Nos. 07-1428 & 08-328

IN THE

Supreme Court of the United States

FRANK RICCI, *et al.*,

Petitioners,

v.

JOHN DESTEFANO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can a municipality—faced with employment test results that establish a prima facie case of Title VII discrimination and testimony that alternative tests exist—decline to certify the results if it has a good faith belief that certifying the test would violate Title VII; or must the employer prove that certification would violate Title VII before declining to certify the results?

2. Should this Court provide "guidance" to the lower courts on the meaning of 42 U.S.C. § 2000e-2(l), which prohibits the race norming of test results, where petitioners did not argue in the district court that the City had violated this provision; the lower courts did not render a holding on this question; and the courts of appeals are not in conflict?

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BRIEF IN OPPOSITION

Respondent City of New Haven files this brief in opposition to the petitions for a writ of certiorari.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

[1] Petitioners filed two separate petitions for certiorari, on May 14, 2008, and September 8, 2008; petitioners have not taken a position on which petition is the operative one.

INTRODUCTION

In their two petitions and supplemental brief, petitioners use sweeping language and raise the specter of "quotas" and "race balancing." A close examination of the case, however, makes clear that certiorari should be denied.

The City of New Haven was confronted with employment test results that, if certified, would have established a prima facie case of Title VII discrimination against minority job applicants. The City also heard testimony that alternative, less discriminatory tests exist. The case presents the question whether the City's decision to decline to certify these test results, based on its good faith belief that certifying the results would violate Title VII, violates the rights of non-minority applicants.

Petitioners and the district court noted that the case was unique. Indeed, although certain members of the Second Circuit have suggested that certiorari should be granted, these judges also stated that the case presents an issue of "first impression ... in the nation." A fortiori, there is no circuit split on any relevant question. Nor is there sufficient lower court guidance on the "indisputably complex" questions that the case presents. And because petitioners waived certain arguments, the case presents a poor vehicle in which to consider the "difficult" questions in the first instance. This Court should deny the petitions.

STATEMENT

A. Legal Framework

As analyzed by the district court, the case involves the intersection of two Title VII frameworks: disparate impact and disparate treatment.

1. *Disparate impact.* Title VII makes it unlawful to employ a facially neutral selection procedure that has an adverse effect on members of one race as compared to members of another race. 42 U.S.C. § 2000e-2(a)(2); *see also Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

In order to prove a Title VII disparate impact violation, a plaintiff must first establish a prima facie case of disparate impact by "offer[ing] statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson* v. *Forth Worth Bank & Trust*, 487 U.S. 977, 994 (1988). A plaintiff may attempt to establish a prima facie case in a number of ways, including by arguing that the selection procedure shows disparate impact under the EEOC Uniform Guidelines on Employee Selection Procedures. *Id.*; *see also* 29 C.F.R. pt. 1607 (Uniform Guidelines). Under the Uniform Guidelines, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will be regarded by the Federal enforcement agencies as evidence of adverse impact[.]" 29 C.F.R. § 1607.4(D). Courts judge the "'significance' or 'substantiality' of numerical disparities on a case-by-case basis." *Watson*, 487 U.S. at 995 n.3 (citations omitted).

Once a plaintiff asserting a disparate impact claim establishes a prima facie case, an employer may rebut the prima facie case by "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity[.]" 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the defendant rebuts the prima facie case, the plaintiff can nonetheless estab-

lish a Title VII disparate impact violation by demonstrating an alternative employment practice that is available, equally valid, and less discriminatory and showing that the defendant refuses to adopt such alternative employment practice. *Id.* § 2000e-2(k)(1)(A)(ii); *see also Albemarle*, 422 U.S. at 425.

2. *Disparate treatment.* Title VII also makes it unlawful to "fail or refuse to hire ... 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[.]" 42 U.S.C. § 2000e-2(a)(1). In disparate treatment cases, unlike disparate impact cases, the employment practice is not facially neutral. *See, e.g., International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977).

a. *Pretextual Discrimination.* In cases where a plaintiff alleges intentional discrimination and a court must decide whether "a legitimate *or* an illegitimate set of considerations led to the challenged decision,"[2] courts apply a framework that this Court adopted in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973).

Under this framework, the plaintiff carries "the initial burden ... of establishing a prima facie case of racial discrimination." *McDonnell Douglas*, 411 U.S. at 802. The burden then shifts "to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer articulates

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[2] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 247 (1989) (emphasis in original) (describing framework that applies in *McDonnell Douglas* cases).

such a reason, then the burden shifts back to the plaintiff, who must "be afforded a fair opportunity to show that [the] stated reason for [the adverse employment action] was in fact pretext." *Id.* at 804. If the plaintiff can show pretext, he will have proved a Title VII pretextual discrimination claim. *Id.* at 807.

b. *Mixed motives.* Because the *McDonnell Douglas* framework operates on the binary assumption that *either* a legitimate *or* an illegitimate consideration motivated the employer, when the plaintiff alleges that an employer made "decisions based on a mixture of legitimate and illegitimate considerations," a different framework applies. *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989). In these cases, often called "mixed motives" cases, "once a plaintiff ... shows that [an impermissible factor] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the impermissible factor] to play such a role." *Id.* at 244-245.

