11-5113(L)

12-0491(CON)

United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-and-

THE VULCAN SOCIETY, INC., MARCUS HAYWOOD, CANDIDO NUNEZ, and ROGER GREGG,

Plaintiffs-Intervenors-Appellees-Cross-Appellants,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant-Cross-Appellee,

NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY DEPARTMENT OF CITYWIDE SERVICES,

Defendants,

MICHAEL BLOOMBERG, Mayor, New York Fire Commissioner NICHOLAS SCOPPETTA, in their individual capacities,

Defendants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT-CROSS-APPELLEES' RESPONSE AND REPLY BRIEF FOR THE CITY OF NEW YORK AND DEFENDANTS BLOOMBERG AND SCOPPETTA

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OVERVIEW

In reviewing the grant of equitable relief, a reviewing court's role is to determine whether the lower court's reasoning demonstrates a sound exercise of discretion. As demonstrated in the City's main brief, the District Court's sweeping injunction was predicated upon its faulty summary judgment determination that the City engaged in a pattern and practice of intentional discrimination. That legal error "influenced" the District Court's subsequent fact-finding, and thus infected its assessment of the need for long-term, closely monitored federal intervention. Yet both Intervenors and the Government principally defend the District Court's injunction by hypothesizing reasons why the Court could have issued it, rather than by defending the rationale actually set forth by the Court. The District Court abused its discretion by imposing an all-encompassing overhaul of FDNY practices based on a legally flawed conclusion that the City, in its testing practices for firefighters, engaged in a standard operating procedure of deliberate racial exclusion.

Critical arguments raised in the City's main brief remain unaddressed or unrebutted by appellees and mandate reversal. They include the following:

- In assessing the need for the relief at issue, the District Court expressly relied on its erroneous finding of a 40-year discriminatory pattern and practice of intentional discrimination.

- To persuade the Court that a highly intrusive injunction was appropriate, the Vulcans returned repeatedly to the same faulty finding that deliberate discrimination had long been the City's standard operating procedure.
- Because *McDonnell Douglas* and its progeny define the defendant's burden of production in a pattern-and-practice claim, the facial neutrality of the Exams is enough to require a trial on whether the City used them with the purpose of excluding black applicants from employment.
- As to the remedial hearing, this Court must consider the entire record, including wrongfully excluded evidence, to determine whether the District Court's conclusions are plausible. Isolated portions of evidence put forth by Intervenors are insufficient to defeat the City's showing of clear error.
- The evidence adduced at the remedial hearing and the disparate impact determination, even if coupled with the intentional discrimination finding, do not justify the sweeping injunctive relief mandated by the District Court.

POINT I

UNDER THE CIRCUMSTANCES OF THIS CASE, LEGAL ERRORS IN THE SUMMARY JUDGMENT RULING ON INTENTIONAL DISCRIMINATION MANDATE VACATUR OF THE INJUNCTIVE RELIEF AT ISSUE.

In light of the District Court's unwavering focus on the City's supposed pattern and practice of intentional discrimination, and due to the litigation strategies

of Intervenors and the Government, the Injunction cannot now be defended on alternative grounds. Thus, this Court need not consider whether Title VII authorizes broad affirmative relief in any disparate impact case, or only for the kind of persistent and egregious discrimination that is absent here.[1] Intervenors persuaded the Court that intervention was needed to counter a deliberately discriminatory regime, and that is precisely why the Court granted the relief at issue.

(A)

Despite the District Court's Passing Reference to the Disparate Impact of the Exams, the Injunction Was Grounded in the Court's Erroneous and Premature Finding of Intentional Discrimination.

The District Court expressly concluded that its assessment of the evidence in support of injunctive relief was "influenced by … the court's conclusion that the City's repeated and knowing use of discriminatory testing procedures established the City's liability for a pattern and practice of intentional discrimination against black firefighter candidates." SPA3, n.1. The court never independently considered whether the disparate impact of the Exams alone

[1] The Vulcans mistakenly question whether the relief at issue is properly categorized as "affirmative" relief (Vulcan Br., at 89, n.28). Not only is their argument contradicted by the very passage they cite, but the District Court considered the relief to be "designed principally to remedy the effects of discrimination that may not be cured by the granting of compliance or compensatory relief" (SPA90).

required the "top-to-bottom" restructuring of the FDNY's hiring and EEO structure it imposed.

In its 30-page decision justifying the Injunction, the Court mentioned the finding of disparate impact in only one paragraph (SPA102-03).[2] Although it concluded that its findings as to the need for injunctive and monitoring relief were "as applicable to the City's violations of the disparate impact provisions of Title VII as they are to the need to prevent further acts of intentional discrimination by the City" (SPA103), the Court arrived at that conclusion through its appraisal of the remedial hearing evidence – an appraisal unmistakably "influenced by" its mistaken belief that the City purposefully refused to diversify the FDNY's ranks (SPA3, n.1). Thus, the Court's conviction that the City long engaged in a deliberate pattern of

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[2] The passage in question reads as follows (SPA102-03, emphases added):

> *The record developed in this case*, viewed against the backdrop of a nearly identical liability ruling almost forty years ago and the failed remedial order that followed it, makes abundantly clear that the City will not comply with its obligations under the applicable equal employment opportunity laws and this court's orders without close and continuing court supervision. The court notes that this conclusion is as applicable to the remedy for the City's violation of the disparate impact provisions of Title VII as it is to the remedy for the City's intentional discrimination against black firefighter candidates.… *[M]uch of the evidence presented in [the remedial-phase bench trial*] demonstrated that the City is incapable of assuring the court that it will henceforth comply with applicable equal employment opportunity law, much less the court's orders. The court's findings as to the need for injunctive and monitoring relief to prevent the City from committing further violations of the equal employment opportunity laws are as applicable to the City's violations of the disparate impact provisions of Title VII as they are to the need to prevent further acts of intentional discrimination by the City.

discrimination prevented it from considering what relief it would have ordered had it found only disparate impact.

The Exams the District Court found lacking were designed by DCAS, not the FDNY. The same is true of the tests at issue in *Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Service Com.*, 490 F.2d 387 (2d Cir. 1973), and *Guardians Asso. of New York City Police Dept., Inc. v. Civil Service Com.*, 630 F.2d 79 (2d Cir. 1980). Following its disparate impact ruling, the District Court appointed a Special Master to ensure proper test-design. Yet the Injunction is aimed almost exclusively at the FDNY which plays virtually no role in test-design. As challenged on this appeal, the Injunction deals with issues having nothing to do with test-design. Absent the District Court's legally unsupported belief that FDNY officials were part of a pattern and practice of race-based exclusion, there was no justification for appointing a Monitor to oversee a "top-to-bottom" restructuring of FDNY recruitment, attrition reduction, character review, or EEO investigations.

A District Court's express reliance on a legally erroneous ruling cannot be ignored. *See Krizek v. CIGNA Group Ins.*, 345 F.3d 91, 100, 102 (2d Cir. 2003) (finding clear error and remanding for a new hearing where the District Court was admittedly unable to overlook evidence that was not properly before it); *Connors v. Conn. Gen. Life Ins. Co.*, 272 F.3d 127, 135-36 (2d Cir. 2001) (vacating and remanding for further proceedings where a clearly erroneous factual finding "infected

the District Court's credibility determination" and where, but for the error, the Court "may have accorded less weight" to the defendant's evidence). Accordingly, if this Court vacates the faulty determination of pattern-and-practice liability (*see* City Br., at 68-84; Point II, *infra*), the Injunction too must be vacated.

The Court's justification for its Injunction can also be found in its reference to the previous *Vulcan Society* ruling (the "nearly identical liability ruling almost forty years ago and the failed remedial order that followed it"). Yet there has never been any contention, much less an adjudication, that the City failed to comply fully with the terms of the injunction entered in that case (*see* A943; A1002). Furthermore, neither the Government nor any private plaintiff challenged the FDNY's exams in the intervening period. *Cf. United States v. W. T. Grant Co.*, 345 U.S. 629, 634 (1953) (where "[t]he Government's remedy under the statute was plain[, p]ostponement of suit indicates doubt on the prosecutor's part as much as intransigence on the defendant's").

(B)

The Intervenors' Trial Strategy Also Anchors the District Court's Exercise of Discretion in Its Mistaken Finding of Deliberate Discrimination.

Furthermore, the Intervenors' tactics at the bench trial preclude this Court from speculating whether the District Court might have imposed the same relief absent the finding of a pattern of disparate treatment. Indeed, it is ironic for

Intervenors now to argue that the Injunction is an appropriate remedy for disparate impact alone, since they returned repeatedly to the pattern-and-practice finding to convince the District Court of the need for a Monitor with the broad powers at issue on this appeal.

From the very outset of his summation, the Vulcans' counsel stressed the intentional discrimination finding (A4399, emphasis added):

> Judge, the first issue that we are dealing with today is whether, and to what extent, this Court should impose affirmative requirements on the City of New York and the Fire Department to undertake specific actions to address the glaring imbalance in the racial composition of the Fire Department of New York, *an imbalance that results from decades of intentional discrimination against African Americans applicants* who would otherwise have enjoyed employment in one of the most [s]ought after jobs in the City of New York.

The advocacy did not end there. The Vulcans continued to press the argument that the remedies were needed to counteract the supposed pattern and practice of disparate treatment. They argued that it was "essential" for the Court to consider its intentional discrimination finding (A4400-01); questioned whether the FDNY "given its history, given its conduct" could be "trusted to move forward in the right direction on its own" (A4401); emphasized the supposed "attitude of deliberate indifference" in the City's past (A4403); and maintained that close federal intervention was needed because the very officials responsible for the ostensible

pattern and practice of discrimination were still in control of the City and FDNY (A4425).

This approach had the desired effect. The City's purportedly deliberate discriminatory conduct colored every aspect of the District Court's exercise of discretion (SPA3, n.1), and cannot now be disregarded. Had Intervenors relied exclusively upon the disparate impact of the Exams to seek this far-reaching relief, and had the District Court relied independently upon it, this Court would need to consider the parties' disagreement concerning the allowable breadth of injunctive relief in a disparate-impact case. But since the Vulcans successfully used the erroneous finding of disparate treatment to obtain the relief at issue, they cannot justify it on other grounds.

(C)

The Government Waived the Argument That the Relief at Issue on Appeal Can Be Justified Without Regard to Intentional Discrimination.

The Government's brief before this Court also represents a striking, and unacknowledged, change in position. Although it had every opportunity to seek the same relief as the Vulcans on the strength of disparate impact liability, or upon the related allegation that the City engaged in "persistent or egregious" discrimination, the Government expressly declined to do so. It thus waived any right to defend the Injunction on those grounds for the first time on appeal (DOJ Br., at 27-40).

Because the intentional relinquishment of a known right constitutes a waiver, *United States v. Olano*, 507 U.S. 725, 733 (1993), a party may not on appeal contradict a position it took in the lower court. *Cornell v. Kirkpatrick*, 665 F.3d 369, 376 (2d Cir. 2011); *Millea v. Metro-North R.R.*, 658 F.3d 154, 163 (2d Cir. 2011); *United States v. Stewart*, 485 F.3d 666, 673 (2d Cir. 2007). Indeed, "[t]he law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below[,] waiver will bar raising the issue on appeal." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) (citation and internal punctuation omitted). That is especially so where, as here, "those arguments were available to the parties below and they proffer no reason for their failure to raise the arguments below." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008), *quoting Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (internal punctuation omitted).

The Government never argued in the District Court that the City engaged in "persistent or egregious" discrimination, as it now maintains (DOJ Br., at 36-39). To the contrary, it affirmatively relinquished the right to seek the remedies at issue on any grounds, and even declined to participate in the hearing despite the District Court's repeated invitation to do so (A2356; A2623; A2809; A4366-67).

