11-5113-cv(L), 12-0491-cv(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VULCAN SOCIETY, MARCUS HAYWOOD,
CANDIDO NUNEZ, ROGER GREGG,

Intervenor Plaintiffs-Appellees-Cross-Appellants,

– v. –

MICHAEL BLOOMBERG, Mayor, New York Fire Commissioner NICHOLAS SCOPPETTA, in their individual and official capacities, CITY OF NEW YORK,

Defendants-Appellants-Cross-Appellees,

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

Defendants.

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6438

LEVY RATNER, P.C.
80 Eighth Avenue, 8th Floor
New York, New York 10011
(212) 627-8100

SCOTT + SCOTT LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 223-6444

Attorneys for Plaintiffs-Appellees-Cross-Appellants

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OVERVIEW

The City of New York is a racially diverse metropolis of more than eight million people, with a fire department that is one of the most cherished and respected institutions in the nation. Unfortunately, for far too long, City residents who have called upon the FDNY could be reasonably certain of one thing: that the firefighter answering the call would be white. In 1963, before the passage of the Civil Rights Act, only four percent of all FDNY employees were black. In 2009, black men and women made up only 3.14% of New York City firefighters. It is as if the FDNY has been frozen in time, impenetrable, while other minority employment opportunities have grown. The percentage of black lawyers in New York City is roughly twice as high, and the percentage of black physicians 2.5 times higher, than the percentage of black firefighters in the FDNY.[1]

This case is about the FDNY's stubborn failure to offer fair employment opportunities and about what our system of laws – and the courts that enforce them – must do to fulfill the Constitutional and statutory promise of nondiscrimination.

The City of New York has not appealed the district court's decision that the employment tests it used to hire firefighters from 1999 to 2008 had an unlawful

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[1] *See Gotham Gazette* (Dec. 2004), *available at* http://www.gothamgazette.com/article/Demographics/20041228/5/1231 (lawyers) and 2000 EEO Occupation Data, EEO Special file, *available at* www.census.gov (physicians).

disparate impact against black and Hispanic applicants – not the first such decision involving the FDNY. This Court found that the City's firefighter employment tests discriminated against blacks and Hispanics in 1973. In the time between those two findings, the percentage of incumbent black firefighters in New York has consistently hovered around 3%. Dozens of opportunities to change this practice have arisen and been refused. The Vulcan Society, the Public Advocate, the New York City Equal Employment Practices Commission, City Councilmembers, State and U.S. Congresspeople, the U.S. Equal Employment Opportunity Commission and others have made requests that the City officials address this glaring underrepresentation and revise the way it selects, and rejects, firefighter hopefuls. These entreaties have fallen on deaf ears. The City, instead, in decision after decision – recounted in detail in this brief – chose to continue the same discriminatory hiring practices that have yielded the same, wholly predictable, racially-exclusionary results.

The district court faced a crucial question: given this history, how could it fashion a remedy meaningful and durable enough to avoid another forty years of damage?

After a lengthy remedial trial, the district court made extensive and amply supported findings of fact and issued a carefully crafted injunctive relief order that targets – head on – the specific, practical barriers to eradicating the effects of the

FDNY's long-standing exclusionary hiring practices. The district court did not abuse its discretion in concluding, based on more than eighty detailed pages of post-trial factual findings, that in addition to developing a valid, job-related entrance exam,[2] the FDNY should enhance its recruitment efforts, reduce candidate attrition rates, address unfairness in post-exam screening, and fix the chronic deficiencies in the FDNY's EEO office, in order to fully remedy the lingering effects of the City's decades-long discriminatory hiring practices. The district court's relief order is wholly consistent with similar remedial orders from numerous other employment cases, and fully supported by the district court's finding of disparate impact discrimination.

The City's two principal arguments on this appeal are that the relief order was based on an improper finding of *intentional discrimination* and that, in any event, the relief granted is overly broad. This brief will show that in the factual circumstances of this case, the modest remedial relief granted was wholly appropriate under the district court's initial finding of Title VII disparate *impact* liability, as well as liability under State and City Law, *i.e.* the findings which are

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[2] *Amicus curie* Merit Matters submitted a brief stressing the importance of hiring the most qualified firefighters without preference for any race. It emphasizes how critical this is to the safety of fellow officers and the public. What appears to be lost on Merit Matters is that the goal of this lawsuit was to obtain a valid – *i.e.* job related — firefighter exam that will *more effectively* select the best-qualified candidates than the unvalidated exams of the past.

not challenged on this appeal. For that reason, it will be unnecessary for this Court to reach the question of intentional discrimination liability.

If this Court finds it must address the question of disparate treatment as a basis for the injunctive relief order, it will find ample evidence of City officials' purposeful obstruction of efforts to rectify unfair hiring practices.

The City additionally, and with no lack of temerity, charges bias against the district court judge for failing to take into account a purported "wealth of evidence" which the City never mentioned in its 56.1 Statement below or in its brief opposing summary judgment. It claims such bias irrespective of the fact that the judge rejected numerous positions taken by all parties in this case and his evidentiary rulings at the remedy trial fell fairly evenly on Intervenors and Defendants alike. No purported erroneous evidentiary ruling is presented as a basis for reversal on this appeal.

Intervenors, Appellees-Cross-Appellants here, also show that the Defendants Fire Commissioner and Mayor plainly obstructed attempts to reform the racially biased hiring practices challenged here, that they are not entitled to immunity in this case and that the district court's dismissal of claims against them on that ground must be reversed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the City's appeal of the district court's Injunctive Relief Order pursuant to 28 U.S.C. §1292(a)(1). However, the Injunctive Relief Order is fully supported by the district court's Disparate Impact Order (A428-520), and therefore, this Court does not have jurisdiction to reach the district court's non-final Disparate Treatment Order (A1371-1440) because it is not "inextricably intertwined" with the Relief Order being reviewed.

This Court has jurisdiction, pursuant to 28 U.S.C. §1291, over the Intervenors' cross-appeal from the district court's dismissal of their claims against Defendants Bloomberg and Scoppetta. Intervenors' cross-appeal is taken from the district court's partial final judgment dismissing those claims based on a grant of federal and state law qualified immunity. (SPA181-82.) The cross-appeal was timely. The district court issued its partial final judgment on February 1, 2012, and the Intervenors' filed their notice of appeal on February 2, 2012. (SPA183-84.)

ISSUES PRESENTED FOR REVIEW

1. Based on the City's liability for violations of Title VII's *disparate impact* provisions, did the district court abuse the broad equitable discretion afforded it under Title VII to provide affirmative, prophylactic relief – even absent a finding of disparate treatment – in light of the detailed and voluminous factual findings demonstrating that merely altering employment examinations would not

suffice to remedy the persistent, lingering and collateral effects of a forty-year history of discriminatory hiring practices?

2. If it is necessary and appropriate under pendant jurisdiction for this Court to reach the district court's finding of *disparate treatment* liability to find support for the challenged relief order, then, did the district court err in granting Intervenors summary judgment on their disparate treatment claim, where the City failed to offer any relevant, non-conclusory evidence sufficient to rebut the strong presumption of intentional discrimination established through overwhelming statistical, historical and circumstantial evidence?

3. In light of the strong evidentiary basis for the district court's judgments, the district court's numerous rulings in favor of Defendants, Defendants' failure to argue abuse of discretion as to any particular evidentiary ruling and the settled law that judicial reassignments are rarely granted, can this Court conclude on the basis of minor comments critical of Defendants' positions, that the district court did not act as a neutral arbiter and reassign any outstanding issues on remand without doing substantial damage to the independence of the federal district courts and unreasonably burdening the courts and the parties in this large five-year long litigation.

4. Did the district court err in dismissing the individual claims against Defendants Bloomberg and Scoppetta on federal qualified immunity grounds in

light of their violation of clearly established law prohibiting discrimination in public employment on the basis of race and on State immunity grounds in light of their failure to show a proper exercise of discretion under the City EEO Policy?

STATEMENT OF THE CASE

Based upon charges of discrimination filed by the Intervenors in 2002 and 2005 alleging discrimination with respect to two firefighter entrance exams (Exam 7029 administered in 1999 and Exam 2043 administered in 2002), followed by an EEOC finding of "probable cause," the United States brought this action against the City of New York in May 2007, alleging disparate impact in violation of Title VII. (A94-107.) Intervenors intervened as of right in September 2007, also alleging disparate impact and adding claims of intentional discrimination, claims under state and local law, and claims against Fire Commissioner Nicholas Scoppetta and Mayor Michael R. Bloomberg.

On July 22, 2009, the district court granted Intervenors' motion for summary judgment finding the City liable for disparate impact discrimination. (A428-520.) The City does not challenge that liability finding on this appeal. On January 13, 2010, the district court entered partial summary judgment in favor of the Intervenors, finding the City liable for a pattern-or-practice of intentional discrimination but dismissing Intervenors' claims against Defendants Bloomberg and Scoppetta based on federal and state qualified immunity. (A1371-1440.)

After a nine-day trial on injunctive relief, the district court made findings of fact (SPA2-82) and conclusions of law (SPA84-145) and issued an affirmative injunction to remedy the effects of the City's discrimination. (SPA151-80.) The City appeals from that injunction and Intervenors cross appeal the dismissal of their claims against the Mayor and Fire Commissioner.

STATEMENT OF FACTS

I. THE CITY'S PATTERN OR PRACTICE OF DISCRIMINATION

A. Statistical Evidence of Intentional Discrimination

1. The Longstanding Exclusion of Blacks from the FDNY – 1970 to 2009

Since before the passage of the Civil Rights Act of 1964, New York City has largely excluded blacks from jobs as FDNY firefighters. (A788-791 at 1, 10-15; A1339-41 at 1,10-15; A834; A841; A843; A930; A988.)[3] From 1963 through 1971, only 4% of all FDNY employees, in any title, were black. (A788 at 1; A1339 at 1; A988.) When the Vulcan Society first sued the City for race discrimination in hiring firefighters in 1973, the City's firefighting force was 5% black and Hispanic, even though 32% of City residents in the age group eligible for

[3] References to the Appendix are "A" and references to the Special Appendix are "SPA." When referring to the district court's Disparate Impact or Disparate Treatment liability findings, "DI" or "DT" precede the Appendix cite. References to the district court docket sheet are "Dkt. #."

appointment were black or Hispanic. (A790 at 7; A1340 at 7); *see also Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Service Comm'n*, 360 F. Supp. 1265 (S.D.N.Y. 1973) ("Vulcan Society I"). In that case, Judge Weinfeld found the City liable for unlawful discrimination and imposed a hiring quota – upheld by this Court – that required the City to hire one minority applicant for every three whites. (A789-90 at 4-6; A1340 at 4-6), *see also Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973). In spite of that court-ordered remedy, which was far more invasive than the remedy at issue here, the City's exclusion of blacks from the FDNY persisted long past the 1970s and up to the present. (A790-91 at 8; A1340-41 at 8.)

In 1990, New York City's population was 29% black, but between 1991 and 2006, blacks never comprised more than 3.9% of all FDNY firefighters. (A791 at 11, 14; A1341-42 at 11, 14; A834; A930.) In 2001, the media reported that the City had fewer black firefighters in 2000 (only 321) than it had in 1965 (when there were 600). (A793 at 23; A1343 at 23; A1105-06.) Black residents made up 25% of the population of the City of New York as of 2002. (A821 at 158; A1366 at 158.)

When this litigation began in 2007, the FDNY had only 3.4% black firefighters. (A791 at 15; A1342 at 15; A429.) As of May 31, 2009, that number had decreased to only 3.14%. (A821 at 158; A1366 at 158; A1197-98.)

The Executive Director of the New York City Equal Employment Practices Commission ("EEPC"), which has responsibility under the City Charter for monitoring City agencies' compliance with equal employment opportunity laws and policies, testified that he had "never seen any similar instance of . . . underrepresentation of such magnitude." (A805 at 73; A1352 at 73; A922 at Tr. 50:16-23.) The statistics bear him out. In May 2001, New York City Public Advocate Mark Green sent a letter to Fire Commissioner Thomas Von Essen, copying the Mayor's Office, concerning the lack of diversity in the Fire Department. (A792 at 19; A1343 at 19; A836-39.) The Public Advocate noted that as of December 2000, the firefighting force was 93% white, and the percentage of black and Hispanic firefighters was lower than it had been twenty-five years earlier. (A792 at 19; A1343 at 19; A836.) The Public Advocate also included tables showing that the FDNY "is the least diverse . . . of all the uniformed services in the City" and that it "lags far behind" fire departments in other major American cities in terms of racial diversity. (A792-93 at 20, 21; A836-37; A1343 at 20, 21.) The tables showed:

New York City Department	**% African American**
Fire Dept	3.8%
Police Dept	16.6%
Sanitation	24.3%
Corrections	61.4%

City	African American & Latino Population	African American & Latino Firefighters
New York	52%	7%
Los Angeles	57%	40%
Chicago	62%	29%
Houston	62%	31%
Philadelphia	51%	30%
Phoenix	39%	22%
San Diego	33%	23%
Dallas	61%	28%
San Antonio	65%	50%

2. *The City's Longstanding Use of Exams with Adverse Impact*

The City excluded black firefighter applicants primarily through the use of entrance exams that had a severe adverse impact on blacks and were not validated. In 1973, the Vulcan Society proved that the City's 1971 firefighter test (Exam 0159) violated the Equal Protection Clause of the U.S. Constitution based on the statistically significant differences in pass rates between whites and minorities and the exam's lack of job-relatedness. (A788-89 at 2-3; A1340 at 2-3), *see also Vulcan Society I*, 360 F. Supp. at 1268-70, *aff'd in relevant part by* 490 F.2d 387 (2d Cir. 1973). The City conceded that it had made no effort to validate either Exam 0159 or any previous firefighter entrance exam. (A789-90 at 5; A1340 at 5.)

The City was subsequently found liable for race discrimination in the hiring of police officers as well. In *Guardians Association of the New York City Police Department, Inc. v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980), this

Court affirmed the district court's finding that the NYPD's entrance exam had a racially disparate impact and was not job-related. (A794 at 25; A1344 at 25.) The district court's decision in *Guardians* contained an "unusually complete discussion of the details of test validation," including specific guidance to the defendant – New York City – concerning the requirements for lawful employment testing. (DI-A480), quoting Lindemann & Grossman, Employment Discrimination Law 151 (3d ed. 1996). In developing the firefighter tests challenged here, however, the City's test developers admit that they did not consult the requirements carefully set forth in *Guardians*. (A1222-23 at 2; A1333 at 3; A1335 at 3.)

In 1988, the City administered firefighter Exam 7022. (A791 at 10; A1341 at 10.) Of the 5,000 top-scoring candidates on that test, only 112 (2.24%) were black (A841), even though 10.85% of those who took the exam were black (SPA 27). As a result, from 1990 through 1995 the City hired 2,256 firefighters, but only 29 (less than 1.3%) were black. (A791 at 12; A1341 at 12; A843.)

In 1992, the City administered firefighter Exam 0084, which was used to hire firefighters from 1996 through 2000. (A791 at 13; A1341 at 13.) While 2,692 firefighters were hired from that list, only 53 (less than 2%) were black (A843), even though 8.5% of the applicants for that exam were black (SPA27). The City did not dispute these statistics, and it did not assert in its submissions below that either Exam 7022 or Exam 0084 was valid. In fact, it is undisputed that the

developer of Exam 0084 did not "complete a job analysis" – the first step to developing a valid exam. (DI-A489.)

3. The Adverse Impact of the Challenged Tests Was Striking.

The firefighter exams specifically challenged in this case – Exam 7029, administered in 1999, and Exam 2043, administered in 2002 – like those before them, had a severe adverse impact on black test-takers and were not validated. (DI-A428-A520.)

The 1999 test (Exam 7029) resulted in a pass rate of 60.3% for black candidates and 89.9% for white candidates, a disparity equal to 33.9 units of standard deviation. (A797 at 37; A1346 at 37.) When black applicants did pass Exam 7029, they were ranked an average of 630 places lower than white candidates on the eligibility list for hiring. (A797 at 38; A1346 at 38.) This is a disparity equal to 6.5 units of standard deviation. (*Id.*) More than 3,200 candidates were ultimately hired from Exam 7029, but only 104 of them (3.2%) were black (A797 at 39; A1346 at 39), even though 13.44% of the applicants for the test were black. (SPA27.)

The 2002 test (Exam 2043) resulted in a pass rate of 85.4% for black candidates and 97.2% for white candidates, a disparity equal to 21.8 units of standard deviation. (A797 at 40; A1347 at 40.) As with Exam 7029, the black candidates who passed Exam 2043 were grouped disproportionately lower than

whites on the ranked eligibility list, on average ranking 974 places lower than white candidates. (A798 at 42; A1347 at 42.) This disparity equals roughly 9.6 units of standard deviation. (*Id.*) Because of the City's practice of hiring in rank-order down the list based on candidates' written and physical test scores, and because the Exam 2043 hiring list was not exhausted, many black candidates who passed the test were never reached for appointment. (DI-A450.) Dr. Bernard R. Siskin, an industrial/organizational psychologist retained by the United States, identified the "effective pass rate" of Exam 2043 as the rate at which candidates scored high enough on the test to be considered for hiring. (A797-98 at 41; A1347 at 41.) The effective pass rate for white candidates on Exam 2043 was 70.3%, but the effective pass rate of black candidates was 41.5%, a disparity equivalent to 21.9 units of standard deviation. (*Id.*) Exam 2043 was used to make entry-level appointments to the FDNY through at least January 2008. (A813 at 119; A1360 at 119; A821 at 159.) As of November 2007, the City had hired more than 2,100 entry-level firefighters from the Exam 2043 eligibility list, but only 80 of them (3.7%) were black (A798 at 43; A1347 at 43; DI-A439), even though 12.45% of applicants for the test were black. (SPA27.)

The City did not dispute any of the above facts in its response to Intervenors' motion for summary judgment on intentional discrimination.

B. Anecdotal Evidence in Further Support of Intervenors' Prima Facie Showing of Intentional Discrimination

Prior to and during the use of Exams 7029 and 2043, the City had notice of the exams' adverse impact on black applicants and of various public and internal concerns about the fairness and validity of the exams. The City was also aware, as shown below, that the exams had not been professionally validated. (Dkt. # 264-5 at 34-35; A615-16.) Disregarding compelling evidence of apparent discrimination – from the Department of Citywide Administrative Services ("DCAS"), reports from the EEPC, and probable cause findings of the U.S. Equal Employment Opportunity Commission ("EEOC") – the City repeatedly extended its use of the unlawful exams for years.

1. Notice of Adverse Impact and Refusal to Study Exam Validity

The chronology of events surrounding the City's prolonged use of discriminatory firefighter exams include the following: As early as 1995, the Vulcan Society sent a letter to the EEPC asserting that one's "position on the [exam eligibility] list is not a gauge of how good, or bad, a firefighter you will be." (A805 at 72; A1352 at 72; A954-55.) The Vulcan Society's then-president Paul Washington also asserted publicly in 1999 that the City's firefighter exam was not job-related. (A792 at 18; A1342 at 18; A971-72.)

Thomas Von Essen, who served as Fire Commissioner from 1996 to 2001, knew while he was Fire Commissioner that black applicants as a group tended to pass the firefighter tests less frequently and, when they did pass, to receive lower scores than whites. (A793 at 24; A1343 at 24; A1211.) Even the City's litigation expert in the field of employment testing, Dr. Philip Bobko, agreed that one would *expect* a cognitive written exam, such as Exam 7029 or Exam 2043, to result in disparate impact upon blacks. (Dkt. # 252 at # 78; Dkt. # 257 at # 78; A1201-02 at Tr. 121:25-123:3.)

In addition to this general understanding of the harm caused by its entrance exams, the City had specific knowledge that Exam 7029 would adversely impact black test-takers. Shortly after administering Exam 7029 in February 1999 – but long before that exam was first used for hiring in February 2001 (DI-A439) – DCAS analyzed test-takers' scores and found that setting the pass mark at 84.705 would result in a 89.84% pass-rate for whites but only a 61.19% pass-rate for blacks, meaning that blacks would pass at only 68% the rate of whites.[4] (A810 at 103; A1357 at 103; A957.)

Carol Wachter, the DCAS Assistant Commissioner for Examinations when Exam 7029 was developed, testified that she would have seen the adverse impact

[4] In fact, blacks passed at only 67% the rate of whites, a disparity equivalent to 33.9 units of standard deviation, but the DCAS analysis at the time showed a close approximation of the adverse impact to be expected. (A797 at 37; A1346 at 37.)

analysis before the passing score for Exam 7029 was selected. (A811 at 104; A1357 at 104; A964-65.) Wachter spoke to Thomas Patitucci, her successor as DCAS Assistant Commissioner for Examinations, "about the adverse impact shown" by the City's analysis. (*Id.*) Wachter believed that the pass mark could be set lower than 84.705 while still selecting only qualified candidates. (A811 at 105; A1357 at 105; A968.)

Yet even with this prediction of severe adverse impact, and even after the Public Advocate and the Vulcan Society had raised concerns regarding discrimination, and, as shown below, even knowing that the exam had not been professionally validated, the City chose to set the passing score for the test at 84.705 (A811 at 104; A1357 at 104; A964-65), significantly higher than the passing score of 70 that the City asserts is its usual "default" civil service exam cutoff score. (DI-A445; DI-A506-507.)

In August 1999, the EEPC began an audit of Exam 7029. (A805 at 74; A1352 at 74; A613.) The preliminary audit findings, which were reported to Commissioner Von Essen, relied upon DCAS data to conclude that the black-white disparity in pass rates on Exam 7029 failed the 80% rule and "indicate adverse impact." (A805-06 at 75; A1352 at 75; A626.)[5] The EEPC also reported that

[5] The City has, in fact, asserted in this case that violation of the 80% rule is indicative of adverse impact. (DI-A451.)

employment rates of black firefighters were much lower in New York City than in any other major city in America. (A805-06 at 74; A1352 at 74; A633.)

The EEPC determined that corrective action was required in order for the FDNY "to comply with . . . the mandates of the City's Equal Employment Opportunity Policy (EEOP)" and the federal Uniform Guidelines on Employee Selection Procedures ("Uniform Guidelines"), 29 C.F.R. § 1607. (A805-06 at 75; A1352 at 75; A618.) Specifically, the EEPC recommended that in light of Exam 7029's disproportionate impact against minority test-takers and "given the egregious and long-standing under-representation of minorities and women in the FDNY, the Department should comply with Section VI(A)(2) of the City's EEO Policy" and conduct an adverse impact study of the written portion of Exam 7029, as well as the FDNY's new requirement that entry-level firefighters obtain 30 college credits prior to appointment. (A806 at 77-78; A1353 at 77-78; A624-25.) If the adverse impact study revealed that the exam or the college requirement "disproportionately screens out minority or female candidates, FDNY should conduct a validation study in accordance with" the Uniform Guidelines. (A806 at 77; A1353 at 77; A626.) These recommendations were issued in May 2000, nine months before the City began hiring from the Exam 7029 eligibility list in February 2001. (A618; DI-A439.)

Commissioner Von Essen took no action in response to the EEPC's repeated

recommendations that the FDNY study the adverse impact of Exam 7029 (A806-07 at 79-80; A1353 at 79-80; A642; A646-47 at #10; A923) and claimed that studying the impact of the written test was "a DCAS issue." (A806-07 at 80; A1353 at 80; A643.) But neither the FDNY or the Mayor's Office ever requested that DCAS conduct such a study, and DCAS never conducted one. (A807-09 at 86, 94; A1354-55 at 86, 94; A1115-19; A1082.)

For the remainder of Commissioner Von Essen's tenure, the EEPC continued to press unsuccessfully for compliance (A807-08 at 81-86; A1353-54 at 81-86; A614; A644-49; A658-69), including pointing out that the Commissioner's positions were "in direct conflict with the City's Equal Employment Opportunity Policy" which "requires the agency (*i.e.* the FDNY) to conduct the adverse impact study." (A807 at 83; A1353 at 83; A656-57.) During Fire Commissioner Scoppetta's tenure, starting in January 2002, the FDNY continued to refuse to implement the EEPC's recommended corrective actions concerning adverse impact studies. (A808 at 87-90; A1354 at 87-90; A923; A992-95; A615.)

In 2002, the City began preparing for its next firefighter test, Exam 2043. At the outset of the development process for Exam 2043, in February 2002, Sherry Kavaler, the FDNY's Assistant Commissioner for Human Resources, sent a letter addressed to DCAS and copied to Fire Commissioner Scoppetta and DCAS Commissioner Martha Hirst, asking which agency (DCAS or FDNY) would

determine the validity of that year's written exam, because "some questions have been raised about its fairness/bias." (A814 at 125; A1361 at 125; A990.) Decisionmakers were already well aware of those "questions." FDNY Deputy Commissioner Douglas White, who joined the Fire Department in 2002 (A981 at Tr. 134:20-23), said that he knew "from as long as I can remember, there had been questions raised about fairness and bias" of the entry-level exams. (A816 at 135; A1362 at 135; A982 at Tr. 137:2-9.)

In August 2002, Captain Paul Washington, president of the Vulcan Society, told Commissioner White that "you don't need to score 85 or above [on the FDNY's written exam] to be a good firefighter," and Commissioner White noted that Captain Washington had previously "made those arguments to the Commissioner, Nicholas Scoppetta and the Mayor, Michael R. Bloomberg." (A816-17 at 134-36; A1362 at 134-36; A998.)

That same month, the Vulcan Society filed a charge with the EEOC alleging that Exam 7029 had an adverse impact on black applicants and also alleging intentional discrimination. (A813 at 120; A1360 at 120; A1000-06.) Mayor Bloomberg testified that he "would have been informed essentially right away" about the Vulcan Society's EEOC charge. (A818 at 142; A1363 at 142; A907 at Tr. 75:16-22.)