B. Factual Background

1. In November and December 2003, the New Haven Fire Department administered written and oral examinations for promotion to Lieutenant and Captain. Pet. App. 6a-7a. White candidates passed both examinations at a much higher rate than minority candidates. In both cases, the pass rate for African American candidates was approximately half of the pass rate for white candidates. *Id.* at 27a; *see also id.* at 7a-8a. With seven Captain vacancies and ten Lieutenant vacancies, it appeared that at most two Hispanics would be promoted to Captain, no Hispanics would be promoted to

Lieutenant, and no African Americans would be promoted to either position. *Id.* at 8a, 28a.[3]

2. After an initial review of the test results, City officials became concerned about the disparate impact shown in the results; they therefore decided to put the issue before the New Haven Civil Service Board ("Board"). Pet. App. 477a. The Board held five hearings to determine whether to certify the examination results. *Id.* at 8a.

At the first hearing, the City's Corporation Counsel at the time, Thomas Ude, provided a letter to the Board explaining that Title VII "prohibits 'disparate impact' discrimination" (Pet. App. 440a) and that EEOC Guidelines regard "'a *selection rate* for any race, sex or ethnic group which is less than 4/5 (or 80%) of the rate for the group with the highest rate'" as "'evidence of adverse impact'" (*id.* at 441a (emphasis in original)). (The selection rate for African Americans on each test was about 50% of the selection rate for whites, far below the 80% under the Guidelines. *Id.* at 27a; *see also id.* at 7a-8a.) Without recommending a course of action, Ude also informed the Board that "voluntary compliance with Title VII is strongly encouraged and is the preferred means of achieving the non-discrimination goals of Title VII." *Id.* at 443a.

The Board heard testimony from a number of people, arguing both for and against certification. Pet. App. 11a-19a. Christopher Hornick, Ph.D., an organizational psychologist who runs a consulting business that

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[3] Under the City Charter's "Rule of Three," each open Captain and Lieutenant position had to be filled by one of the three eligible individuals with the highest scores on the exam. *Id.* at 7a.

designs promotional tests, testified that the results presented "relatively high adverse impact": "I'm a little surprised at how much adverse impact there is in these tests." *Id.* at 14a-15a. He said that his company designs tests that typically show "significantly and dramatically less adverse impact[.]" *Id.* at 14a. He also suggested that the City's heavy weighting of the written portion of the exam might have contributed to the adverse impact. *Id.* at 551a. Dr. Hornick noted that one alternative testing procedure consists of "an assessment center process," rather than a written and oral exam. *Id.* at 15a-16a; 556a-557a.[4]

The Board ultimately held a vote on whether to certify the results and voted 2-2. Pet. App. 19a. Because there was no majority, the City did not certify the results. *Id.*

3. Petitioners, seventeen white candidates and one Hispanic candidate, sued the City of New Haven and a number of individuals, alleging violations of, among other things, Title VII and the Equal Protection Clause. Pet. App. 5a-6a. The parties filed cross motions for summary judgment, and the district court granted summary judgment for respondents on all federal claims. *Id.* at 6a.

In analyzing the Title VII claim, the parties presented arguments under the burden-shifting framework of *McDonnell Douglas*,[5] and the court applied

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[4] *See also id.* at 485a (member of black firefighters union testifying that the city of Bridgeport, Connecticut reduced adverse impact in its firefighter promotion test by "chang[ing] the relative weights" of the written and oral portions of the test to place greater weight on the oral portion of the test).

[5] *See, e.g.*, Pls. Opp. to Mot. for S.J. 33-34.

that framework. Pet. App. 22a. On the first step, the court assumed, arguendo, that petitioners had established a prima facie case of discrimination. *Id.* at 25a. Respondents then proffered, as their legitimate, nondiscriminatory reason for not certifying the exams, that "they desired to comply with the letter and the spirit of Title VII." *Id.*

In evaluating respondents' proffered nondiscriminatory reason—that they were seeking to comply with Title VII—the district court turned to a second Title VII framework, the disparate impact framework. The district court noted, however, that this presented a novel application of the disparate impact framework:

> As plaintiffs point out, this case presents the opposite scenario of the usual challenge to an employment or promotional examination, as plaintiffs attack not the use of allegedly racially discriminatory exam results, but defendants' reason for their *refusal* to use the results.... Here, the roles of the parties are in essence reversed....

Pet. App. 25a-26a. In this "revers[e]" application of the disparate impact framework, the district court faced a question that does not arise in a typical disparate impact case: whether, before it can decline to certify test results, the City must *prove* that certification of the test would constitute a Title VII violation (i.e., prove a disparate impact Title VII violation against itself) or, rather, whether it could decline to certify based on its good faith belief that certification would violate Title VII.

The district court noted that "plaintiffs do not dispute that the results showed a racially adverse impact

on African-American candidates ... as judged by the EEOC Guidelines." Pet. App. 26a-27a. Thus, it was "necessarily undisputed that, had minority firefighters challenged the results of the examinations, the City would have been in a position of defending tests that, under applicable Guidelines, presumptively had a disparate racial impact." *Id.* at 27a. The district court also noted that respondents had presented evidence to support their good faith belief that less discriminatory alternatives to the exams existed. *Id.* at 32a-33a.

