonparty preclusion"; any alternative scenarios would be "fiendishly complicated, and therefore unsuitable for a conduct-guiding standard." *Ibid.*

In short, the City's interpretation of this Court's opinion in *Ricci* is fundamentally inconsistent with the text of the opinion (see pages 21-25, *supra*), with settled precedent barring nonparty preclusion (see pages 15-20, *supra*), and with Title VII ((see pages 27-28, *supra*). It should be rejected by this Court.

C. *Stare Decisis* And The Mandate Rule Do Not Preclude Respondent's Suit.

The City argues that the doctrine of *stare decisis* and the mandate rule require that preclusive effect be given to the penultimate paragraph in *Ricci*. Pet.

10, 21. But this argument fails because—as we have just explained—the Court's opinion does not mean what the City claims that it means.

Even if the sentence on which the City relies were ambiguous, moreover, it would be dicta. *Pacific Operators Offshore, LLP* v. *Valladolid*, 132 S. Ct. 680, 688 (2012) ("[I]n any event, the ambiguous comment was made without analysis in dicta and does not control this case."). *Ricci* did not present any question regarding the circumstances, if any, in which a finding of a "strong basis in evidence" of a disparate-treatment violation bars a subsequent disparate-impact claim. See pages 21-25, *supra*.

"[A] formula repeated in dictum but never the basis for judgment is not owed *stare decisis* weight." *Gonzalez* v. *United States*, 553 U.S. 242, 256 (2008) (Scalia, J., concurring in the judgment); see also *Pacific Operators Offshore, LLP*, 132 S. Ct. at 688; *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 626 (1935).

Nor does the mandate rule apply. That rule governs the legal issues a lower court may decide *in the same litigation* upon remand of a case from a higher court. See, *e.g.*, *Burrell* v. *United States*, 467 F.3d 160, 165 (2d Cir. 2006) (the "mandate rule is a branch of the law-of-the-case doctrine" and "holds that where issues have been explicitly or implicitly decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court") (internal quotation marks and citations omitted). The mandate rule is not a device for circumventing the rule against nonparty preclusion. This case is separate from *Ricci*, and the mandate rule has no application here.

D. There Is No Circuit Conflict.

The City wrongly claims that the court of appeals' ruling conflicts with the Third Circuit's decision in *NAACP* v. *North Hudson Regional Fire & Rescue*, 665 F.3d 464 (3d Cir. 2011). In fact, *North Hudson* is fully consistent with the decision below.

North Hudson involved a challenge by black firefighters to the validity of a residency requirement for a municipal firefighting company that served several towns of predominantly Hispanic population. *Id.* at 469-470. The district court enjoined the residency requirement on the ground that it created a disparate impact and was not job related or otherwise justified by business necessity under Title VII. *Id.* at 475. The Third Circuit affirmed, rejecting not only the company's challenge to the district court's disparate-impact ruling but also the company's argument that its recission of the longstanding residency requirement would amount to disparate treatment against Hispanics. *Id.* at 483-484.

The Third Circuit specifically rejected the claim that *Ricci* applies "in the converse situation" in which "an employer is charged with disparate-impact discrimination but fears disparate-treatment liability if it ceases the employment practice that is causing the disparate impact." *Id.* at 483. Beyond noting the "specific" limits of the *Ricci* "holding," *id.* at 484-484, the court of appeals cited and relied on the court of appeals decision below, noting with approval that the "[t]he Second Circuit refused to extend *Ricci*'s 'strong basis in evidence' defense to the disparate-impact suit against New Haven," and that "[w]e likewise see no reason to extend *Ricci*'s 'strong basis in evidence' defense to the NAACP Plaintiffs' disparate-impact suit against North Hudson." *Id.* at 484.

Accordingly, on the major issue pursued by the City here—whether *Ricci* should be applied "conversely" to foreclose respondent's disparate-impact challenge—no conflict exists among the courts of appeals.

Apparently recognizing that *North Hudson* actually supports the ruling of the court below, the City attempts to manufacture a circuit conflict with *North Hudson* on the basis of a statement that it misleadingly quotes and describes out of context—"that '[a] government employer's compliance with a judicial mandate does not constitute an official policy or employment practice' that can trigger Title VII liability," Pet. 3 (quoting *North Hudson*, 665 F.3d at 484-485). From this quote the City argues that there is a "split on whether a government employer is immune from Title VII liability for complying with a court order." Pet. 23.