Despite these renewed expressions of concern, and its admitted knowledge of EEOC charges regarding Exam 7029, the City chose to allow hiring to continue from the Exam 7029 eligibility list and to develop Exam 2043 using the same job analysis and the same test-construction process it had used to create Exam 7029. (A813 at 117; A1359 at 117; A1116; DI-A464; DI-A472.) It also chose to use the new test in the same rank-ordered fashion as Exam 7029, resulting in a virtually identical exam that had a predictably severe disparate impact on black applicants. (*Id*.; DI-A438.)

The City did not assert at the time – and has not asserted since – that it had any reason to believe that Exam 2043 would have less adverse impact than its nearly-identical predecessor. It is also undisputed that neither the FDNY nor DCAS "determine[d] the validity" of either Exam 7029 or Exam 2043 before they were used. (Dkt. # 264-5 at 34-35; A615-16.)

On December 10 and December 11, 2002, the EEPC's audit process moved forward again with a report and final determination letter to Commissioner Scoppetta reiterating that the FDNY was not in "compliance with the equal employment opportunity requirements of Chapters 35 and 36 of the City Charter," because the agency had not conducted an adverse impact study or validity study of Exam 7029. (A808-09 at 91-92; A1355 at 91-92; A670-75; A926-27; A1182-88.) Just days later, with apparent unconcern for its noncompliance with EEO law, the

City pressed ahead with the administration of Exam 2043 on December 14, 2002 (DI-A439), effectively continuing its policy of using unvalidated exams with obvious adverse impact.

The EEPC, which has no independent enforcement authority, had only one option in the face of the FDNY's non-cooperation: to ask the Mayor to direct the agency to take the recommended corrective action. (A804 at 68; A1351 at 68; A924-25.) Only twice in EEPC's history of conducting approximately 200 agency audits had it needed to seek help from the Mayor because an agency had refused to comply with the law. (A809 at 96; A1355 at 96; A924.) In this case it "voted unanimously to issue a Report to The Mayor pursuant to the failure of the New York Fire Department to take certain appropriate and effective corrective actions" concerning Exam 7029. (A809 at 95; A1355 at 95; A708.)

In April 2003, the EEPC sent Mayor Bloomberg its report recounting the history of its audit of Exam 7029, its statistical findings of disparate pass rates between white and black candidates, and the FDNY's noncompliant responses to its recommendations. (A810 at 101; A1356 at 101; A818 at 143; A1363 at 143; A610-708.) The report asked the Mayor to "direct Commissioner Nicholas Scoppetta to comply with the requirements of Chapter 36 of the New York City Charter and the City's Equal Employment Opportunity Policy" by conducting an adverse impact study to determine if the FDNY's college credit requirement or the

written exam "disproportionately screens out" minorities and, if so, "conduct[ing] a validation study in accordance with the federal government's 'Uniform Guidelines on Employment Selection Procedures.'" (A615-16.)

Mayor Bloomberg spoke to Commissioner Scoppetta about the EEPC report and, in October 2003, responded to the EEPC that "I am satisfied that the Fire Department has adequately addressed the points raised in the EEPC's report." (A810 at 102; A1357 at 102; A1018.)[6] Yet there is absolutely no evidence in the record indicating that the Fire Department had done anything to address the adverse impact and validity concerns raised by the EEPC, and there is no evidence that Mayor Bloomberg had any basis to believe otherwise.

Mayor Bloomberg later explained that he had declined to require adverse impact studies because "[a]fter talking with the Fire Commissioner, it seemed best to spend public resources to move forward with *new exams* and new recruitment strategies rather than spending scarce public money to study *past exams*." (A818-

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[6] Aside from the FDNY, the only other agency to refuse compliance with the City's EEO Policy was the Administration for Children's Services ("ACS"). (A809 at 97; A1356 at 97; A924.) Commissioner Scoppetta was the head of ACS from 1996-2001 (A1079), and the EEPC found that from 1997-1999, ACS was out of compliance with the City's EEO Policy. (A1009-1010.) While the EEPC initiated efforts to obtain compliance after Scoppetta's departure, the underlying violations were uncovered during his tenure, and they had not been corrected by the time he left ACS in 2001. (A1009-1014.) When Mayor Bloomberg received the EEPC's report concerning compliance failures at ACS, he did what he did here – he supported the agency's refusal to comply with the EEPC. (A810 at 102; A1357 at 102; A925; A1016.)

19 at 147; A1364 at 147; A1097-98) (emphasis added). This explanation, however, is inconsistent with the undisputed fact that, at the time the Mayor rejected the EEPC's request for assistance, the "*new*" firefighter exam that the City was about to start using was Exam 2043, which was – by design – virtually identical to the "*past*" Exam 7029 and, in keeping with the City's practice, would be used to hire firefighters for the next four years. (A813 at 117; A1359 at 117; A1116; DI-A439; DI-A464; DI-A472.)

Instead of commissioning an adverse impact study or a validity study to investigate whether the City's firefighter tests were fair, Mayor Bloomberg testified at his deposition that "I asked everybody from the Commissioner on down, and I had nobody tell me that they thought the test was biased, other than if the Vulcan Society sued us and alleged it, I guess they did. And if [Captain] Paul [Washington] said it in a meeting, I guess he did. I have no recollection of a specific conversation." (A817 at 139; A1362 at 139; A907 at Tr. 76:18-77:2.) Bloomberg testified that he relied on the informal responses of firefighters and fire officers – who had passed City firefighter exams with scores high enough to be hired – concerning whether they thought the exam was fair,[7] but he did not claim

[7] Bloomberg made no mention of those conversations in his earlier responses to interrogatories that specifically asked him to identify any communications he had regarding the FDNY's entry-level exams. (A817-18 at 141; A1363 at 141; A1095-96; A1099.)

that they had any expertise in evaluating exams for bias or validity. (A817 at 140; A1363 at 140; A905-06; A909.)

Mayor Bloomberg also explained his refusal to enforce the EEPC's recommendations by writing that "as you know, the Fire Department has undertaken a wide-ranging recruitment campaign to attract women and minorities to its ranks, including various methods in which to recruit and retain candidates of color." (A1018.) The Mayor did not, however, describe any plan to ensure the fairness or validity of the tests that these future recruits would have to take. (*Id.*)[8] In fact, the Mayor acknowledged that if an exam was unfairly excluding blacks from the job, he was not sure how recruitment would help solve that problem. (A819 at 149; A1364 at 149; A908 at Tr. 81:9-19.)

It was not until May 2004 – more than a year after the EEPC had issued its report to the Mayor specifically warning of non-compliance with EEO law (A610-708) – that the City began hiring from the Exam 2043 eligibility list, with predictably bad results for black and Hispanic applicants. (A813 at 119; A1360 at 119; DI-A439.) Even though the City set the passing score for Exam 2043 at 70 (DI-A445), instead of the unusually high passing score of 84.705 used on its

[8] The City's next firefighter exam after the Mayor's rejection of the EEPC's request, was Exam 6019, which the district court also found failed to comply with Title VII. (A1753-89.) The City did not appeal that finding in spite of the district court's permanent injunction against further use of Exam 6019 for hiring. (Dkt. # 569.)

previous exam (DI-A443), the use of Exam 2043 in rank-order actually resulted in an even more severe adverse impact on black candidates (9.6 units of standard deviation) (DI-A448-49) than resulted from the use of Exam 7029 (6.5 units of standard deviation). (DI-A447.)

In June 2004, one month after the City made its first round of hiring from the Exam 2043 eligibility list, the EEOC issued a probable cause finding with respect to Exam 7029. (Dkt. # 125-3.) The EEOC concluded that "Black test-takers were discriminated against when the City, relying upon a pre-employment test that Blacks disproportionately failed and that was not validated according to professional standards, excluded them from further consideration because they failed the test." (*Id.* at 6.) The City refused to conciliate the charges or remedy the problems identified by the EEOC (A814 at 122; A1360 at 122; A1071-73), and it went right on using the virtually-identical Exam 2043 despite the EEPC and EEOC's clear warnings as to lack of validity.

As Mayor Bloomberg's term progressed, the FDNY's exams continued to be a matter of public concern. In February 2005, then-City Councilmember Yvette Clarke suggested to the Mayor that the firefighter exam could be revised to make it more job-related. (A819 at 150; A1365 at 150; A1053-57.) The following month, the *New York Daily News* reported the well-known fact that "the FDNY has the

widest racial divide by far in city government." (A819 at 151; A1365 at 151; A1110-11.)

Three additional charges of discrimination were also filed with the EEOC by test-takers Marcus Haywood, Roger Gregg and Candido Nuñez on February 24, 2005 concerning Exam 2043. (A814 at 123; A1360 at 123; A1020-41.) The EEOC's November 2005 determinations of those charges found that Exam 2043 "produced a high degree of adverse impact against African-American applicants and was not validated according to professional standards." (A814 at 123; A1360 at 123; A1043-51) (internal quotation marks omitted). Yet the City's leadership continued hiring from the Exam 2043 list all the way to 2008. (DI-A439.)

In 2006, City Councilmember Charles Barron, then-State Senator David Paterson, and other government officials wrote to Mayor Bloomberg raising familiar concerns about the disproportionately low percentage of minorities in the FDNY. (A819-20 at 153; A1365 at 153; A1067.) Around the same time, U.S. Congressman Charles Rangel sent Mayor Bloomberg a letter specifically asking him to change the scoring method for the next written test. (A820 at 154; A1365 at 154; A1069.) Captain Washington also met with Mayor Bloomberg again in 2006 and advocated a pass/fail methodology for scoring the written exam and instituting an oral testing component. (A820 at 155; A1365 at 155; A1060-61 at Tr. 115:5-116:6; A1063-64 at Tr. 148:22-149:3.) There is no evidence that the Mayor took

any action in response to these entreaties by public officials and black firefighters. Notwithstanding the meetings, letters, and calls of concern, the City's officials, including the Mayor and the Fire Commissioner, opted to continue hiring from Exam 2043 until 2008. (A813 at 119; A1360 at 119.) As of November 2007, the City had hired more than 2,100 entry-level firefighters from Exam 2043, only 80 of whom (3.7%) were black. (A798 at 43; A1347 at 43.)

2. *Failure to Comply with Legally Established Validation Requirements*

As noted above, this Court's 1980 decision in *Guardians* contained an "unusually complete discussion of the details of test validation" under the EEOC's Uniform Guidelines. (DI-A480.) It announced to public employers – and to the City of New York in particular – exactly what federal law and the Uniform Guidelines require. But when the City began creating Exam 7029 in 1998, and when it subsequently developed Exam 2043 in 2002, it "ignored the Second Circuit's guidance" in *Guardians*. (A794 at 26; A1344 at 26; A1333 at 3; A1335 at 3.) As a result, the City repeated many of the same test development practices for which the *Guardians* Court had criticized it in 1980. (A794 at 26; A1344 at 26.)

(a) *The City failed to test for critical skills and abilities*. *Guardians* requires that employment tests measure abilities that have been found to be important through a "job analysis." 630 F.2d at 95. The City's analysis of the firefighter job identified eighteen important cognitive abilities, but it tested only nine of them

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(A794 at 28; A1344 at 28), leaving out the two *most* important cognitive abilities for the job: oral comprehension and oral communication. (A795 at 29; A1345 at 29.) Seven other "important" cognitive abilities were omitted simply because the "standard operating procedure" was to not test them. (A795 at 30; A1345 at 30.) *Non*-cognitive abilities relevant to the firefighter job were not included on the tests although the federal government had recommended their use in firefighter exams since at least 1975. (A795-96 at 31-32; A1345 at 31-32.)

FDNY firefighters also rated physical ability as *more* important than cognitive ability for the performance of their jobs (A796 at 33-34; A1345 at 33-34; A1128-29), but candidates were not permitted to take the physical test until first passing the written exam. (DI-A437.) And, because more than 70% of applicants considered for hiring scored 100 on the physical test (DI-A437-38; A796 at 34; A1345 at 34; A1126-29), the written exam was essentially the sole determinant of who was hired.

(b) *Test questions were written by non-experts*. The City used firefighters, not test-developers, to draft the actual questions for Exams 7029 and 2043, a practice directly criticized by this Court in *Guardians*, 630 F.2d at 96. (A794 at 27; A1344 at 27.)

(c) *The passing scores had no psychometric justification*. The City did not set the passing score for either exam based on a prediction of job performance, as

required by *Guardians*, 630 F.2d at 105. It chose the pass mark for Exam 7029 based on anticipated hiring needs and set the pass mark for Exam 2043 using a "default" cutoff score of 70. Both methods were prohibited by *Guardians*. *Id.* at 105-06. (A796 -97 at 35-36; A1346 at 35-36.)

(d) *Rank-ordering of candidates had no psychometric justification*. While the City continued to use rank-ordered hiring, it could not show that small differences in test scores could predict a difference in future job performance (DI-A512-518), again in disregard of *Guardians*, 630 F.2d at 100-01.

3. Implementation of an Unvalidated College-Credit Requirement

For Exam 7029, the FDNY began requiring candidates to complete 30 college credits prior to appointment. (A811 at 106; A1357 at 106; A960-61.) The credits could be in any subject, whether or not related to firefighting. (A1083, Tr. 59:11-19.) DCAS Assistant Commissioners Wachter and Patitucci opposed the requirement as unjustified and because of "its effect on increasing adverse impact" (A811 at 107; A1357-58 at 107; A961-63), but the requirement was imposed nonetheless. (A811 at 108; A1358 at 108; A960-61.) Despite pressure from the EEPC, Commissioner Von Essen refused to study the adverse impact of the college requirement. (A811 at 110; A1358 at 110; A923-24; A612.)

Dr. Catherine Cline, a DCAS psychometrician who helped develop Exam 6019, later concluded that rather than requiring college credits, a high school

diploma and six months of work experience were sufficient qualifications for the job. (A812 at 113; A1359 at 113; A1213-1220.) In fact, Dr. Cline opined that construction experience would likely be a more useful background for firefighting than college courses. (A812 at 114; A1359 at 114; A1088-89.) Yet Commissioner Scoppetta came into office and kept the college requirement, even though he had no evidence that college classes made better firefighters. (A812 at 115; A1359 at 115; A1082-83.) The City never studied the adverse impact or the validity of the educational requirement for Exam 7029 or Exam 2043. (A812 at 112; A1358 at 112; A612.)

4. Defendant Scoppetta's Knowledge and Participation in Discrimination

Nicholas Scoppetta, an attorney by training, became Fire Commissioner in January 2002, after serving as Commissioner of the Administration for Children's Services. (A814 at 124; A1360 at 124; A1076-80.) Scoppetta was aware of the lack of diversity in the FDNY long before he became Fire Commissioner. Between 1996 and January 2002, he had attended town hall meetings with Mayor Rudolph Giuliani at which the issue of minority underrepresentation in the FDNY was raised. (A814 at 124; A1360 at 124; A1078.)

A month after Commissioner Scoppetta joined the FDNY, his Assistant Commissioner, Sherry Kavaler, informed him in writing that "questions have been raised about [the] fairness/bias" of the FDNY's firefighter exam. (A814 at 125;

A1361 at 125; A990.) A few months later, Scoppetta participated in a meeting with Mayor Bloomberg and Vulcan Society President Paul Washington regarding diversity in the Fire Department, and he later had additional meetings with representatives of the Vulcan Society concerning that issue. (A814-15 at 126; A1361 at 126; A1085; A1062.)

Both the 1996 and 2005 City EEO Policies explicitly required agency heads like Scoppetta to examine their agencies' employment practices to determine whether they pose barriers to equal opportunity, and to cease their use in that event. (A799 at 52; A1348 at 52; A864; A885-86.) The 1996 EEO Policy requires:

> Agencies will examine all devices used to select candidates for employment to determine whether these devices adversely impact any particular racial, ethnic, disability, or gender group. To the extent that adverse impact is discovered, agency heads will determine whether the device is job-related. *If the device is not job-related the agency will discontinue using that device.* (A865.) (emphasis added.)

The 2005 EEO Policy includes virtually identical language. (A886.)

In September 2002, Commissioner Scoppetta was quoted in the *New York Daily News* as saying "the Fire Department is 93% white and male – there's something seriously wrong with that picture." (A815 at 127; A1361 at 127; A1113.) Yet he adamantly refused to conduct the adverse impact studies required by the EEO Policy and recommended by the EEPC (A815 at 128; A1361 at 128),

and he continued using the college requirement with no evidence of its validity. (A1082-83.)

5. *Defendant Bloomberg's Knowledge and Participation in Discrimination*

Mayor Bloomberg took office in January 2002 and was aware of the lack of racial diversity in the FDNY early in his administration through personal observation and professional dealings with the Department. (A815 at 129; A1361 at 129.) He realized it "was very heavily weighted towards White males" (*Id.*; A899) and spoke to Commissioner Scoppetta about the diversity problem. (A815 at 130; A1361 at 130.) In April 2002 he met with, among others, Vulcan Society President Paul Washington about that "the insufficiency of the City's firefighter recruitment program, as well as the legality of the entry level firefighter examinations and other selection procedures." (A815-16 at 131-34; A1361-62 at 131-34; A897-99; A947; A984-85; A997-98.)

Under the City's EEO Policy, "[t]he Mayor of the City of New York has ultimate responsibility for ensuring that EEO laws are being adhered to and that appropriate EEO policies are developed and enforced." (A799 at 48; A1348 at 48; A867.) Mayor Bloomberg agreed that he is responsible for setting EEO policy for City agencies and "to make sure those policies are followed, and if they are not followed . . . to take appropriate steps to help the agency try to follow them in the future." (A799 at 51; A1348 at 51; A905.) As noted, he refused to fulfill this legal

obligation when he was officially informed by the EEPC and the EEOC that the FDNY was violating the law.

C. The City's Purported Diversity Efforts

The City suggests it raised a material dispute of fact below by asserting that (1) it tried to increase black representation in the FDNY through recruitment (City Br. 13-14, 16); (2) it introduced a promotional test for emergency medical technicians to become firefighters to increase diversity (*id.* at 15); (3) it implemented a New York City residency credit to increase diversity (*id.* at 82, 90); and (4) it engaged in other post-charge period ameliorative conduct (*id.* at 13, 20-21, 44, 80, 90). Although none of this evidence responds directly to the City's unlawful civil service testing, its purported efforts are discussed here.[9]

1. Recruitment Efforts Were neither Meaningful nor Effective; They Were Cosmetic.

In 1994, the EEPC initiated an audit of the FDNY's recruitment of minority and women applicants. (A804 at 69-70; A1351-52 at 69-70; A920.) The FDNY asserted that its recruitment for Exam 0084, given in 1992, had been "successful" (A931), but the EEPC found that, in fact, fewer black applicants took Exam 0084

[9] Several of the City's assertions find no support in the record. For example, the City asserts that the registration period for Exam 2043 was extended for 30 days "just to allow more time for minority candidates to register" (City Br. 14), but the cited pages provide no evidence that the date was changed because of diversity concerns. (A679; A714.)

(2,009 black test-takers or 6.4% of all examinees) than had taken Exam 7022 four years earlier (3,629 black test-takers or 10.8% of all examinees). (A804 at 70; A1352 at 70; A933-34.) The number of black recruits continued to decline for the exams challenged here. Only 1,749 black applicants took Exam 7029 in 1999, and even fewer, only 1,393, took Exam 2043 in 2002. (DI-A439; DI-A443; DI-A445.) These numbers are undisputed.

The City cites the EEPC's May 2000 audit report (A620) as evidence of its recruitment efforts. The report does note that the FDNY placed advertisements in minority-oriented media outlets and sent recruiters to schools and community organizations with substantial minority populations (A620), but on the following page, the EEPC goes on to say that it "found a number of deficiencies in the Department's recruitment activities," that the size of the FDNY's recruitment staff "was inadequate to accomplish the mission of attracting substantially larger numbers of historically underrepresented groups," and that "[f]urthermore, the Department failed to implement the EEPC's first 1994 Joint Recommendation on this issue." (A621.)

Whatever efforts the City made were not effective, and the City knew this no later than December 2002, when the administration of Exam 2043 resulted in the fewest black test-takers in at least 14 years. (A804 at 70; A1352 at 70; A933-34; DI-A439; DI-A443; DI-A445.)

2. *The EMT Promotional Test Did Not Address New Applicant Testing Procedures Much Less Affect Black Incumbency Rates in the FDNY.*

The City also asserts, for the first time on appeal, that its promotional exam, which allows emergency medical technicians (EMTs) to promote into the title of firefighter, "was specifically designed to diversify the FDNY's ranks after 'recruitment efforts in that regard had not proved successful.'" (City Br. 15 n.7, citing *Gallagher v. City of N.Y.*, 307 A.D.2d 76, 78-79 (1st Dep't), *appeal denied*, 1 N.Y.3d 503 (2003)).[10] But a promotional opportunity available to EMTs, who are already FDNY employees, provides no benefit to the non-EMT applicants who were subjected to the City's discriminatory entry-level exams and are the Intervenors in this case. Nor did it alter the downward trend in minority hiring from the challenged exams.

3. *Bonus Points Were Not Implemented With the Purpose of Increasing Diversity or Lessening the Adverse Impact of the Exams.*

The City's next new assertion – which was, again, not raised below (A1222-24) – is that its policy of providing a five-point "credit" on the exam to New York City residents should be considered a "diversity strateg[y]" (City Br. 102 n.26), because it "predominantly helped minority candidates." (*Id.* at 82, 90.) But the City

[10] The State Appellate Division's recognition that recruitment efforts "had not proved successful" is additional evidence that such recruitment was not material or meaningful as it had no effect on the rates of black employment in the firefighter title. *Gallagher*, 307 A.D.2d at 78.

cannot point to any record evidence supporting the assertion that the residency credit was meant to be a diversity strategy or was motivated, even in part, by a desire to benefit minority candidates. Nor did the residency credit do anything to address the exams' lack of validity. And the extremely low black hiring rates continued.

4. Post-Charge Conduct by the City Is Immaterial.

The balance of the City's evidence of diversity efforts pertains to conduct after the charge-filing period, *i.e.*, after August 2002. (A813 at 120; A1360 at 120; A1000-06.) The City maintains – although it did not assert this below – that it "enlisted" Columbia University to study its recruitment program (City Br. 20, 24, 80, 101 n.25), but that did not happen until 2003. (Dkt. # 102 ¶19.) The City also says it partnered with the Department of Education to create the FDNY High School (City Br. 20-21), but that was also in 2003 and only eight (8) students from that school, of any race, have gone on to become FDNY employees – in any title, not necessarily that of firefighter. (A3022.)

II. THE INJUNCTIVE RELIEF TRIAL AND THE DISTRICT COURT'S REMEDIAL ORDER

In its statement of facts, the City omits or mischaracterizes much of the evidence presented at the injunctive relief trial. We summarize below, as to each

provision of the Injunctive Relief Order, the relevant evidence, the court's findings, and the specific relief imposed.

A. Voluntary Candidate Attrition

1. The Evidence Before the District Court

While the City notes that the eligibility list from each open-competitive firefighter exam is used for four years (City Br. 50), it fails to mention that candidates often wait up to five, six, or seven years after taking an exam to be hired as firefighters. (A2828; A3155-57; A3767-68; A3813-14.) This waiting time between exam and appointment is considerably longer than in other major cities such as Boston, Los Angeles, Houston, San Francisco, and Phoenix. (A5439.)

Retired FDNY firefighter Sheldon Wright, speaking from his experience both as a firefighter candidate and later as an FDNY recruiter for six years, testified that this long period between the time candidates take the firefighter examination and the time they are called by the Candidate Investigation Division ("CID") causes many candidates to give up on the firefighter hiring process. (A3157-59; A3163; A3170-71; A3180-82.) This was corroborated by FDNY data showing that over 5000, about 31%, of the candidates called for processing by CID from the eligibility lists for Exams 7029, 2043, and 6019 stopped pursuing the years-long hiring process. (A784-86; Dkt. # 597-14, at 2-41.) These candidates had all passed the exam and were high enough on the list to be reached for

appointment. The City acknowledges that the rates of voluntary attrition were significantly higher among minority candidates than white candidates on Exam 6019 (City Br. 50), and similar racial disparities existed on Exam 7029. (A5269.) Moreover, in 2003, the FDNY learned from researchers at Columbia University that a "significant" factor in the higher attrition rates among minority candidates was the lack of informal support networks of family and friends within the FDNY to help guide these candidates through the long hiring process. (A5440-41.) This same point was made in a 2004 internal memo from a CID investigator to FDNY Deputy Commissioner White. (A2756-58; A4735-36.) The memo reads in part:

> [O]ur "minority" candidates are not familiar with the process and are easily intimidated. Other candidates receive guidance from family members or friends that work for the Department while the "minority" candidates very often do not know anyone that could provide guidance in this regard. "Minority" candidates have a greater likelihood of getting caught up in hurdles and giving up on the process. (A4736.)

The CID's Director, Dean Tow, and the Columbia researchers also confirmed that FDNY employees take an active role in supporting the appointment of candidates who are *their* family members or friends. (A2758; A5440-41.)

Both the 2003 Columbia Study and the 2004 CID memo recommended that the FDNY's Office of Recruitment and Diversity ("ORD") provide the informal support that minority firefighter candidates often lack, by mentoring them throughout the post-exam hiring process. (A4736; A5440.) But it was not until

2008, *after* the filing of this lawsuit, that the FDNY took any steps to implement this recommendation, and the only step it took was to have ORD director Michele Maglione personally call candidates who had failed to report for their initial CID interviews and to have ORD notify candidates about the FDNY's preparation class for the physical portion of the exam.[11] (A2684; A2752; A2978-80; A3087-88.) These modest efforts were not successful. The rate of voluntary attrition for candidates on the Exam 6019 eligibility list, which was established in 2008, was actually higher (39.5%) than the attrition rate for Exam 7029 and Exam 2043 candidates, and the attrition rate for black candidates remained disproportionately high. (A784-86; A2684; A4739; Dkt. # 597-14 at 2-41.)