In this context—where certifying the test would result in a prima facie disparate impact violation, and where the City had a good faith belief that less discriminatory alternatives existed—the district court rejected the argument that the City must *prove* that certification would constitute a Title VII violation. "[I]t is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact ... simply because they have not yet formulated a better selection method." Pet. App. 34a (emphasis in original).[6]

The district court also rejected petitioners' equal protection claim, holding that petitioners could not show either a facial classification based on race or a fa-

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[6] The court also rejected petitioners' argument that the City was obligated to conduct a validity study regarding the job-relatedness of the exams, noting that "[t]he guidelines do not require or mandate a validity study where an employer decides *against* using a certain selection procedure that manifests [disparate] impact[.]" Pet. App. 32a (emphasis in original). Because the City did not complete a validity study, *see id.* at 29a, the exams were never validated.

cially neutral employment action applied in a discriminatory manner. Pet. App. 45a-46a.

4. On February 15, 2008, the Second Circuit affirmed the district court's opinion in a summary order. The court concluded that the Board "was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact" and that respondents were not liable. Pet. App. 3a-4a. On June 9, 2008, the panel withdrew the order and issued a short per curiam opinion nearly identical to the original summary order. *See Ricci* v. *DeStefano*, 530 F.3d 87 (2d Cir. 2008) (*Ricci per curiam*).

5. The Second Circuit conducted a sua sponte poll, and, on June 12, 2008, denied rehearing en banc by a vote of 7 to 6. The court released a number of decisions concurring in, and dissenting from, the rehearing decision. *See Ricci* v. *DeStefano*, 530 F.3d 88 (2d Cir. 2008) (*Ricci en banc*).

Judge Cabranes, writing for the dissenting judges, noted that the appeal presented issues that were "indisputably complex," and that raised "questions of first impression in our Circuit—and indeed, in the nation[.]" 530 F.3d at 93-94. Judge Cabranes also questioned whether the *McDonnell Douglas* standard was the proper analytical framework; he stated that the mixed motives framework of *Price Waterhouse* might instead apply. *Id.* at 99.[7]

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[7] The dissenting judges also questioned whether it was appropriate for the circuit to decide this case with a per curiam opinion, affirming for the reasons stated by the district court, *see id.* at 94 (Cabranes, J.), and the judges debated when the circuit should

Judge Calabresi, concurring in the denial of rehearing, noted that a mixed motives analysis under *Price Waterhouse* was waived: "[t]he parties did not present a mixed motive argument to the district court or to the panel." *Ricci en banc*, 530 F.3d at 89. "It is the unavailability of mixed motive analysis that makes this case an especially undesirable one for elective review." *Id.* As Judge Calabresi explained: "[d]ifficult issues should be decided only when they must be decided, or when they are truly well presented. When they need not be decided ... it is wise to wait until they come up in a manner that helps, rather than hinders, clarity of thought." *Id.*

6. On May 14, 2008, petitioners filed a petition for writ of certiorari ("First Petition"), seeking review of the February 15 judgment. On August 21, 2008, petitioners filed a supplemental brief alerting the Court to the activity in the Second Circuit after the First Petition was filed. Petitioners included in this supplemental brief a footnote stating that "petitioners anticipate filing another petition directed to the June 9 judgment" of the Second Circuit. Supplemental Br. 2 n.2. On August 27, 2008, this Court directed respondents to file a response to the First Petition. And on September 8, 2008, petitioners filed a second petition for certiorari ("Second Petition"), seeking review of the Second Circuit's June 9 judgment. This Second Petition raises different questions for this Court's review, and reworks many of the arguments. This brief in opposition responds to both petitions.

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rehear a case en banc, *see id.* at 89 (Calabresi, J.); *id.* at 89-90 (Katzmann, J.); *id.* at 92 (Jacobs, C.J.).

REASONS FOR DENYING THE PETITIONS

This is a novel case that does not merit this Court's review. Petitioners have stated that the case has "no parallel in the case law." Pls. Opp. to Mot. for S.J. 34. Judge Cabranes has likewise stated that the case is not only "indisputably complex" but that it also raises questions of "first impression ... in the nation." *Ricci en banc*, 530 F.3d at 93-94. The Court should deny review of these difficult and unique questions, which do not implicate a circuit split, and arise with little to no lower court guidance.

The principal Title VII question that petitioners raise is whether an employer can decline to certify test results if it has a good faith belief that certifying the results would violate Title VII. There is no conflict of authority on this question. Indeed, petitioners, the district court, and the Second Circuit judges who advocated rehearing all acknowledged that the case was unique. And although certain judges on the Second Circuit suggested that a different Title VII framework should instead apply—a mixed motives analysis rather than the *McDonnell Douglas* framework—petitioners expressly rejected this argument.