Before and after the hearing, the Government reiterated that the bulk of the equitable remedies sought by Intervenors were "predicated on claims that the

United States did not assert or litigate" – i.e., intentional discrimination – and therefore declined to take a position on whether they were needed or appropriate (A2356; A2623; A4430-31). In fact, the District Court's decision specifically notes that the Government "[r]egrettably … declined to actively participate in the remedial-phase bench trial" because it "did not believe the evidence presented in that proceeding to be relevant to the injunctive relief the court would impose for the City's violations of Title VII's disparate impact provisions" (SPA103).

Aside from exam-related relief previously ordered, which is not challenged on appeal, the Government raised only two areas of "overlap" between the remedies it requested and those sought by Intervenors: an order requiring the City to maintain certain hiring records, and an injunction against retaliation (A2354-64; A2623-24; A4427-29).[3] Those two specific remedies are also not challenged on this appeal. As to the balance of the injunctive order, the Government waived any ability to defend relief it never sought in the District Court

Nor should this waiver be disregarded. In its appellate brief, the Government "proffer[s] no reason" for its affirmative disclaimer below, nor does it

[3] The Government also asked the District Court to extend the same relief to Hispanic applicants and employees that it might deem appropriate for African Americans (A4431-32). However, the Government did not maintain that such relief was independently warranted by the disparate impact of the Exams, but only requested as a matter of "fairness and equity" that any such relief, *if ordered*, be extended to all members of the plaintiff class (*id.*).

"suggest that there will be any great injustice" if this Court refuses to address its revised argument. *Allianz*, 416 F.3d at 114. Indeed, it elides almost entirely over its position in the lower court, noting only its recognition that precedent supported the Vulcans' application (DOJ Br, at 21). But as can be seen below, that portion of its statement to the District Court clearly pertained solely to precedent based on intentional discrimination, and does not diminish the effect of its waiver (A4430-31, emphasis added):

> … [T]he United States did not plead any intentional discrimination claims or any claims under New York State or local law. Nor did the United States conduct any discovery or conduct any litigation regarding these claims. The United States does acknowledge that case law supports this court's ability to enter the relief that has been requested by the plaintiff intervenors, but otherwise, *the United States takes no position on the merits of these requests because the relief they request is predicated on claims that the United States did not assert or litigate*.

Had the Government been referring to existing case law governing disparate impact liability, as it now implies, it would not have felt constrained to "take[] no position on the merits of these requests" on the grounds that they were "predicated on claims the United States did not assert or litigate" (*id*.). The Government's arguments on this issue have been waived.[4]

[4] Although the Government takes no direct position on the propriety of the intentional discrimination ruling, it nonetheless relies upon it in arguing that the City's conduct constituted "persistent or egregious" discrimination (*see* DOJ Br., at 37, *citing* A1421).

In sum, this Court should not examine whether the District Court *could have* imposed the Injunction on the strength of the disparate effects of the Exams, or on any grounds other than the Court's unfounded belief in a pattern and practice of deliberate race-based exclusion.[5] The fact remains that its exercise of discretion was affected in every respect by that erroneous finding. So long as this Court agrees that summary judgment on disparate treatment was improvidently entered (Point II, *infra*), that error fatally undermines the express basis for the Injunction.

[5] Somewhat analogously, Intervenors maintain that the Injunction does not run afoul of federalism because a state court purportedly "could have entered the same relief" under the State and City Human Rights Laws (Vulcan Br., at 96-97). The District Court imposed the Injunction under the auspices of Title VII, and did not contemplate whether broader relief was available pursuant to State or City law (SPA88-90). Furthermore, the single state-court citation Intervenors rely upon for this proposition does not address, much less sanction, the kind of broad-ranging relief awarded here. *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62 (1st Dept. 2009). Indeed, although the First Department recognized that the City HRL was intended to provide broader protection than federal statutes, it went on to affirm the grant of summary judgment to the employer, and therefore did not reach the issue of remedy. *Id.* at 81. In any case, since principles of federalism govern the balance of power between the federal and state sovereignties, such concerns could not be implicated by a state-court order against a locality.

POINT II

INTERVENORS FAIL TO REFUTE THE CITY'S SHOWING THAT THE DISTRICT COURT'S SUMMARY JUDGMENT RULING ON THE PATTERN-OR-PRACTICE CLAIM OF INTENTIONAL DISCRIMINATION MUST BE SET ASIDE.

The Government makes no effort to defend the District Court's grant of summary judgment on the issue of intentional discrimination, and nothing in Intervenors' brief provides a valid basis to support the District Court's "finding" of a pattern or practice of deliberate discrimination as a matter of law. The governing precedent and record materials undermine each aspect of their argument.

(A)

The Legal Burden of a Defendant Charged with a Pattern or Practice of Disparate Treatment.

In defense of the intentional discrimination ruling, the Vulcans primarily assert that *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), heightens a defendant's burden in defending against a pattern-or-practice claim, arguing that the standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973), is inapplicable (Vulcan Br., at 108-13, 128). That is not the law. *McDonnell Douglas* and its progeny, including *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), demonstrate that the City met its burden of production when it provided a non-discriminatory reason for its hiring decisions – i.e., reliance on the

results of the facially neutral exams – and also furnished evidence of its affirmative initiatives to increase minority representation among firefighters, further disputing the inference of intent (*see* City Br., at 70-74, 79-84).

Contrary to Intervenors' argument, the Supreme Court's decision in *Teamsters* did not abrogate *McDonnell Douglas* in a pattern-or-practice case. Rather, as later precedent makes clear, *Teamsters* provided two additional ways for a defendant to meet its burden. In doing so, the *Teamsters* Court left untouched *McDonnell Douglas*'s holding that a defendant meets its burden of production by articulating a nondiscriminatory reason for every adverse employment action.

Indeed, this Court has frequently recognized in pattern-or-practice claims that *Teamsters* incorporates the *McDonnell Douglas* standard. For example, the City's main brief cited *Ottaviani v. State University of New York*, 875 F.2d 365 (2d Cir. 1989) (City Br., at 70), in which plaintiffs alleged "a pattern of ongoing discrimination against women." *Id*. at 366. This Court cited both *Teamsters* and *McDonnell Douglas* in ruling that once a prima facie case is established, "the burden of production shifts to the defendants to articulate some legitimate, nondiscriminatory reason for the challenged employment practice." *Id*. at 369. Intervenors do not address *Ottaviani* in arguing to the contrary.

Intervenors next misconstrue *Ste. Marie v. Eastern R. Assoc*., 650 F.2d 395 (2d Cir. 1981). They maintain that it involved an individual claim

(Vulcan Br., at 110), but, to the contrary, this Court squarely held that the lower court erred in concluding that defendants had followed "a policy and practice of sex discrimination" because it failed to apply the burden-shifting framework set forth in *McDonnell Douglas*. *Id*. at 397, 399. This Court was unambiguous in setting out the appropriate standard, as follows:

> It has been clear ever since *McDonnell Douglas* that the burden that is shifted to the defendant by plaintiff's making out a prima facie case of disparate treatment, a task described in *Burdine* as "not onerous," is not a burden of persuading the trier of a business necessity to employ or promote a person belonging to the majority. The shifted burden is simply to articulate some legitimate, nondiscriminatory reason for the (minority) employee's rejection.… The employer … sufficiently rebuts a prima facie case by pointing to a business reason for his employment decision. By doing this he adequately negates, for the time being, the force of a plaintiff's initial showing.… The district court's conclusion that defendants had followed a pattern and practice of disparate treatment must therefore fall as based on an erroneous allocation of the burden of proof.

(*id*. at 399, citations and internal punctuation omitted).

Similarly, in *Woodbury v. New York City Transit Authority*, 832 F.2d 764, 771 (2d Cir. 1987), this Court analyzed the proof under *McDonnell Douglas* to reverse a finding of a "pattern or practice" of "intentionally discriminatory lenience toward white officers." The Court specifically held that "[t]he second step of the discriminatory treatment analysis requires the defendant to rebut the presumption by articulating some legitimate, nondiscriminatory reason for the

purportedly discriminatory acts." *Id*. at 769 (*citing McDonnell Douglas*, 411 U.S. at 802).[6]

Nor does *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001) (Vulcan Br., at 104-05) reflect a different analysis. In *Robinson*, this Court explained that, at trial, the defendant in a pattern-or-practice claim has three distinct options to carry its burden of "demonstrating that the plaintiffs' proof is either inaccurate or insignificant." *Id*. at 159, *citing Teamsters*, 431 U.S. at 360 (internal punctuation omitted). Aside from attacking the source or accuracy of the movant's statistical evidence, the defendant may "present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination." *Id*., quoting 1 Arthur Larson et al., *Employment Discrimination* § 9.03[2], at 9-23 to 9-24 (2d ed. 2001) (internal quotation marks omitted). While the Court went on to note that the "prudent" defendant would attempt to "follow all three routes *if possible*," (*id*., emphasis added), it never suggested that the proffer of any one defense could fail as a matter of law without accompanying evidence of the other two types. This analysis is moreover consistent with the fact that *Teamsters* expressly declined to

[6] Other Circuits are in accord. *See Ardrey v. United Parcel Service*, 798 F.2d 679, 683-84 (4th Cir. 1986); *Kilgo v. Bowman Transp., Inc*., 789 F.2d 859, 874 (11th Cir. 1986); *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985).

place any "limits" on the types of evidence a defendant could use to rebut the prima facie case. 431 U.S. at 360, n.46.

In their treatment of *Robinson* (Vulcan Br., at 105), Intervenors try to transform what a "prudent" defendant can do to enhance its likelihood of success at trial into that which every defendant "must" do to survive summary judgment. *Robinson* does not withstand this interpretation. This Court in *Robinson* was setting forth a roadmap for the parties at trial, and expressly cautioned that "'[n]either statistical nor anecdotal evidence is automatically entitled to reverence to the exclusion of the other.'" *Id*. at 158-59, *quoting Ardrey*, 798 F.2d at 684. Although the *Robinson* Court made this observation in the context of the movant's prima facie case, *Ardrey's* holding to the same effect pertained to the respective burdens of both parties. *Id*.[7]

The City's reading of *Robinson* and *Teamsters* also makes intuitive sense. In a pattern-or-practice claim, the plaintiff must ultimately prove not only

[7] Intervenors fault the City for its reliance on *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 580 (1978), asserting that *Furnco* "was decided under *McDonnell Douglas*, not *Teamsters*, which requires that a defendant's rebuttal evidence must be 'designed to meet' the plaintiff's prima facie showing" (Vulcan Br., at 128). In *Conn. v. Teal*, 457 U.S. 440, 454 (1982), the Supreme Court cited both *Furnco* and *Teamsters* in its discussion of the kinds of proof that are relevant "on the issue of intent when that issue is yet to be decided." This Court's precedent, cited above, similarly undercuts both the premise that *Teamsters* somehow limits a defendant's options in a pattern-or-practice claim, as well as the supposition that anecdotal evidence of race-neutral or benign purpose is irrelevant as not "designed to meet" proof of intentional discrimination as a standard operating procedure.

that a discriminatory policy existed but also that it was undertaken with the purpose of excluding a protected group. *Teamsters*, 431 U.S. at 336; *Robinson*, 267 F.3d at 158. The first two options set forth in *Robinson* – attacking the source or accuracy of the movant's statistical evidence – amounts to disputing whether the policy had a discriminatory effect, which is only half the battle. As the cases cited by the City show, in the remaining critical dispute – discriminatory intent – *McDonnell Douglas* allows an employer to present any evidence that could lead a reasonable fact-finder to conclude that any disparate impact did not result from a discriminatory purpose.