2. *The District Court's Factual Findings*

Based on the foregoing, the court below found by a preponderance of the evidence that the FDNY's extremely long hiring process promotes high rates of voluntary candidate attrition. (SPA14.) It also found that using such attrition as a means of screening out candidates is inconsistent with a merit-based selection system, because many of the candidates high on the eligibility list drop out of the process. (SPA14-15.) Such attrition has an adverse impact on black firefighter candidates who are significantly less likely to have informal support mechanisms

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[11] The FDNY did not implement any of these measures for the Exam 2043 hiring cycle, which lasted from 2004 to January 2008. (A96; A2752.)

within the FDNY to help them through the hiring process because the City's discriminatory testing procedures have systematically excluded black candidates from the Department. (SPA15-16.) The court further found that the FDNY could limit the adverse impact on black candidates by expanding upon and devoting sufficient resources to attrition-mitigation measures. (SPA16-18.)

3. *Injunctive Relief Order Provisions Concerning Voluntary Candidate Attrition*

The Injunctive Relief Order requires the City, in consultation with the Court Monitor and the other parties in the case, to draft and implement "a written plan to mitigate and diminish rates of voluntary candidate attrition" between different steps in the firefighter hiring process, and requires that such plan "shall focus particularly on the steps needed to prevent 'voluntary' . . . candidate attrition from disproportionately affecting the retention rates for black and Hispanic firefighter candidates during the firefighter hiring process for [the current open competitive firefighter] Exam 2000." (SPA161.)

B. FDNY's Post-Exam Candidate Screening Process

1. *Arbitrariness and Lack of Transparency in CID and PRB Decisionmaking*

(a) *Evidence before the District Court*. FDNY officials admitted at trial that the FDNY's CID, and its Personnel Review Board ("PRB"), lack standards for reviewing and assessing firefighter candidates' character and fitness.

CID Director Tow, who decides whether to refer a firefighter candidate to the PRB, testified that, other than a policy of automatically referring all candidates with arrest records to the PRB, there are no FDNY guidelines or policies informing his decision to refer a candidate or the recommendation he makes to the PRB regarding a candidate's appointment. (A2699; A2703; A2711-12.) Similarly, both FDNY Assistant Commissioner Kavaler, a former PRB member, and her successor Donay Queenan acknowledge that there are no written guidelines governing the PRB's decisionmaking. (A3295-96; A4875-77.) Deputy Commissioner White, a PRB member for more than nine years, testified that he thought "some rules for the PRB would be good. . . to make sure that things are transparent and there's a certain amount of fairness involved." (A3425.)

To illustrate how the lack of standards in the CID's decisionmaking process could disadvantage minority candidates, Intervenors offered the records of a white and a Hispanic firefighter candidate, both of whom were arrested but never convicted of domestic violence offenses. (A4741-93.) Both gave virtually identical explanations for their arrests. (*Id.*) The only significant difference was that the white candidate's charges were slightly more serious (involving a weapon) and his arrest was more recent. (A4741-42; A4772-73.) Nevertheless, Tow recommended that the PRB appoint the white candidate but not the Hispanic candidate, and he

could not explain these differing recommendations when asked to do so at trial. (A2732-36; A4741; A4772.)[12]

Several FDNY officials involved in the CID and PRB review processes also testified that they were contacted by current FDNY officers or executives whose family and friends were firefighter candidates under review, that FDNY policy does not require that such communications be disclosed, and that, in CID director Tow's case, he does not disclose such communications to the PRB. (A2758-59; A3295; A3424-26.) Moreover, the deposition testimony of Commissioner Kavaler, which was read into the record at trial, discussed at length how such communications usually worked to the advantage of white firefighter candidates who, because of the historic underrepresentation of blacks in the FDNY, were more likely to have friends or relatives in the Department:

> LEVY: Was there any inquiry made whether anyone on the PRB panel knew the candidate?

[12] The City offered the records of five black candidates from Exam 6019 with lengthy arrest histories who were all denied appointment by the PRB (A5686-893), purportedly to rebut statistical evidence offered by the Intervenors concerning the disparities in PRB denial rates between white and black candidates and to respond to Captain Washington's deposition testimony that he had seen anecdotal evidence of the PRB denying appointment to black candidates with minor arrest histories while appointing whites with similar histories. However, the court refused to admit these records because it had already excluded Intervenors' statistical evidence, the records were irrelevant to Captain Washington's testimony, and the City did not provide any evidence concerning white Exam 6019 candidates for comparison or any information about the reasons for the PRB's rejections of these five candidates. (A4235-36; A4350-51.)

KAVALER: If they knew the candidate, that would be a positive thing because they would bring insight into what was just on paper.

LEVY: So it did happen that people knew the candidate?

KAVALER: Yes.

LEVY: How frequently did that happen?

KAVALER: I'm sure probably at every one or every other meeting there is some candidate that is known.

LEVY: And did it ever happen that someone was a relative of someone on the PRB?

KAVALER: Not so much the relative of the PRB but maybe a relative of someone within the Fire Department that the PRB people knew.

LEVY: Were those people given that consideration?

KAVALER: Yes.

LEVY: And were they more likely to be passed?

KAVALER: Yes.

. . .

LEVY: What would be the nature of the conversations?

KAVALER: Somehow or other, although I am very upset with my staff, it appears people knew who was going to PRB. It got leaked out of my CID area. No one would ever tell me who did or why. People knew what was going on and who was going to the PRB. You would have lieutenants and captains, whatever, posting chief of department: This is the son of so and so, this is the son of so and so. I lived next door to him for years. He's a good guy. He just had a fight in a disco. He got drunk.

Someone made a pass at his girlfriend. He socked him. He did community service. Something like that. Whatever it was. He beat his wife but his wife took him back so he shouldn't be considered a wife beater. He still could be a good firefighter. These types of things, that would be brought to the table and people would say I know this guy. He's a good guy. His son has got to come on the job. I will vouch for him. I will bring him into my office tomorrow. I'll read him the riot act, say he's getting the chance of a lifetime and he better own up to it and make us proud and we would hire him.

. . .

LEVY: Were there certain topics that would come up routinely? Was there a sort of checklist at the PRB, what to look for?

KAVALER: No, it wasn't a checklist or anything like that. You're dealing with a lot of Irishmen who are drunks and they get into bar fights and they get arrested and they get arrested again. They fight, they sock their girlfriends, this is the things that cause their records to pop up to us because they get arrested, because they fought with the police when they got arrested. This is boys being boys, that type of thing.

(A2759-64; A4879-80.)

Tow, Queenan, Kavaler, and other PRB members also testified that when the PRB renders a decision regarding the appointment of a firefighter candidate, it does not give the candidate, the CID, the FDNY's EEO office, or anyone else a reason for its decision. (A2709-11; A3294; A3428; A4876-77.) The City claims that a candidate can challenge a negative PRB decision through an Article 78 proceeding in New York State Court or by filing a discrimination complaint with the EEOC or the New York City or State Human Rights Commissions, or can request her candidate investigation file through a Freedom of Information Law

request, or can in certain circumstances make a written inquiry pursuant to New York's Correction Law for the reasons for her rejection by the PRB. (City Br. 38-39.) These avenues are illusory because a candidate can never learn the purported reasons behind the PRB's decision, as they are not recorded anywhere. (A3369-70; A3373-75.) Commissioner White testified that he believes it would be beneficial for the PRB to adopt a policy of providing each candidate who is a denied appointment a written explanation of the reasons for the denial. (A3294.)

(b) *The District Court's Factual Findings*. Based on the foregoing, the court below found that there is no written guideline or policy informing the CID's recommendations to the PRB and that this lack of guidance materially increases the risk that any recommendation will be arbitrary and based on impermissible factors, such as race. (SPA49-50.) To illustrate this danger, the court referred to Tow's differential treatment of the white and Hispanic firefighter candidates who had each been arrested on virtually-identical domestic violence charges. (SPA50.) Additionally, the court found that the PRB "is, in function, a black box that permits arbitrary decision-making unguided by rules or training and without the possibility of meaningful review," and that "absent court monitoring of PRB decision-making,

the court will be unable to assure that firefighter candidates are treated fairly by the PRB regardless of race."[13] (SPA61.)

2. *Improper Use of Candidate Arrest Records*

(a) *Evidence before the District Court*. The EEOC's Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964 ("EEOC Guidance")[14] specifies that for an employer to properly exclude a job applicant on the basis of an arrest record, in the absence of a conviction, the employer "must determine whether the applicant is likely to have committed the conduct alleged." (A5058.) The Guidance further counsels that an "employer is required to allow the person a meaningful opportunity to explain the circumstances of the arrest(s) and to make a reasonable effort to determine whether the explanation is credible before eliminating him/her from employment opportunities," and that the employer cannot "ignore [an applicant's] explanation where the person's claims could easily be verified by a phone call, i.e. to a previous employer or a police department." (*Id.*)

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[13] As the City also points out (City Br. 43), the court below excluded both the Intervenors' and the City's statistical evidence comparing the number of black and white firefighter candidates rejected by the PRB and did not rely on that evidence in making its factual findings. (A4235-37.)

[14] *See* U.S. Equal Employment Opportunity Commission, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, Notice No. 915.061 (Sep. 7, 1990), *available at* http://www.eeoc.gov/policy/docs/ arrest_records.html.

The CID and PRB review processes do not follow the EEOC Guidance. CID investigators are not required to conduct any independent investigation into the factual circumstances underlying a candidate's past arrests. (A3403-04.) Investigators rarely if ever contact the arresting law enforcement agency or witnesses about the circumstances of a candidate's arrest but instead usually rely exclusively on information provided by the candidate's rap sheet – which simply lists the crime(s) charged – and the explanation of the arrest provided by the candidate. (A2717-18.) Further, CID Director Tow "is not too familiar" with the EEOC Guidance and neither he nor his investigators use it when deciding to refer a candidate with an arrest history to the PRB. (A2718-19.) The CID simply automatically refers all candidates with prior arrests to the PRB regardless of the circumstances surrounding the arrest. (A2697; A2701; A2715; A3394.) Both Tow and his predecessor have arbitrarily disregarded candidates' explanations for their arrests without doing any independent investigation to determine the credibility of such explanations (A2729-31; A4741-42; A4772-73; A4832-53.)

The PRB's decisionmaking process similarly contravenes the EEOC Guidance. Fire Commissioner Cassano, who served on the PRB for five years, and Deputy Commissioner White both testified that they knew of no guidelines, from the EEOC or otherwise, which governed their consideration of candidates' arrest records. (A3286-87; A3289-90; A3687-88.) In addition, Commissioner Cassano

testified that the PRB made credibility determinations about a candidate's explanation for his or her arrest without independently investigating the facts surrounding the arrest, and the PRB has rejected candidates based solely upon a record of arrests that did not result in convictions because it did not find the candidates' explanations for such arrests credible. (A3685-87.)

(b) *The District Court's Factual Findings*. The court below found that the CID's and PRB's practices regarding consideration of candidates' arrest records make it more likely than not that firefighter candidates will be improperly denied appointment based on prior arrests that did not result in conviction. (SPA50-55.)

3. Adverse Impact from Improper Use of Arrest Records

(a) *Evidence before the District Court*. As the City notes (City Br. 43), Intervenors provided statistics on the race of all persons arrested by the NYPD between 2005 and 2009. These statistics were compiled from the NYPD's own arrest report data for those years, which was produced by the City in a separate litigation.[15] (A2811-12; A4866.) The statistics showed that 48.96% of all arrestees were black, 34.27% were Hispanic, and 11.96% were white. (A4871.) Meanwhile, 2010 U.S. Census data showed that 22.7% of the City's population is black, 33.1% is white, and 28.58% is Hispanic. (SPA56.) While the City objected to the relevance of its own arrest statistics (City Br. 43), it introduced no evidence

[15] *Floyd v. City of New York*, 08 Civ. 1034 (S.D.N.Y.). (A2811-12; A4866.)

suggesting material differences between the racial distribution of arrests in New York City generally compared to the racial distribution of arrests among those eligible for appointment as a firefighter.

(b) *The District Court's Factual Findings*. Based on the foregoing, the court found by a preponderance of the evidence that black New York City firefighter candidates are significantly more likely than white candidates to have been arrested and are thus more likely to be subjected to, and disadvantaged by, the CID and PRB's review of candidate arrest records. (SPA59.) It further found that the PRB's improper use of candidate arrest information in exercising hiring discretion will more likely than not have an adverse impact on black candidates. (*Id*.)

(c) *Injunctive Relief Order Provisions Regarding the Post-Exam Candidate Screening Process*. The Injunctive Relief Order requires City employees, agents, or officials who are involved in the CID and PRB processes to create a written record of oral communications concerning individual firefighter candidates being considered for appointment. (SPA163-64.) The Order further requires the City to create written policies and procedures governing CID and PRB operations. (SPA164-66.) These policies and procedures must, among other things: (a) specify circumstances under which the CID will refer a candidate to the PRB; (b) specify when a deeper investigation of a candidate's background (*e.g.* the circumstances surrounding a prior arrest that did not result in a conviction) is required and how to

conduct such investigation; (c) require PRB members to disclose any potential conflicts of interest or personal knowledge they may have, and prior communications they have had, concerning particular firefighter candidates under PRB review; and (d) require that the PRB adopt an individualized and fact-specific statement of reasons for any adverse decision it makes as to any firefighter candidate. (*Id.*) In addition, the Order requires that all CID staff and PRB members receive training on applicable EEO laws and policies. (*Id.*) Finally, the Order requires that the Court Monitor attend meetings of the PRB at which candidates are considered and then file a report identifying problems, if any, with the CID/PRB review process and make recommendations for additional policies and procedures to ensure fairness and compliance with EEO laws and policies. (SPA166-67.)

C. Firefighter Candidate Recruitment

1. The Evidence before the District Court

(a) *Need for Sustained Formal Targeted Remedial Recruitment*. The evidence submitted to the district court demonstrates that the FDNY's informal family-and-friends recruitment network has been a major, if not the primary, source for FDNY firefighter applicants. Commissioner Cassano acknowledged as much at trial, explaining that, along with seeing firefighters at work in the community, having friends and family in the FDNY provides candidates with

knowledge of, and fosters their interest in, the firefighter job and its benefits. (A3705-06; A3709.) Cassano's testimony was corroborated by a 2003 FDNY-Columbia University survey of Exam 2043 candidates, which found that 40% of male respondents and 33% of female respondents had a relative in the FDNY, and noted that family and friends were the largest sources of recruitment messages. (A5282; A5431-32.) The evidence also shows that because of the historic underrepresentation of blacks in the FDNY, they are far less likely to have friends and family members in the FDNY and are therefore at a distinct recruitment disadvantage to whites. (A3663-64; A5282; A5436-37.) Commissioner Cassano acknowledged that the FDNY must compensate for the lack of an informal family-and-friends recruitment network in minority communities with a formal recruitment effort targeted to such communities. (A3663-64.)

Meanwhile, applicant data for Exam 6019 and Exam 2000 confirm the importance of formal recruiting. The data show an initial surge in applications filed by whites in the early days of the application period, followed by a steady daily increase in the percentage of applications filed by blacks as the filing period – and the City's recruitment efforts – gained steam. (A6343-6413.) The increase in applications from black job-seekers was much quicker and more pronounced during the Exam 2000 application period, which featured a more robust, targeted recruitment effort than did Exam 6019. (*Id.*)

(b) *The City's History of Inadequate and Inconsistent Commitment to Recruitment*. The evidence before the district court also shows that the City has historically failed to devote sufficient resources to formal recruitment, until faced with EEOC charges and a federal class action lawsuit for race discrimination. Vulcan Society President and FDNY firefighter John Coombs, who worked as an FDNY recruiter during the 2002 and 2006 recruitment campaigns, offered uncontroverted testimony about the numerous shortcomings of the 2002 campaign, including insufficient staffing (only 20 part-time recruiters, all of whom were injured and on light duty),[16] limited access to vehicles for travel to recruitment events (one van), and lack of preparation (no training provided to recruiters; no tables, chairs or pens for recruitment events). (A2832-39.) Not surprisingly, the 2002 campaign failed to bring in a racially-diverse applicant pool. Only 12.5% of applicants were black, fewer in terms of percentage and absolute numbers than on the previous exam in 1999, and far lower than the percentage of age-eligible black City residents. (A4672; A5280.) That same year, the FDNY Cadet Program, which had drawn young people of color into the FDNY's EMT and firefighter ranks from the mid-1990's until 2002, was discontinued for budgetary reasons despite costing

[16] Meanwhile, independent of the City's efforts, the Vulcan Society sent as many as 40 of its members out at a time to recruit at community events around the City on weekends during the application period for the 2002 Exam. (A2841-42.)

less than $2 million a year to operate in an annual FDNY budget of $1.6 billion. (A3159-86; A3634; A4568-69.)

While the FDNY made several improvements to its 2006 recruitment effort for Exam 6019, that was *after* the EEOC's probable cause findings against the City and *after* the United States had commenced its Title VII investigation into the FDNY's hiring practices. (A710-16; A1043-51; A1110.) Moreover, the 2006 recruitment campaign still had significant shortcomings, including recruitment vehicles in severe disrepair and a failure to advertise on radio stations with large black and Hispanic audiences. (A2845; A4694-95.) The final applicant pool for Exam 6019 was more diverse than on prior exams, but blacks were still underrepresented at only 19.22%. (A4672; A6396-97.) The district court found that exam had an adverse impact on black applicants and was not validated. (A1753-89.)

As for the Exam 2000 recruitment campaign, the City's improvements were made *after* the district court's two liability rulings in this case (City Br. 44; A2927-28; A2935), or, in some cases, on the eve of and even during the trial on injunctive relief. (A2938-40.) For example, radio advertising was not included in the FDNY's recruitment budget for FY 2012, even though a firefighter exam was planned for that fiscal year. (A2964-66.) The FDNY did not start advertising on black radio stations until the first week of August 2011 (A2939, Tr. 246:10-12), even though

the application period for the test began July 15, 2011 (A2928, Tr. 235:19-22), and despite the fact that the Vulcan Society had been calling for radio advertising for months and had even submitted an advertising proposal and budget to the ORD. (A2938-40; A2950-53; A2965-66.)

Most of the City's improvements and increases in resources are unlikely to be sustained. The City continues to rely on donations from private sources, rather than its own funds, for important elements of its recruitment effort, including vehicles for FDNY recruiters and the design of an advertising strategy. (A2960-61; A3053-54; A3061-62.) The majority of additional funds for the Exam 2000 recruitment effort came in the form of an increase in overtime available to part-time recruiters, which, even recruitment director Maglione admits, exceeded the overtime cap permitted by the FDNY. (A2957-58.) Finally, despite its decades-long failure to recruit black, Hispanic, and women applicants, the City refused to hire an outside expert on firefighter recruitment or to research best practices for recruiting a diverse firefighter applicant pool. (A2950; A2953-54.)

(c) *The City's Failure to Set Measurable Recruitment Goals*. Along with its failure to devote sufficient resources to recruitment, the City never set goals for the number of minority applicants it seeks to recruit for each firefighter exam. (A2967; A3673-75.) Instead, the City measures the success of each recruitment campaign

by comparison to its previous campaigns, which were largely unsuccessful. (A2967-69.)

(d) *Failure of DCAS and the FDNY's Recruitment Office to Coordinate Efforts*. DCAS schedules exam application periods without consulting with, or even informing, the FDNY's recruitment office. (A2952-53.) This prevents ORD from fully planning its media strategy or buying advertising until after the application period has begun, and it would have caused the most recent application period to end before the City's annual African-American Day Parade – a major recruitment opportunity – had the parties not requested that the court extend the application period by four days. (Dkt. # 731.)

2. The District Court's Factual Findings

Based on the foregoing, the court below made four principal findings of fact with respect to firefighter candidate recruitment. First, "[i]n the absence of a robust and highly-organized remedial [FDNY] recruitment campaign," whites will continue to be overrepresented and blacks underrepresented in the firefighter candidate pool, which will in turn perpetuate the effects of the City's prior discrimination. (SPA33-34.) Second, "in the absence of court supervision, the City is likely to significantly curtail its commitment of financial resources" to such remedial recruitment efforts. (SPA37.) Third, the City's failure to set performance goals for its recruitment efforts prevents the court, and the City, from meaningfully

assessing their sufficiency. (SPA39.) Finally, the failure of DCAS and the FDNY to coordinate regarding scheduling and administering the firefighter exam undermines the FDNY's remedial recruitment efforts. (SPA39-40.)

3. Injunctive Relief Order Provisions Concerning Candidate Recruitment

The Injunctive Relief Order requires the City to administer an optional survey to Exam 2000 candidates to assess the effectiveness of the FDNY's recruitment activities and strategies, to determine the reasons why firefighter candidates applied for the job, and to determine how many candidates have friends or relatives in the FDNY. (SPA159.) In addition, the Order requires the City to retain an independent recruitment consultant who, in consultation with the City and the Court Monitor, will conduct research and submit a report that will: (a) evaluate the effectiveness of the FDNY's current recruitment activities and strategies targeting black and Hispanic firefighter candidates; (b) identify best practices, both in New York City and nationally, for recruitment of black and Hispanic employees, particularly firefighters; (c) recommend changes to the FDNY's black and Hispanic firefighter recruitment tactics and long-term strategies; (d) identify measurable goals; and (e) identify additional resources necessary and recommend annual recruitment budgets, during both exam and non-exam years, to meet these goals. (SPA159-61.)

D. The FDNY's EEO Office

1. The Evidence before the District Court

The evidence before the district court showed that the FDNY's EEO office is severely and chronically under-resourced and has consistently failed to fulfill many of its mandated functions under the City's EEO Policy. The EEO office, which covers an FDNY workforce of 16,000 people (A3634), is assigned thirteen staff positions; but four to five of them were vacant and another six were filled by temporary staff as of August 2011. (A3504-05; A3513.) Many of these vacancies persisted for years despite repeated requests from former Assistant Commissioner of EEO Lyndelle Phillips and the City's former Chief Diversity and EEO Officer Dianne Crothers to fill the positions, particularly the staff attorney positions that are responsible for EEO complaint investigations. (A3228-29; A3514-15.) Crothers, who had oversight of the FDNY's EEO activities between 2007 and 2011, concluded that the EEO office's staff was too small to handle the large volume of open complaint investigations it was facing. (A3224-25.)

The EEO office's complaint investigation backlog ballooned from 98 in March 2005 to 275 by the end of June 2008. (A310-11; A4717-23; A4882-5026.) Many unresolved complaints languished for years without action. (A4717-23.) Long lists of complaints filed in 2003 and 2004 were still unresolved in the third quarter of 2005. (A4717-20.) For each of these complaints, the respondent had

submitted no response and the complainant had not been notified of the unilateral "extension" of time for the FDNY to investigate the complaint. (*Id.*)

While the backlog did decrease by 70% between 2008 and 2010 (City Br. 54), this decrease was due primarily to changes in accounting methods, which allowed EEO investigators to combine multiple investigations into a single line-item for reporting purposes, and stricter screening of complaints at the intake phase, so that more complaints are rejected without any investigation. (A3535-39; A3570-79.) The backlog was also reduced through reallocation of resources away from other mandated EEO functions, like conducting compliance inspections at FDNY facilities, which EEO office staff has not done since 2009. (A3515-16; A3570-79; A3583.) The termination of compliance investigations is especially troubling, given that racially insensitive and divisive materials have appeared several times in FDNY firehouses in recent years, including nooses (A4098-99) and a flyer making fun of a memorial service for black firefighters who died on 9/11. (A3850-54; A4707.)

Meanwhile, Commissioner Cassano, who assumed office in January 2010 with a stated goal of reducing the EEO office's complaint investigation backlog (A3648), only permitted Assistant Commissioner Phillips to replace only one of the three permanent staff attorneys who left during her tenure. (A3512; 3514-15.) He later decided to remove Phillips because of the backlog. (A3692; A4921-5017.)

As for EEO office staffing, not until August 2011, in the midst of the injunctive relief trial, did Cassano finally agree to fill some of the long-vacant positions. (A3649.)

The FDNY's EEO office has also failed to fulfill its other mandated responsibilities under the City's EEO Policy. For example, while the City policy requires all agencies to prepare annual EEO plans (A5177-78), the FDNY's EEO office has created an EEO plan only two or three times over the past five years. (A3528-29.) In addition, all agencies are required to assess their recruitment and hiring practices for adverse impact on any group (A5178-79), but the FDNY's EEO Office has little or no contact with the FDNY's Recruitment Office, has never assessed the PRB and CID's post-exam screening practices for adverse impact, and does not assess the adverse impact of the firefighter entrance exams. (A3504; A3574-75.)

2. The District Court's Factual Findings

Based on the foregoing, the court below found that the FDNY's EEO office is so chronically and severely under-resourced that it cannot fulfill its responsibilities under the City's EEO Policy to assess the FDNY's hiring and recruitment practices for adverse impact, to investigate EEO complaints, and to conduct compliance inspections of FDNY facilities. (SPA75-82.) The court further concluded that if the EEO office could not fulfill these responsibilities, it would

also be unable to ensure the FDNY's compliance with any court order prohibiting the use of discriminatory firefighter exams or to prevent retaliation or discrimination against black and Hispanic firefighters who will be hired in the future, including the victims in this case. (SPA82.)