The second Title VII question that petitioners raise is whether the City's actions violated a statutory provision that bars race norming of test results. This issue was not raised by petitioners in the district court and, therefore, was not the basis of a holding by the district court (or the Second Circuit). In any event, there is no need to provide "guidance" to the lower courts on an issue that has not divided the courts of appeals and that arises infrequently.

Petitioners also seek this Court's review of the Equal Protection Clause challenge to respondents' re-

fusal to certify the test results. The district court determined that this conduct was not a racial classification warranting strict scrutiny; petitioners assert that this determination is contrary to this Court's precedent and that of other circuit courts. Petitioners, however, fail to demonstrate any error in the court's decision, and the request for error correction would not merit review in any event. Apparently recognizing as much, petitioners focus most of their equal protection arguments on the question whether, under strict scrutiny, respondents' efforts to comply with Title VII can justify the refusal to certify the test results. That question, however, was not considered by the courts below and is not squarely before the Court.

I. THE CASE DOES NOT PRESENT ANY QUESTION UNDER TITLE VII THAT WARRANTS THIS COURT'S REVIEW

A. This Case Is Unique And There Is No Split Of Authority On Whether An Employer Needs To Prove A Title VII Violation Against Itself Before Declining To Certify Test Results

The primary Title VII question raised by petitioners—whether an employer can decline to certify test results if it has a good faith belief that certifying the test results would violate Title VII—is a novel one that does not implicate a circuit split. It does not warrant this Court's review.

1. The novelty of the Title VII question is due in part to the fact that the case involves a Title VII framework within a framework—specifically, a disparate impact question embedded within petitioners' disparate treatment claim.

In analyzing petitioners' disparate treatment claim, the district court applied the *McDonnell Douglas* burden-shifting test. Pet. App. 22a. Within that disparate

treatment framework, respondents proffered as the legitimate, non-discriminatory reason for their actions their good faith belief that certifying the test results would itself constitute a Title VII violation—namely, a disparate impact violation against minority firefighters. *Id.* at 25a. The district court assessed the legitimacy of the City's proffered reason using the disparate impact framework. *Id.* at 26a-34a.

Yet this embedded question—the application of the disparate impact framework within a reverse discrimination disparate treatment case—presented the opposite fact pattern of the typical disparate impact action. The novelty of this fact pattern was noted by petitioners and the district court, as well as by the Second Circuit judges who dissented from the denial of rehearing. *See* Pls. Opp. to Mot. for S.J. 34 (noting that "the court is presented with an odd sequence of events" and "[t]he facts of this case find no parallel in the case law"); Pet. App. 25a-26a; *Ricci en banc*, 530 F.3d at 95 (Cabranes, J.) ("The District Court recognized the exceptional circumstances presented by the case, noting that it 'presents the opposite scenario of the usual challenge to an employment or promotional examination[.]'"); *id.* at 100 (the case "required a 'reversal' of the usual roles").[8]

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[8] Petitioners attempt to argue that the Second Circuit's decision in *Bushey* v. *New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984), is similar to this case. In *Bushey*, however, the public employer adjusted the test scores based on race such that the percent of minorities who passed increased by fifty percent; this case involves no such race-based adjustments. And, even if *Bushey* is read as implicating similar issues, the twenty-four year gap between *Bushey* and this case makes clear that the issue in this case arises extremely rarely. Thus, the case cannot be said to present an issue of recurring importance that would war-

2. As the novelty of the case implies, there is no circuit split; petitioners attempt to manufacture a conflict, but the four cases they cite are inapposite.

Three of the four cases (two from the Seventh Circuit and one from the Eastern District of Missouri), were not even reverse discrimination cases: the cases involved minority workers challenging promotional tests and procedures as having a disparate impact and, therefore, involved straightforward applications of the disparate impact framework.[9] They therefore did not address the question presented here: whether a good faith belief that test certification would create a disparate impact violation is a legitimate justification, under the disparate treatment analysis, not to certify test results.

And the fourth case—the Eleventh Circuit's 1987 decision in *Afro-American Patrolmen's League* v. *City of Atlanta*, 817 F.2d 719 (11th Cir. 1987)—did not con-

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rant this Court's review. Similar facts are also not presented in *Williams* v. *Consolidated City of Jacksonville*, 341 F.3d 1261 (11th Cir. 2003), and *Biondo* v. *City of Chicago*, 382 F.3d 680 (7th Cir. 2004), which are repeatedly cited by petitioners. *See Williams*, 341 F.3d at 1264 (involving no Title VII question and no suggestion that the promotional test might be discriminatory); *Biondo*, 382 F.3d at 682-683 (involving the creation of racially segregated lists, and proportional promotions from each list). *See also infra* Part II.

[9] *See Stewart* v. *City of St. Louis*, No. 4:04cv00885, 2007 WL 1557414 (E.D. Mo. May 25, 2007), *aff'd per curiam*, 532 F.3d 939 (8th Cir. 2008) (denying minority firefighters' Title VII disparate impact claim); *Allen* v. *City of Chicago*, 351 F.3d 306 (7th Cir. 2003) (holding that minority police officers did not prove their disparate impact claim against the city); *Gillespie* v. *Wisconsin*, 771 F.2d 1035 (7th Cir. 1985) (denying Title VII disparate impact claim of minority employees).

strue Title VII at all. Rather, it interpreted a specific provision of a consent decree concerning test certification, addressing whether the City of Atlanta should be held in contempt for violating the consent decree's terms:

> Here, the City ... abandoned a procedure it had agreed to in the consent decree. The sole issue then is whether ... the City failed to fulfill its duties under the June 1980 consent decree. We hold that it did.