(B)

The Facial Neutrality of the Exams Alone Mandates a Trial on Whether they were Designed or Used to Screen Out Black Applicants.

Since *McDonnell Douglas* and its progeny define the City's burden, the central holding of *Raytheon*, 540 U.S. 43, fully applies to the Vulcans' intentional discrimination claim. Therefore the use of facially neutral Exams satisfied the City's burden of production. *Id*. at 53 (s*ee* City Br., at 72-74).

It is inapposite for the Intervenors to note that "a defense of facial neutrality is necessarily insufficient to *defeat*" a claim of disparate treatment (Vulcan Br., at 111, emphasis added), as the City is only contending that a fact-finder must consider the issue (*see, e.g.*, City Br., at 73-74). For the same reason, there is no

merit to Intervenors' drastic contention that the application of *Raytheon* to a pattern-or-practice claim would render *Teamsters* and *Robinson* meaningless (Vulcan Br., at 113). *Raytheon* simply forecloses a grant of summary judgment to the movant where, as here, the statistical evidence supporting the prima facie case of intentional discrimination is directly and admittedly traceable to a facially neutral device.

The cases cited by Intervenors erode their own argument. Most notably, in *EEOC v. Dial Corp*., 469 F.3d 735 (8th Cir. 2006), a disparate treatment case based on an employment test, the Eighth Circuit did not, as the Vulcans claim, "uph[old] a finding of intentional discrimination as a matter of law" (Vulcan Br., at 111-12). Rather, the Court affirmed the *denial* of the employer's motion for judgment as a matter of law, finding the evidence sufficient to support *a jury's determination* that the employer used the test deliberately to exclude female applicants. *Id.* at 742. The mischaracterization is significant, since the true holding of *Dial Corp*. lends credence to the conclusion that the determination is properly left to a fact-finder.

Nor do Intervenors find support in the other cases they cite, as they all stand for the unremarkable proposition that a facially neutral law or policy will be struck down if it is proven to have been adopted or used for a discriminatory purpose (*see* Vulcan Br., at 111). Indeed, in *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005), *cert. denied,* 546 U.S. 1015 (2005), summary judgment to the

defendant was affirmed despite evidence that, in re-enacting a constitutional provision disenfranchising felons, the State knew it had been initially enacted with a racially discriminatory purpose, and despite the law's "disturbing" disparate impact on black voters. *Id.* at 1222, 1225. This Court recently acted analogously in affirming a judgment on the pleadings for the defendant despite nearly identical allegations to those in *Johnson*, observing that disproportionate impact, while not irrelevant to the inquiry of intentional discrimination, "must be traced to a purpose to discriminate on the basis of race." *Hayden v. Paterson*, 594 F.3d 150, 162-163 (2d Cir. 2010). And in *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) (Vulcan Br., at 111), this Court made clear that where a plaintiff claims that a "facially neutral policy … has an adverse effect and [] was motivated by discriminatory animus," they must "substantiate their claim" that the policy "was motivated by racial discrimination."

Intervenors' reference to isolated language in *Ardrey*, 798 F.2d at 683, is also unavailing (Vulcan Br., at 110). Indeed, *Ardrey* squarely holds that a pattern-or-practice claim may fail despite strong statistical evidence "if the defendant articulates a nondiscriminatory, nonpretextual reason for *every* discharge." *Id.* at 683-84 (emphasis in original), *quoting Coates*, 756 F.2d at 532 (internal quotation marks omitted). The City's faithful adherence to its eligibility lists is a perfect example of such a universal justification.

In the language misleadingly relied upon by Intervenors, the Court in *Ardrey* then went on to hold that the "defendant's successful rebuttal" of claimed discriminatory motive in hiring decisions regarding "the named class representatives and any other testifying employees" would not "defeat" the plaintiff's class claim. *Id*., *citing Coates*, 756 F.2d at 532-33. In contrast to *Ardrey*, where the plaintiffs alleged that the employer made a host of subjective employment decisions for a discriminatory or retaliatory purpose (*Ardrey*, 798 F.2d at 679-80 and n.1), *every* hiring decision here was concededly based on the same objective testing mechanism. It must therefore remain for a jury to decide whether the City had an invidious racial motive in creating or using those tests.

Intervenors seem to believe that the City cannot rely on the results of the Exams because they were improperly validated and therefore could not be shown to be "job related" and "consistent with business necessity" (Vulcan Br., at 124-26). This Court has squarely rejected that notion, in recognition of the fact that the defendant's burden in a disparate impact claim is far more demanding than its burden in a pattern-or-practice claim. *Ste. Marie*, 650 F.2d at 399, n.2.

The favorable inference flowing from the use of facially neutral Exams is especially strong because, as this Court has noted, Title VII expressly authorizes the use of employment tests in making hiring decisions. *Guardians*, 630 F.2d at 112; 42 USCS § 2000e-2. As this Court has also recognized, there

may be many nondiscriminatory explanations for a test-design that is ultimately determined to be inadequate in the course of litigation of a disparate impact case. *Guardians*, 630 F.2d at 111-12. Even the District Court acknowledged that it is far from simple to construct a valid civil-service exam, and that the use of such tests as rank-ordering mechanisms "satisfies a felt need for objectivity" in hiring decisions (*see* City Br., at 76, *citing* A435). To nevertheless find racial motivation as a matter of law constitutes reversible error.

The Vulcans also maintain that the Exams had a "manifest" lack of validity (Vulcan Br., at 110). That is a factual argument that must be reserved for trial, especially since the Exams were only determined not to be sufficiently valid to defeat a disparate impact claim years later, during the course of this litigation. Indeed, once the City reduced the passing grade to 70%, the 2002 exam's pass rate met the 80% Rule set forth in the Guidelines, which vitiated the need for a validity study under Title VII (*see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 [1975]) and thus gave the City a good-faith basis to believe that it had indeed taken "corrective action" (Vulcan Br., at 110).

To be sure, the Supreme Court in *Hunt v. Cromartie*, 526 U.S. at 553 recognized that a grant of summary judgment to a disparate treatment claimant is within the realm of "imagin[ation]" (Vulcan Br., at 134). Nevertheless, Intervenors fail to identify a single case where summary judgment was granted to a

plaintiff on a claim of intentional discrimination, much less one where an objective employment test was held to constitute a discriminatory pattern or practice as a matter of law. To the contrary, if a claimant makes a prima facie showing, the cases appear to uniformly reserve the issue of intent for a fact-finder's consideration. *See Dial Corp*., 469 F.3d at 742; *Easley v. Anheuser-Busch, Inc*., 758 F.2d 251, 261 (8th Cir. 1985); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 266 (2d Cir. 1981).

(C)

Evidence of the City's Various Efforts to Diversify the FDNY Also Warranted a Trial.

In its main brief, the City cited its numerous diversity efforts to demonstrate why a trial was needed on the disputed factual issue of intent (City Br., at 79-84). Intervenors' challenges to the materiality of these efforts are unavailing. They incorrectly maintain that only diversity programs which successfully balanced the racial makeup of the FDNY's ranks are material (Vulcan Br., at 130- 33). This Court has held that minority recruitment and affirmative action programs, if determined by a fact-finder to be conducted in good faith, "directly controvert a claim that discrimination is the standard operating procedure." *Woodbury*, 832 F.2d at 772; *quoting Coser v. Moore*, 739 F.2d 746, 751 (2d Cir. 1984) *and Teamsters*, 431 U.S. at 336 (internal quotation marks

omitted). Indeed, if such efforts are determined by the fact-finder to be "effective" or "impressive," that fact alone mandates judgment for the employer. *Woodbury*, 832 F.2d at 772; *Coser*, 739 F.2d at 751. It is thus evident that a fact-finder considering the challenged policy here must be permitted to consider the City's commission of the Columbia study, its minority recruitment efforts, its preferential promotional exams, its youth outreach, and its award of city-resident bonus points (*see* City Br., at 79-84).

At any rate, Intervenors' claim that the City's diversification efforts were uniformly unsuccessful misrepresents or ignores contrary record evidence. Parenthetically, to support this argument, Intervenors improperly defend summary judgment by relying largely on testimony elicited at the remedial bench trial – and even to the District Court's findings of fact from that hearing – an implicit concession that a trial was necessary before this issue could be resolved (*see* Vulcan Br., at 130). In the summary judgment record, moreover, Intervenors' counsel recognized that the preferential EMT promotional exam led to a marked increase in the diversity of incoming classes at the Fire Academy (A747-48). Similarly, the Government's expert acknowledged that the City-residency bonus "works to the advantage of African Americans and Hispanics and reduces the disparate impact of the rank-order process" in the Exams (A206; *see also* A837; A1102).

Intervenors also distort the record in arguing that the 2002 recruitment campaign was so inadequate as to be immaterial. They quote misleadingly from the EEOC report to assert that the Commission never reviewed the 2002 recruitment campaign but only the Exam itself (Vulcan Br., at 130, n.42). The EEOC expressly considered whether the City "show[ed] that its actions, *from recruitment through final selection*, were open to all and equally applied" (A713, emphasis added). After recounting the City's concerted efforts to recruit minorities in great detail, the EEOC stated that it "[could] not conclude that the relatively small number of Blacks who appeared for the test was the result of an unlawfully exclusionary recruitment program" (A713-14).[8]

Intervenors also claim that the EMT promotional exam is not material evidence of intent. They first maintain that the City's facilitation of EMT promotions to entry-level firefighter is irrelevant because EMTs are already FDNY employees (Vulcan Br., at 36). Of course, it is the racial distribution of entry-level firefighters that has always been at issue in this action, not the overall percentage of black FDNY employees (A117; A1395; A1410). Paramedics and EMTs who

[8] Here, especially, in attempting to raise a contrary inference, Intervenors are forced to go outside the summary judgment record, citing evidence adduced at the remedial hearing and even relying on the resulting findings of fact that are challenged on this appeal (Vulcan Br., at 130). As noted above, they thus underscore the need for a trial. Nor does the City concede that any of these references, even if not wholly inapposite for their proffered purpose, disprove the good faith of our recruitment and diversity programs.

pass the promotional exam are eligible for appointment as entry-level firefighters (A110; A315; A642). *Gallagher v. City of N.Y.*, 307 A.D.2d 76, 79 (1st Dep't), *appeal denied*, 1 N.Y.3d 503 (2003).

Next, Intervenors argue that the promotional test provided no benefit to black applicants who took the entry-level exam (Vulcan Br., at 131-32). Again, their argument confuses an individual or disparate impact claim with one alleging deliberate exclusion. The City offered evidence of its implementation of the promotional path to establish the existence of City policies designed to maximize the number of black entry-level firefighters, to rebut any inference of discriminatory intent from use of invalidated exams, and to dispute the claim that intentional discrimination was the City's "standard operating procedure – the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336; *see Woodbury*, 832 F.2d at 772. To be sure, "discrimination *against one employee* cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race" (Vulcan Br., at 132, emphasis added), but Intervenors' claim here is that the City engaged in a pattern and practice of intentional discrimination against minority applicants, and therefore evidence of the City's efforts to increase the number of minority entry-level firefighters is

directly relevant to the issue of intent. *E.g.*, *Washington v. Davis*, 426 U.S. 229, 246 (1976); *Woodbury*, 832 F.2d at 772.[9]

Intervenors also wrongly maintain that any City diversification efforts post-dating the administration of the 2002 Exam are irrelevant (Vulcan Br., at 37; 117, n.39; *see also id.* at 129). This argument is irreconcilable with their proof, as well as the District Court's ruling. In the lower court and on this appeal, Intervenors have repeatedly asserted that the City's invidious intent is discernible from its continued use of the Exams through 2007-08 despite allegations of their disparate impact on minorities (A127-30; A791; A798; A813-14; Vulcan Br., at 22-28). Further, the District Court expressly ruled that the City was guilty of disparate treatment "from February 2001 through at least January 2008" (A1399). The City's diversity efforts during the same period are thus directly relevant to rebut the allegations and the finding, and to demonstrate a material issue for trial.