3. Injunctive Relief Order Provisions Concerning the FDNY's EEO Compliance

The Injunctive Relief Order requires the City to retain an independent EEO consultant who will, in consultation with the City and the Court Monitor, conduct research and submit a final report which, among other things, will: (a) identify all equal employment opportunity law compliance activities currently performed by the FDNY and evaluate the effectiveness of such activities; (b) identify all tasks the FDNY's EEO office should be performing under the City's EEO Policy or to ensure the FDNY's compliance with EEO laws; (c) identify best practices in other New York City agencies and firefighter departments nationally for ensuring compliance with applicable EEO laws and policies; (d) recommend a compliance program to be carried out by the FDNY's EEO office, which includes specific compliance activities and measurable goals; (e) identify and recommend specific actions the FDNY's EEO office, and any other relevant City agency, must take to deter and prevent acts of discrimination and retaliation against current and future City employees involved in the present litigation; (f) identify additional EEO office staff and resources and a minimum and ideal EEO office budget needed to

successfully carry out the recommended EEO compliance and retaliation-prevention programs; and (g) recommend process, organizational, and policy changes within the FDNY's EEO office, and the FDNY and City as a whole, to eliminate barriers ensuring compliance with federal, state, and City EEO laws and policies. (SPA168-70.)

SUMMARY OF THE ARGUMENT

I. In fixating on the district court's finding of disparate *treatment*, the City fails to appreciate that the injunctive relief order is independently justified by the district court's findings of disparate *impact* liability – findings the City has not challenged on this appeal. Contrary to the City's unsupported assertions, a district court is fully authorized to issue a remedy for a Title VII violation that reaches not just the specific unlawful employment practices giving rise to liability, but also the continuing effects of those practices. The Supreme Court has repeatedly emphasized that Congress provided district courts with the power to order the "'most complete relief possible, '" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (quoting 118 Cong. Rec. 7168 (1972)), for violations of each of Title VII's liability provisions. Under that power, broad affirmative relief as entered in this case is appropriate under a disparate impact finding, as well as an intentional discrimination finding. That relief includes prophylactic, affirmative relief that a court, in its broad discretion, finds is necessary to root out lingering or collateral

effects of the discriminatory employment practices. As this Court need not reach the district court's finding of intentional discrimination in order to uphold the injunctive relief order, it lacks jurisdiction to reach that issue pursuant to the narrow doctrine of pendent appellate jurisdiction, because there is no final judgment on the intentional discrimination order. *See Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

II. In the event the Court chooses to reach the question, the district court was correct in concluding that Intervenors were entitled to summary judgment on their disparate treatment claim. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Intervenors' evidence created a strong presumption that the City's repeated decisions to maintain a discriminatory testing system were based on race. The City, rather than meaningfully challenging the reliability or probative force of this statistical and anecdotal evidence in the district court, or providing other explanations for the gross disparities in the City's hiring of black candidates, merely pointed to conclusory, self-serving and immaterial statements, and cosmetic but ineffective acts, which it argues should shield it from liability.

Notably, the City raises on appeal for the first time a host of new facts regarding the intentional discrimination finding that it then criticizes the district court for ignoring. Indeed, by urging this Court to consider dozens of new purported facts that it *failed* to present to the district court in opposition to

summary judgment, and by attempting to have this Court apply the *McDonnell Douglas* rebuttal standard applicable only to individual discrimination cases, rather than the *Teamsters* standard that governs pattern-or-practice cases, the City implicitly concedes that it procedurally defaulted on its burden of production before the district court. Because the City failed to offer any legitimate or relevant nondiscriminatory reason for the discriminatory use of its exams, as it was required to do in a pattern-or-practice case such as this – *and* in a manner consistent with Rule 56 – the district court rightly granted Intervenors judgment as a matter of law.

III. The City asks this Court to reassign this case to another district court judge in light of alleged bias. The request is completely groundless. The City dedicates more pages to the remarkable proposition that it was denied a neutral arbiter than to the actual propriety of the injunctive relief ordered in this case. (*Compare* City Br. 111-25 (biased judge) *with* City Br. 84-97 (injunctive remedy inappropriate).) Yet throughout that extended discussion, the City cites to scant case authority in support of its grievance, perforce because this Court has rarely granted the extraordinary step of judicial reassignment. The district court in this case, like Judge Weinfeld forty years earlier, based its decisions upon a full and fair evidentiary record, careful and detailed factual findings and a deliberative assessment of the law. A litigant's attempt to replace a judge who is rightfully critical of that litigant's persistent violations of the law presents a direct and

troubling challenge to the independence of the federal district courts and should be squarely rejected.

IV. Intervenors' cross appeal asserts that the district court erred in granting Defendants Bloomberg and Scoppetta qualified and official immunity from damages on Intervenors' claims brought pursuant to 42 U.S.C. §§ 1981 and 1983 and under State and City law. Because it is clearly established that public officials are not immune to liability from individual liability for actions that violate clearly established rights – in this case the right to be considered for public employment without racial bias – and because the Commissioner and Mayor were directly involved in preserving such discriminatory practices, dismissal of claims against them was in error.

Separately, the district court applied incorrect legal standards in granting Defendants Bloomberg and Scoppetta immunity under the State and City Human Rights Laws. Because they failed to comply with the City's own EEO Policy, and failed to follow the express recommendations of the New York City Equal Employment Practices Commission ("EEPC") that they do so, they could not meet their burden under State law to show a proper exercise of discretion.

This Court should affirm the district court's injunctive relief order on the basis of the disparate impact liability order alone, or in the alternative, affirm the intentional discrimination liability order and affirm the injunctive order on the

basis of both liability findings. The Court should reverse the grant of qualified immunity on federal and state law grounds and decline to order the reassignment of this case to a different judge for subsequent proceedings.

ARGUMENT

I. BECAUSE THE DISTRICT COURT'S INJUNCTIVE RELIEF ORDER IS FULLY SUPPORTED BY ITS DISPARATE IMPACT FINDINGS (NOT CHALLENGED HERE) AND THE REMEDY TRIAL FINDINGS, THIS COURT SHOULD AFFIRM THE INJUNCTIVE ORDER WITHOUT REVIEWING THE DISPARATE TREATMENT DECISION.

The district court expressly – and correctly – concluded that its Injunctive Relief Order was equally supported by both its Disparate Impact and Disparate Treatment liability findings.[17] Given the substantial overlap in the underlying facts, there can be little doubt that the relief ordered by the district court is fully supported by either the proper finding of intentional discrimination from which the City has appealed, or the disparate impact finding from which the City has not appealed. But, because the City does not appeal the district court's disparate impact decision, this Court can and should uphold the injunctive order on the basis

[17] "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." (Oct. 5, 2011 Order, SPA103.)

of the finding of disparate impact liability, without reaching the contested question of whether the City met its burden to rebut Intervenors' prima facie case of intentional discrimination.[18]

A. Title VII and the Federal Courts' Broad Equitable Powers Amply Support the District Court's Authority to Impose the Affirmative Relief Ordered in this Case Based on its Disparate Impact Finding.

In two of the earliest of the Supreme Court's disparate impact decisions, the Court defined the scope of relief under Title VII. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court noted that Congress intended that

[18] Because the City seeks interlocutory review of the Disparate Treatment Order pursuant to the doctrine of pendent appellate jurisdiction, and because the Disparate Impact Order provides an independent basis for the Injunctive Relief Order, the City cannot show that it is appropriate for this Court to review the Disparate Treatment Order as a pendent matter. (City Br. 3.) This Court has made clear "that pendent appellate jurisdiction should be exercised sparingly, if ever, by the courts of appeals." *Mancuso v. N.Y. State Thruway Auth.,* 86 F.3d 289, 292 (2d Cir.1996) (citing *Swint*, 514 U.S. 35; *accord Bolmer v. Oliveira*, 594 F.3d 134, 141 (2010) (defendants failed to explain how grant of summary judgment was "inextricably intertwined or necessary to assure meaningful review," and court declined to exercise pendent jurisdiction). Neither *Lamar Advertising v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004) nor *Luna v. Pico*, 356 F.3d 481 (2004) – cases where this Court found issues were inextricably intertwined – involved the issue presented here, *i.e.*, a separate unappealed judgment that provides an independent basis for the relief afforded. The City's claim that the district court's factual findings on relief were "predicated on" and "inseparable from" its Disparate Treatment Order (City Br. 99) is not supported by the record. While the district court references both the Disparate Impact and Disparate Treatment Orders in its findings of fact supporting the Injunctive Relief Order, it is sufficient for purposes of this appeal that the relief granted was appropriate based upon the findings contained in the Disparate Impact Order alone.

Title VII relief not be limited to "'the elimination of the particular unlawful employment practice complained of,'" *id*. at 421 (quoting 118 Cong. Rec. 7168 (1972)), and that the district court had "'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.'" *Id*. at 418 (quoting *Louisiana v. United States*, 380 U.S 145, 154 (1965)). Congress intended to "arm the [district] courts with [the] full equitable powers" of the federal courts. *Id.* Likewise, in *Griggs v. Duke Power Co*., 401 U.S. 424, 429-30 (1971), the Supreme Court recognized that Congress's purpose in enacting Title VII –

> was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

See also Teamsters, 431 U.S. at 364 (Title VII vests "broad equitable powers" in federal district courts).[19] Moreover, because a "primary objective of Title VII is

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[19] That power rests in both Title VII and the general federal equitable powers of any district court. *See Rios v. Enter. Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974). ("In addition to the powers expressly granted by the Civil Rights Act, the court possesses the equitable power, upon finding any unlawful discrimination, to 'eliminate the discriminatory effects of the past as well as bar like discrimination in the future,'") (quoting *Louisiana v. United States*, 380 U.S 145, 154 (1965)); *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district

prophylactic," *Teamsters*, 431 U.S. at 364, district courts retain broad discretion to remedy the incidental or lingering effects of discriminatory practices in terms that are broader than the underlying unlawful employment practice.

These principles remain as vital today as they were when first enunciated, and, when placed alongside the broad discretion generally given to district courts to remediate constitutional violations, *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), *United States v. Crescent Amusement Co.*, 323 U.S. 173, 185 (1944), they plainly authorize the district court's exercise of reasoned discretion to grant the injunctive relief in this case. Indeed, since *Griggs* and *Albemarle Paper*, district courts have followed these principles in disparate impact cases to enter relief of a similar scope to that entered by the district court here. For example, courts have required employment of a court monitor and consultants to assist in implementation of broad-ranging aspects of a court's remedial order. *See, e.g.*, *McClain v. Lufkin Industries*, No. 9:97-63 2010 WL 455351, at *4-5 (E.D. Tex. Jan. 15, 2010) (ordering defendant to adopt objective employment standards and processes and to appoint an internal monitor to oversee various EEO activities, appointing an Ombudsman to investigate EEO charges and to review personnel actions for adverse impact and recommend test validation where appropriate, and

court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

ordering the hiring of consultant to prepare training program for executives, managers and supervisors); *Lewis v. City of Chi.*, No. 98 C 5596, 2007 WL 869559 at *12 (N.D. Ill. Mar. 20, 2007), *aff'd in part and rev'd in part on other grounds*, 643 F.3d 201 (7th Cir. 2011) (appointing special master to monitor City's treatment of black class members hired pursuant to court's relief order); *NAACP v. Town of E. Haven*, 259 F.3d 113, 117 (2d Cir. 2001) (noting that district court decree in disparate impact case had required the City to consult with independent testing agencies in selecting and administering hiring tests).

Courts in disparate impact cases have similarly imposed heightened recruitment efforts on municipalities, beyond ordering the alteration of a discriminatory test. *See Newark Branch, NAACP v. Harrison,* 940 F.2d 792, 806 (3d Cir. 1991) (in a disparate impact case, affirming an injunction requiring the City to "adopt and implement affirmative recruitment activities directed towards potential black applicants" including "paid radio station advertising and public service announcements on radio stations 'having a large black audience' and have as their goal 'the recruitment of black applicants for each position or examination in numbers reflecting their availability in the job category being filled'"); *NAACP v. Town of E. Haven,* 998 F. Supp. 176, 187-88 (D. Conn. 1998), *aff'd*, 259 F.3d 113, 117 (2d Cir. 2001) (quoting *Albemarle Paper Co.*, 422 U.S. at 417-18) (in a disparate impact case, ordering targeted recruitment relief to "achieve equal

employment opportunity and to remove the barriers that have operated to favor white male employees over other employees," even though no recruitment claim was brought); *Commonwealth of Pa. v. Glickman,* 370 F. Supp. 724, 737 (W.D. Pa. 1974) (in disparate impact case, ordering fire department to "take all necessary steps with all reasonable diligence to recruit eligible blacks to take the eligibility examination").

B. The Court's Injunction Properly Corresponds to the Nature and Scope of the Violation.

The City does not dispute this fundamental aspect of the federal court's remedial power; indeed, it only restates the general rule that relief should "correspond to the nature and scope of the violation" (City Br. 93)[20] – a standard

[20] The City cites a handful of cases in which the Supreme Court has limited injunctive relief for various reasons. (City Br. 92-93.) Yet *none* of the cases cited by the City involve facts akin to those presented here, namely, a more than forty-year history of exclusion of blacks from employment in the "best job in the world." (SPA85.) Nor does any even hint that it is an improper exercise of equitable discretion for the district court to order relief necessary to remedy the continuing effects of a defendant's past discrimination. For example, *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976), involved an injunctive order against a municipality that was grounded upon only a handful incidents of individual police misconduct involving a small number of officers over the course of a year – vastly different from the forty-year history of discrimination by the City in this case; *Milliken v. Bradley*, 418 U.S. 717, 741 (1974), involved the grant of injunctive relief against multiple suburban school districts not subject to the district court's liability finding – unlike the single municipality involved here; and *Lewis v. Casey*, 518 U.S. 343, 386 (1996), is a case involving prison reform which is subject to its own peculiar limitations on the scope of federal review as governed by *Procunier v. Martinez*,

the injunction plainly meets. The City chooses to interpret this flexible standard as one that would prohibit the adoption of a Title VII remedy that exceeds the four corners of a complaint's allegations. (City Br. 94.) The City offers no support for this proposition, which stands in direct contradiction to the Supreme Court's mandate that district courts "'fashion the most complete relief possible,'" *Albemarle Paper*, 422 U.S. at 421 (quoting 118 Cong. Rec. 7168 (1972)), in order to root out and prospectively prevent practices (overt and subtle) that perpetuate discrimination. *See Teamsters*, 431 U.S. at 364; *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976); *Griggs*, 401 U.S. at 429-31.

By its very nature, prophylactic relief of the sort mandated by Title VII may obligate a defendant to undertake actions to remedy the related or collateral effects that arise out of or compound a Title VII violation. The Supreme Court recognized even prior to the enactment of Title VII that the scope of the district court's equitable powers reaches to practices that are *related* to those found unlawful even if those related practices are not independently unlawful. *United States v. Loew's, Inc.,* 371 U.S. 38, 53 (1962) ("Some of the practices which the Government seeks to have enjoined with its requested modifications are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise

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416 U.S. 396 (1974), and which has no applicability here. The City's reliance upon these cases is simply inapposite.

permissible practices connected with the acts found to be illegal must sometimes be enjoined."); *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 88-89 (1950) (Injunctive relief "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal."). This is the precise import of *Teamsters* – which recognizes that an effective, long-term remedy for discrimination must often be framed in terms *broader* than the proof of the discrimination. *See Teamsters*, 431 U.S. at 366 n.51 (observing that "the far-ranging effects of subtle discriminatory practices have not escaped the scrutiny of the federal courts, which have provided relief from practices designed to discourage job applications from minority-group members") (citing cases). Or, as this Court explained in *Greshman v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974), "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." (emphasis added).

The district court in this case properly exercised its broadly delegated discretion. The Injunctive Relief Order was supported by ample – indeed, exhaustive – factual findings covering more than eighty pages (SPA1-82) and was specifically tailored to remedy the direct and indirect effects of the discriminatory

hiring. Indeed, once one sets aside the City's erroneous proposition that Title VII remedial relief cannot be broader than the contours of a liability determination, the City has not offered any basis for rejecting the district court's exercise of discretion in this case.[21]

C. Confronted with Overwhelming Evidence of the Continuing Effects of the City's Discrimination, the District Court Did Not Abuse its Broad Discretion in Crafting Equitable Relief to Advance Title VII's Purposes.

The district court properly exercised its broad discretion to order relief consistent with the Congressional purposes underlying Title VII and its vesting of broad, remedial powers in the federal courts – to remedy the continuing effects of the the City's past discrimination and to bring to a close this ignominious page in the City's history. Merely ordering a new hiring exam as the City proposed below and presses again on appeal, would not be sufficient to effectively remediate the harmful, long-term effects associated with a forty-year (or more) history of discriminatory impact in hiring. At the same time, specifically considering the City's interests in sovereign decision-making and the interests of federalism, the district court refrained from imposing more aggressive relief than it arguably could

[21] The City does make a generic appeal to the principles of federalism (City Br. 95-97), but does not offer any concrete analysis of how the remedial order actually runs afoul of federalism. As demonstrated below, it does not. *See infra* Part I (D)(4).

have, such as quotas or strict timelines.

The district court made detailed, well-supported findings regarding the City's discriminatory exams and the continuing effects of that discrimination. The Court expressly found that the City's history of discrimination continued to disadvantage black applicants in each of the areas where the Court ordered injunctive relief beyond construction of a new exam. Based on these findings, the Court ordered relief specifically directed to those lingering direct and collateral effects. Significantly, other than quibling with stray factual findings,[22] and misstating the broad legal authority Title VII gives to district courts to fashion affirmative relief, the City simply does not argue that any components of the district court's remedial relief constitutes an abuse of discretion.

Each component of the injunction order related to remedying the persistent effects of discrimimatory practices is discussed in turn.

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[22] The City goes so far as to suggest that various of the district courts findings in support of the injunciotn were "clearly erroneous," and that this Court should set the injunction aside on that basis. Yet the City's apparent disagreement with the district court's factual findings, is plainly insufficient to demonstrate that they are clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1987) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."). This Court has repeatedly acknowledged that the deferential standard for review "does not entitle us to second guess a district court's choice between permissible inferences to be drawn from the evidence." *Krizek v. Cigna Grp. Ins.*, 345 F.3d 91, 100 (2d Cir. 2003); *accord Ceraso v. Motiva Enters., LLC*, 326 F.3d 303, 316 (2d Cir.2003); *Cifra v. G.E. Co.*, 252 F.3d 205, 213 (2d Cir. 2001).

1. Discriminatory Impact of Overall FDNY Hiring Process

As to the overall hiring process, including the post-exam screening, CID Investigator Iris Ramos wrote in 2004 that:

> Our "minority" candidates are not familiar with the investigation process and are easily intimidated. Other candidates receive guidance from family members or friends that work for the Department while the "minority" candidates very often do not know anyone that could provide guidance in this regard.

(SPA11.) The City's own Columbia Study found, among other damaging conclusions, that "candidates without relatives in the Department, which by definition are also disproportionately minority candidates, seem to be at a disadvantage in the candidacy process." (SPA11.)

In light of the "intimidation" that black firefighters face in the hiring process, and the informal-but-strong advantages maintained by candidates with family-and-friends connections – all of which is a result of the decades-long exclusion of blacks from the FDNY caused primarily by the City's discriminatory exams – any relief seeking to remedy the harmful effects of this long-term discriminatory impact in hiring (even absent proof of intentional discrimination) would *have* to do more than simply order a new test. The City has no answer to this elementary understanding of a court's power under Title VII.

2. Recruitment

Regarding recruitment, the district court found that "[t]he applicant data

strongly support evidence presented at trial that, in the absence of a formal FDNY recruitment campaign, white firefighter candidates are significantly more likely to be recruited to apply for the firefighter exam through an informal friends-and-family recruitment network." (SPA30-33.)[23] The Court also found that the recruitment campaign for Exam 2043 was woefully inadequate (SPA18-20) and "was hampered by poor preparation and a lack of resources." (SPA19.) As a result, the number of blacks recruited for Exam 2043 actually declined. (SPA25-26.) One-hundred *fewer black applicants* but *1900 more whites* were recruited for Exam 2043 than Exam 7029. (*Id*.)

Without increased and effective recruitment efforts, the number of black firefighters who successfully pass the exam will remain suppressed. Accordingly, the remedy mandating increased and supervised recruitment efforts – in a manner the City is permitted to devise itself – is directly tied to the court's finding of disparate impact. (SPA34) (finding "any policy or practice of the City of New York that fails to adequately recruit black persons to become firefighter candidates serves to maintain and perpetuate the effects of the City's discrimination against black firefighter candidates."). *Teamsters*, 431 U.S. at 366 n.51 (observing that federal courts "have provided relief from practices designed to discourage job

[23] As Commissioner Cassano put it, "the benefits of the job are . . . told and handed down and . . . they see the value of becoming a firefighter because, you know, their father was a firefighter, their uncle was a firefighter." (A3709 Tr. at 926:4-14.)

applications from minority-group members")

The City argues that the district court's detailed findings nevertheless "provide no basis" for ordering the recruitment remedies (City Br. 103) and are "internally inconsistent." (*Id.* at 100.) The City further claims that meaningful improvements in its firefighter recruitment began in 2002. (City Br. 100-01.) That claim is contradicted by the record, which discloses an under-resourced, disorganized 2002 recruitment drive. (A2832-39; A4672; A5280). Indeed, the district court made ample findings that the FDNY did not implement effective changes to its recruitment practices until 2006 – after the EEOC's two probable cause findings of discrimination and the start of the United States' Title VII investigation – and that even then the City's recruitment efforts largely failed to attract a racially-diverse firefighter applicant pool. (SPA26-27.) Other improvements did not occur until 2010 and 2011, after the district court's Disparate Impact and Disparate Treatment liability rulings, and, in the case of advertisements on black radio stations, not until after the start of the injunctive relief trial. (City Br. 44; A2927-28; A2935; A2938-40.) And, while the district court praised aspects of [FDNY recruitment director] Maglione's work (SPA16-17), the court also noted that she had no experience in personnel recruitment prior to joining the FDNY (A2960; A2963-65) and she failed to undertake numerous steps critical to increasing recruitment.

Because the City has not shown that the court's conclusion is in any way implausible, it must be upheld. *Anderson*, 470 U.S. at 573-74.

3. Reducing Disproportionate Rates of Attrition

Regarding attrition, the district court found that the City's post-exam hiring process (sometimes taking four to five years) was unusually long compared to other cities (SPA6-7), and that as a result, an unusually large number of candidates withdrew from the process. (SPA8).

The court further found that the family-and-friends network that whites enjoyed in far greater proportions than blacks, worked to a white candidate's advantage by "encouraging them to persevere through the FDNY's inordinately long hiring process." (SPA15-16.) For Exam 6019, administered in 2007, black candidates were "approximately 40% more likely than white candidates to be disqualified" because of attrition in the post-screening process. (SPA16.) The court correctly concluded that, unless the City addressed its persistent failure to keep minority candidates informed and encouraged them to "stay the course," the underrepresentation of blacks in the FDNY would be perpetuated. *Id*. Here, too, the City – not the court – is directed to propose the mitigation plan. (SPA161-62.)

The City argues that in concluding that this remedy was necessary, the district court clearly erred by disregarding the Columbia Study and the measures that the FDNY's recruitment office took in 2006 to reduce pre-exam voluntary

attrition and in 2008 to address voluntary attrition in post-exam screening. (City Br. 100-01.) But, as with recruitment, the 2006 attrition-mitigation efforts occurred after the EEOC's probable cause findings, and the 2008 attrition mitigation efforts began after this lawsuit. (A2684; A2752; A2978-80.) In light of this timing, and the entrenched practices of racial exclusion, the court properly gave this evidence little weight. *See NAACP v. City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982) (quoting *James v. Stockham Valves*, 559 F.2d 310, 354-55 (5th Cir. 1977)) ("'[R]eform timed to anticipate or blunt the force of a lawsuit offers insufficient assurance' that the practice sought to be enjoined will not be repeated."); *Gonzalez v. Police Dep't, San Jose*, 901 F.2d 758, 762 (9th Cir. 1990) (quoting *Gamble v. Birmingham S. R.R. Co.*, 514 F.2d 678, 683 (5th Cir. 1975)) (actions taken by employer police department "'in the face of'" a Title VII lawsuit "'are equivocal in purpose, motive and permanence'").

4. *Post-Exam Character and Background Screening*

The court's injunctive relief regarding post-exam screening of candidates' characters and backgrounds was also tied to the advantages whites experienced as a result of family and friend connections. The court found that "firefighters and fire officers remain actively involved in monitoring the progress of firefighter candidates who are their friends or family members – even going so far as to attempt to intervene in the firefighter hiring process on their behalf." (SPA11.)

Former Assistant Commissioner Kavaler described the influence a candidate's family-and-friends connections had upon the Personnel Review Board and how it worked to the advantage of whites:

KAVALER: You would have lieutenants and captains, whatever, posting chief of department: This is the son of so and so, this is the son of so and so. I lived next door to him for years. He's a good guy. . . . He just had a fight in a disco. He got drunk. Someone made a pass at his girlfriend. He socked him. He did community service. Something like that. Whatever it was. He beat his wife but his wife took him back so he shouldn't be considered a wife beater. He still could be a good firefighter. These types of things, that would be brought to the table and people would say I know this guy. He's a good guy. His son has got to come on the job. I will vouch for him. I will bring him into my office tomorrow. I'll read him the riot act, say he's getting the chance of a lifetime and he better own up to it and make us proud *and we would hire him.* (emphasis added)

(SPA13.)

FDNY managers also testified that the policies for post-exam screening of candidates for character and satisfactory background provided essentially "unfettered" discretion. (SPA45.) CID Director Tow acknowledged at trial that he was unable to explain why he had treated similarly-situated white and Hispanic candidates differently in terms of a hiring recommendation – raising the obvious

inference of discrimination.[24] (SPA50.)

Similarly, the district court found that the FDNY's evaluation of candidates with prior arrests was standardless (SPA52-53), was performed by personnel who lacked proper training (SPA52, SPA55), and did not include an independent investigation of the circumstances of the arrests (SPA54-55), contrary to the EEOC Guidance. (*See supra* note 14.)[25] The court found these practices to significantly "increase the risk that firefighter candidates who have been arrested but not convicted will be denied employment as firefighters because they were previously arrested" (SPA54) and found that "a black New York City firefighter candidate is significantly more likely to have been arrested in New York City than a white firefighter candidate, and is thus, significantly more likely to be subjected to and disadvantaged by a PRB review." (SPA59.)