817 F.2d at 724 (footnote omitted).

3. In any event, the district court's resolution of this question was correct. Petitioners argue that, faced with test results that were prima facie discriminatory and testimony indicating that alternatives were available, the City was not permitted to take voluntary actions to comply with Title VII; rather, under petitioners' view, the City was obligated to *prove* that certifying the test results would constitute a Title VII violation—in effect, prove a discrimination case against itself—before declining to certify the results.

This Court, however, has repeatedly made clear that Title VII encourages voluntary remedial measures. *See, e.g., Johnson* v. *Transportation Agency, Santa Clara County, Ca.*, 480 U.S. 616, 640 (1987); *see also United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 204 (1979) (noting that "a law triggered by a Nation's concern over centuries of racial injustice" was "intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices'" (*citing Albemarle*, 422 U.S. at 418)).

In particular, in another context, the Court has stated that an employer need not prove a Title VII violation against itself before taking remedial actions and, indeed, has stated that remedial actions can be undertaken even when there is not a prima facie case of discrimination. *See, e.g., Johnson*, 480 U.S. at 630, 632;[10] *cf. Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."). This approach is "grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts." *Johnson*, 480 U.S. at 630.

The consequence of petitioners' view is that conduct is discriminatory unless avoiding such conduct is itself discriminatory. This view allows for no flexibility and creates an "us versus them" legal regime. Yet Ti-

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[10] In both *Johnson* and *Weber*, the Court approved of voluntary affirmative action plans designed to "eliminate a manifest racial [or gender] imbalance" in a particular job category. *Weber*, 443 U.S. at 208; *see also Johnson*, 480 U.S. at 631-632. In *Johnson*, the Court stated that "[a] manifest imbalance need not be such that it would support a prima facie case against the employer" before the employer can institute a voluntary plan. 480 U.S. at 632. And citing what it characterized to be the holding of *Weber*, the *Johnson* Court stated that "an employer seeking to justify the adoption of a plan need not point ... even to evidence of an 'arguable violation' on its part." *Id.* at 630 (citing *Weber*, 443 U.S. at 212 (Blackmun, J. concurring)).

tle VII does not create this stark (and troubling) divide. Rather, as this Court's precedent indicates, there is a middle ground—in which an employer can take voluntary remedial measures that do not violate the rights of either whites or minorities. This case involves precisely this middle ground.[11]

B. The Question Of The Proper Analytical Framework In This Novel Context Was Not Litigated Below And Is Not Presented Here

If this Court were inclined to wade into this "indisputably complex" issue, the Court should await a vehicle in which the parties have litigated, and are seeking review of, the question of which analytical framework should apply. That is not the case here.

The district court applied a *McDonnell Douglas* burden-shifting analysis. Some members of the Second Circuit, as well as the amicus in this Court, suggested that the case should have been analyzed under the "mixed motives" framework of *Price Waterhouse*, rather than under the *McDonnell Douglas* burden-shifting framework. *See Ricci en banc*, 530 F.3d at 99-100 (Cabranes, J.); *see also id.* at 89 (Calabresi, J.); *id.* at 91 (Parker, J.); Center for Individual Rights Amicus Br. 8.

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[11] The practical consequences of petitioners' view also demonstrate why it is untenable. As petitioners would have it, even if a municipality has a good faith belief that less discriminatory tests exist, and that certification would violate Title VII, the municipality must nonetheless certify the test results. Yet it is unclear how the municipality would then defend against a Title VII action by minority employees and, in particular, how it would respond to interrogatories or requests for admission on these topics (*e.g.*, whether the municipality believes that alternatives exist and whether it believes that its act of certification violated Title VII).

The mixed motives framework, however, was expressly rejected by petitioners, was not passed on by the district court or the court of appeals below, and is not raised by petitioners in this Court. After both parties presented *McDonnell Douglas* arguments to the district court, the district court analyzed the petitioners' claims under *McDonnell Douglas*. *See, e.g.*, Pet. App. 22a; Pls. Opp. to Mot. for S.J. 33-34. Indeed, the *Price Waterhouse* framework was first raised by an amicus brief in the Second Circuit filed by the Center for Individual Rights ("CIR") (also amicus in this Court). *See* CIR 2d Cir. Amicus Br. 1, 7. And petitioners expressly disclaimed this framework. *See* Pls. 2d Cir. Reply Br. 20 n.17 ("Plaintiffs disagree insofar as CIR suggests defendants offered a non-discriminatory motive to mix with an alleged discriminatory motive[.]"). As noted by Judge Calabresi, the *Price Waterhouse* framework was therefore not available to the Second Circuit "for the most traditional of legal reasons. The parties did not present a mixed motive argument to the district court or to the panel." *Ricci en banc*, 530 F.3d at 89.[12]