[9] The purpose of this evidence was made clear in our main brief (City Br., at 20, 82). The Vulcan's accusation that the City seeks sanction of a separate "black route" to appointment as a firefighter is needlessly inflammatory (Vulcan Br., at 132). It is also ironic that Intervenors claim that the preferential promotional exam, in which every promotional candidate with a passing score was considered for appointment before the top-ranked candidate on the open competitive exam, undercuts the City's good-faith belief in the Exams as job-related (Vulcan Br., at 133). It has been judicially recognized that the City implemented this measure in an attempt to bring more people of color into the firefighter ranks. *Gallagher*, 307 A.D.2d at 78-79. Intervenors thus seek to fault the City for taking steps to enhance the hiring of minority firefighters.

(D)

Good-Faith Efforts to Design Job-Related Exams Are Also Directly Relevant to the City's Lack of Intent to Discriminate

In its main brief, the City pointed to evidence providing a basis to conclude that the DCAS test designers made significant attempts to comply with the Guidelines, which this Court has held to militate against a finding of deliberate discrimination (City Br., at 74-79). Intervenors nevertheless maintain that the test-designers' unfamiliarity with relevant case precedent, their failure to consult with counsel, and the City's choice to attempt in-house exams rather than retain an outside test-design expert, all cast doubt upon the "genuineness" of those attempts (Vulcan Br., at 123-27). That argument is telling. It amounts to a challenge to the persuasiveness of the City's evidence to a factfinder and thus confirms that summary judgment should have been denied on the issue of discriminatory intent. Under the burden-shifting framework, the City does not bear the burden of persuasion, but only the burden of production. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

Here, the City met that burden, not only based on the factual findings set forth in the Disparate Impact ruling (*see* City Br., at 9-12, 74-79), but also by its submission of the EEOC report on the intentional discrimination motion (A715). Although the EEOC found probable cause that the Exam could not be

fully validated to rebut a disparate impact claim, it noted that DCAS's supporting documentation "contain[ed] sections which could be considered part of 'test development' and sections which are important components of a validation study" including "a job analysis, a linking of abilities with tasks, a test plan, and a discussion of item writing and a review of the items by panels" (A715). Further, the City submitted an expert report which opined that both Exams were constructed in accordance with "standard job analytic and test development procedures" (A1261-62). Summary judgment is not the appropriate mechanism for weighing this evidence. Indeed, a reasonable jury would be entitled, if not compelled, to find that the City's test-design methods did not warrant an inference of deliberately discriminatory purpose. *See Guardians*, 630 F.2d at 112.

Both Intervenors and the Government dwell on the ways in which DCAS's methods failed to satisfy the demanding standards set forth in *Guardians* (*see* Vulcan Br., at 123-27; DOJ Br., at 13, 27 n.7). As should be plain from the City's brief, this argument misses the mark because the issue here is intentional discrimination, not disparate impact. The City does not challenge the District Court's disparate impact determination. That the City did not succeed, in hindsight, in formulating tests that defeat a disparate impact claim "entitles the plaintiffs to some relief, but does not justify … an unwarranted inference of deliberate discrimination." *Guardians*, 630 F.2d at 112.

In fact, some of the methods that diverge from *Guardians* are nevertheless acknowledged by Intervenors to reflect race-neutral purposes. The passing scores for each Exam, for example, even if not job-related, were concededly chosen for reasons unrelated to race: anticipated personnel needs for the 1999 exam and the default passing grade for civil-service exams in 2002 (Vulcan Br., at 126-27).

Based on the EEPC's report to the Mayor recommending a validity study on the 1999 exam, Intervenors argue that summary judgment was appropriate because the City's failure to follow the recommendation established an "intentional refusal to follow law and policy" (Vulcan's Br., at 127). This is a classic example of begging the question. Not every exercise of judgment that implicates civil rights or enforcement of anti-discrimination policies constitutes intentional discrimination. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009). Indeed, the record evidence showed that the City chose to "move forward," by retaining an expert psychometrician to design an improved exam and by heightening other methods to maximize diversity (*e.g.*, A818-19; A1093; A1098). The entire course of City conduct must be evaluated by a trier of fact, along with all the other evidence of the City's actions during the extended period of supposed intentional discrimination. The District Court erred when it pre-empted this inquiry and found intentional discrimination as a matter of law.

(E)

Evidence of the Subjective Intent of DCAS Personnel Is Also Relevant to the Factual Dispute over Intentional Discrimination.

Despite Intervenors' contrary arguments (Vulcan Br., at 121-22), the evidence of the DCAS test-designers' intent, while not wholly dispositive, was also entitled to consideration by a fact-finder (A1333-35). Intent is a peculiarly subjective factual issue. Thus, Intervenors' reliance on *Vega-Colon v. Wyeth Pharms.*, 625 F.3d 22, 27 (1st Cir. 2010) is misplaced (Vulcan Br., at 122). While the Court in *Vega-Colon* rejected as conclusory the plaintiff's subjective opinion that he was more qualified for a job than the hiree, especially since he had no knowledge of his competitor's qualifications, the Court went on to affirm summary judgment for the employer on the strength of affidavits explaining that the chosen applicant "was selected for the position because she was the strongest candidate," a legitimate non-discriminatory reason for the decision. *Id*. Here, evidence of the test-designers' intent created, at a minimum, a disputed issue whether the testing mechanism was intentionally discriminatory.

To be sure, "affirmations of good faith in making *individual selections* are insufficient to dispel a prima facie case of systematic exclusion." *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972) (emphasis added). But the City's "affirmations of good faith" came from the designers of the Exams at issue and

were relevant to show that the exams were not designed to fall more harshly on minorities, but rather were intended to measure job-related skills (A1333-35). Even the District Court ruled that this evidence was "circumstantially relevant" to the issue of intent, but rejected it nonetheless in the erroneous belief that evidence regarding the tests could not rebut the inference of discriminatory intent unless the City could prove that they were sufficiently job-related to defeat a disparate impact claim (A1408).

(F)

All Facts Requiring Reversal of the Summary Judgment Ruling on Intentional Discrimination Are Properly Before This Court.

Intervenors alternatively claim that this Court should decline to reverse summary judgment because the facts raised by the City on appeal were not adequately presented to the District Court under Fed. R. Civ. Proc 56 and Local Rule 56.1 (Vulcan Br., at 113-20). There is no merit to this argument. As the grant of summary judgment is reviewed *de novo*, this Court has a "duty to consider the record as a whole in determining the presence of genuine issues of material fact[,]" even assuming the opposing party in the lower court failed to focus on an issue reflected in the supporting papers. *Gallo v. Madera*, 136 F.3d 326, 330 (2d Cir. 1998); *see also Yong Qin Luo v. Mikel*, 625 F.3d 772, 778 (2d Cir. 2010).

In any event, by their plain language, Rule 56 and Local Rule 56.1 only govern motions for summary judgment. Here, the City's motion, made under Rule 12(b)(6), was for dismissal of the disparate treatment claim. The District Court converted it to a motion for summary judgment without prior notice, ruling that the City would not be prejudiced by conversion largely because it had submitted "substantial factual materials in connection with the dismissal motion" (A1391-93). Thus, the Court chose to dispense with the issue-identification procedures in Local Rule 56.1. Its duty to search the record on a motion for summary judgment (*Jiminez v. Dreis & Krump Mfg. Co.*, 736 F.2d 51, 53 [2d Cir. 1984]) was therefore especially acute.

As Intervenors do not deny, the District Court had before it the relevant evidence the City contends created a disputed issue of material fact. For example, in support of its motion to dismiss, the City submitted detailed proof of its recruitment efforts, including postponement of the 2002 Exam registration deadline due to City officials' disappointment in the paucity of black registrants, and referenced both its preferential promotional policy for EMTs and its efforts to minimize voluntary attrition (*see* City Br., at 13-16). Further, as previously noted, the EEOC's 2004 probable cause determination, reflecting DCAS's substantial

efforts to conform with the Guidelines, was appended to the City's motion (A715).[10]

The facts raised in the City's Local Rule 56.1 statement in opposition to the cross-motion for summary judgment only amplified the need for a trial. The City expressly asserted that it had devoted increased manpower and funding to diversity efforts (A1223). Those efforts included "millions spent on advertising," increased manpower targeting recruitment in black communities, and youth outreach in the development of the FDNY High School (A1223-24). Finally, the City noted that it had increased the frequency of the EMT promotional exam in order to draw on a concentrated pool of black applicants for entry-level firefighter (A1223-24). It is uncontested that each of these assertions was properly supported by citations to record evidence that would be admissible at trial, in accordance with Rule 56.1. Nor can Intervenors complain that the City's appellate brief expounded

[10] Even assuming it was necessary to supplement the EEOC report in this regard, this Court may also consider the District Court's previously-entered findings of fact reflecting that the Exams were constructed with some attention to the Guidelines and were intended to measure certain job-related skills (*see* City Br., at 9-12). Where a factual determination has been made in an earlier stage of litigation, it is the law of the case and must be adhered to absent cogent and compelling reasons, such as an intervening change in law or the availability of new evidence. *De Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009); *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002). Intervenors presented the District Court with no reason to depart from those findings, and they are properly considered part of the summary judgment record.

on these facts in greater detail, as the Rule requires that each statement be "concise."[11]

Furthermore, the need for a trial may be discerned from Intervenors' own submissions. For instance, a press account attributed the 2002 test extension to the City's desire for more black candidates to register for the exam (A1113). The same article recounted then-Commissioner Scoppetta's visit to a black church to announce the extension, his "blunt" assessment "that the Fire Department badly need[ed] more women and minority firefighters," and the fact that he was "making the rounds at black churches in the city … with the [FDNY]'s recruiting message" (*id.*).[12] Indeed, the Vulcans' materials made it clear that City officials viewed the FDNY's homogeneity as a problem and expressed the desire to remedy it (A793; A815; A817; A899; A902; A910; A930; A990; A997-98; A1018; A1091-94; A1101; A1197-98; A1182-85), and suggested that race-neutral considerations,

[11] It also bears noting that the District Court never relied on procedural defects in the City's presentation of evidence as a basis for its erroneous ruling granting summary judgment on intentional discrimination. The Court ruled that the City could not challenge Intervenors' prima facie showing except through statistical evidence, and therefore found it unnecessary to examine the City's anecdotal evidence except to "serve the interests of completeness and finality" (A1407). Alternatively, the Court summarily dismissed that evidence as irrelevant because it did not directly address the problems with the Exams (A1409-10). Thus, even had the City's Local Rule 56.1 statement expounded on the facts in the same detail as its appellate brief, it would not have changed the Court's ruling.

[12] Given that their own submission firmly established that the exam was extended specifically due to the City's desire for greater diversity, it is surprising that Intervenors maintain that the connection "find[s] no support in the record" (Vulcan Br., at 34, n.9).

including the effects of 9/11, hiring needs, bureaucratic confusion, debates over how best to increase diversity, and limited resources, motivated the City's conduct (A801-02; A806-07; A914-17; A925; A933; A947-48; A952; A964; A968-69; A983; A990; A1081-83; A1105-07; A1182-88; A1207). Under Rule 56, before awarding summary judgment, the District Court was obligated to consider whether a reasonable fact-finder, viewing this evidence in the light most favorable to the City, could conclude that the City was not motivated by racial animus. *See Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 225 (2d Cir. 2000); *see also D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006); *Vt. Teddy Bear Co. v. 1-800 BEARGRAM Co.*, 373 F.3d 241, 244 (2d Cir. 2004).