The City suggests that this relief was not necessary because the evidence failed to show that the FDNY's CID/PRB process has adversely affected large

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[24]Both were arrested but never convicted of almost identical domestic violence offenses and gave virtually identical explanations for their arrests. (A4741-93). The white candidate, who had a prior drug arrest, was charged with "Menacing – 2nd: Weapon" and plead guilty (to a lesser charge). (A4741-42.) The Hispanic candidate had only one arrest, which was less recent than the white candidate's arrest and did not involve a weapon. (A4772-73.) Nonetheless, Tow recommended employment of the white candidate, but not the Hispanic one.

[25]The City's argument that this finding is in error (City Br. 106) fails to take into account contrary evidence from its own witnesses.

numbers of black and Hispanic candidates. (City Br. 103-06.) However, this argument largely misses the point because "[t]he purpose of an injunction is to prevent *future* violations . . . and, of course it can be utilized even without a showing of past wrongs," as long as "there exists some cognizable danger of recurrent violation. . . ." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (emphasis added); *see also Berkman v. N.Y.*, 705 F.2d 584, 594 (2d Cir. 1983) (scope of relief under Title VII reflects its prophylactic purpose to "prevent discrimination and achieve equal opportunity in the future.")

Further, the City fails to recognize that the small numbers of black candidates affected by the CID/PRB process is itself a vestige of the City's discriminatory hiring exams, which have precluded large numbers of black candidates from placing high enough on the eligibility lists to be reached for CID/PRB processing. Under a less discriminatory test, the number of black candidates who will undergo the CID/PRB screening should increase significantly. Thus, the district court rightly focused its findings on the likelihood that the CID/PRB process, as presently constructed, would illegally disadvantage *future* black candidates and thereby perpetuate the effects of the City's previous decades of race discrimination. (SPA49-61.)

Each of the City's practices addressed by the Injunctive Relief Order "stand[s] as a barrier to the elimination of the principal vestige of the City's

discrimination against black firefighter candidates – the underrepresentation of blacks within the FDNY." (SPA55-56.) Accordingly, the remedies imposed necessarily flow from the district court's Disparate Impact finding and can be justified on that basis alone – without a finding of discriminatory intent. *See Greshman*, 501 F.2d at 691.[26]

5. *EEO Practices*

The district court also found that the FDNY's EEO policies and practices prevent the EEO office from fulfilling its legal compliance obligations. (SPA61.) The FDNY failed to produce an annual EEO plan in a number of recent years (SPA76) and "consistently failed to comply with those portions of the Citywide EEO Policy requiring the FDNY to commit to assessing its firefighter recruitment and hiring procedures for adverse impact." (SPA77.) The City's EEO complaint

[26]The City's claim of clear error is groundless. The court's conclusion that the City's post-exam screening of candidates created ready mechanisms for discrimination, and was not subject to meaningful review, was based upon the testimony of the City's *own witnesses*. (A2699; A2703; A2711-12; A3295-96; A4875-77.) Powerful testimony demonstrated that FDNY incumbents insert themselves into the CID/PRB process on behalf of candidates they wish to support, and that these interventions are likely to favor white candidates over black candidates who, because of historic discrimination, are less likely to have family and friends in the FDNY. (A2759-64; A4879-80.) These findings alone are sufficient for the relief ordered. Nor did the court err in drawing inferences from the City's own records regarding arrests in New York City. The district court relied on five years of NYPD arrest data, which showed that black and Hispanic New Yorkers are arrested at a rate greatly disproportionate to their representation in the City population. (A4871; SPA56.)

process was utterly ineffective, due to years of insufficient staffing (SPA62-63; A3224-25; A3228-29; A3504-05; A3513-15), leaving unresolved complaints languishing unattended for years. (SPA66-67; A4717-23). The FDNY leadership either ignored or refused to address these problems. (A3510-12; A3514-15.)

The FDNY's persistent failure to abide by the City's own EEO Policy, strongly buttresses the need for court supervision. (SPA75-77.) Accordingly, the district court acted fully within its discretion to assure compliance with Title VII when it ordered the City to study improvements to the FDNY's EEO program – again, requiring the City itself to propose a plan rather than simply ordering it. An ineffective EEO program will provide no protection for class members who will be hired pursuant to the court's orders and who risk discriminatory treatment or retaliation upon hire. Leaving them without adequate recourse would undermine the purposes of this litigation and the remedial purposes of Title VII.

D. The City Fails to Show that the District Court Abused its Discretion in Awarding Relief.

1. A District Court's Power to Impose Affirmative, Remedial Relief Is Not Limited to Cases of Intentional Discrimination.

Part of the City's strategy to defeat the Remedial Order is the City's effort to link it solely to the district court's intentional discrimination ruling. The City argues that Title VII "presumptively limits affirmative relief to cases of intentional

discrimination" and that "the Injunction [could not] be justified on this record without a finding of intent." (City Br. 85-86.) This proposition is inconsistent with the foregoing principles giving district court full equitable powers to remedy Title VII violations. *See supra* Part I(A). Stretching to find support for its proposed limitation on the court's remedial powers, the City cites the statutory language found at 42 U.S.C. § 2000e-5(g) (codifying § 706(g) of Title VII), which states that the district court may order "affirmative action" if the court "finds that the respondent has intentionally engaged in . . . an unlawful employment practice." Yet the City ignores a well-settled line of cases which interpret the relief provisions of Title VII more broadly. *See Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 280 n.22 (2d Cir. 1981) ("The requirement that an employer have discriminated 'intentionally'" in order to authorize "affirmative relief" means "not that there must have been a discriminatory purpose, but only that the acts must have been deliberate, not accidental."); *accord Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221, 1230 (10th Cir.1997); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 796 (4th Cir. 1971); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980,996 (5th Cir. 1969). The Eleventh Circuit has likewise explained that "the statutory requirement that the court find that the employer has 'intentionally engaged' in the unlawful employment practice does not mean that this remedial

provision is only applicable in disparate treatment or pattern or practice cases." *In re Employment Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1316 n.13 (11th Cir. 1999). Accordingly, contrary to the City's suggestion, "*the full range of equitable remedies are available in disparate impact cases* as well" as in intentional discrimination cases. *Id.* (emphasis added.)

2. *The "Persistent or Egregious" Standard Governing the Imposition of Fixed Numerical Quotas Does Not Govern the Grant of Other Forms of Affirmative Injunctive Relief.*

The City compounds its confusion regarding the scope of the district court's remedial power by apparently conflating the term "affirmative action" in § 706(g) with the term "affirmative action" as a term of art referencing numerical racial quotas. Specifically, in arguing that affirmative relief of the kind ordered by the district court *must* be supported by a showing of "intentional discrimination" or a finding of "persistent or egregious" discrimination, the City relies exclusively upon case law assessing orders that imposed fixed numerical quotas.[27] (City Br. 87) (citing *Local 28 of the Sheet Metal Workers International Ass'n v. EEOC*, 478 U.S. 421, 476-77 (1986); *United States v. Paradise*, 480 U.S. 149, 169 (1987); *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.*, 94

[27]Significantly, the City concedes that affirmative relief is available under a disparate impact finding, but tries to limit the situations where such is possible to those where the discrimination is persistent or egregious. (City Br. 86-87.) This is contrary to both Supreme Court law and this Circuit's own law as addressed elsewhere in this brief.

F.3d 1366, 1371 (9th Cir. 1996)). Quota-based "affirmative action" plans and similar "affirmative relief" should not be confused with Congress's use of the term "affirmative action" in § 706(g). Section 706(g) is properly read simply as a grant of authority to exercise a court's full equitable powers. *See EEOC v. E.I. Du Pont de Nemours & Co*., No. Civ. 03-1605, 2005 WL 1630815, at *2 (E.D. La. Jan. 4, 2005) (citing *Ex parte Lennon*, 166 U.S.548, 556 (1897)) (noting that the Supreme Court has long recognized the power of federal equity courts to award "affirmative action" and not simply a negative injunction to cease taking unlawful action). As such, neither the few cases cited by the City, nor any other principle of law, prohibit the imposition of the race-neutral injunctive relief in this case based on a finding of disparate impact. *See supra* Part I(A) (describing broad equitable power and discretion of district courts to remedy Title VII violations).

It is true that numerical quotas may be imposed "where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *Local 28*, 478 U.S. at 445. Similarly, in *Guardians*, 630 F.2d at 109, this Court noted that quota relief may be granted where "significant discrimination has persisted for a substantial time" – a standard that in fact has been met in this case. But fixed numerical quotas are not at issue in this appeal. The district court specifically rejected such a remedy. (Dkt. # 390 at 3, 31) ("The court . . . rejects the

Intervenors' proposal that the court impose a 60% minority hiring quota as an interim measure."). This Court has recognized that lesser forms of affirmative injunctive relief – *i.e.*, ones that do not included fixed long-term racial quotas – are not subject to these heightened tests for quota relief. *See Berkman*, 705 F.2d at 596 ("We have indicated, however, that affirmative relief[28] for Title VII-type violations may be *upheld even in the absence of these factors* if it is limited to an interim stage and does not require the hiring of persons who are not members of the plaintiff class. . . .") (emphasis added).

Here, the district court's Injunctive Relief Order neither includes an interim-stage quota nor requires the hiring of persons who are not members of the plaintiff class. Instead, the district court ordered less intrusive, race-neutral relief to remove barriers that have operated in the past to favor whites and to remedy the effects of the City's past discrimination. Therefore, the relief ordered is authorized under the general remedial powers of Title VII courts, without requiring proof under the

[28] Decisions in this Court have varied in their definitions of "affirmative relief" under Title VII. Both *Guardians*, 630 F.2d at 108, and *Association Against Discrimination in Employment*, 647 F.2d at 278, defined "affirmative relief" as "relief [that] involves interim hiring at any ratio greater than what is necessary just to avoid a disparate racial impact and any required long-term hiring targets or ratios." However, other courts have defined "affirmative relief" more generally to include relief "designed principally to remedy the effects of discrimination that may not be cured by the granting of compliance or compensatory relief." *Berkman*, 705 F.2d at 596. However, *Berkman* provides that the higher standard for quota relief is not applicable to other forms of "affirmative" injunctive relief.

"persistent or egregious" test of *Local 28*.[29] The City does not argue and cannot show that the district court abused its broad discretion under this permissive standard.

3. The District Court Did Not Abuse its Broad Discretion in Concluding that the City's Nominal Attempts to Reduce Discrimination Would Not Provide Effective Remedial Relief to the Plaintiff Class.

The City argues that it has "'taken [...] [sic] meaningful steps to eradicate the effects' of its entrance exams" (City Br. 90) (quoting *Rios v. Enter. Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622, 631-32 (2d Cir. 1974)). But, as the district court properly found, these meager, belated steps taken under threat of litigation, or during the course of the litigation, fall dramatically short of remedial obligations under Title VII. *See Albemarle Paper*, 422 US. at 418 (noting duty of the district court to "render a decree which will so far as possible eliminate the discriminatory effects of the past"). The City also fails to meet the high standards set forth for vitiating injunctive relief. *See N.Y. State Nat. Org. for Women v. Terry*, 159

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[29] Even if the persistent or egregious test were applicable, the district court made findings in its Disparate Impact Order that meet this standard, noting that "the overwhelmingly monochromatic composition of the FDNY has stubbornly persisted." (DI-A432.) Despite the Supreme Court's observation in *Teamsters* that "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired" *Teamsters*, 431 U.S. at 340 n.20, here the black firefighter workforce has remained at approximately 3% since Judge Weinfeld's discrimination finding in 1973. A more detailed statement of the persistent, egregious nature of the City's discrimination is set forth at note 36, *infra*.

F.3d 86, 91 (2d Cir. 1998) (internal quotations omitted) (entry of injunctive relief remains appropriate unless the City made "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.") (emphasis added); *see also Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 202 (2d Cir. 1999) (vitiating injunctive relief is proper only where "(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.") (internal quotations omitted). The efforts undertaken by the City – and considered by the court below – do not undermine the discretionary judgment of a district court that broader efforts are necessary to remedy the effects of long-term discrimination.

The City extols its "targeted recruitment efforts" and suggests they should obviate the need for remedial relief. But its recruitment efforts prior to the filing of the EEOC charges in this case resulted in a *decrease* in the number of *black* applicants and an *increase* in the number of *white* applicants. (SPA26-27.) Very small numbers of black applicants were hired off the Exam 7029 and 2043 eligibility lists. Of the 5,300 candidates appointed from the two eligibility lists, only 184 were black. (DI-A430.) And the City's own witnesses testified that recruitment efforts in 2006 and 2011 remained deficient in significant respects. (A1293; SPA25.) As for the 2011 recruitment effort, the district court found the

continuing need for improvement (SPA25; SPA34-39) and continuing advantages to whites stemming from historical discrimination. (SPA31-32.) Plainly, the court had discretion to order additional steps to reduce the continuing effects of the family-and-friends advantage and to effectuate Title VII's remedial aims.

The City also references its "initiation of the Columbia Study (A1272-74)," as another "meaningful step" to eradicate the effects of its discriminatory exams. (City Br. 90.) Yet, as the district court properly observed, a number of the problems identified by the Columbia Study *continue* into the present (SPA7; SPA10-11; SPA14; SPA31-32), and the Study therefore supports, rather than undermines, the Injunctive Relief Order.

The City also points to the "establishment of the FDNY high school in a heavily minority neighborhood (A1276-77; A1286)." (City Br. 90.) This development, of little practical import, did not alter the need for relief. As of August 2011, only *eight* graduates of the FDNY high school (of any race or national origin) had become employees of the FDNY in *any* job title (not necessarily firefighter). (A3022.) As such, the district court was correct in concluding that the vanishingly small effects of this program could not eradicate the broad, persistent effects of the City's discriminatory practices. Next, the City urges that the City-residency bonus points on exams (A195-96; A206) represents a significant step to eradicate the effects of the discriminatory exams (City Br. 90),

without acknowledging that this step had little or no impact on the City's hiring. Even adding City-residency bonus points produced only 184 black hires (3.4%), out of a total of 5,300 hires. (DI-A430.)

The City finally argues that "the high diversity of the most recent Exam 6019 eligibility list (A1197-98; A2955)" as well as the "City's frequent administration of the EMT promotional test" each demonstrate meaningful steps to eliminate the effects of the City's discriminatory tests." (City Br. 90.) Again, the number of candidates hired through these procedures had no appreciable effect on the FDNY's bottom line. The racial composition of the FDNY workforce as of May 31, 2009 included only 363 (3.14%) black firefighters out of a total of 11,529. (A1198.) Nor does the City's argument take into account the discriminatory nature of Exam 6019 itself. (A1763-65.) The City did not appeal the district court's finding that Exam 6019 had a disparate impact upon black applicants, was not shown to be job related, and again failed to comply with *Guardians*. (A1752-89.)

The district court certainly did not abuse its discretion in concluding – based on overwhelming record testimony – that the remarkably minimal effects of the City's outreach programs would not eradicate the substantial, persistent effects of the City's discriminatory practices.

4. The District Court Appropriately Considered the City's Interests in Fashioning a Remedial Order.

Contrary to the caricature the City paints of the district court as overly

intruding on FDNY operations, the court gave the City substantial latitude to develop its own plans to reform its hiring and related practices. First, out of respect for the City's interests, the district court rejected Intervenors' request for the imposition of numerical quotas. (Dkt. # 390 at 3, 31.) Equally significant, the Injunctive Relief Order itself does not order specific changes; instead, it directs the *study* of the City's overall hiring and related practices that carry forward vestiges of the City's past discrimination (SPA151-80), and the *study* of the FDNY's EEO office's enforcement of anti-discrimination laws. (SPA168-70.) Then, after appropriate study, the City, the Monitor, and/or City-retained experts, will prepare reports that will propose changes in the employment practices affecting applicants and new hires. The City will report to the court on its recommended changes which will then be subject to court review. (SPA151-80.)

Importantly, by ordering the City to study its employment practices that impact upon the hiring of black and Hispanic firefighter candidates, the district court was doing little more than what the City's *own EEO Policy requires of the City*. That Policy, mandated by the City Charter, and in effect in two slightly varying forms since 1996, calls for City agency heads, including the FDNY Commissioner, to "assess the employment practices of their . . . agencies to determine whether there are barriers to equal opportunity. If problems are identified, agency heads must develop initiatives designed to resolve them."

(A864.)[30] The court's order, for the most part, directs the City to follow EEO Policies it should have been following for years.

The City's assertion, made with little explanation, that the Remedial Order violated general postulates of federalism is also without merit. (City Br. 95-97.) First, the Remedial Order specifically acknowledges that respect for the sovereign interests of the municipality counsels against an overly intrusive remedy. Second, the district court gave the City an opportunity to respond to the court's proposed relief in a draft order before entering it. (SPA84; SPA112.) Indeed, at the remedy hearing the district court called Commissioner Cassano specifically to give him the opportunity to explain how the Intervenors' proposed relief might interfere with the management of the FDNY. (A3329-30.) Cassano testified in conclusory fashion that, he knew "what's best for the department" (A3651, Tr. 868:22-23) and that appointment of a monitor to oversee changes in the EEO program would "infringe on [his] responsibilities." (A3642, Tr. 859:9-14.) Cassano never testified (nor does the City now argue) that any of the proposed relief interfered with the firefighting or public safety functions of the Department. In fact, Cassano acknowledged that the Special Master's role in supervising the construction of the new exam had been a "productive service for the City." (A3655, Tr. 872:5-8.)

Third, the Injunctive Relief Order itself provides the City the opportunity to

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[30] The equivalent provisions exist in the 2005 EEO Policy as well. (A886-87.)

make proposals to the court for changes in its practices, to hire consultants of its own choosing to help it develop proposals for change, and to study and advise the court of which of the recommended changes it intends to implement. Accordingly, the district court's consideration of the City's interests – balanced against the federal government's interest in effective enforcement of Title VII as well as the State and City's interest in compliance with their own Human Rights Laws – was entirely appropriate. As this Court has instructed:

> A proper respect for the principles of federalism does not require a court to adopt wholesale the local government's choice of remedies. . . . The defendant must come forward with a plan that promises realistically to work, and promises realistically to work *now*. The district court has not only the power but the duty to ensure that the defendant's proposal represents the most effective means of achieving desegregation. Thus, when the City proposed its alternative plan to desegregate Yonkers, the district court was under a duty to "weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness."

United States v. Yonkers Bd. of Educ., 29 F.3d 40 (2d Cir. 1994) (quoting *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 439 (1968)).

Finally, the City fails to mention that the Injunction enforces not only federal law, but State and City Human Rights Laws as well. (SPA156, ¶¶ 13, 15.) Both the State and City laws provide for broad affirmative relief. *See* State Exec. Law § 298 (authorizing relief that "will effectuate the purposes of this article". . . [including]

"requiring such respondent to take . . . affirmative action"); Admin. Code § 8-120 ("shall require the respondent to take such affirmative action as, in the judgment of the commission, will effectuate the purposes of this chapter.") The relief afforded is, in some instances, even greater than that afforded by federal law. *See, e.g.*, *Williams v. N.Y.C. Hous. Auth.,* 872 N.Y.S.2d 27, 38 (N.Y. App. Div., 1st Dept. 2009). Therefore, federalism concerns are substantially minimized here, as the New York State Courts could have entered the same relief.

E. The United States Has Acknowledged the Propriety of the Injunctive Relief Ordered.

The City speculates that the position of the United States in this case somehow reflects disagreement with the Injunctive Relief Order. (City Br. 30, 60.) The record suggests otherwise. First, the United States acknowledged in its argument before the district court that applicable case law "supports this court's ability to enter the relief that has been requested by the [I]ntervenors."[31] (A4431, Tr. 1504:1-3.) Second, the United States asked that "to the extent this court grants any of the additional injunctive relief requested by the [I]ntervenors, this relief should also apply to Hispanic applicants and employees" – whose only claims

[31] Fully appreciating the remedial power of the courts, the United States requested, as part of its disparate impact case, that the City take "appropriate action to correct the *present effects* of its discriminatory policies and practices," and to "make whole those harmed by the City's policies and practices." (DI-A431.)

were brought under a disparate impact theory. (A4431, Tr. 1504:13-15.)[32]

II. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DECISION GRANTING INTERVENORS SUMMARY JUDGMENT ON THEIR DISPARATE TREATMENT CLAIM.

Should the Court find it necessary to reach the Disparate Treatment Order, it should uphold it in light of the City's demonstrable failure to rebut Intervenors' powerful prima facie case.

The City's argument against the intentional discrimination finding is based on a misunderstanding of the burden-shifting obligations relevant to a pattern-or-practice disparate treatment claim. Where a plaintiff, as here, makes out a strong prima facie case of systemic intentional discrimination, the defendant cannot defeat the claim with conclusory assertions of an absence of animus or by pointing to "any" isolated, anecdotal evidence of nondiscriminatory intent. (City Br. 72.) Here, the City effectively defaulted on its obligation to rebut the strong presumption of discrimination established through overwhelming statistical and

[32] The court granted the request of the United States, making the additional relief ordered applicable to Hispanic candidates as well as black candidates. *See, e.g.*, ¶ 26 (recruitment), ¶ 31 (attrition), ¶ 37 (post-exam screening), and ¶ 47 (EEO practices). Paragraph 19 requires that the City "with reasonable diligence, take all steps necessary to eliminate all policies and procedures that have a disparate impact on black and Hispanic firefighter candidates and all practices that perpetuate the effects of said disparate impact." (SPA157, 159, 161, 163, 168.)

circumstantial evidence. This default mandated a judgment in favor of Intervenors in light of the presumption of discrimination established by the evidence.

Moreover, by raising for the first time on appeal dozens of factual assertions that it never bothered to present to the court below, the City implicitly concedes that the limited evidence it presented below did not rebut Intervenors' prima facie case. Because the evidence the City presented below was immaterial or was otherwise not probative enough to demonstrate the existence of a genuine issue of fact for trial, the district court correctly awarded summary judgment to Intervenors.

A. To Overcome the Presumption of Discrimination Created by a Plaintiff's Prima Facie Case of a Pattern-or-Practice of Disparate Treatment, The City Was Required to Demonstrate That Intervenors' Evidence Was "Inaccurate or Insignificant."

1. *The District Court Applied the Correct Burden-Shifting Standard from Teamsters Relevant to Pattern-or-Practice Disparate Treatment Cases.*

Teamsters v. United States, 431 U.S. 324 (1977), sets forth the applicable burden-shifting framework in a case alleging a pattern-or-practice of intentional discrimination. The plaintiff must first establish a prima facie case, which it may do through the use of statistics alone. As the Supreme Court observed, a racial or ethnic "imbalance is often a telltale sign of purposeful discrimination" because

> absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a

> work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant. . . .

Teamsters, 431 U.S. at 340 n.20; *see also Hazelwood*, 433 U.S. at 307-08; *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1976); *Robinson*, 267 F.3d at 158-59 ("Statistics alone can make out a prima facie case"); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 (2d Cir. 1986); *EEOC v. American Nat'l Bank*, 652 F.2d 1176 (4th Cir. 1981) ("As frequently observed by the Supreme Court . . . gross statistical disparities in the static work force during the relevant period may alone constitute prima facie proof of the discriminatory practice.")

a. *Intervenors' Prima Facie Case*

The district court found that Intervenors made a strong prima facie showing that the City's "use of the written examinations and rank-ordering procedure to screen entry-level firefighters" constituted a pattern or practice of intentional discrimination. (DT-A1395; A1400-01.) Significantly, on appeal the City concedes the existence of a prima facie case. (City Br. 68.)

The prima facie case was based upon extreme and persistent disparities in the hiring outcomes for black and white firefighter applicants over a long period of time. Specifically, the district court found "that blacks have been consistently and

drastically underrepresented in the FDNY relative to their representation in the City population; that blacks have been underrepresented in the FDNY relative to their representation in the fire departments of other large cities; and that blacks have been underrepresented in the FDNY relative to their representation in New York's other uniformed-services agencies." (DT-A1401.)

The undisputed evidence shows that "absent the disparity" caused by the unlawful cutoff score for Exam 7029, "114 additional black firefighters would have been appointed" (DI-A443-44) and "absent the disparity" caused by the Exam 2043 cutoff score, "30 additional black firefighters would have been appointed." (DI-A445-46.)[33] The discriminatory rank-ordering of candidates delayed the appointments of 68 black candidates hired from Exam 7029 and 44 black candidates hired from Exam 2043. (DI-A449.) Out of a force of 8,998 FDNY firefighters in 2007, only 303 – 3.36% – were black, demonstrating the "substantial practical significance" of these disparities. (DI-A454.) Had the City not used discriminatory tests and rank-ordering procedures during this period, the number of

[33] The district court noted that "the City does not dispute the statistical calculations of Plaintiffs' experts, but rather, disputes Plaintiffs' reliance on statistical significance testing because of assumptions underlying that methodology." (DI-A443; DI-A454.)

black firefighters working in the FDNY would have increased by more than 60%.[34]

The City's use of discriminatory testing and rank-ordering procedures was not only egregious in nature but also remarkably persistent.[35] New York City was first found liable for race discrimination in firefighter testing in 1973, a time when blacks and Hispanics made up only 5% of the FDNY but 32 % of New York City residents age-eligible for firefighter jobs. *See Vulcan Society I*, 360 F. Supp. at 1269, *aff'd in relevant part*, 490 F.2d 387 (2d Cir. 1973). Judge Weinfeld described the disparities as "overwhelming." *Id.* Yet little has changed in the forty years since his finding of class-wide discrimination. While minority groups have come to represent an even greater share of the City's population, "the overwhelmingly monochromatic composition of the FDNY has stubbornly

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[34] These figures do not take into account the number of additional black firefighters who would have been hired absent the disadvantages in recruitment, attrition and post-exam screening that are discussed in Part I (C), *supra*.