The City is incorrect. The relevant passage from *North Hudson* provides:

> [T]his Court, rather than North Hudson, is responsible for eliminating the residency requirement. *A government employer's compliance with a judicial mandate does not constitute an official policy or employment practice of the employer*, see, e.g., Wolfe v. City of Pittsburgh, 140 F.3d 236, 240 (3d Cir. 1998), *and it is an employer's deliberate discrimination that the disparate-treatment provision of Title VII prohibits.* Removal of the residency requirement can hardly be viewed as a race-based decision when it is motivated by the imperative to comply with a judicial order.

Id. at 484-485 (emphasis added).

The passage above makes clear that the Third Circuit did not rule—as the City claims—that compliance with a judicial mandate categorically cloaks an employer with "immun[ity] from Title VII liability." After all, such a ruling could not be squared with *Martin* v. *Wilks*, *supra,* in which this Court permitted white firefighters to challenge municipal employment actions that had been compelled by the terms of a prior court-ordered consent decree to which the white firefighters had not been joined as parties. See pages 17-19, *supra*.

The quoted portion of *North Hudson* ruled far more narrowly that for purposes of disparate-*treatment* liability an employer's compliance with a judicial mandate was not attributable to an employer as its own action for purposes of determining if the employer had a deliberate intent to discriminate. Here, of course, respondent claims disparate impact, not disparate treatment, and intent to discriminate is self-evidently not an element of a disparate-impact claim. *North Hudson* is inapposite.

E. The Impact Of The Court Of Appeals Decision Is Not Significant And Does Not Warrant This Court's Intervention.

The City and its *amici* complain that the court of appeals decision will adversely affect municipal employers who seek to use competitive hiring and promotional exams. These concerns are wholly unfounded.

First, the City and *amici* complain that the court of appeals decision will provoke a "flood" of litigation and saddle municipal employers with conflicting liability for disparate treatment and disparate impact arising from the very same promotional exam. Pet.

3; Br. for Nat'l League of Cities et al. as *Amici Curiae* 3-4 ("NLC Am. Br.").

But the court of appeals correctly concluded that employers may easily avoid such problems by joining persons whose interests will be affected or by invoking Title VII's notice-and-hearing procedures to make any judgment binding on non-parties.[8] If all interested parties are joined or bound by one action, then successive claims from the same exam will not arise. The "unwinnable situation" which the City and its *amici* predict simply will not occur if employers make use of these standard procedural devices. Br. for Pacific Legal Foundation *et al.* as *Amici Curiae* 7 ("PLF Am. Br."). The City's conundrum in this case stems from its own failure to take well-known and readily available steps that Congress designed to prevent multiplicative litigation.

Second, *amici* complain that the court of appeals ruling will "make[] it extremely difficult for employers to determine whether their hiring and promotion practices comply with the dual non-discrimination provisions of Title VII." NLC Am. Br. 7. But employers know after *Ricci* that they may not deliberately discriminate in hiring and promotion unless they have a strong basis in evidence that they will be liable for disparate impact. Employers knew before and after *Ricci* that they may not engage in hiring or

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[8] Because Title VII creates an alternative procedure under 42 U.S.C. § 2000e-2(n) for a nonparty to be bound by a Title VII judgment, there is no merit to *amici*'s claim that job applicants will necessarily "become parties to a time consuming and costly lawsuit" and that "[s]uch mandatory litigation could very well discourage many well-qualified individuals from applying in the first place." NLC Am. Br. 16.

promotional practices that create disparate impact unless they satisfy one of the specific business necessity exceptions that Congress created in the disparate-impact context.

As Chief Judge Jacobs concluded, "extending the express holding in *Ricci* to a disparate-impact claim would seem to be unnecessary," because "[a]n employer seeking to protect itself from the interplay between disparate-impact and disparate-treatment liability needs only the guidance from the express holding of *Ricci*." Pet. App. 20a.

This case is unusual because the City's litigation missteps resulted in a court order directing the City to certify the exam results *without ensuring that this court order would bind other interested parties to this judgment.* Accordingly, the general concerns raised by the City and *amici* about municipal employers facing liability as a result of their compliance with court orders will materialize only in the rarest of cases.

Third, the court of appeals decision does not set an "impossibly high bar" (NLC Am. Br. 13) or create a "significant expansion in liability" (PLF Am. Br. 18). On the contrary, the decision leaves disparate-impact law undisturbed, declining to legislate a new safe harbor for municipal employers to evade disparate-impact liability—a safe harbor that Congress itself did not see fit to create. It is the City and its *amici* who would transform this Court's narrow holding in *Ricci* into a sweeping change of law concerning an issue not raised by the facts or any party in that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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