In short, all the facts noted in the City's appellate brief are drawn from the materials presented in support of and in opposition to the competing motions for dismissal and summary judgment, including repeated reference to the City's recruitment of Columbia to study new strategies for diversifying the FDNY (A1223; A1273; A1306-07), another illuminating piece of evidence Intervenors urge this Court to ignore (Vulcan Br., at 117).

Nor should the Court disregard the ruling in *Gallagher*, 307 A.D.2d 76, recognizing and upholding an important piece of the FDNY's diversification efforts. The City's submissions in the District Court made the same contention the Appellate Division recognized in *Gallagher*, albeit less directly. *See* A1272 ("The

court's recent approval of the promotional path from EMT to Firefighter, with the [FDNY]'s full support, has and will continue to help our efforts [to diversify]"). In any event, if necessary, this Court may take judicial notice that the City appealed a state-court injunction barring its promotional exam and prevailed, in large part because it had adopted the measure for the express purpose of diversifying the FDNY's firefighter ranks. *See Hayden*, 594 F.3d at 168; *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York*, 311 F.3d 534, 540 n.1 (2002).

POINT III

ALTERNATIVELY, THE INJUNCTION SHOULD BE VACATED BECAUSE NONE OF ITS DISPUTED PROVISIONS WERE NECESSARY TO AFFORD COMPLETE RELIEF OR TO DISPEL EFFECTS OF PAST DISCRIMINATION.

Leaving the foregoing aside, the Court below abused its discretion in appointing a Monitor to oversee virtually every aspect of the FDNY's hiring and EEO procedures for a period of at least ten years. As demonstrated in the City's main brief, the relief granted ranged too far afield of the only proven violation (City Br., at 92-98). Further, to the extent that the District Court tried to justify its overhaul of character and fitness review, recruitment, and reduction of voluntary attrition as necessary to extinguish "vestiges" of the City's discriminatory conduct, review of the full record – rather than the isolated portions offered by the Vulcans – demonstrates the fundamental error in its conclusions.

(A)

Overbreadth

Both Intervenors and the Government rely upon *Albermarle* and *Teamsters* for the general proposition that Title VII confers broad equitable powers "to make possible the fashioning of the most complete relief possible," and grants district courts "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Teamsters*, 431 U.S. at 364-365; *quoting Albemarle*, 422 U.S. 405, 421 (1975) (internal punctuation omitted). But neither case purported to confer unfettered discretion in this regard, nor did either case concern an injunction designed to rectify supposedly discriminatory conduct that was neither pled nor proven at the liability phase of the action.

The broad discretion entrusted to District Courts under Title VII does not supplant the basic tenets of equity. *See Albemarle*, 422 U.S. at 416. The Supreme Court has repeatedly cautioned that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994), *citing Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), *and Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 418-420 (1977). Indeed, this Court recently observed that it is the "essence of equity jurisdiction" that a court may only grant relief "no

broader than necessary to cure the effects of the harm caused by the violation," and therefore vacated parts of an injunction that restrained the defendant from engaging in conduct that was "not fairly the subject of litigation." *City of New York v. Mickalis Pawn Shop*, LLC, 645 F.3d 114, 144-45 (2d Cir. 2011) (citation and internal quotation marks omitted). An equitable remedy that is too broad in scope cannot stand. *Id*.; *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir. 1984); *United States v. Criminal Sheriff*, 19 F.3d 238, 240-241 (5th Cir. 1994); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div*., 821 F.2d 1085, 1091 (5th Cir. 1987); *see also Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc*., 675 F.3d 149, 162 (2d Cir. 2012). The remedy in this case – geared toward recruitment, reduction of attrition among minorities, character and fitness review, and EEO investigations – does not fit the liability determination.

Under the approach urged by Intervenors, and now the Government, discriminatory impact from any discrete employment practice would support an injunction directed at an unrelated practice, which may be tacked on to the case at the remedy stage and claimed to be a "vestige" of discrimination. Thus, if a racial imbalance in the FDNY had been alleged and proven to result only from a lack of recruitment, the City could nevertheless be ordered to change its character-review process at the remedy stage, merely on the strength of the underrepresentation of

African-Americans. Or if discretionary refusals to hire were the sole practice alleged and proven to have caused predominantly white hiring, the Court could order redesign of the City's employment exams.

This Court has held otherwise. In *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Com.*, 482 F.2d 1333 (2d Cir. 1973), this Court affirmed a finding of *de facto* discrimination in hiring that led to a pronounced racial imbalance in the Bridgeport Police Department. The underrepresentation of minority patrolmen caused by biased entrance exams also affected the racial distribution in the higher echelons. *Id*. at 1339. Indeed, there were "no non-White supervisory personnel" and "only one non-White above the rank of patrolman," which this Court directly attributed to "the discriminatory hiring examination." *Id*. Nevertheless, this Court vacated the portion of the remedial decree that imposed restrictions on promotions because the proof at the liability trial was insufficient to show that the promotional process was also discriminatory. *Id*. at 1341.

Precedent cited by Intervenors and the Government is consistent with the City's arguments. First, they offer cases where a broad injunction was imposed to remedy discrimination that was pled and proven to permeate various aspects of an employer's conduct, rather than one discrete practice such as test-design. *See Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 429 (1986)

(after trial, the District Court found the union guilty of "discriminating against nonwhite workers in recruitment, selection, training, and admission"); *NAACP v. Evergreen*, 693 F.2d 1367, 1371 (11th Cir. 1982) (plaintiffs proved at trial that the defendant "was engaging in a pattern and practice of discrimination against blacks in … hiring and promotional practices for jobs in the various city agencies and departments;" denial of equitable relief held an abuse of discretion); *Kilgo,* 789 F.2d at 874 (trial evidence showed that defendant "used many different devices to discourage women from becoming OTR drivers" and often waived hiring criteria for men that were strictly enforced against women); *City of Bridgeport*, 647 F.2d at 266 (in addition to using discriminatory tests, defendant deliberately refused to recruit minorities, actively impeded minority recruitment campaign, refused to allow individual minority applicants to take the exam, or did not timely notify them that they passed); *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 275 (E.D. Tex. 1999), *aff'd in part on other grounds*, 649 F.3d 374 (5th Cir. Tex. 2011) ("The disparate impacts begin on the day one is hired and are potentially magnified each time one's career is intersects a subjective decision-making process"); *EEOC v. Local 638*, 532 F.2d 821, 826-27 (2d Cir. 1976); *Rios v. Enterprise Asso. Steamfitters Local 638*, 501 F.2d 622, 625 (2d Cir. 1974) (union engaged in a "pattern and practice of discrimination against non-whites by failing to admit them to full journeyman status, by discriminating against them in work referral, and by

participating in an apprenticeship program which discriminated against them"). Here, in contrast, the District Court's liability determinations stemmed exclusively from test-design, but its remedy attacked a host of unrelated practices.

Second, a court may enjoin the very practice that is claimed and proven to disparately impact minorities. *City of Bridgeport*, 647 F.2d at 266 (enhanced recruitment order properly based, *inter alia*, on finding at trial that the defendant deliberately "made little or no effort to recruit minority persons for the fire department"); *Greshman v. Chambers*, 501 F.2d 687, 688 (2d Cir. 1974) (requiring heightened recruitment where the complaint directly alleged discriminatory recruitment);[13] *NAACP v. Town of East Haven*, 998 F. Supp. 176, 178, 185, (D. Conn. 1998) (finding lack of recruitment discriminatory); *id*. at 186 (finding employment exams discriminatory); *NAACP v. Town of East Haven*,259 F.3d 113, 117 (2d Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002) (noting that the Town had been ordered to improve minority recruitment and consult with an

[13] Intervenors cite *Greshman* (Vulcan Br., at 73), but there the court upheld the denial of a preliminary injunction under §1981 because plaintiff failed to establish a pattern of discrimination by the employer, "purposeful or otherwise." *Greshman*, 501 F.2d at 691-92. It was in that context that this Court observed: "Only upon a showing of unlawful discrimination will formal open recruiting … be mandated in lieu of word-of-mouth recruiting. Where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral will no longer be accepted as non-discriminatory. Additional methods must then be devised to compensate for the effects of past discriminatory practices and to guard against their perpetuation or recurrence." *Id*. at 691. Most notably, however, both the claim and the remedy sought specifically pertained to recruitment. *Id*. at 688.

outside expert in devising new exams).[14] For this reason, the City has raised no objection to the previous order directing development of a new exam under the supervision of the first Special Master.[15]

Third, to be sure, a practice not directly at issue in the complaint may be enjoined where it is otherwise impossible to afford effective relief. In such a case, the relief "flows logically" from the nature of the violation, such as an order directing an employer to recruit minorities in surrounding areas where a longstanding town residency requirement in a largely white town was struck down. *Newark Branch, NAACP v. Harrison*, 940 F.2d 792, 806 (3d Cir. 1991). Here, in contrast, the entire remedial hearing amounted to a mini-trial on new allegations of discriminatory conduct that the District Court had previously refused to add the complaint (A163-74). Further, as previously noted, the alleged and proven failings giving rise to disparate impact liability resulted exclusively from faulty practices at

[14] While Intervenors cite to this Court's review of the attorneys' fees award (*Town of E. Haven*, 259 F.3d 113) (*see* Vulcan Br., at 70), neither the remedy nor the liability finding was subjected to appellate scrutiny. District Court decisions are not binding upon this Court. *Redd v. New York State Office of Parole*, No. 10-1410, 2012 U.S. App. LEXIS 9194 at *23 (2d Cir. May 4, 2012). The remedy in *Pennsylvania v. Glickman*, 370 F. Supp. 724, 726 (W.D. Pa. 1974), also cited by Intervenors (Vulcan Br., at 71), was likewise never reviewed on appeal. The complaint in *Glickman* alleged discriminatory recruitment practices, but the Court found that the employer had made good-faith efforts to recruit minorities. It nevertheless entered an injunctive order requiring such efforts to be continued or heightened. *Id.* at 737-38. The City does not concede that such an order would have been sustained on appeal.

[15] Of course, such powers are not unlimited. The City reserves the right to appeal any subsequent order regarding the new exam should it be warranted.

DCAS, the City agency responsible for civil-service test design, not the FDNY. Yet the injunctive relief now at issue requires an overhaul of the FDNY, including close federal oversight of FDNY recruitment efforts, candidate processing, and EEO procedures. These remedies do not remotely "flow logically" from the proven wrongs.

The provisions of the Injunction pertaining to the City's EEO investigations are even further removed from civil service entrance tests. The complaints and findings at the liability phase exclusively pertained to one specific *hiring* practice, namely, the examinations. They were devoid of allegations – much less evidence – of discriminatory handling of EEO complaints among FDNY incumbents, which are not even part of the hiring process.

Finally, the precedent the Intervenors and the Government rely upon to justify the appointment of a Monitor are readily distinguishable. As previously noted (*supra* p. 42), *Local 638*, 532 F.2d at 821, involved systemic (and intentional) discrimination covering multiple facets of the defendant's conduct that is absent from the liability findings in this case. *Id.* at 826-27. In *City of Bridgeport*, 647 F.2d at 284, too, the discriminatory conduct was proven to be both broad and deliberate (*see supra* p. 41). Moreover, the Master's powers there were far more circumscribed, to oversee the hiring of 102 shortfall candidates from a list prepared by the City and preside over hearings to determine whether they had been

deterred from applying for employment by previous discriminatory practices. *Id.* at n.9. Similarly, in *Lewis v. City of Chicago*, No. 98 C 5596, 2007 U.S. Dist. LEXIS 24378 at *12 (N.D. Ill. 2007) *rev'd on other grounds*, 528 F.3d 488 (7th Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 2191 (2010), the Monitor's only duties were to "address[] the special needs and problems of people entering the Academy as a result of this lawsuit" and to "report[] to the court, if necessary, on the progress of the shortfall group." *Id.*[16]

Compared with the foregoing cases, the Court Monitor's powers here, which are to last for a minimum of ten years, are immense (*see* City Br., at 64-66). Moreover, neither the Government nor the Intervenors identify a single instance where, after a Special Master has already been appointed to oversee compliance, a second Monitor is appointed to oversee even further relief in other areas, much less authorized to hire a staff and intervene in the intrusive manner authorized here.