[35] As discussed in Part I (D), *supra*, the City incorrectly asserts that the district court's Injunctive Relief Order would only be proper in the context of "persistent, egregious" discrimination. (City Br. 86-87.) That standard, in fact, is applicable only to quota relief, *not* to the far less invasive relief ordered here. In any event, the City's misconduct was sufficiently persistent and egregious that the Injunctive Relief Order would be proper even if that *were* the applicable standard. This Court in *Guardians*, deemed workforce disparities similar to those here to be "flagrant" evidence of exclusion of blacks and/or Hispanics that justified affirmative relief. 630 F.2d at 113, 109 ("The prior discrimination warranting such a [quota] remedy must either be intentional, or it must plainly appear that significant discrimination has persisted for a substantial time. *Gross disparity between minority employment and minority percentage in the relevant work force may imply such discrimination, especially when the minority employment is extremely low*.") (emphasis added).

persisted." (DI-A432.) As of 2002, 25% of New York City's residents were black, but only 2.6% of the firefighter workforce was black. (DI-A429.)

Intervenors supplemented these statistics with "extensive historical, anecdotal, and testimonial evidence that intentional discrimination was the City's 'standard operating procedure,'" (DT-A1401) (quoting *Teamsters*, 431 U.S. at 336), thus bringing "the cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339. Intervenors' anecdotal evidence revealed "that the City, its agencies, and relevant decisionmakers have been aware that the FDNY's hiring procedures discriminate against black applicants and have nonetheless refused to take steps to remedy this discrimination." (DT-A1402.) The evidence of this awareness and refusal to act included the EEPC's repeated, unsuccessful efforts to persuade Fire Commissioner Von Essen, Fire Commissioner Scoppetta, and Mayor Bloomberg to comply with municipal and federal law regarding adverse impact and validity studies, and the decision by DCAS to set the Exam 7029 passing score at 84.705 in spite of its prior knowledge that such a pass mark would result in adverse impact against black applicants. (*Id.*)

This evidence created a strong presumption of discrimination by the City. *See, e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979) ("[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact of a forbidden purpose"); *Pers. Adm'r of Mass. v. Feeney*, 442

U.S. 256, 279 n.25 (1979) ("[W]hen the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the challenged law], *a strong inference that the adverse effects were desired can reasonably be drawn*.") (emphasis added). The failure to rebut that presumption of illegality with material, responsive evidence, mandated a judgment in favor of Intervenors.

b. *The City's Burden to Rebut the Presumption of Discrimination*

Once a prima facie case is established, "'the burden [of production] then shifts to the employer to defeat [it] . . . by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant.'" *Robinson*, 267 F.3d at 159, quoting *Teamsters*, 431 U.S. at 360. As this Court has explained,

> Three basic avenues of attack are open to the defendant challenging the plaintiff[s'] statistics, namely assault on the source, accuracy, or probative force. The defendant can present its own statistical summary treatment of the protected class and try to convince the fact finder that these numbers present a more accurate, complete, or relevant picture than the plaintiffs' statistical showing. Or the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination. *The prudent defendant will follow all three routes if possible, presenting its own version of the numbers game, attempting to undermine the plaintiffs' version with specific attacks on [the] validity of the plaintiffs' statistics, and garnering non-statistical evidentiary support as well.*

Robinson, 267 F.3d at 159 (emphasis added) (quoting 1 Arthur Larson et al., *Employment Discrimination* § 9.03[2], at 9-23 to 9-24 (2d ed. 2001)).

Robinson thus underscores what is an intuitive and long-standing feature of the burden-shifting process in a pattern-or-practice case: because the presumption of discrimination, based on statistical and circumstantial proof, is otherwise dispositive, a "prudent" defendant must attempt to respond specifically to that statistical and circumstantial evidence.

"The employer's defense must, of course, be designed to meet the prima facie case of the [plaintiff]." *Teamsters*, 431 U.S. at 360 n.46. Where a pattern of discrimination is "demonstrated by examining the discrete decisions of which it is composed" – in this case, the City's discrete decisions to use, and reaffirm, unlawful exams – the employer's proof must be material, *i.e.* "designed to meet" the evidence concerning those decisions. *Id*. Where, also as here, the pattern is demonstrated statistically, with "proof of the expected result of a regularly followed discriminatory policy," the "burden is to provide a nondiscriminatory explanation for the *apparently discriminatory result*." *Id*. (emphasis added); *accord Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985); *Ardrey v. United Parcel Service*, 798 F.2d 679, 683 (4th Cir. 1986).

Accordingly, to rebut Intervenors' statistical case, the City's burden was to produce evidence that its strikingly low rates of employing black firefighters had

"a nondiscriminatory explanation." *Teamsters*, 431 U.S. at 360 & 360 n.46. It must legitimately explain why, from 1999 to 2008, it continued to subject black applicants to testing and ranking procedures shown to produce discriminatory results. It is not enough for the City to proffer anecdotal evidence of other, isolated attempts to mediate the rampant, forty-year legacy of discrimination in the FDNY, particularly where those isolated attempts have no bearing on the use of the challenged exams. The City must directly address Intervenors' prima facie case because courts "'presume [that] these facts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.'" *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). To the extent the City's evidence does not provide "a nondiscriminatory explanation" for its "discrete decisions" to use, and reaffirm, the patently discriminatory tests, such evidence does not create a *material* dispute of fact, since it does not "meet the prima facie case." *Teamsters*, 431 U.S. at 360 n.46.

c. *The City's Response to Intervenors' Prima Facie Case*

In its response to Intervenors' powerful statistical and circumstantial evidence of discrimination, the City did *none* of the three things *Robinson* instructs defendants to do to rebut a prima facie case of pattern-or-practice discrimination.

As the district court observed:

> The City has not offered a competing "statistical summary treatment of the protected class," has not attempted to undermine the Intervenors' statistics with "specific attacks on [their] validity," and has garnered no "anecdotal [or] other non-statistical evidence tending to rebut the inference of discrimination."

(DT-A1403, quoting *Robinson*, 267 F.3d at 159.)[36]

The City's response did not, and does not here, offer facts that provide a "nondiscriminatory explanation for the apparently discriminatory result" of its hiring practices, and it presents no probative evidence that "the discrete decisions" of which its hiring practices were composed were nondiscriminatory. *Teamsters*, 431 U.S. at 360 n.46. In fact, the City did not even dispute that DCAS set the Exam 7029 passing score with the knowledge that it would result in adverse impact against blacks. (A810-11 at 103-05; A1357 at 103-05; A957; A964-69.) Nor did it dispute that the FDNY's failure to conduct adverse impact and validity studies

[36] Other methods by which an employer can explain, in a nondiscriminatory way, the statistical proof of discrimination include showing "that the claimed discriminatory pattern is a product of pre-[Title VII] hiring rather than unlawful post-[Title VII] discrimination, or that during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination." *Teamsters*, 431 U.S. at 360. These examples underscore the *kind* of evidence a defendant might marshal to meet a plaintiff's prima facie case. These responses offer plausible, nondiscriminatory explanations for evidently discriminatory outcomes. The City's responsive evidence, however, is categorically different in kind and does not respond to Intervenors' prima facie case in any manner that would create a triable issue.

violated municipal law. (A798-801 at 45-56; A1347-49 at 45-56; A847-69; A871-94.)

Instead, "the City attempts to circumvent its burden of production entirely by arguing that the Intervenors have not proved that the City harbored a subjective intent to discriminate against black applicants." (DT-A1403.) But that self-serving defense is irrelevant as a matter of law to the Intervenors' case. "Direct proof of an employer's state of mind is 'hard to come by,' [*Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J. concurring)], and intentional discrimination may be revealed through circumstantial evidence alone." (DT-A1404, citing *Aiken*, 460 U.S. at 714 n.3, 716.) That is why the Supreme Court devised a system of shifting evidentiary burdens that is "intended progressively to sharpen the inquiry into the *elusive* factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8 (emphasis added). As the district court correctly explained, "if defendants were allowed to sustain or circumvent their burden of production by invoking the ultimate issue of intent, the burden-shifting structure would become a nullity." (DT-A1406.)

2. The City Improperly Attempts to Import the McDonnell Douglas Standard for Individual Discrimination Cases into the Pattern-or-Practice Context.

As described above, the district court assessed the City's rebuttal evidence using the standard set out by the Supreme Court in *Teamsters*, specifically for

pattern-or-practice cases, and applied by this Court in *Robinson*. (DT-A1395-98.) The City simply brushes aside this long-standing precedent. It asserts, instead, that to rebut the Intervenors' prima facie case, it "need only dispute that it had any such intent . . . by offering *any* legitimate, nondiscriminatory justification" for its continued practices – even if not directly responsive to Intervenors' prima facie case. (City Br. 72, citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 1004 (Blackmun, J. concurring).) This novel standard – lifted from a concurring opinion – is decidedly not applicable to a pattern-or-practice case analyzed under *Teamsters*. It is relevant only to evaluating *individual* claims of disparate treatment under *McDonnell Douglas*. *See Watson*, 487 U.S. at 1004.[37] Indeed, *Teamsters* itself takes pains to distinguish individual discrimination cases evaluated under *McDonnell Douglas* from pattern-or-practice cases that rely on strong presumptions of discrimination based on statistical evidence. *Teamsters,* 431 U.S. at 358 & n.44; *see also Franks*, 424 U.S. at 772.

[37] Moreover, the language from *Watson* that is cited by the City is preceded by a reminder that, in order to rebut the presumption of discrimination, an employer's evidence must be "sufficient to 'rais[e] a genuine issue of fact as to whether it discriminated.'" *Watson*, 487 U.S. at 1003 (citing *Burdine*, 450 U.S. at 254-55). Thus, even using the standard proposed by Justice Blackmun for individual disparate treatment claims, which does not apply here, an employer may not simply articulate *any* conclusory, immaterial or otherwise unsupported denial of intent to discriminate but must produce evidence sufficient to raise a genuine dispute of fact as to discrimination. As shown below, the City's evidence was insufficient to create such a dispute.

Each of the cases cited by the City – *Burdine*, *Raytheon* and *Ste. Marie* – involves an individual disparate treatment claim rather than a pattern-or-practice allegation, except for *Ardrey v. United Parcel Service*, 798 F.2d 679, 683 (4th Cir. 1986), which, far from supporting the City, confirms that it must meet the standard set out in *Teamsters*. (City Br. 71-72.) In *Ardrey*, the defendant was accused of various adverse employment actions against a class of black employees. The Fourth Circuit Court noted that even "a defendant's successful rebuttal of each alleged instance of discrimination weakens, but does not defeat, a plaintiff's class claim," quoting *Coates*, 756 F.2d at 532-33 (7th Cir. 1985). This is because a response to the individual complaints often leaves unanswered the larger question posed by a class claim, namely the nondiscriminatory reason for the employer's use of the challenged practice that disproportionately harmed the plaintiff class. *Teamsters*, 431 U.S at 360.

Here, the Intervenors' prima facie case establishes *more* than what is required from an individual plaintiff in a disparate treatment context, and the City's response must "meet the prima facie case" that has been established. That prima facie case goes far beyond the bare recitation of disparate impact resulting from Exams 7029 and 2043. It establishes that decisionmakers continued to use exams despite knowledge as to their expected discriminatory results, a manifest lack of evidence of validity, and the entreaties of EEO officials to take corrective action.

3. The Facial Neutrality of an Employment Practice Is Not a Defense to a Pattern-or-Practice Claim.

In a related argument, the City claims that it met its burden to rebut the prima facie case by showing that its unlawful firefighter exams were "facially neutral." (City Br. 72.) This assertion finds no support in the law. Since a plaintiff may prove the existence of a pattern-or-practice of intentional discrimination even if the challenged practice is neutral on its face, a defense of facial neutrality is necessarily insufficient to defeat such a claim. *See, e.g., Wash. v. Davis*, 426 U.S. 229, 241 ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race" (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886))); *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) ("[A] plaintiff seeking to establish a violation of equal protection by intentional discrimination may proceed in 'several ways,' including by pointing to . . . a facially neutral law or policy that has been applied in an unlawfully discriminatory manner, or a facially neutral policy that has an adverse effect and that was motivated by discriminatory animus" and need not "allege or show . . . an express racial classification embedded in a statute or policy. . . ."); *accord Johnson v. Governor of Florida*, 405 F.3d 1214, 1218 (11th Cir. 2005) ("Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race."). Accordingly, in *EEOC v. Dial Corp.*, 469 F.3d 765 (8th Cir. 2006), the Eighth Circuit upheld a finding of intentional

discrimination as a matter of law, based on the employer's continued use of a test whose results disproportionately favored hiring men over women.

The City's reliance on *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), is obviously misplaced. There, an individual plaintiff asserted a disparate treatment claim based on disability when his employer failed to rehire him after his termination for workplace misconduct. *Id.* at 49. In response, the employer pointed to its legitimate, non-discriminatory policy against rehiring terminated workers. *Id.* at 50. The Supreme Court found that the employer's "proffer of its neutral no-rehire policy plainly satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire [the employee]." *Id.* at 53. (Indeed, the plaintiff in *Raytheon* could never have proven discriminatory intent because the decision not to rehire him was made without knowledge that he was disabled. *Id*. at 54, 55 n.7.) The City argues that the facial neutrality of its exams – like the facially-neutral policy in *Raytheon* – rebuts the prima facie case. But *Raytheon* was not a pattern-or-practice case, where a plaintiff can establish liability by showing "a facially neutral law or policy that has been applied in an unlawfully discriminatory manner, or a facially neutral policy that has an adverse effect and that was motivated by discriminatory animus." *Pyke*, 258 F.3d at 110; *see also Wash.*, 426 U.S. at 241; *Johnson*, 405 F.3d at 1218. Thus, if the claim had been that *Raytheon* defendant's policy caused a statistically-significant harm to

disabled workers as a class, the employer could not have defended the policy simply by noting that it was facially neutral. If it were sufficient for the City simply to note that its exams are facially neutral, the precise requirements set forth by *Teamsters* and *Robinson* would be rendered meaningless.

B. Because the City Failed Utterly to Proffer Evidence Responsive to Intervenors' Prima Facie Case, the City Effectively Defaulted on Its Burden Shifting Obligations.

1. Under Rule 56, a Party Must Direct the District Court to Particular Facts in the Record Upon Which It Seeks to Rely to Oppose Summary Judgment.

The City also seeks reversal of the Disparate Treatment Order on the grounds that the district court "improperly disregarded a wealth of evidence relevant to the City's lack of discriminatory intent." (City Br. 79.) In actuality, the City failed to comply with the express provisions of Fed. R. Civ. P. 56 and Local Rule 56.1 requiring it to present such evidence to the trial court, and its failure to do so amounts to a waiver. The City may not transfer blame to the district court for its own failure to set out the facts upon which it now seeks to rely.

District courts are not required to consider facts not properly placed before them in opposition to a motion for summary judgment. *See* Fed. R. Civ. P. 56(c)(1)(A) (Assertions in support or opposition to summary judgment must "cite[e] to *particular parts* of materials in the record, including depositions,

documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.") (emphasis added.) The Eastern District of New York's Local Rules require the filing of statements of fact in support of summary judgment or in opposition to a motion for summary judgment, and those statements "must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)." Local Civ. R. 56.1(c). Rule 56(e), in turn, expressly permits the district court to treat facts as undisputed if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c).

This Court has never required the district courts to sift through the record in search of disputes of fact. *See Amnesty Am. v. Town of W. Hartford,* 288 F.3d 467, 470 (2d Cir. 2002) (Rule 56 "does not impose an obligation on a district court to perform an independent review of the record to find proof of a factual dispute."); *see also In re Agent Orange Product Liability Litig.*, 517 F.3d 76, 92 n.14 (2d Cir. 2008) (same). To the contrary, this Court refuses to consider facts not presented to the district court. *See Call Ctr. Techs., Inc. v. Grand Adventures Tour & Travel Pub. Corp.*, 635 F.3d 48, 53 n.4 (2d Cir. 2011) ("Despite Call Center's assertions that we should consider in this regard facts in the summary judgment record that it highlights for the first time in its appellate brief, we confine our review of this

record to the facts raised by the parties below or otherwise noted in the district court's decision.").

The City's failure to brief the district court as to the specific facts upon which it now seeks to rely is contrary to Rule 56 and Local Rule 56.1 and renders its argument meritless. *See also Dothard v. Rawlinson*, 433 U.S. 321, 340 (1977) (Rehnquist, J., concurring) (Where the defendant has the burden of production, "a reviewing court is not ordinarily justified in relying on" new contentions of a job-related reason for an employment practice "that were not first presented to the trial court.").

Where a defendant fails to rebut the prima facie case, the court "must find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-10 n.3 (1993) (emphasis in original); *see also Burdine* 450 U.S. at 254 ("[I]f the employer is silent in the face of the presumption, the court *must* enter judgment for the plaintiff because no issue of fact remains in the case.") (emphasis added). Based on the City's failure to assert specific facts below that would create an issue for trial, judgment for the Intervenors is proper.

2. *The Majority of "Facts" the City Relies Upon on Appeal Were Never Presented to the District Court for Its Consideration.*

The City's statement of facts in the district court covered less than three pages and included only six factual assertions in support of its own motion to dismiss. (A577-78.) It later submitted only five factual statements in opposition to Intervenors' motion for summary judgment. (A1222-23.)[38] Its submission consisted of only "a brief statement concerning the development of the Exams and the FDNY's efforts to recruit black firefighters." (DT-A1407; A1222-23.) The district court correctly found this meager proof to be inapposite to the City's burden and, in any event, insufficient to create a genuine dispute of material fact. (DT-A1408-09.)

In its brief on appeal, the City attempts a do-over. It now includes a lengthy specification of facts (City Br. 10-25), which it argues that the district court improperly disregarded. (*Id*. at 66-89.) But the City's detailed briefing on appeal stands in marked contrast to the record the City developed below, in which factual assertions and related arguments were remarkably few.

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[38] The district court took notice of the paucity of the City's briefing: "Defendants' Opposition Memorandum consists, in its entirety, of one argument reiterated over nine double-spaced pages. Despite its slightness, this memorandum is riddled with misspellings, elisions, and novel citation formats. It is disappointing that, in the face of a carefully briefed and voluminously supported omnibus judgment motion that could subject the City – and, ultimately, its taxpayers – to substantial monetary damages, the City has declined to mount a similarly deft or vigorous defense." (DT-A1404 n.18.)

For example, the City refers to its "enlisting" Columbia University to study firefighter hiring and recruitment at least fifteen different times (City Br. 1, 20, 24, 51, 57, 80, 90, 101, 112) and complains that the district court "made no mention of the aforementioned Columbia Study." (*Id*. at 24.) Yet in its submissions to the district court, the City *never once mentioned* the Columbia Study, much less submit it to the district court for review. (A577-79; A1222-25; Dkt. # 359.) Rather, among more than 300 pages of documents attached to the City's briefs (A580-782; A1225-1367) is a single sentence referring to the City's "enlisting" Columbia University. (A1273.)[39]

Similarly, the City recites a multitude of facts concerning recruitment (City Br. 13-16, 20-21, 41-49) that were not included in the briefs or statements of fact below. The City now argues that it conferred with the Vulcan Society regarding recruitment strategies; placed newspaper ads in minority-oriented media outlets, conducted a $2.7 million media campaign in 2002; assigned twenty trained recruiters per day for Exam 2043; collected expression of interest cards from potential candidates, 40% of whom were black; posted 700 recruiting posters per week on bus shelters and kiosks, and extended the exam period for thirty days "just

[39] This evidence is likewise immaterial under Rule 56, as the Columbia Study was not initiated until *after* Exams 7029 and 2043 *were administered*. (A1274.)

to allow more time for minority candidates to register for Exam 2043." (*Id*. at 13-14.) The City asserted not one of these facts before the district court.

The examples continue. The City's assertions that it "increased the minority composition of its other uniformed services, engaged an expert with a mandate to design an improved exam, and devised a panoply of other devices to diversify the FDNY's ranks" (City Br. 1) were never mentioned in its briefs or statements of fact below. Nor did the City advise the court that it was relying upon factual findings in its Disparate Impact Order, upon which it now seeks to rely – including its argument that the pass mark on Exam 2043 did not adversely impact black applicants (City Br. 10), that a psychometrician had previously performed a job analysis for the City (*id*. at 11), that the Exam 7029 job analysis had been "aimed at" identifying the tasks performed by an entry-level firefighter (*id*. at 11), and that the exam questions were "intended" to evaluate nine cognitive abilities. (*Id*.)

The City also faults the district court for not making findings based upon conclusions contained in an EEOC determination letter, even though it did not call the district court's attention to those facts in any way. (City Br. 14-15.) As to the City's implementation of a "preferential promotional examination" for paramedics and EMTs (*id*. at 15), that fact, too, was never mentioned below. (A577-79; A1222-24; Dkt. # 359.) The same is true of the City's "Attrition Prevention Plan," computer database for contacting potential candidates, and informational sessions

held in 2002. (City Br. 16.) The City, in opposing summary judgment, never asserted, as it does now, that (1) it was not feasible to test for some job-related abilities in a multiple-choice format, (2) a different format would have been extremely costly, or (3) the City took steps to improve its tests and racial hiring practices. (City Br. 19.) Nor was mention made of hiring a full-time recruitment director in 2002, the size of its recruitment spending in 2005-06, the expansion of recruitment staff for the 2005-06 campaign, the FDNY's Strategic Plan, or the City's various "youth initiatives," including the Fire High School, the Exploring Program, and the Cadet Program. (*Id*. at 20-21.)

Not only did the City fail to supply its own factual account to the district court, it also did not dispute the bulk of the factual assertions relied upon by Intervenors in support of their motion for summary judgment. Instead, for 95 of the Intervenors' 164 factual statements (A787), the City simply "den[ied] the materiality" of those statements without disputing their truth (A1338) and then "refer[red] the Court to documents cited" by Intervenors "for a true and complete recitation of their contents." (*See, e.g.*, A1347.) The City did not set forth specific facts to dispute any of those 95 fact paragraphs (*see, e.g.*, A1340), and it did not refer to particular parts of the record in support of any contrary facts.

By failing to respond directly to the evidence in support of Intervenors' prima facie case, by failing to dispute the Intervenors' evidence in accordance with

Rule 56, and by instead simply insisting that Intervenors had not directly proven discriminatory intent, the City failed to create a genuine issue of fact that would render summary judgment inappropriate. The City cannot now fault the district court for "disregarding" evidence or require this Court to sift through and analyze newly-presented facts in reviewing the lower court's decision. The City – represented by one of the largest legal organizations in the country – cannot disregard rules of law and practice and then burden the appellate courts and the parties with new facts concerning a motion decided more than two (2) years ago.

C. Even if This Court Concludes That the City Did Not Procedurally Default, the Limited Evidence the City Seeks to Produce Would Not Be Sufficiently Probative or Material to Overcome the Presumption of Discrimination.

On appeal, the City makes two broad assertions based on its newly-raised facts. First, it asserts that it "made repeated attempts to design valid job-related exams." (City Br. 68.) Second, it claims that there was "ample anecdotal evidence of the City's efforts to increase its 'bottom line' of minority employees." (*Id.*) Even if this Court accepts facts raised for the first time on appeal, neither of the City's assertions is supported by evidence sufficiently probative to create a genuine dispute for trial.

1. *The City's Conclusory, Self-Serving Statements Regarding Its Absence of Animus*

Conclusory allegations without supporting particulars are insufficient to create a dispute of fact under Rule 56. *BellSouth Telecomms. v. W.R. Grace & Co.,* 77 F.3d 603, 615 (2d Cir.1996) (noting that "the party opposing the motion [for summary judgment] must set forth 'concrete particulars.'") (citation omitted); *see also Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 451-52 (2d Cir. 1999) (holding that the district court had properly disregarded conclusory allegations of racial animus while noting that "we have previously held that '[t]o satisfy Rule 56(e), affidavits must be based upon 'concrete particulars,' not conclusory allegations.'") (citation omitted); *Fagan v. N.Y. State Elec. & Gas Corp*., 186 F.3d 127, 134 (2d Cir. 1999) (affirming grant of summary judgment on age discrimination claim, holding that plaintiff employee's "unparticularized characterization that his job responsibilities were 'effectively' reassigned to three younger employees" was "too vague to create a genuine issue as to how his work was reassigned."); *SEC v. Research Automation Corp.,* 585 F.2d 31, 33 (2d Cir. 1978) (noting that, under Rule 56, "it is not sufficient merely to assert a conclusion without supplying supporting arguments or facts in opposition to the motion").

The City relies upon a number of conclusory statements, without supplying specific facts or "concrete particulars" on which to base those conclusions. For example, the City asserts that the developers of Exam 7029 and Exam 2043

"attempted to develop the examination in accord with what they believed were appropriate and acceptable test development methods" (A1222 at 1) and that they "did not intend to discriminate against any protected group." (A1223 at 3.)

These assertions are not sufficient to defeat summary judgment under Rule 56 and the Supreme Court has held that such evidence does not create a material dispute of fact. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (holding that the object of Rule 56 is not to replace conclusory averments in a pleading with conclusory allegations in an affidavit); *see also Vega-Colon v. Wyeth Pharms.*, 625 F.3d 22, 28 (1st Cir. 2010) (employee's "subjective belief" and "personal opinion" of his own job qualifications insufficiently probative to defeat summary judgment). Similarly, this Court noted the prevailing rule that ultimate facts or legal conclusions "are insufficient to raise a triable issue of material fact, and hence [are] properly disregarded." *BellSouth Telecomms.*, at 615.

2. The City's Purported Attempts to Design a Fair Exam Are Not Supported by the Record and Do Not Rebut the Presumption of Discrimination.

The City attempts to analogize this case to *Guardians*, where the test developers' "extensive efforts to understand and apply the [EEOC's Uniform] Guidelines" dispelled the "inference of deliberate discrimination." (City Br. 68, 74-75, citing *Guardians*, 630 F.2d at 112.) The analogy does not work.