If the Court were inclined to grant review in a case involving a fact pattern similar to the present one, it should do so in a case in which the question of the proper framework—*McDonnell Douglas*, *Price Water-*

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[12] Petitioners' argument that "mixed motives is an affirmative defense" such that respondents bore the burden of raising the issue (*see* Supp. Br. 6 n.5) is inapposite. *Price Waterhouse* itself suggests that a plaintiff need not label, but must plead, a mixed motives case from the outset even if it is alleged in the alternative. 490 U.S. at 247 n.12. And regardless of burdens, the obstacles to this Court's consideration remain—the issue has not been vetted by the lower courts and is not squarely presented here.

house, or some other approach—was litigated by the parties. *See Ricci en banc*, 530 F.3d at 89 (Calabresi, J.) ("It is the unavailability of mixed motive analysis that makes this case an especially undesirable one for elective review.").[13]

C. Petitioners Did Not Argue In the District Court That The City Violated The Title VII Provision Barring The Race Norming Of Test Scores And Lower Courts Are Not In Need Of "Guidance" On Its Application

In their second question presented in each petition, petitioners raise a separate Title VII question, stating that lower courts "clearly need guidance in the proper application of 42 U.S.C. § 2000e-2(l)." This provision, enacted in 1991, prohibits the race norming of test scores.[14] Yet petitioners did not raise this issue in the district court and, as a result, there is no relevant holding below. In any event, the issue does not warrant this Court's review.

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[13] The fact that all of the potentially relevant Title VII frameworks were not raised also affects whether the Court should grant review on the equal protection question. As a matter of constitutional avoidance, this Court should only reach the constitutional question after first resolving the Title VII question. *See Jean* v. *Nelson*, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." (citations omitted)). The Court should therefore await a case in which the Title VII issues were fully litigated below.

[14] Specifically, the provision makes it unlawful for an employer to "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(l).

Petitioners did not argue in the district court that the City had violated this provision. As the district court stated, "[w]hile plaintiffs are correct that Title VII now prohibits race-norming, *none is alleged to have happened here*[.]" Pet. App. 38a-39a n.9 (emphasis added). Petitioners cited this provision, but only to argue that it undermined certain Second Circuit authority on which respondents relied,[15] an argument that the district court rejected. *See id.* (stating that "the 1991 amendments do not affect the reasoning and holding of" the Second Circuit precedent). Thus, petitioners are flatly incorrect to make the remarkable assertion that "[t]he district court held § 2000e-2(l) was not violated." Second Pet. 36. The district court held no such thing.[16]

In any event, the courts of appeals are not in need of "guidance" on this question. The two circuit cases petitioners cite have similar holdings, and involved different facts from those at issue here. *See Dean* v. *City of Shreveport*, 438 F.3d 448, 462-463 (5th Cir. 2006) (holding that city violated "the plain language of section 2000e-2(l)" by "separating applicants' Civil Service Exam scores by race"); *Biondo* v. *City of Chicago*, 382 F.3d 680, 684 (7th Cir. 2004) (holding that the city's practice of creating racially segregated promotional lists was an equal protection violation, noting that "the

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[15] *See* Pls. Opp. to Mot. for S.J. 55, 59-60.

[16] Notwithstanding the district court's clear statement that no race norming "is alleged to have happened here," petitioners argue that the district court reached a holding on this question. To do so, petitioners excerpt from a parenthetical to a citation in the district court opinion. *See* Second Pet. 36 (excerpting the parenthetical the district court provided for its citation of *Hayden* v. *County of Nassau*, 180 F.3d 42 (2d Cir. 1999)).

dualist response to disparate impact" is also forbidden by Section 2000e-2(l), and stating in dicta that the creation of race-neutral score banding might be permissible).[17]

II. THE DISTRICT COURT'S RESOLUTION OF PETITIONERS' EQUAL PROTECTION CLAIM DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners' Second Petition[18] raises the question whether respondents violated the Equal Protection Clause by refusing to certify test results that were prima facie discriminatory under Title VII and where potentially less discriminatory alternatives existed. Sounding the alarms of "quotas," "racial balancing," and "race politics," petitioners insist that review is necessary because this case creates a circuit split. An analysis of the issues in this case and the cases in the purported split, however, makes clear that petitioners merely seek error correction. To the extent that the petitioners seek consideration of other questions, they ignore substantial obstacles to review.

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[17] This Court should also deny review of the third Question Presented in the First Petition, which asks whether Title VII permits "federal courts to relieve municipalities from compliance with" local civil service laws. Petitioners do not separately discuss this question, and do not allege that there is a circuit split on this issue or that it is one of recurring importance. The Second Petition does not raise this question.

[18] The questions presented in the First Petition for a writ of certiorari do not mention the Equal Protection Clause or the United States Constitution more generally.

A. The District Court's Equal Protection Holding Was Limited To Whether Strict Scrutiny Applies

Reading petitioners' arguments, one would think that this case presents the question whether, under strict scrutiny, respondents could justify their refusal to certify the test results based on a compelling interest in complying with Title VII. Yet the district court's decision rested on its determination that the refusal to certify the test results was not a racial classification. Pet. App. 45a-46a. Accordingly, it did not consider whether the classification survives strict scrutiny, i.e., whether it was justified by a "compelling governmental interest" and "narrowly tailored to the achievement of that goal." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (internal quotation marks and citations omitted).