[16] We note that the remedy in *Lewis* was never subjected to appellate scrutiny, as is also the case in *McClain*, 649 F.3d at 380, n.3, and thus are not binding upon this Court (*see* n. 14, *supra*). Intervenors claim that a Monitor was appointed in *Town of East Haven*, 70 F.3d 219, but that is not reflected anywhere in the opinion.

(B)

Clear Error and Partiality

Even assuming that practices unrelated to test-design could have been enjoined upon the requisite showing, the need for such relief was neither demonstrated by Intervenors nor properly justified by the District Court.

Preliminarily, Intervenors wrongly maintain that the City bore the burden at the hearing to show that the need for injunctive relief was "vitiated" (Vulcan Br., at 90-91). That principle applies only where a mootness defense is interposed, because the defendant must show cessation of *the very activities alleged in the complaint* to deprive the District Court of equity jurisdiction. *Id*., *citing N.Y. State Nat. Org. for Women v. Terry*, 159 F.3d 86, 91 (2d Cir. 1998); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc*., 191 F.3d 198, 202 (2d Cir. 1999). But the City has never denied the existence of a live controversy. Rather, as Intervenors were seeking to enjoin conduct *unrelated* to the practice at issue in the liability phase, they bore the burden of proving a need for it. Indeed, in *W. T. Grant*, 345 U.S. at 633, a case cited by Intervenors, the Supreme Court held that injunctive relief is only appropriate where the movant demonstrates its necessity

(Vulcan Br., at 83). Intervenors failed to meet their burden of proof, and the District Court clearly erred in concluding otherwise.[17]

In response to the City's detailed explication of clear error in key aspects of the District Court's treatment of the hearing evidence (*see* City Br., at 100-11), Intervenors do little more than point to testimony which, in a vacuum, could have supported the Court's conclusions (Vulcan Br., at 76-84). Clear error review requires examination of the *entire* record, which here leads to the conviction that a mistake has been made *despite* snippets of supporting evidence. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Indeed, the precedent relied upon by Intervenors to assert that "plausibility" is the applicable standard requires the Court's findings to be "plausible in light of the record viewed in its entirety." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

Intervenors do not address the Court's failure to account for gaps in their statistical evidence, its undue reliance on evidence that was not particularly probative, or its failure to admit and consider all the relevant proof. They cannot defend the various inferences drawn by the Court which the record as a whole does

[17] The City maintains that, at the least, the District Court's factual conclusions, being "influenced" by its unsupported belief in the City's pattern of intentional discrimination, were predicated on a misunderstanding of the governing legal principles (*see* City Br., at 99). If this Court agrees that summary judgment was erroneously granted on intentional discrimination but still deems it necessary to evaluate the District Court's conclusions of fact, *de novo* review is therefore appropriate (*id.*).

not permit, *see Doe v. Menefee*, 391 F.3d 147, 164 (2d Cir. 2004), or legitimately explain the significant inequities in the Court's evidentiary rulings (*see* City Br., at 113-16). Instead, they dismissively characterize the City's showing as "quibling [*sic*] with stray factual findings" (Vulcan Br., at 75). In reality, the points raised by the City are central to the Court's exercise of discretion. Indeed, the Vulcans' own analysis proves that to be true, as they rely largely on those very factual findings and inferences which cannot be supported by the record as a whole.

(1)

Character Review

First, despite their attempt to justify the Injunction's overhaul of the Candidate Investigation Division ("CID") and Personnel Review Board ("PRB"), Intervenors concede that the PRB's discretionary power to refuse employment affects a negligible number of black applicants (Vulcan Br., at 82-83). They argue, however, that due to the discriminatory tests, few black applicants ranked highly enough on the eligibility lists to reach the character review stage (*id*. at 83). But even if the number were several times higher, it would still constitute a tiny fraction when compared with the numbers affected by the disparate impact of the exams, the only proven Title VII violation. The numbers are further dwarfed by the extent and degree of the remedy imposed. Moreover, the small number of black firefighters rejected during character review is only half the story.

Statistically, there has been no difference in the PRB's treatment of black and white candidates in the last decade (*see* City Br., at 105). Indeed, a white candidate on the 2002 Exam's eligibility list was slightly more likely to be rejected by the PRB (A2787-94). When the Court struck the Vulcans' expert report asserting a disparate impact on blacks on the latest 2007 list (along with the City's expert report which decisively rebutted that claim) (A4235-36; A4226-33), the Court was left with no evidentiary basis to conclude that FDNY character review contributes to the racial imbalance among firefighters.

As Intervenors correctly note, the Court's decision did not take these undisputed statistical facts into account (Vulcan Br., at 47 n.13). That is precisely the City's point. Instead, the Court excused this fundamental gap in the Vulcans' evidence with the *sua sponte* conclusion that the City's records were not kept in an "easily accessible format" (SPA78). Notably, the Vulcans have never attributed their failure of proof to the City's record-keeping, and do not now attempt to defend the Court's conclusion in that regard.

Intervenors also do not address the sequence of events concerning the ultimately stricken expert reports regarding the 2007 eligibility list and what it demonstrates about the Court's partiality. The Court accepted the Vulcans' admittedly untimely expert report on the issue when they asserted it would show a disparate impact. Only after it became clear that the evidence decisively favored

the City did the Court strike both the Vulcans' and the City's reports on grounds of untimeliness (*see* City Br., at 113-14). Further, only by striking the City's expert report could the Court conclude that the City failed to keep "easily accessible" records and to thereby discount the statistical facts established by the whole record – that FDNY character review does not disproportionately exclude black applicants (*id*. at 114). The Vulcans' claim that the City was not prejudiced by the report's exclusion therefore lacks merit (Vulcan Br., at 136, 139).

Also unavailing is Intervenors' reliance on evidence that FDNY incumbents sometimes seek to affect PRB deliberations (Vulcan Br., at 80-81). Absent any racial discrepancy in "CNS" dispositions ("Considered, Not Selected" by the PRB on a discretionary basis), it was pure speculation for the Court to conclude that such attempts, even if effective, disproportionately benefit white applicants, especially where the record established the Vulcan Society's corresponding advocacy for black applicants undergoing PRB review (A3291-93).

Nor did the Vulcans bring forth even a single instance of inconsistent "CNS" dispositions for similarly situated black and white candidates. Significantly, they continue to rely on the differing CID recommendations for a pair of candidates in 2004, one white and one Hispanic (Vulcan Br., at 42-43, 81-82). There is no dispute that CID investigators *recommended* the Hispanic candidate's rejection, but the full record establishes that the PRB did not follow

that recommendation (A2737), an uncontested fact which, like the District Court, the Vulcans cannot explain away and simply do not discuss.

Intervenors also do not respond to the negligible probative value of their statistical evidence showing that blacks are more likely to incur an arrest than whites, which the District Court relied on to conclude that the FDNY's use of arrest records may cause a higher rate of "CNS" dispositions for black applicants (*see* City Br., at 43, 63, 108-09). Among other things, those statistics did not reflect the racial rate of arrestees lacking high-school diplomas or having previous felony convictions, which would have automatically disqualified them from appointment (*id*.). Accordingly, the Court's reliance upon this evidence was clear error. *Cf. Woodbury*, 832 F.2d at 770. At any rate, absent concrete evidence of race affecting even a single discretionary hiring decision, or circumstantial statistical evidence hinting at such a pattern, it was wholly speculative for the District Court to conclude that the FDNY's use of arrest records might unduly disadvantage black candidates.

As to the City's proffered consideration reports from its most recent eligibility list, Intervenors wrongly contend that they were properly excluded on relevance grounds (Vulcan Br., at 43, n.12). Those documents patently bore directly on the essential disputed issues at the hearing. They established that each refusal to hire a black candidate was substantiated by lengthy arrest records, never

a single arrest, and by questionable explanations provided by the candidates for the underlying circumstances (A5686-893). The Court's refusal to admit such key evidence was a clear abuse of discretion, especially in a bench trial. *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994); *Builders Steel Co. v. Commissioner*, 179 F.2d 377, 379 (8th Cir. 1950); 11 C. Wright & A. Miller & M. Kane, *Federal Practice and Procedure* § 2885, at 454-55 (2d ed. 1995); *see Multi-Medical Convalescent & Nursing Center v. NLRB*, 550 F.2d 974, 977 (4th Cir. 1977). It was also highly prejudicial. The reports not only tended to rebut the Court's fear that the FDNY might use arrest records in impermissible ways – given that multiple arrests may be considered in gauging the applicant's credibility under the Guidelines – but also helped dispel the conclusion that additional written documentation was necessary to afford effective review of PRB decision-making (SPA55-60).

Indeed, the District Court repeatedly accepted Intervenors' proof on the assurance that it would only consider the evidence to the extent that it was admissible (*e.g.*, A2609; A2646; A2813; A2992; A3344). Yet the City's proof was repeatedly excluded, especially those portions – i.e., expert evidence disproving disparate impact, documentary proof supporting the PRB's decisions, Dr. Eimicke's testimony regarding the City's long-standing efforts to diversify the FDNY – that cast the most doubt on the need for further equitable relief (*see* City

Br., at 105-06; 113-14). Such inequitable treatment of the parties' respective proffers is hardly indicative of a neutral arbiter.

Intervenors are wrong in asserting that the City waived the claim that the Court's exclusion of Dr. Eimicke constituted an abuse of discretion (Vulcan Br., at 139). The City specifically argued that the Court's refusal to hear his testimony, like its exclusion of the City's proffered consideration reports from Exam 6019, resulted from the Court's bias in conducting the hearing rather than any valid evidentiary ruling (City Br., at 113, *see also id*. at 101 n.25).

In sum, these clearly erroneous rulings, together with the absence of probative evidence relating to character and fitness review, require reversal of the Injunction's provisions dealing with the practices of the CID and PRB.

(2)

Recruitment and Voluntary Attrition

At the conclusion of the hearing, the District Court was left with "no doubt" that "if left to its own devices" the City would "recruit as many black and Hispanic firefighter candidates as possible…" (SPA100-01). Yet it still ordered structured development of a recruitment-improvement plan in conjunction with an independent recruitment consultant under the Court Monitor's supervision, subject to court approval. The Court also acknowledged that the City's independent plan to reduce voluntary attrition "show[ed] promise" (SPA16-17). As in *Woodbury*,

832 F.2d at 772, the District Court clearly erred in failing to afford the City's recognized achievements "their proper significance."

Intervenors make no attempt to resolve these fundamental contradictions in the Court's findings. Instead, they draw this Court's attention to the few ways in which the District Court observed that the efforts of Michele Maglione, the FDNY's head of recruitment, "showed room for improvement" (Vulcan Br., at 78; SPA25). But the Court simultaneously praised Maglione for constantly seeking to improve her methods, finding her candor to be "a refreshing departure" from that of other City witnesses who, the Court felt, showed the need for federal supervision by refusing to admit that anything more needed to be done (SPA25; *see* A2965-66; A3084; A3100). The Court also assured Maglione that he was "not questioning [her] expertise" (A2954; *see* A2934-35; A3030-32). It is difficult to see how any witness could have satisfied the Court that comprehensive supervised intervention was not needed.