The City made only three factual assertions in the district court concerning its development of the two challenged examinations: (1) that the test developers "attempted to develop the examination in accord with what they believed were appropriate and acceptable test development methods;" (2) that they "did not, prior to developing the Examinations consult with counsel or review the *Guardians* decision;" and (3) that they "did not intend to discriminate against any protected group." (A1222-23; A1333; A1335.)

The fact that these non-expert, in-house test developers never even consulted the *Guardians* decision and were never advised by counsel says much about the genuineness of the City's attempts to comply with the law. The test developers' testimony confirms that they had no familiarity with the Uniform Guidelines and made no effort to understand or apply them. The developer of Exam 7029 had *never* conducted a content validity study, a construct validity study or a criterion-related validity study on any exam (Dkt. # 264-5 at 34-35) as required by *Guardians*, 630 F.2d at 91, and the Guidelines §§ 5(B), 14. And, when asked "[w]hose job in particular at DCAS would it be to enforce the guidelines?" he answered candidly, "I don't know." (Dkt. # 267-27 at 47, Tr. 437:21-23.)

Similarly, the developer of Exam 2043 – which was virtually identical to Exam 7029 – conflated the Guidelines with unrelated standards issued by private testing organizations and testified that, it "would not be honest to sit here and say,

hey, I look at it [the Guidelines] whenever I am giving a test and I look for those guidelines." (Dkt. # 267-8 at 26, Tr. 94:23-95:3.) When asked if he had ever used the Uniform Guidelines as a reference in developing a test, he discussed asking survey participants to state their race and gender since it is "required by law." (*Id*. at 27, Tr. 98:5-25.) That is not what is required by the Guidelines.

The City's failure to educate test developers about legal standards that have been in place for more than twenty years is exactly the opposite of "extensive efforts to understand and comply," and it reinforces the finding of willful and deliberate inaction. Moreover, the district court's Disparate Impact Order, which is not challenged here, records the City's failure on *each* of *Guardians'* five "necessary attributes" of content validity to permit the use of an exam "notwithstanding its disparate racial impact." (DI-A479-81, citing *Guardians*, 630 F.2d at 95.)

(a) *No Use of Experts*. Despite this Court's admonition that test construction is a matter for experts, and that a municipality proceeds "at its own peril," in not relying on expert assistance, *Guardians*, 630 F.2d at 96, the City used inexperienced in-house staff to oversee the test development, and used untrained

firefighters ("amateurs in the art of test construction") to write the exam questions.[40] *Id*. (DI-A490.)

(b) *No Pretesting*. Nor did the City heed this Court's admonition that exam questions "be tested on a sample population" prior to use. *Guardians*, 630 F.2d at 96; (DI-A490-91.) No effort was made to determine whether the test questions actually measured the ability they claimed to measure (DI-A464; DI-A472; DI-A490-91), and, not surprisingly, they did not. (DI-A492-93.)

(c) *No Link Between Abilities Tested and Job Requirements*. The City also failed to establish a link between firefighter job tasks and the abilities being tested. (DI-A482, citing *Guardians*, 630 F.2d at 98) ("Only if the relationship of abilities to tasks is clearly set forth can there be confidence that the pertinent abilities have been selected for measurement.") Incumbent firefighters were asked to rate the importance of certain abilities to the tasks they perform (DI-A466-470), but the abilities were not defined anywhere, and the result was a meaningless exercise.

[40] Even before the development of Exams 7029 and 2043, the City had a history of eschewing the use of testing experts, or ignoring their advice. "Following Judge Weinfeld's decision in *Vulcan Society [I]*, the City contracted with a private consulting firm to construct valid written and physical examinations; these contracts were cancelled three years later, however, apparently on account of a budget crisis." (DI-A431-32); *see also Berkman*, 536 F. Supp. 177, 184, 200, 204 (E.D.N.Y. 1982) (finding that the 1978 physical test for the firefighter job had an adverse impact on women and was not job-related and noting that "the City, under Judge Weinfeld's mandate, employed experts to assist them, but then took the dangerous course of dispensing with the experts' advice").

"For example, one member testified that he 'probably didn't know' what Inductive Reasoning meant when providing a rating, 'so I gave it a two since I didn't know what it was, quite frankly.'" (DI-A483-84)[41]

(d) *Insufficient Representativeness.* The City failed to show that its exams measured skills and abilities that are "significant aspects" of the job. (DI-A495-96; DI-A500; DI-A504, citing *Guardians*, 630 F.2d at 99.) It irresponsibly left out of its exams the two most important cognitive abilities for the firefighter job and made no attempt to measure non-cognitive abilities that were even more job-related than many cognitive abilities. (DI-A496-97.) DCAS "didn't do anything specific to determine" whether non-cognitive abilities were testable; instead "going by . . . standard operating procedure at that time in our unit . . . that these abilities" would not be tested. (DI-A497.) Those abilities could have been included if this Court's instructions in *Guardians* had been heeded. (DI-A501-02.)

(e) *Use of Exam for Pass/Fail and Rank-Ordering*. The passing score for the exams were based on hiring needs or a default score of 70, not based on differences in skill between those who met the pass mark and those who did not,

[41] Untrained firefighters were required to know the difference between highly conceptual abilities such as "inductive reasoning" and "deductive reasoning" and were expected to understand the meaning of abilities such as "fluency of ideas," "speed of closure," "flexibility of closure," and "selective attention." (DI-A468-69.)

and the City failed to justify its rank-ordering of candidates based on their scores. (DI-A513-14.) This directly violated *Guardians*, 630 F.2d at 104-05.

(f) *Intentional Refusal to Follow Law and Policy*. The EEPC specifically warned the FDNY and the Mayor's Office that "corrective action" was needed "to comply with . . . the mandates of the City's Equal Employment Opportunity Policy (EEOP)" and the Uniform Guidelines. (A805-06 at 75; A1352 at 75.) City leaders adamantly refused to take corrective action. (A610-708; A1018.) Because the City expressly declined to comply with the EEOC's Uniform Guidelines, its own EEO policy, and its own EEPC, it cannot seriously claim good or even neutral intentions. Bald assertions that it attempted to construct valid exams create no issue of fact for trial.

3. Even Considering the City's Limited, Conclusory Statements Regarding Its Attempts to Diversify the Fire Department, Such Evidence Would Not Rebut the Intervenors' Prima Facie Case.

Appellants argue that the purportedly "ample anecdotal evidence of the City's efforts to increase its 'bottom line' of minority employees," is sufficient to rebut the presumption of intentional discrimination. (City Br. 68, 79-80.) Even if this Court did not regard the City's failure to present evidence below as a waiver, its asserted "efforts to diversify" are insufficient to create inferences to rebut the prima facie case.

The City relies upon *Furnco*, 438 U.S. at 580, to argue that it must be "allowed some latitude to introduce evidence which bears on [its] motive," and asserts that evidence regarding diversification efforts is therefore relevant here. (City Br. 79-80.) But *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. *Teamsters*, 431 U.S. at 360 n.46; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted.") (internal citation omitted). As this Court has pointed out, "in order to prevent summary judgment in favor of the plaintiff," a defendant must offer an explanation that would, "if taken as true, 'permit the conclusion that there was a nondiscriminatory reason *for the adverse action*.'" *Back v. Hastings-on-Hudson Union Free Sch. Dist.*, 365 F.3d 107, 123 (2d Cir. 2004) quoting *Hicks*, 509 U.S. at 509 (emphasis added). Evidence that does not directly explain the "employment decision" and "adverse action" – here, the continued use of the challenged exams – is not material and should not be considered.

The City's new evidence regarding its diversity efforts, even if considered, could not create a material inference in the City's favor that is "'significantly

probative' so as to create a genuine issue of fact for trial." *Hunt v. Cromartie*, 526 U.S. 541, 553 n.9 (1999).

(a) *The Columbia Study*. The Columbia Study – which the City now cites as evidence of good intentions (City Br. 80) – began in 2003 (SPA6; Dkt. # 102 at ¶19). There is no evidence that it *ever* led the City to change its firefighter selection procedures, let alone that such changes happened prior to Exams 7029 or 2043. Nor does the City argue that it took any steps associated with the Columbia Study that increased the employment of black firefighters or eradicated the effects of the City's long history of discrimination.

(b) *The City's Recruitment Activities Are Immaterial and Were Not Meaningful or Effective.* The City claims that its "[t]argeted recruitment efforts also help to negate any inference that an employer deliberately discriminated on the basis of race." (City Br. 80.) The district court was correct to dismiss this evidence as immaterial, explaining,

> The issue in this case is not whether the City recruited enough black applicants, but whether the screening and ranking procedure that the City applied to those applicants was racially discriminatory. The Intervenors have made out a prima facie case that the City used the exams to discriminate against black applicants – in other words, that the exams illegally harmed black test-takers. If more blacks were taking the exam as a result of the City's recruitment efforts, then more blacks were being illegally harmed, and the City's evidence is relevant only to the scope of the injury, not its source.

(A1409.) Mayor Bloomberg conceded that if the entrance exam was biased, he did not know that additional recruitment would help. (A908 at Tr. 81:9-19.)[42]

Moreover, only *effective* diversity efforts may be used to help rebut the presumption of discrimination. *Cf. Wash.*, 426 U.S. at 246. As noted in Part I(C)(2) *supra*, the City recruited *fewer* blacks to take the 2002 test than took the 1999 test, and both those exams had fewer black applicants than the exam from 1992. (SPA26-27.) "The FDNY's recruitment campaign for Exam 2043 was hampered by poor preparation and a lack of resources." (SPA19.) Even from Commissioner Scoppetta's viewpoint, it was not until 2006 that the City "conduct[ed] the kind of outreach that we [felt] was needed. . . ." (A1293.) And, even with respect to the 2012 test, Exam 2000, the district court found that "the City's financial commitment to enhanced firefighter recruitment lacks indications of long-term sustainability." (SPA36.)

Thus, the City's contention in its minimal 56.1 Statement below that the Bloomberg administration "has devoted increased manpower, funds, spending

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[42] The City also seeks shelter in the fact that the EEOC's probable cause determination did not include a finding of recruitment discrimination. (City Br. 14-15.) That in itself, of course, does not indicate that the City's recruitment efforts were sufficient to rebut the inference of intentional discrimination concerning the use of testing and rank-ordering procedures. Rather, the EEOC simply left the question of recruitment for another day, writing that the Vulcan Society's complaints about the City's substandard recruitment efforts "may some day prove true," but that "[f]or jurisdictional and practical reasons, the Commission chooses to focus its investigation on the written test." (A713.)

millions on advertising, and helping to develop the FDNY High School, in an effort to reach out to black communities and increase the number of blacks taking the entry level examination" (A1223 at 4) does not create a material dispute of fact, not only because such assertions had no bearing on the continuing decision to use discriminatory tests, but also because they did not affect the bottom-line. Similarly, the City's contention below that it "increased the frequency of the examination for promotion to firefighter which draws on larger minority pool of EMTs and paramedics" (A1223-24 at 5) had no impact whatsoever on the hiring of entry-level applicants.

The City also now asserts that it made efforts to reduce candidate attrition. (City Br. 16.) But such purported efforts were made on behalf of all applicants regardless of race. (A697.) Any efforts to reduce candidate attrition had no appreciable effect on black appointment rates (A791 at 15; A1342 at 15; A429; A821 at 158; A1366 at 158; A1197-98) and certainly did not relieve the enormous adverse impact of the exam itself. (A797-98 at 40-42; A1347 at 40-42.)

(c) *Promotion of EMTs Is Irrelevant to The City's Intentional Use of a Bias Selection Process*. The City claims that the opportunity for Emergency Medical Technicians (EMTs) to promote into the title of firefighter "gave preferential hiring status to a heavy concentration of black and Hispanic firefighter applicants (A1272; A1284; A1300)" and evidences its "desire to diversify the FDNY's

ranks." (City Br. 82.) The City does not explain how hiring EMTs into the firefighter title is of any benefit to black applicants who took entry-level firefighter tests – who are the Intervenors here – or how it relates to evidence of the City's discriminatory intent. *See Brown v. Henderson*, 257 F.3d 246, 252-253 (2d Cir. 2001) ("discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race")(citing *Conn. v. Teal*, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees . . . merely because he favorably treats other members of the employees' group.")).

Does the City mean that those harmed by Exams 7029 and 2043 could have avoided discrimination by, instead, applying to become EMTs, passing the civil service test for the EMT job, working as EMTs for a minimum of one year in order to become eligible to take the firefighter promotional exam, and then taking and passing the promotional exam?[43] Is this the "black route" to a firefighter job when the open-competitive exam discriminates? The very idea raises an inference of discrimination.

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[43] Many of the black victims here could not have taken that route even if they tried. Some would have been too young at the time of the promotional test to have gone through all of the preliminary steps required to be eligible to take the promotional exam. For others who were, say, twenty-eight at the time of the entry-level exam, becoming an EMT instead would mean that they would have been overage to become a firefighter by the time the next promotional exam came around.

Nor is there evidence that the EMT-promotion process had any effect on the bottom-line diversity of the firefighter workforce. The percentage of black firefighters in the FDNY has not increased, and EMT promotions cannot reduce the adverse impact of the unlawful entry-level exams. If anything, the City's willingness to hire EMT promotional candidates ahead of entry-level candidates whose scores on the exact same exam were significantly higher is strong evidence that the City itself did not have a good faith belief that exam scores were an important indicator of ability to perform as a firefighter.

(d) *The Residency Credit Was Not a Diversity Measure.* The City's claim that adding bonus points to the exam scores of New York City residents obviates an intentional discrimination finding (City Br. 82) – a claim not presented to the district court – is likewise untenable. There is no evidence that the residency credit was motivated by diversity interests,[44] as opposed to "economic and public safety benefits," as described by a New York State Appellate Division. *McGuinn v. City of New York*, 248 A.D.2d 282 (1st Dep't 1998). And there is no evidence that the residency credit had an effect on the FDNY's bottom-line employment of black candidates.

[44] The FDNY's black and Hispanic fraternal organizations asked the City to add the 5-point credit to applicants' written test scores rather than their final scores, "to increase the number of minorities eligible to take the physical portion of the exam," where they would have the chance to outperform others and thereby boost their final scores. (A623.) The City rejected that request. (A127-128.)

(e) *Better Hiring Rates in Other City Agencies Highlight The FDNY's Unique Barriers*. The City's proclaimed "success in diversifying its other uniformed services, including the NYPD" (City Br. 83) is not only irrelevant, it actually *underscores* the extraordinary rates of exclusion seen in the FDNY. The City claims that the firefighter job is "the best job in the world." (SPA85.) Proof that the City provides black job-seekers with work in less desirable positions is hardly evidence to rebut the presumption of discrimination with respect to the highly sought-after firefighter job. *See Teamsters*, 431 U.S. at 329 (finding defendant guilty of discrimination by excluding minorities from preferred jobs and placing them instead into "lower paying, less desirable jobs as servicemen or local city drivers.").

The City cites *Cromartie*, 526 U.S. at 553 n.9, for the proposition that summary judgment for the party who must prove discriminatory motive is "rarely" warranted, but fails to acknowledge that the Supreme Court recognized that there could be instances "where the uncontroverted evidence and the reasonable inferences to be drawn in the nonmoving party's favor would not be 'significantly probative' so as to create a genuine issue of fact for trial." *Id*. That is precisely the case here, in light of the City's decision to dispense with specific factual assertions in its motion practice before the district court.

III. THE CITY'S CLAIM OF JUDICIAL BIAS AND REQUEST FOR REASSIGNMENT ARE MERITLESS.

Claims of judicial bias are rarely made and consequent requests for reassignment are even more rarely granted. *United States v. Awadallah*, 436 F.3d 125,135 (2d Cir. 2006); *United States v. Jacob,* 955 F.2d 7, 10 (2d Cir. 1992) (reassignment is an "extraordinary remedy" reserved for the "extraordinary case") (internal citation omitted).

The standard for finding judicial bias is extremely difficult to meet. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Further, "bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer had it in for the party for reasons unrelated to the officer's view of the law[.]" *McLaughlin v. Union Oil Co.,* 869 F.2d 1039, 1047 (7th Cir. 1989). Nor can bias be established by "expressions of impatience, dissatisfaction, annoyance, and even anger. . . ." *Liteky,* 510 U.S. at 555-56. Instead, in reviewing a challenge to a trial judge's conduct, the Second Circuit evaluates "'whether the judge's behavior was so *prejudicial* that it denied [a party] a fair, as opposed to a perfect, trial.'" *Shah v.*

Pan Am. World Servs, Inc., 148 F.3d 84, 98 (quoting *United States v. Rosa*, 11 F.3d 315, 343 (2d Cir. 1993), cert. denied, 511 U.S. 1042 (1994)) (emphasis added). The City does not point to a single challenged comment or ruling that prejudiced it unfairly, nor does it satisfy the very high standard for the unusual remedy of reassignment.

A. The Record as a Whole Demonstrates No Bias.

The Second Circuit considers claims of judicial bias "in the context of the record as a whole." *United States v. English*, 629 F.3d 311, 321 (2d Cir. 2011). A review of the record as a whole reveals that far from automatically ruling against Defendants, the district court made numerous crucial and in some cases dispositive decisions in Defendants' *favor*. The court dismissed all individual claims against Defendants Mayor Bloomberg and Commissioner Nicholas Scoppetta (A1433-38) and declined to impose hiring quotas as part of its remedial order, though they were sought by Intervenors. (Dkt. # 390 at 3.) The court also rejected Intervenors' argument against dividing the class into subclasses (Dkt. # 640 at 10-12); rejected Plaintiff and Intervenors' proposal to calculate the mitigation of damages on either a class-wide or subclass-wide basis (*id.* at 24-25); and rejected Intervenors' proposal to calculate noneconomic compensatory damages on either a class-wide or subclass-wide basis. (Dkt. # 665 at 19-35.)

The court's minor evidentiary rulings were similarly balanced. By Intervenors' count, in nine days of a bench trial on injunctive relief the court sustained 118 of the City's objections and overruled 145. (A2625-4200; A4242-4547 (hearing transcripts in their entirety); A3952 at 4-23 (sustaining City's objection to relevance); A4089 at 17-19 (sustaining City's objection to leading question), A4090 at 18; A4091 at 4 (sustaining City's objections to hearsay); A4110 at 8-14 at 12 (sustaining City's objections to admissibility of final settlement agreement)). Intervenors made far fewer objections, of which the court sustained thirteen and overruled six. (A4137 at 15-38 at 5 (overruling Intervenors' objection to evidence not previously produced or identified on City's exhibit list); A4287 at 6-10 (overruling Intervenors' objection to lack of foundation)). The City's claims of judicial bias and request for reassignment, unusual in a bench trial to begin with, are particularly inappropriate given that the district court has made several crucial decisions and numerous evidentiary rulings in favor of the party claiming prejudice.

1. *Unfavorable Rulings Cited by the City Caused No Prejudice.*

Rather than acknowledge important and dispositive rulings in Defendants' favor, the City focuses on decisions that had no impact on the outcome of the case. A case in point is the district court's appointment of former Manhattan District Attorney Robert Morgenthau, one of the nation's most distinguished public

servants, as Special Master over the limited matter of developing a new, valid firefighter test. The court appointed the Special Master *after* finding disparate impact and intentional discrimination and after issuing remedial orders. (A1692-1703.) Nonetheless, the City was outraged at the court's selection, pointing to a funding dispute between the district attorney's office and the Mayor and to that office's consideration – and rejection – of charges against high-ranking Fire Department officials after two firefighters died. (A1704-09.) These disputes had no relevance to the development of a nondiscriminatory test or even to claims of discrimination, much less any impact on Mayor Bloomberg or Nicholas Scoppetta, whose motions to dismiss the court had just granted. Nonetheless, based on the City's objections, Mr. Morgenthau asked to withdraw from serving as Special Master (A1750-51), and the court appointed Mary Jo White instead. (Dkt. # 448.) Thus, any purported bias that the City speculates that Mr. Morgenthau might have exhibited had no influence on the case at trial or on matters on appeal and is hardly evidence of judicial bias.

2. The City Waves Any Claim that the District Court Abused its Discretion in its Evidentiary Rulings.

The City's arguments regarding bias in evidentiary rulings are similarly weak. It is well within a trial court's discretion to manage the examination of witnesses and to limit the parties' presentation of evidence. *See United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO,* 44 F.3d 1091, 1095 (2d Cir.

1995). Such decisions cannot amount to bias; they do not even amount to an abuse of discretion, the standard by which evidentiary rulings are assessed. *U.S. v. Kelley*, 551 F.3d 171, 174-75 (2d Cir. 2009). Indeed, nowhere does the City argue that the district court abused its discretion in making any evidentiary ruling, nor does it claim that any admission or exclusion of evidence in and of itself justifies vacating the district court's judgments. Challenges to these evidentiary rulings are therefore waived.

Nonetheless, the City protests a short and selective list of rulings it dislikes but does not directly appeal. (City Br. 114-15.) Three examples demonstrate the insignificance and even pettiness of the City's complaints. First, the City alleges that the court unfairly precluded expert witness Professor Eimicke from testifying. (City Br. 113.) But the City had proposed calling Professor Eimicke for the sole purpose of establishing a foundation for admitting into evidence certain reports issued by Columbia University researchers; once the court admitted the reports, the City's stated reason for calling Professor Eimicke vanished. (A4237.) Second, the City complains that an expert report regarding Examination 6019 was excluded for untimeliness. (City Br. 113-14.) At the same time, the City admits that the court also excluded Intervenors' report on the same subject (Dkt. # 722), an implicit concession of no prejudice. Third, the City argues that the court exceeded its authority by calling three witnesses. (City Br. 116.) But Fed. R. Evid. 614(a)

explicitly permits the court to call witnesses, and the City does not and cannot make any argument that Defendants were precluded from cross-examination or that the court abused its discretion.

Far from demonstrating bias, these rulings are evidence of "ordinary efforts at courtroom administration," which "remain immune" from charges of misconduct. *Liteky*, 510 U.S. at 556. Further, the City's examples of the court's purportedly "confrontational" style of questioning witnesses (City Br. 119) do not qualify as "expressions of impatience, dissatisfaction, annoyance, and even anger" found permissible in *Liteky*, 510 U.S. at 555-56, much less the "extreme" conduct required to find judicial bias. *Chen et al. v. Chen Qualified Settlement Fund*, 552 F.3d 218, 227 (2d Cir. 2009). *See also United States v. Herndon*, 359 Fed. Appx. 241, 243 (2d Cir. 2010) (unnecessarily skeptical tone of judicial questioning not grounds for reversal). Nor were the court's questions excessive. Of the approximately 4,566 questions asked of witnesses throughout the hearing, Judge Garaufis' accounted for a mere 13.21%.

The City also claims that the Judge violated Fed. R. Evid. 605 by supplementing the record with his own evidence while questioning Commissioner Cassano. (City Br. 116-18.) Again, its two examples are remarkably minor. In one, Judge Garaufis used a publically available document found on the FDNY's website to formulate questions (A3707-08); in another, he mentioned seeing a car accident

involving an FDNY vehicle on the way to work (A3702-03.) The former amounts to no more than the court taking judicial notice of a fact as permitted by Fed. R. Evid. 201. *See United States v. Bari*, 599 F.3d 176, 180-81 (2d Cir. 2010) (use of an internet search regarding fact not subject to reasonable dispute not reversible error). The City quibbles with this harmless use of a public document but fails to articulate any effect on, much less prejudice to, its case.

If the comment regarding the car accident amounts to error at all – the court struck "anything regarding the Prius accident" from the record (A3732-33) – it is exemplary of the type of "harmless error" that simply does not warrant reversal on appeal. *Perry v. Ethan Allan Inc.,* 115 F.3d 143, 150 (2d Cir. 1997) (evidentiary rulings do not warrant reversal unless "a substantial right of the party is affected.") (internal citations omitted). The accident was mentioned in the context of a discussion about the availability of FDNY vehicles for use in EEO compliance inspections. Earlier in the trial, the FDNY's EEO Commissioner had testified that the removal of her unit's vehicle impacted her ability to inspect firehouses. (A3516-17.) After asking Fire Commissioner Cassano to speak to that issue, the Judge determined that it was a matter the Commissioner "can address without any help from the court" (A3703:20-21), and the injunctive relief order imposes no requirement upon the City with respect to the availability of vehicles.

Harmless judicial additions do not warrant reversal even in criminal cases and jury trials. *United States v. Berber-Tinoco*, 510 F.3d 1083, 1092 (9th Cir. 2007), cert. denied, 555 U.S. 850 (2008) (three violations of Rule 605 constitute harmless error because verdict was not substantially swayed by the error). The insignificant additions here had no impact on the court's rulings and the City does not point to any.

3. The Court's Analysis Evinced No Bias.

Having failed to challenge specific evidentiary rulings or demonstrate that any such rulings were prejudicial, the City addresses purported bias in the court's analysis of the evidence, alleging primarily that the court viewed portions of the Columbia Study in a negative light. (City Br. 112-13.) But adverse judicial rulings in and of themselves – including the fact-finder's weighing of evidence – cannot be a basis for finding bias. *Chen,* 552 F.3d at 227.

Further, the City's unhappiness is attributable in great part to its own neglect. As noted, the City presented almost no evidence in response to Intervenors' motion for summary judgment on intentional discrimination, either in its Rule 56.1 Statement (A1222-24) or in its nine-page opposition brief. (Dkt. # 359.) The vaunted Columbia Study is not mentioned, nor did the City provide the court with any factual basis to undermine Intervenors' statistical evidence. Given that the City itself did not present evidence that it now says is crucial, it has waived

any right to criticize the court's failure to evaluate it. As might be expected, the City cites no legal support for the unusual claim that a court's failure to analyze evidence with which it has not been presented demonstrates bias. (City Br. 112-19.)