On the predicate question, petitioners assert that the district court's refusal to apply strict scrutiny "is at odds with this Court's and other circuits' holdings." Second Pet. 16. Thus, in petitioners' own view, all they seek is error correction on the question whether strict scrutiny ought to apply. And it is far from clear that the district court erred in finding that the refusal to certify the test results for all applicants was not a racial classification.[19] Tellingly, the cases from this Court that petitioners cite do not address the question

[19] Petitioners wrongly assert that because the district court "assumed petitioners suffered a race-based adverse employment action," it should not have concluded that the City did not create a racial classification (Second Pet. 18). In the district court's Title VII analysis, the court merely assumed without deciding that petitioners established a prima facie case of discrimination. *See* Pet. App. 25a. This, in turn, raises the question whether the Court would need to reach the Title VII questions that petitioners raise.

whether this case involves a racial classification, standing instead for the undisputed proposition that strict scrutiny ought to apply to racial classifications. *See* Second Pet. 16, 18-19.

The principal circuit court case that petitioners cite on this point (Second Pet. 17), *Williams* v. *Consolidated City of Jacksonville*, 341 F.3d 1261, 1269 (11th Cir. 2003), also does not demonstrate that the district court erred in this case. In *Williams*, the fire department used results from a test taken by applicants for captain positions to create an eligibility list from which promotions were to be made in rank order. 341 F.3d at 1264. Significantly, there had been no challenge to the test or any indication that it was flawed. *Id.* The fire department's director and chief considered creating four new captain positions and then decided not to do so because the four candidates at the top of the eligibility list were white men. *Id.* at 1265.

On these facts, the *Williams* court framed the question as whether "a decision not to *create* new positions that is based solely upon the race and gender of the next eligible candidates for promotion" constitutes a racial classification. 341 F.3d at 1269 (emphasis in original). And *Williams* determined that it was such a classification. *Id.*

By contrast, the issue in the present case is respondents' decision, with the same effects across the board, not to certify a test based on a good faith belief (premised on a prima facie violation) that certification would violate Title VII. Likening this case to *Williams* assumes away the critical features of this case. And petitioners cite no case establishing that comparable

efforts to comply with federal law constitute racial classifications.[20]

B. This Court's Review Is Not Warranted On The Question Whether The Refusal To Certify The Test Results Is Based On A Compelling Interest And Is Narrowly Tailored

Rather than focusing on their request for error correction, petitioners ask the Court to ignore the rationale of the decision below—that strict scrutiny did not apply—and jump directly to the question whether the refusal to certify the test results satisfies strict scrutiny. But even were the Court to approach the case this way, review is unwarranted, as petitioners' asserted circuit split does not exist.[21]

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[20] The other cases cited by petitioners do not involve classifications that are racially neutral on their face. For example, the case other than *Williams* that petitioners address at length, *Biondo* v. *City of Chicago*, 382 F.3d 680 (7th Cir. 2004), involved the creation of racially segregated employment lists and racially proportional hiring. *See infra* Part II.B.

[21] Petitioners are also incorrect to suggest that this Court's 1985 denial of the petition for certiorari in *Bushey* (469 U.S. 1117) warrants review of the equal protection issue in this case. *See* Second Pet. 26-27. First, the Second Circuit's decision in *Bushey* did not even address the Equal Protection Clause; it focused exclusively on Title VII. *See* 733 F.2d at 222. Second, even assuming that the cases raise similar questions, the apparent gap of more than two decades suggests the questions do not, in fact, have a wide-ranging impact. Third, this case involves very different remedial actions than in *Bushey* (where the public employer adjusted employment examination scores, thereby increasing the percentage of minorities who passed by fifty percent); indeed, the actions taken in *Bushey* are now prohibited by Title VII, *see* 42 U.S.C. § 2000e-2(l). Finally, the Court has already resolved one of the principal questions that then-Justice Rehnquist wanted to

In fact, the context and analysis of the case that petitioners rely on most heavily—*Biondo* v. *City of Chicago*, 382 F.3d 680 (7th Cir. 2004)—highlight the contrasts with this case. To start with, *Biondo* does not conflict with the decision below on the question whether compliance with statutes or regulations can justify certain employment actions for the simple reason that this question has not been addressed in this case. But even assuming the courts below had concluded that the non-certification of the test results was justified by a compelling government interest, that decision would implicate no conflict with *Biondo*.