Intervenors repeatedly maintain that the District Court discredited the City's efforts because they were undertaken during the course of litigation (Vulcan Br., at 78, 80). To some extent, the Court purported to do just that (SPA36-37). Irreconcilably, however, the Court also found that the need for further equitable relief would have been eliminated if the City's leadership had "shown the least bit of concern for the effect of the court's liability rulings" or "demonstrated by word

and deed an intention to use this litigation as an opportunity to reconsider and reevaluate [its] hiring practices and procedures" (SPA101). It also found that the City's recruitment efforts steadily increased over the last 10 years, throughout this entire mayoral administration, not abruptly upon the filing of this action (*see* City Br., at 100-01). Here, again, the Court's reasoning is logically inconsistent. Nor do Intervenors account for the undisputed fact that some of the City's diversity measures – City-residency bonus points, the EMT promotional exam – were instituted long before this litigation began (*see* City Br., at 101-02, and n.25 & 26).

The foregoing errors require vacatur of the Injunction's provisions concerning recruitment and reduction of voluntary attrition.

POINT IV

THE MAYOR AND FIRE COMMISSIONER WERE CORRECTLY GRANTED IMMUNITY UNDER FEDERAL AND STATE LAW.

(A)

Qualified Immunity Under Federal Law

In their cross-appeal, Intervenors maintain that Mayor Bloomberg and Fire Commissioner Scoppetta were not entitled to qualified immunity (Vulcan Br., at 146-54). For the following reasons, their arguments lack merit.

Qualified immunity is "an immunity from suit rather than the mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It "protects

government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), *quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine confers "an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Qualified immunity may properly be found as a matter of law if there is no factual dispute, or if the defendant demonstrates an entitlement to it even under plaintiff's version of the facts. *See Tierney v. Davidson*, 133 F.3d 189, 194 (2d Cir. 1998).[18]

There is no individual liability under Title VII. *Wrighten v. Glowski*, 232 F.3d 119, 120 (2d Cir. 2000). The Mayor and Commissioner are sued in their individual capacities under §§ 1983, 1981 and the Equal Protection Clause of the Fourteenth Amendment (A132), each of which requires a showing of intent. *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000).

The element of intent in Intervenors' claims alters the typical qualified immunity analysis. When a defendant invokes qualified immunity, courts

[18] Review of an issue of law is qualitatively different from review of an exercise of discretion, which requires an examination of the facts and conclusions actually relied upon by the lower court (*see* Point I, *infra*). Because the immunity issues involve the application of pure law to facts taken in the light most favorable to Intervenors, upon *de novo* review this Court may affirm on any basis preserved in the lower court. *See Acequip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003).

normally engage in a two-part inquiry: "A government agent enjoys qualified immunity when he or she performs discretionary functions if either (1) the conduct did not violate clearly established rights of which a reasonable person would have known, or (2) it was objectively reasonable to believe that the conduct did not violate clearly established rights." *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 278 (2d Cir. 1999). However, "where a more specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law." *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001). Accordingly, the pertinent question at the summary judgment stage becomes whether Intervenors' evidence would allow a jury to find the requisite intent. *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 130 (2d Cir. 2004) ("specific intent" to engage in gender discrimination); *Mandell v. County of Suffolk*, 316 F.3d 368, 385 (2d Cir. 2003) ("retaliatory animus"); *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 145 (2d Cir. 1999) ("deliberate indifference" to racial hostility).

Here, Intervenors confront the burden of convincing a fact-finder that the Mayor and Fire Commissioner made the decision to go forward with hiring because they wanted to keep blacks from obtaining appointments as firefighters. "[P]urposeful discrimination requires more than intent as volition or intent as

awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effects upon an identifiable group." *Iqbal*, 556 U.S. at 676-77 (citation and internal quotation marks omitted) (brackets in original); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

As the City demonstrated before the District Court (Docket #323, pp. 1-10), Intervenors failed to provide sufficient evidence for a trier of fact to conclude that the individual defendants "themselves acted on account of a constitutionally protected characteristic." *Iqbal*, 556 U.S. at 683. Significantly, the bulk of Intervenors' prima facie evidence against the City is not applicable against the Mayor or Fire Commissioner. The Mayor took office in January 2002, and he appointed the Fire Commissioner sometime thereafter (A721; A1078). Neither had any connection with the 1970s-era liability rulings against the City reflected in *Vulcan Society* and *Guardians*. Nor were they responsible for the design or administration of the 1999 Exam, or any of the prior exams that led to the racial makeup of the FDNY's firefighter ranks. Even the design of the 2002 Exam, which, in any event, was performed by DCAS with no personal involvement by either of these defendants, was already well underway by the time they took office (A1116).

As Intervenors implicitly concede, since all statistical evidence of disproportionately white hiring is traceable to events occurring before the Mayor and Fire Commissioner took office, the sole allegation that personally implicates them is their failure, despite receiving reports of their disproportionate effect on black applicants, to suspend all hiring from pre-existing eligibility lists and undertake a validity study on the Exams (Vulcan Br., at 147-48). Intervenors' claim requires proof from which a reasonable jury could conclude that, by undertaking this course of action, the individuals personally "intended the discrimination to occur." *Gant*, 195 F.3d at 141. As knowledge of discriminatory effect is insufficient to make out a claim of intentional discrimination, *Iqbal*, 556 U.S. at 676-677, Intervenors had to present "particularized evidence of direct or circumstantial facts" to support their claim of unconstitutional motive. *Locurto*, 264 F.3d at 168-169 (internal quotation marks omitted), *citing Sheppard v. Beerman*, 94 F.3d 823, 828 (2d Cir. 1996) *and Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995).

But aside from evidence that the individual defendants – who were both deposed in this case – knew of the Exams' disparate impact, the record is devoid of proof that they continued using the Exams out of a desire to bar black applicants from employment. For instance, there is no allegation or evidence that white applicants were ever hired without taking or passing the tests. *See Merritt v.*

Old Dominion Freight Line, Inc., 601 F.3d 289, 300 (4th Cir. 2010); *Dial Corp.*, 469 F.3d 735. There is likewise no allegation or evidence that black applicants were deterred or prevented from registering for the Exams, or given misleading information about whether they had passed. *See City of Bridgeport*, 647 F.2d at 266. There is also no dispute that those who passed the Exams were processed for employment in rank order, irrespective of race. *See Easley*, 758 F.2d at 261. The use of civil-service tests with a foreseeable disparate impact on black applicants is insufficient, standing alone, to support an inference of discriminatory intent against the Mayor or Fire Commissioner. *See Guardians*, 630 F.2d at 112, n.31.

The legal framework governing the City's use of the Exams precludes a reasonable inference of discriminatory intent arising from the continuation of hiring from eligibility lists generated by competitive testing. The City is constrained under state law to hire firefighters by competitive testing wherever practicable. N.Y. Const. Art. 5, § 6; N.Y. Civ. Svce. Law § 50 *et seq.*; *see Guardians Ass'n of N.Y. City Police Dep't v. Civil Serv. Comm'n*, 431 F. Supp. 526, 534-535 (S.D.N.Y. 1977), *remanded on other grounds*, 633 F.2d 232, 263 (2d Cir. 1980). Thus, City decision-makers could not stop using the eligibility lists unless they suspended hiring while better tests were designed, administered, and scored. The factual context facing the individual defendants is also significant. When the Mayor and Fire Commissioner took office in January 2002, they were

charged with the formidable task of rebuilding the FDNY after the events of September 11th, 2001 (A729; A746; A968-69; A1312-13). During the very period at issue, the FDNY was experiencing a personnel crisis caused by the devastating effects of that day. Had the defendants brought hiring to a standstill, the FDNY's pressing personnel needs could not have been met.[19]

Even assuming complaints regarding the tests could allow a fact-finder to infer unconstitutional intent to discriminate by the individual defendants, this Court should not consider that evidence in a vacuum. A massive amount of other evidence shows that these same defendants and their subordinates were making substantial efforts to bolster the number of minority firefighters. "At summary judgment in an employment discrimination case, a court should examine the record as a whole, just as a jury would, to determine whether a jury could reasonably find an invidious discriminatory purpose on the part of an employer." *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 102 (2d Cir. 2001). For instance, in an age discrimination case where an employer had said he wanted

[19] In addition to the 343 active firefighters killed in the destruction of the World Trade Center, the following years saw a dramatic surge in retirements. In fact, one-third of the FDNY's workforce retired between September 2001 and September 2006. *See* nyc.gov/html/fdny/pdf/publications/wtc_assessments/2007/section4.pdf. This Court may take judicial notice of the well-known facts regarding the effects of 9/11 on FDNY staffing, especially as reflected in publicly available documents whose accuracy cannot reasonably be questioned. *See Hayden*, 594 F.3d at 168; *Hotel Employees*, 311 F.3d at 540 n.1; *see also United States v. Adedoyin*,

younger employees and the plaintiff had evidence that the stated reason for his firing was a pretext, this Court still awarded summary judgment to the employer because when "considered in the context of the case as a whole," the evidence heavily relied on by the plaintiff could not support an inference of intentional discrimination. *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 94 (2d Cir. 2001), *cert. denied*, 534 U.S. 951 (2001).

The same is true here. Indeed, much of the evidence at summary judgment pertains to diversity initiatives created or implemented in 2002 or later, under the current administration (*see* City Br., at 13-16; 19-21). For example, minority recruitment was enhanced; the 2002 Exam's deadline was extended to allow more time for minorities to register; the Commissioner personally began "making the rounds of black churches" to deliver the FDNY's recruiting message; and an expert psychometrician was hired and given a mandate to design a better exam for future use (*id.*; *see* pp. 32-36, infra).

Defendants' handling of the EMT promotional exam is particularly illuminating. A court enjoined the EMT test in July 2002, several months after the Mayor and Fire Commissioner took office. *See Gallagher v. City of New York*, No. 125716/00, 2002 N.Y. Misc. LEXIS 880 (Sup. Ct. N.Y. County July 11,

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369 F.3d 337, 342 (3d Cir. N.J. 2004); *United States v. Stewart*, 590 F.3d 93, 148, 162 (2d Cir. 2009) (Calabresi, J., concurring), *cert. denied*, 130 S. Ct. 1924 (2010).

2002), *rev'd*, 307 A.D.2d 76 (1st Dep't), *appeal denied*, 1 N.Y.3d 503 (2003). If City decision-makers were using the Exams to prevent blacks from becoming firefighters, they could have simply acceded to the lower court's injunction. Instead, they pursued an appeal and succeeded, expressly raising the need for enhanced diversity among firefighters as the primary defense for a promotional exam. *Gallagher*, 307 A.D.2d at 78-79. Further, once the injunction was lifted, the City began administering the promotional exam with greater frequency (A1272; A1284; A1300).

In sum, Intervenors' evidence was insufficient to allow a jury to conclude that the Mayor or Fire Commissioner took any actions for the purpose of preventing minorities from becoming firefighters. Accordingly, the dismissal of the federal claims against them on grounds of qualified immunity should be affirmed.

(B)

State-Law Immunity

Also without merit is Intervenors' contention that the Mayor and Fire Commissioner were not entitled to immunity for claims brought under the State and City Human Rights Laws (Vulcan Br., at 154-60).

Under New York law, discretionary acts of a municipal employee may never be a basis for liability, even if they allegedly result from malice, so long

as they are governmental rather than proprietary in nature, and the official has not exceeded the scope of his authority in exercising his discretion. *Valdez v. City of New York*, 18 N.Y.3d 69, 75-76 (2011); *McLean v. City of New York*, 12 N.Y.3d 194, 202 (2009); *Della Pietra v. State*, 71 N.Y.2d 792, 796 (1988); *Tango v. Tulevech*, 61 N.Y.2d 34, 40 (1983). Intervenors do not dispute that, in allowing firefighters to be hired from DCAS' eligibility lists, the Mayor and Fire Commissioner performed a governmental function within the scope of their authority. The sole state-law immunity issue thus distills to whether their conduct constituted an exercise of discretion.

In *Valdez*, the New York Court of Appeals reaffirmed that New York's common-law "governmental function immunity" is absolute, and exists independently from other defenses available to municipal employees. 18 N.Y.3d at 76, n.2. The Court explained the important public policies furthered by governmental immunity (*id.* at 75-76):

> [T]he common-law doctrine of governmental immunity continues to shield public entities from liability for discretionary actions taken during the performance of governmental functions. This limitation on liability reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts. It further "reflects a value judgment that – despite injury to a member of the public – the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and

> retaliatory lawsuits, outweighs the benefits to be had from imposing liability for injury." (*Mon v City of New York*, 78 NY2d 309, 313 [1991]).

Put more succinctly, although ministerial acts may provide a basis for liability, "government action, if discretionary, may not[.]" *Valdez*, at 76, *quoting McLean*, 12 N.Y.3d at 203 (citation and internal punctuation omitted). A ministerial act "envisions direct adherence to a governing rule or standard with a compulsory result," while discretionary conduct involves "the exercise of reasoned judgment which could typically produce different acceptable results." *Tango*, 61 N.Y.2d at 41; *see Arteaga v. State*, 72 N.Y.2d 212, 216 (1988) (applying same principle in quasi-judicial immunity analysis). Drawing the line between discretionary and ministerial functions requires an examination of the duties entrusted to the municipal actor. "[D]iscretion is indicated if the powers are to be executed or withheld according to his own view of what is necessary and proper." *Tango*, at 40 (citation and internal quotation marks omitted). A finding of discretion also depends in part on "the degree of responsibility resting on the officer, and his position in the municipality's table of organization." *Id.*

Here, the decision of the Commissioner and the Mayor to continue hiring firefighters from existing eligibility lists, despite the EEPC's report recommending a validity study, involved discretionary decision-making by high-ranking officials with a "degree of responsibility" indicative of the broadest level

of discretion. The City Charter empowers the Mayor, as chief executive of the City, to respond to an EEPC recommendation as he or she "deems appropriate." Charter § 832. Similarly, as the highest-ranking official in the FDNY, the Fire Commissioner is vested with the "sole and exclusive power" to set policy as to its "government, discipline, management, maintenance and direction." Charter § 487; *Von Essen v. N.Y. City Civ. Serv. Comm'n*, 4 N.Y.3d 220, 223-224 (2005). That authority includes the discretion to make appointments from a certified eligibility list. *Andriola v. Ortiz*, 82 N.Y.2d 320, 324 (1993); *see* Civil Service Law § 61.

Separation of powers is the fundamental principle underlying governmental function immunity. *Valdez*, 18 N.Y.3d at 75-76; *Denis v. Town of Haverstraw*, No. 10-CV-669, 2012 U.S. Dist. LEXIS 46200, at *15 (S.D.N.Y. Mar. 30, 2012). Nowhere is this doctrine more resonant than where two of the highest-ranking individuals in the Executive Branch are hailed into a court of law to answer for the discharge of discretionary duties that fall within the scope of their respective offices.

Intervenors misread *Arteaga*, 72 N.Y.2d at 216, when they assert that New York's discretionary immunity may be overcome by a showing of bad faith (Vulcan Br., at 154-55; 158). In the first instance, Intervenors have not made such a showing (*see* Point IV(A), *supra*). But in any event, *Arteaga* squarely held that "decisions requiring the application of governing rules to particular facts, an

exercise of reasoned judgment which could typically produce different acceptable results" are cloaked with absolute, not qualified, immunity. *Id*. at 216 (citations and internal punctuation omitted). Nor does *Baez v. City of Amsterdam*, 245 A.D.2d 705 (3d Dep't 1997), require a different result (Vulcan Br., at 158-59). The Appellate Division in *Baez* applied a qualified immunity defense to a claim brought under both federal and state constitutional law. *Id*. at 706. Once the Court determined that the officers were entitled to the narrower protections of qualified immunity, the issue of whether the broader state-law immunity applied was "rendered academic." *Id*. at 707.[20]

To be sure, discretionary immunity does not attach where the municipal actor violates an internal rule or policy that mandates a specific action in a certain situation. However, citing *Haddock v. City of New York*, 75 N.Y.2d 478, 484 (1990), Intervenors wrongly assert that the City's EEO Policy eliminated the Fire Commissioner's discretion by requiring him, as an "agency head," to assess the civil-service examination for disparate impact and "discontinue using that

[20] Intervenors' reliance on *Lore v. City of Syracuse*, 670 F.3d 127, 165 (2d Cir. 2012) is misplaced (Vulcan Br., at 159). There, the defendant claimed that a City Corporation Counsel's remarks to the press were immunized under state law because they were made in the capacity of an attorney during "pending litigation." *Id.* Consequently, this Court considered only the scope of New York's "judicial, quasi-judicial, prosecutorial, or quasi-prosecutorial" immunity, and concluded that the immunity did not apply because at least one injurious statement was made before litigation was commenced. The Court of Appeals in *Valdez* made it clear that the governmental function

device" if it was found not to be job-related (Vulcan Br., at 155-56, citing A864-65). This construction is flawed, because the Fire Commissioner could not hire new firefighters without using the eligibility list. If the EEO Policy provision is interpreted in a manner consistent with state law – as it must be – it imposes no ministerial duty on the Fire Commissioner with respect to a civil service test prepared and administered by DCAS.

As noted, hiring without using an eligibility list was not a legally available option. The New York Constitution's Merit and Fitness clause commands that all appointments to civil service positions, such as entry-level firefighter, be made by open competitive examination "wherever practicable." N.Y. Const. Art. 5, § 6; N.Y. Civ. Svce. Law § 50 *et seq.*; *Sullivan v. Finegan*, 275 N.Y. 479 (1937). The Fire Commissioner's broad discretion in overseeing FDNY operations does not encompass the authority to contravene the state constitution or the Civil Service Law. Not even the state Legislature may circumvent the Merit and Fitness clause without an express legislative determination that "ascertaining fitness [for the position] by competitive examination is impracticable" and a "sound, discernible basis supporting the determination of impracticability." *Wood v. Irving*, 85 N.Y.2d 238, 243 (1995); *see also City of New York v. New York State*

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immunity entails a different analysis than quasi-judicial immunity, and confers a broader protection. *Valdez*, 18 N.Y.3d at 76, n. 2.

Div. of Human Rights, 93 N.Y.2d 768, 774 (1999) (legislature may not create a special eligibility list even to compensate victims of recognized discrimination).

Indeed, a state appellate court rejected an agency's effort to delay a civil service examination despite the argument that the test "may be invalid under Federal law" and was therefore "impracticable." *Hannon v. Bartlett*, 63 A.D.2d 810, 811 (3d Dept. 1978). It certainly follows that the Fire Commissioner could not justify refusing to use a certified eligibility list on similar grounds.

As the agency charged with implementing the merit system within the City (*see* Civil Service Law § 50[1]; NYC Charter § 814), it is for DCAS, not an agency head like the Fire Commissioner, to "determine the requisite knowledge, skill and ability required for a given civil service position, assess the most appropriate way to measure a candidate's relevant attributes, and … administer and grade a test by which those qualifications may be judged." *Gallagher*, 307 A.D.2d at 80-81. An agency head is only authorized to "assist" DCAS in analyzing the duties of its civil service members to help prepare the exam. Charter § 815(a). Examination development, which necessarily includes review of its effectiveness in measuring job-related skills, otherwise falls exclusively within DCAS' ambit. Charter §§ 814(2)-(5). Indeed, the Charter specifically assigns DCAS the duty to "determine the appropriateness of eligible lists." Charter § 814 (5).

A City policy may not be construed in a manner that would violate applicable state constitutional and legal principles. Thus, the City's EEO policy only requires agency heads to examine all selection devices under the control of their own respective agencies, because only then may the agency "discontinue using that device" (A865). For the Fire Commissioner, that mandate would apply to hiring procedures for non-competitive positions, unlike firefighters, or hiring devices used by the FDNY in processing candidates from the eligibility lists. But since the FDNY is forbidden by law from relying on anything but an open competitive test in hiring firefighters, the Fire Commissioner did not bear the onus of analyzing civil service exams designed by DCAS.

Intervenors' argument that the Mayor failed to adhere to a ministerial command in the EEO Policy is likewise meritless. They maintain that because the Policy assigned to the Mayor "ultimate responsibility for ensuring that EEO laws are being adhered to and that appropriate EEO policies are developed and enforced" (A867), his failure to direct the Commissioner to analyze the Exam was counter to the Policy and thus nondiscretionary (Vulcan Br., at 156).

This contention fails for two reasons. First, the duty thus described – bearing "ultimate responsibility" for ensuring compliance with a host of EEO laws by a multitude of City agencies – is hardy "essentially clerical or routine" so as to defeat immunity. *Mon*, 78 N.Y.2d at 312-13. Indeed, discharge of that duty

involves exactly the kind of reasoned judgment which could typically produce different acceptable results. Second, the record is very clear that the Mayor considered the EEPC's recommendation and, after consultation with the Fire Commissioner and Deputy Mayor for Legal Affairs, decided not to suspend or delay hiring while a validity study was conducted because he was "satisfied" with the steps the Commissioner had taken to increase diversity (A1018).[21] The Mayor thus simply exercised his discretion in a different manner than that favored by Intervenors. That disagreement does not deprive the Mayor or Commissioner of immunity under New York law. At bottom, there is no question that the Mayor exercised discretion, and Intervenors are left to allege although the Mayor "did exercise [his] discretion," he "did so improperly." *Mon*, 8 N.Y.2d at 316; *see Johnson v. City of New York*, 15 N.Y.3d 676, 681 (2010). That does not pierce the veil of immunity under New York law. *Id.*

[21] The EEPC report was submitted to Mayor Bloomberg on April 8, 2003, and sought a validity study on Exam 7029, which had been given in 1999 (A610). By that time, Exam 2043 had already been administered, in December 2002 (A96; A127; A742). The Mayor thus chose not to expend scarce public resources to study an examination that would soon fall into disuse (A818-19; A1093; A1098). While Intervenors allege that Exam 2043 was indistinguishable from the earlier exam, the pass rate for black test-takers on Exam 2043 satisfied the 80% Rule set forth in the Guidelines, a significant improvement (A445; A451-52; A797; A1242-45). In any case, the Mayor was not involved in the development of either test, which took place, in whole or in large part, under the previous administration, and was not familiar with the specifics of DCAS's methods (A736). Exam 6019 was the only test that was fully developed under the Bloomberg administration, and despite flaws that came to light late in this action, it was indisputably designed by an expert psychometrician and created an eligibility list that was unprecedented in its diversity (A812; A1197-98; A2955).

New York law does not countenance construction of the City's EEO Policy to allow or require an eligibility list to be discarded if an agency head discovers infirmities in a civil service exam. That is apparent from the Merit and Fitness clause, the City Charter's delegation of powers between DCAS and agency heads, and the holding of *Hannon*, 63 A.D.2d at 811. Consequently, the EEO Policy provision at issue does not pertain to the conduct of the Fire Commissioner here, much less the Mayor's. Accordingly, the grant of state-law immunity must be affirmed.

CONCLUSION

The summary judgment ruling on intentional discrimination should be reversed, the Injunction vacated as a result, and the case remanded to a different judge for trial of the issue of intentional discrimination. Even if the summary judgment ruling is affirmed, the Injunction should be vacated and the case remanded to a different judge for further proceedings. On the cross-appeal, the dismissal of all claims against the Mayor and Fire Commissioner should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order of February 22, 2012 because it contains 19,710 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: New York, New York
May 11, 2012

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