In *Biondo*, the fire department created two racially segregated eligibility lists, one for whites and one for minorities, and made promotions on a proportional basis—the percentages of whites and minorities promoted matching the percentages of each group that had taken the test. 382 F.3d at 683. In assessing the equal protection implications of this conduct, the Seventh Circuit assumed that the federal regulations on which the department based its actions "tell employers not to hire or promote in strict sequence when that would cause minority groups to succeed less than 80% as often as whites." *Id.* at 684. Applying strict scrutiny, the court found that such a regulation could not provide a compelling interest to justify the proportional hiring from the racially segregated lists. *Id.*

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reach in *Bushey*. *Compare Bushey*, 469 U.S. 1119 (Rehnquist, J., dissent from denial of the petition for certiorari) (raising question whether the Second Circuit had properly extended this Court's holding in *Weber*, which dealt with voluntary affirmative action by *private* employers, "to allow voluntary affirmative action by *state* employers" (emphasis added)), *with Johnson*, 480 U.S. at 627 n.6, 641-642 (applying the reasoning of *Weber* to a state actor).

This case, however, involved a refusal to certify a test across the board, not proportional hiring off of racially segregated lists. And the noncertification was justified based on a concern that the test violated Title VII itself, not an effort to comply with a regulation that the court read to fix race-based limits on hiring decisions.

Williams likewise offers no evidence of a circuit split. As detailed above, the test underlying the eligibility lists in *Williams* was not challenged and there was no suggestion that the fire department chief and director was attempting to comply with Title VII, or any law or regulation, in declining to create the positions.[22]

Some of petitioners' arguments seem to suggest that, at bottom, they are seeking to raise the question

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[22] The other cases supposedly forming the split in authority are irrelevant to the issues at hand. None of these cases concerned the constitutional permissibility of refusing to certify a prima facie discriminatory test—indeed, though all the cases involved hiring decisions, none involved any potential challenges to the underlying test. And several of the cases focused heavily on the hiring process in the context of a consent decree related to prior discrimination, an issue not present in this case. *See Dean*, 438 F.3d 448 (race-based hiring lists, based in part on unchallenged tests, created in response to a consent decree relating to past discrimination); *Quinn* v. *City of Boston*, 325 F.3d 18 (1st Cir. 2003) (hiring preferences given to minority candidates with lower test scores on an unchallenged test, against a backdrop of a consent decree); *Maryland Troopers Ass'n* v. *Evans*, 993 F.2d 1072 (4th Cir. 1993) (challenge to a consent decree under which the state police agreed to hire set percentages of minority applicants at each state trooper rank); *see also Dallas Fire Fighters Ass'n* v. *City of Dallas*, 150 F.3d 438 (5th Cir. 1998) (hiring preferences given to minority candidates with lower test scores on a valid test).

whether compliance with Title VII's disparate impact requirements itself violates the Equal Protection Clause. *See* Second Pet. 24 (equating Title VII compliance with "proportionality" and "racial balancing," which it views as "patently unconstitutional"). But petitioners do not even attempt to argue that this question was addressed by the court below, must less that the court resolved the issue or that there is a circuit conflict. And even were the Court to find that this question warranted review, this would be a poor vehicle for such review. The Court would reach this question only if it first resolved the Title VII question against petitioners;[23] then held that the case involves a racial classification such that strict scrutiny applies; and then continued to the application of strict scrutiny (even though the lower courts did not proceed to this step in the analysis).[24] Accordingly, the Court ought not grant review in this case in order to address this question.

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[23] *See, e.g., Jean*, 472 U.S. at 854; *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J. concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *see also supra* n.13.

[24] Additionally, the question of the conflict between Title VII and the Equal Protection Clause is not cleanly presented; as detailed above, the district court determined that respondents need not establish a Title VII violation before declining to certify the test results.

III. THE SECOND CIRCUIT'S DIVIDED DECISION ON REHEARING DOES NOT COUNSEL IN FAVOR OF THIS COURT'S REVIEW

Contrary to petitioners' arguments, the Second Circuit's divided decision on rehearing en banc does not counsel in favor of review. Indeed, the opinions make clear that lower courts have not yet weighed in on the issue. *Ricci en banc*, 530 F.3d at 93 (Cabranes, J.) (observing that case was one of "first impression" in the Second Circuit and "the nation"). By highlighting the "difficult[y]" and "indisputabl[e] complex[ity]" of the issues, *id.* at 94, 100, the decisions further confirm that any review in this Court should await development in the lower courts. And the repeated suggestions that a different analytical framework might apply reinforce the conclusion that review should await a case in which such other methods of analysis have not been rejected by the petitioners themselves. *See id.* at 89 (Calabresi, J.) ("It is the unavailability of mixed motive analysis that makes this case an especially undesirable one for elective review."); *see also id.* ("Difficult issues should be decided only when they must be decided, or when they are truly well presented. When they need not be decided ... it is wise to wait until they come up in a manner that helps, rather than hinders, clarity of thought.").[25]

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[25] In fact, much of the dispute in the Second Circuit was focused on whether rehearing was warranted because the Second Circuit panel had not authored a full opinion. *See id.*, 530 F.3d at 96 (Cabranes, J.) (criticizing the fact that the panel's "*per curiam* opinion adopted *in toto* the reasoning of the District Court, without further elaboration or substantive comment"). The lack of such an opinion, combined with the lack of precedent elsewhere, counsels against review before these issues are further developed in the lower courts. Moreover, it is unclear what precedential

CONCLUSION

This Court should deny the petitions for a writ of certiorari.

Respectfully submitted.

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value the Second Circuit itself will accord to the per curiam opinion.