B. Reassignment Is Inappropriate and Would Undermine Judicial Independence.

The City argues finally that even if this Court finds no bias, the judge should be reassigned to protect the appearance of justice. But reassignment is an "extraordinary remedy." *Jacob*, 955 F.2d at 10. If granted here, it could actually diminish public faith in judicial independence. The City should not be permitted to win judicial reassignment – and waste untold judicial and party resources – by eliciting provocative commentary from the press and then claiming that the public perceives that the City has been unduly punished.

The Second Circuit looks to three factors in considering whether to reassign a case on remand: "(1) whether the original judge would reasonably be expected to have substantial difficulty in putting out of his or her mind previously-expressed views or erroneous findings; (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007)

(internal quotations omitted). All of three of these factors militate against reassignment here.

In the few cases in which appellate courts reassign on remand, courts tend to find that the judge has expressed a "visceral judgment on the party's personal credibility." *Shcherbakovskiy*, 490 F.3d at 142. Here, although the City complains of the "vehemence of [the Court's] beliefs" regarding the City's "ill will" it points to no specific examples other than the court's actual holding that the City intentionally discriminated and its order for injunctive relief. (City Br. 123.) Such circular reasoning, if accepted, would mean that any finding of intentional discrimination and order for relief would justify judicial reassignment. But "adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality." *Chen,* 552 F.3d at 227. Further, criticisms of the City's case, where "neither unfounded nor so extreme" as to suggest bias, are better understood as an "honest assessment of the issues relevant to the court's determination." *Id*. at 227-28.

Reassignment will not promote the appearance of justice. Media coverage of the case does not constitute public condemnation of the judge's decision-making. Indeed, of the four articles that the City claims question "the Judge's detachment," three are opinion pieces that cannot claim to survey public perception, and the fourth, an article in the *New York Times*, merely analyzes the court's rulings in the

context of FDNY culture. (City Br. 124 n.31.) The City's conflation of public perception with its own disappointment is unfounded.

Finally, reassignment would waste judicial resources. Even where a party may have a legitimate claim regarding the appearance of fairness – which the City here does not – these concerns must be balanced against "countervailing considerations of efficiency and feasibility" and the inevitable "wasteful delay or duplicated effort." *United States v. Robin*, 553 F.2d 8, 11 (2d Cir. 1977). *See also Juicy Whip, Inc. v. Orange Bang, Inc.*, 382 F.3d 1367, 1373 (D.C. Cir. 2004) (injudicious remarks over a lifetime of litigation do not justify reassignment that would waste judicial resources); *Hamad v. Woodcrest Condominium Association*, 328 F.3d 224, 239 (6th Cir. 2004) (district judge's comments that he did not agree with existing law did not demonstrate inability to judge case fairly or outweigh difficulty a new judge would have in becoming familiar with extensive record).

This litigation has already spanned nearly five years and involved numerous substantive holdings and a massive and complex evidentiary record. The City has not appealed the court's disparate impact finding, and efforts to comply with the remedial order are well underway. Reassignment upon remand would exacerbate the already lengthy delays in relief for firefighters and applicants who have been victims of discrimination. The tangible impact on the plaintiff class cannot be justified by the City's weak claims regarding public perception of unfairness.

"Inherent in an adversary system is the reality that typically one side wins and the other loses. If losses compromised the appearance of justice, this system would grind to a halt." *Awadallah*, 436 F.3d at 137. The City's losses do not meet the very high standards to demonstrate bias or justify reassignment, and its request should be denied.

IV. DEFENDANTS BLOOMBERG AND SCOPPETTA ARE NOT ENTITLED TO IMMUNITY FROM SUIT ON EITHER FEDERAL OR STATE LAW CLAIMS.

A. Because the Law Prohibiting Discrimination Against Public Employees Was Clearly Established, Defendants Bloomberg and Scoppetta Are Not Entitled to Qualified Immunity from Intervenors' § 1981 and Equal Protection Claims.

In considering the qualified immunity defense raised by Defendants Bloomberg and Scoppetta to Intervenors' § 1981 and §1983 claims, the district court correctly found that Intervenors had "submitted copious evidence from which a reasonable fact-finder could infer that the Mayor and Commissioner harbored an intent to discriminate against black applicants – evidence which, under a Title VII framework, might well establish a prima facie case of intentional discrimination as a matter of law." (DT-A1435.)

Despite this finding, however, the district court erroneously granted these Defendants qualified immunity on Intervenors' §1981/1983 race discrimination

claims. It did so by imposing on Intervenors burdens that have no basis in federal immunity law. First, it found that Intervenors had not shown that the Defendants were on notice that the method of proving a Constitutional equal protection claim is similar to the burden-shifting framework clearly established for proving a Title VII claim. Second, the court imposed upon Intervenors the obligation to present not just circumstantial evidence upon which an inference of discrimination could be drawn but also "*direct* evidence that Mayor Bloomberg and Commissioner Scoppetta acted with discriminatory purpose." (DT-A1435) (emphasis added). As set out more fully below, both applications were clearly in error.

1. The Commissioner and Mayor Chose to Continue Using the Discriminatory Exams in the Face of Repeated Entreaties to Do Otherwise.

Uncontroverted evidence proved that Defendants Bloomberg and Scoppetta were well-aware of the glaring racial imbalance in the Fire Department, recognized it as a "problem," and were advised by the Intervenors (A814-820 at 126, 131, 133-134, 136, 155; A845; A947; A975; A977-79; A984-85; A997-98; A1361-1365 at 126, 131, 133-134, 136, 155; A1060-61; A1062; A1063-64; A1085) and numerous public officials – from City Council members to Congressmen (A819-20 at 150, 153-154; A1365 at 150, 153-154; A1053-57; A1067; A1069) – that the racial imbalance needed to be investigated and the selection process validated. Moreover, Commissioner Scoppetta was repeatedly told by the City's own Equal

Employment Practices Commission that an impact study was required. (A808-09 at 87, 89-93; A1354-55 at 87, 89-93; A615; A670-75; A923; A926-27; A1182-88.) Commissioner Scoppetta, after repeated stalling (A677-79), never did the study. (A809 at 94; A1355 at 94.) Mayor Bloomberg, having been given the EEPC's full report on the problem and its recommendations, including the details of that agency's numerous unsuccessful attempts to obtain compliance from the Commissioner, simply overruled the EEPC's recommendation.[45] (A810 at 100-102; A1356-57 at 100-102; A610-708; A1018.) Thereafter, in 2004 and 2005, the EEOC issued its findings of probable cause, but still the Commissioner and Mayor refused to act. As a result, the City continued to use the biased exam from 2002 to 2008, which continued to act as a barrier to the employment of blacks in the firefighter job.

As stated more fully in Part IV(B) (State Law Immunity) *infra*, in refusing to investigate, or direct an investigation of, the apparent bias in the selection process, and in failing to take steps to correct the problem, the Commissioner and the Mayor were flagrantly violating the City Charter provisions (NYC Charter § 815 (19); § 814 (12-13)) and the City's EEO Policy adopted pursuant to those Charter

[45] This was only the second time the EEPC had been required to seek Mayoral support to obtain compliance from a Commissioner. (A809 at 96; A1355 at 96; A924.)

directives. (A847-69; A871-94.) The district court repeatedly identified the individual defendants' knowing misconduct:

- "As explained above, the fact that the Mayor and Commissioner were *deliberately* indifferent to the exam's impact on Blacks is circumstantial evidence that the City engaged in purposeful discrimination against black applicants." (DT-A1429) (emphasis added).
- "The Intervenors' proof strongly indicates that Mayor Bloomberg and Commissioner Scoppetta were *deliberately* indifferent to the discriminatory effects of the City's examination policies." (DT-A1435.)
- "[I]t is clear in this case that the Mayor's and Commissioner's actions (or inactions) were the product of conscious choice, inasmuch as they were aware of the hiring procedures' discriminatory effects and nonetheless ratified them or permitted them to continue. (DT-A1438; A799-810 at 47, 81-93, 95-97, 100; A1348-56 at 47, 81-93, 95-97, 100; A610-708; A1018.)

Based on their obstructive conduct, a reasonable trier of fact could readily conclude that their actions were taken with discriminatory purpose.

2. Defendants Are Not Entitled to Qualified Immunity Because They Violated a Clearly Established Right to Be Free From Employment Discrimination in Hiring.

The federal doctrine of qualified immunity protects a government official from suit only if the official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). To evaluate a claim of qualified immunity, a court, taking the facts "in the light most favorable to the party asserting the injury" asks if (1) "the facts alleged show the [official's] conduct violated a . . . right" and, if so, (2) "whether that right was 'clearly established' at the time of the events at issue." *Nagle v. Marron*, 663 F.3d 100, 114 (2d Cir. 2011) (internal quotations omitted)**;** *see also Harlow*, 457 U.S. at 818-19 ("If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."); *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 434 n. 11 (2d Cir. 2009) (a state actor "who violates clearly established law necessarily lacks an objectively reasonable belief that his conduct was lawful.")

There can be no dispute that intentional discrimination by a public employer in hiring personnel is unconstitutional. *See Wash.,* 426 U.S. at 239-41. Summarizing decades of precedent, the 11th Circuit appropriately characterized the clarity of this legal principle:

> We need not engage in a lengthy discussion of the patently obvious illegality of racial discrimination in public employment at the time the appellants voted to replace Smith. It can hardly be argued that in . . . 1989, when the events leading up to this lawsuit [took] place . . . intentional race discrimination in the workplace did not violate the Fourteenth Amendment.

Smith v. Lomax, 45 F.3d 402, 407 (11th Cir. 1995) (internal quotations omitted) (citing *Wash.*, 426 U.S. at 239). This Circuit, too, has long recognized the principle that the Constitution applies to public employment. *Jamieson v. Poughkeepsie City Sch. Dist.*, 195 F. Supp. 2d 457, 471 (S.D.N.Y. 2002) (noting, in employment context, that "[a] decision motivated by racial animus, despite any other contributing motivations, violated clearly established law of which [defendant] should have been aware"); *DeNigris v. New York City Health & Hosps. Corp.*, 09 CIV. 6808 DAB, 2012 WL 955382 (S.D.N.Y. Mar. 9, 2012) ("[I]t has long been clearly established that individuals have the right to be free from intentional race discrimination and retaliation in employment.")

The district court did not apply the established test for evaluating claims of qualified immunity. Had the district court properly asked whether the Intervenors had a clearly established constitutional right to be free from intentional racial discrimination in the FDNY selection process, the Defendants would obviously not have been entitled to qualified immunity. Yet the district court held that it was not enough that the Defendants were aware of a clear right that their conduct violated,

but needed, as well, to be cognizant of the particular trial burdens that the parties to discrimination litigation confront. The court's analysis follows:

> As far as this court is aware . . . neither the Supreme Court nor any court in this circuit has used the *McDonnell Douglas* or *Teamsters* frameworks to determine whether an *individual*, as opposed to a governmental employer, is liable for discrimination under either § 1981 or the Equal Protection Clause. A ruling applying *Teamsters* to the claims against the Mayor and Fire Commissioner would therefore require an extension, rather than an automatic application, of existing precedents. In the absence of such precedent, the Mayor and Fire Commissioner could not have reasonably anticipated that their actions would need to conform to the requirements of Title VII.

(DT-A1434-35) (emphasis in original.)

First, whether the individual Defendants would have known that the *McDonnell Douglas* or *Teamsters* analytic framework applied in this §1981/§1983 case is irrelevant. It was enough that they would have known that race discrimination in the employment context was unconstitutional. As this Court noted in *Nagle*, the Supreme Court has required only that "the rights at issue in such cases . . . be sufficiently 'particularized' to be 'relevant' to the inquiry: 'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" 663 F.3d at 114 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). There is no requirement that there have been a prior case with the same fact pattern or framework. "[F]or a

constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730 739-41 (2002) (internal quotations omitted). There is likewise no requirement that the burden shifting analysis applicable to those constitutional rights also be known to the defendants.

Second, even under the district court's novel standard, the Defendants should have been on notice that the burden-shifting would apply to evaluate the legality of their conduct. There were prior precedents applying the burden-shifting from Title VII. To take one example, in *Annis v. Cnty. of Westchester*, 136 F.3d 239 (2d Cir. 1998) this Court affirmed a jury verdict against individual governmental actors in a § 1983 action by "borrow[ing]" from Title VII's burden-shifting analysis. The Second Circuit stated:

> In analyzing whether conduct was unlawfully discriminatory for purposes of § 1983, we borrow the burden-shifting framework of Title VII claims. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506 n. 1, 113 S.Ct. 2742, 2747-48 n. 1, 125 L.Ed.2d 407 (1993) (assuming that the same burden-shifting analysis applies to both § 1983 and Title VII claims of discrimination)

Annis, 136 F.3d at 245. *See also*, *Back v. Hastings-on-Hudson*, 365 F.3d at 123.

This Court has applied these same standards to individual liability under §1981 claims. *Hudson v. Int'l Bus. Machs. Corp.*, 620 F.2d 351, 354 (2d Cir. 1980) (applying *McDonnell Douglas* standards to §1981 claims generally); *Whidbee v.*

Garzarelli Food Specialties, Inc., 223 F.3d 62, 74-75 (2d Cir. 2000) (acknowledging individual liability under §1981). Thus, the district court erred as a matter of law in concluding that the Mayor and Fire Commissioner could not have reasonably anticipated Title VII principles might be used by the court to analyze claims arising under §§ 1981 and 1983.

Because the unlawfulness of racial discrimination in hiring is long-established and Defendants Bloomberg and Scoppetta knowingly, and in the face of clear demands to the contrary, not only willfully condoned its continuation but actively blocked the EEPC's attempt to require investigation of the apparent illegality of the Exams' adverse impact, they are entitled to no immunity under federal law.

B. State Law Official Immunity Is Not Available.

The district court also erred in finding that Mayor Bloomberg and Commissioner Scoppetta were immune under state law from liability with respect to the State and City Human Rights Law claims. (DT-A1436-38.) State law provides two standards applicable to immunity of municipal officers who fail to follow the City's or State's own established employment policies: (1) When no discretion or judgment is exercised pursuant to the applicable policy, no immunity is available. *Haddock v. New York,* 75 N.Y.2d 478, 484, 554 N.Y.S.2d 439, 443 (1990); (2) When judgments are made pursuant to those policies, a qualified

immunity applies *unless* the judgment was made in bad faith or without a reasonable basis. *Arteaga v. State,* 72 N.Y. 2d 212, 216-17, 532 N.Y.S.2d 57, 59 (1998). Because the district court misapplied applicable law in granting summary judgment on immunity grounds to Defendants Bloomberg and Scoppetta, that judgment should be reversed.

1. The City Defendants May Not Invoke an Immunity Defense in Light of Haddock v. New York.

Where municipal officials violate their own regulations in failing to take required action or to exercise required discretion, they are not immune from suit. *Haddock,* 75 N.Y.2d at 484. The Mayor and Commissioner plainly violated City law and policy, as well as federal and state law. Pursuant to the City's EEO Policy (adopted by DCAS pursuant to a duty imposed by the City Charter § 814(12)), Commissioner Scoppetta was obligated, as agency head to do the following:

> 1) Agency heads are required to assess the employment practices of their respective agencies to determine whether there are barriers to equal opportunity. If problems are identified, agency heads must develop initiatives designed to resolve them and 2) *Agencies will examine all devises used to select candidates for employment to determine whether these devices adversely impact any particular racial . . . group. To the extent that adverse impact is discovered, agency heads will determine whether the device is job-related. If the device is not job-related the agency will discontinue using that device.* Devices which diminish adverse impact will be preferred over those with greater impact. . . . "

(A864-65.)

The Charter also required Scoppetta to "*ensure* that such agency does not discriminate against employees or applicants for employment as prohibited by federal, state and local law." *N.Y.C. Charter 815* (19) (emphasis supplied). The EEO 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.)

Commissioner Scoppetta fulfilled none of the obligations imposed by the EEO Plan. Even after the EEPC called on him to investigate the very apparent adverse impact of Exams 7029 and 2043 as required, he chose not to do so and therefore failed to determine, in accord with applicable law, whether the device was job-related. (A809 at 94; A1355 at 94.) Had he investigated, he would have discovered that the use of the exam was not job-related, and had he followed the Charter-imposed obligations, he would have discontinued use of the device. (A865.) Nor is there any dispute that the Mayor did nothing to enforce the City's EEO Policy with respect to Exams 7029 and 2043; rather, he affirmatively obstructed appropriate action requested by the EEPC. (A1018.)

The immunity question presented in this case falls squarely under settled New York law. In *Haddock*, the City failed to follow its own policy to review an employee's prior criminal history to determine whether, under the standards set by the policy, continued employment was appropriate. *Haddock,* 75 N.Y.2d at 485.

But because the City simply failed to review the employee's prior criminal history once his "rap sheet" became available, the New York Court of Appeals held that no immunity, whether absolute or qualified, was available. Rejecting the City's argument that immunity applied, the Court of Appeals concluded that

> the difficulty with the City's contention that it is entitled to a cloak of immunity for the discretionary decision to retain [the employee] in his status is that *there is no evidence that . . . the City in fact made any such decision or exercised any such discretion* . . . [or] made any effort to comply with its own personnel procedures for employees with criminal records . . . [T]hat critical omission cannot be cured by later supposition that, had a review been made, the employee's placement would have remained unchanged.

Id. at 485 (emphasis added). To meet *Haddock's* standard, Defendants needed to show an exercise of discretion that was required by the Policy itself.

The district court here rejected the applicability of *Haddock* by overlooking provisions of the EEO Policy that required the discontinuance of the exams if the required validity and job-relatedness inquiry showed non-compliance with the law. In so doing, the district court erroneously concluded that, the EEO Policy was "not the same thing as a rule requiring the official to alter or abandon those practices," and therefore that the EEO Policy did not "constrain either official's discretion to take the challenged action." (DT-A1437-38.) The district court's conclusion is contrary to the plain language of the EEO Policy, which mandates that "if the device is not job-related the agency *will* discontinue using that device." (A865)

(emphasis added). Second, the district court concluded that the Mayor's and Commissioner's actions or inactions "were the product of conscious choice, inasmuch as they were aware of the hiring procedures' discriminatory effects and nonetheless ratified them or permitted them to continue." (DT-A1438). Yet that conclusion, too, ignores express terms of the EEO Policy calling for Commisioner Scoppetta, when confronted with evidence of adverse impact, *to ascertain whether those employment practices were job-related*. (A865.) To do so consistently with applicable law, a validity study was required. Ignoring their legal obligations, Defendants simply chose to continue use of the exams without conducting an impact or validity study that would have shown the exams were not job related.

The New York Court of Appeals was clear in *Haddock* that the exercise of the discretion must be pursuant to the City's policies, not a judgment to evade those very policies altogether.

2. Even if the Mayor and Commissioner Were Found to Have Exercised Discretion, It Would Not Be Grounds for Immunity Under State Law.

The New York Court of Appeals has held that a qualified, not absolute, immunity is available under state law when discretion is exercised by agency officials unless the discretion is exercised in "bad faith or the action taken is *without a reasonable basis*." *Arteaga,* 72 N.Y. 2d at 216 (emphasis added); *accord Baez v. City of Amsterdam*, 245 A.D.2d 705, 706-07, 666 N.Y.S.2d 312, 313

(1997). This Court recently applied this rule to reverse a grant of qualified immunity for an individual defendant under the New York State Human Rights Law. *Lore v. City of Syracuse*, 670 F.3d 127, 167 (2d Cir. 2012). In reversing, this Court found that an individual defendant had failed to meet his burden to show good faith and imposed liability against him for damages. *Id*. at 180. Other courts have also applied this immunity rule to claims for damages against individual municipal defendants under the State and City Human Rights Laws. *Dawson v. Cnty. of Westchester*, 351 F. Supp. 2d 176, 199-200 (S.D.N.Y. 2004); *Hiller v. Cnty. of Suffolk*, 81 F.Supp.2d 420, 423-424 (E.D.N.Y. 2000).

Applying that rule to the facts of this case, Defendants have failed to show that they acted in good faith – or even had a legitimate reason – to fail to follow the City's own EEO Policy and the urgings of the EEPC. They were aware of the problematic nature of the use of the exams, and such knowledge would have compelled an official seeking in good faith to comply with the EEO Policy (and applicable federal, state and city law) to go the next step, and order that a validity study be conducted. That was not done – nor is there any suggestion that the Defendants even considered selection practices with lesser adverse impact. Under state law, there was simply no "reasonable basis" for the Mayor and Commissioner, consistent with their obligations under federal, state and city law, to close their eyes to the obvious adverse impact of these unvalidated firefighter

exams and continue their use. The district court failed to apply this qualified immunity rule.

Conclusion

The district court's Injunctive Relief Order should be upheld based upon the district court's finding of disparate impact liability. If this Court reaches the lower court's disparate treatment liability finding, it should be upheld as well. If the disparate treatment liability is reversed, that question should be remanded to the district court for a reconsideration of Intervenors' motion for summary judgment and, if necessary, trial. The case should not be reassigned. Finally, the district court's grant of federal and state qualified immunity to Defendant Michael R. Bloomberg and Defendant Nicholas Scoppetta should be reversed and remanded.

Dated: April 6, 2012
New York, New York

Respectfully submitted,

LEVY RATNER, P.C.

s/ Richard A. Levy
By: Richard A. Levy
80 Eighth Avenue, 8th Floor
New York, New York 10011
(212) 627-8100
(212) 627-8182 (fax)

CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012-2399
(212) 614-6438
(212) 614-6499 (fax)

SCOTT + SCOTT, LLP
500 Fifth Avenue, 40th Floor
New York, NY 10110
(212) 223-6444
(212) 223-6334 (fax)

Attorneys for Plaintiffs-Intervenors-Appellees-Cross-Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order of February 22, 2012 because it contains 38,483 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: April 6, 2012
New York, New York

s/ Richard A. Levy
By: Richard A. Levy
LEVY RATNER, P.C.
80 Eighth Avenue, 8th Floor
New York, New York 10011
(212) 627-8100
(212) 627-8182 (fax)

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
UNITED STATES OF AMERICA,

Plaintiff,

-against-

PARTIAL FINAL JUDGMENT
07-CV- 2067 (NGG)

THE VULCAN SOCIETY, INC., *for itself and on behalf of its members,* JAMEL NICHOLSON, *and* RUSEBELL WILSON, *individually and on behalf of a subclass of all other victims similarly situated seeking classwide injunctive relief;*

ROGER GREGG, MARCUS HAYWOOD, *and* KEVIN WALKER, *individually and on behalf of a subclass of all other non-hire victims similarly situated;* and

CANDIDO NUNEZ, *and* KEVIN SIMPKINS, *individually and on behalf of a subclass of all other delayed-hire victims similarly situated,*

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES; MAYOR MICHAEL BLOOMBERG and NEW YORK CITY FIRE COMMISSIONER NICHOLAS SCOPPETTA, in their individual and official capacities,

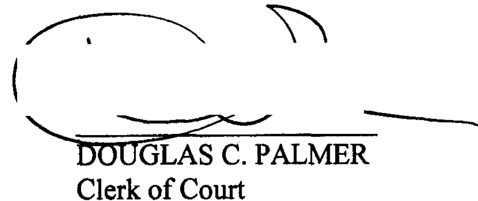
Defendants.
---X

A Memorandum and Order of Honorable Nicholas G. Garaufis, United States District Judge, having been filed on February 1, 2012, ordering inter alia the Clerk of Court to issue a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) on

Plaintiff-Intervenors' claims against Defendants Mayor Michael Bloomberg and Fire Commissioner Nicholas Scoppetta in accordance with the Court's Memorandum and Order dated January 12, 2010; it is

ORDERED and ADJUDGED that a partial final judgment is hereby entered (1) dismissing Plaintiff-Intervenors' Title VII claims against Defendants Mayor Michael Bloomberg and Fire Commissioner Nicholas Scoppetta, and (2) in favor of Defendants Mayor Michael Bloomberg and Fire Commissioner Nicholas Scoppetta and against Plaintiff-Intervenors' on the remaining federal claims on the grounds of qualified immunity and on the state law claims on the grounds of official immunity.

Dated: Brooklyn, New York
February 01, 2012



DOUGLAS C. PALMER
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
UNITED STATES OF AMERICA,

Plaintiff,

-and-

THE VULCAN SOCIETY, INC., *for itself and on behalf of its members,* JAMEL NICHOLSON, *and* RUSEBELL WILSON, *individually and on behalf of a subclass of all other victims similarly situated seeking classwide injunctive relief*;

ROGER GREGG, MARCUS HAYWOOD, *and* KEVIN WALKER, *individually and on behalf of a subclass of all other non-hire victims similarly situated*; and

CANDIDO NUNEZ, *and* KEVIN SIMPKINS, *individually and on behalf of a subclass of all other delayed-hire victims similarly situated,*

Plaintiff-Intervenors,

-against-

THE CITY OF NEW YORK, MAYOR MICHAEL BLOOMBERG *and* FIRE COMMISSIONER NOCHOLAS SCOPPETTA, *in their individual and official capacities,*

Defendants.
---X

NOTICE OF APPEAL

Civil Action No. CV 07 2067 (NGG) (RLM)

PLEASE TAKE NOTICE that Plaintiffs-Intervenors hereby appeal to the United States Court of Appeals for the Second Circuit, from the Partial Final Judgment entered in this action on the 1st day of February, 2012 and entered in the docket on or about the same date. This appeal is taken from that part of the Partial Final Judgment that is entered in favor of Defendants Mayor Michael Bloomberg and Fire Commissioner Nicholas Scoppetta, and against Plaintiffs-Intervenors, on the grounds of qualified immunity as to

Plaintiffs-Intervenors' federal law claims under 42 U.S.C. §§ 1981 and 1983 and on the grounds of official immunity as to Plaintiffs-Intervenors' State and City law claims under New York State Human Rights Law, New York Executive Law §§ 290 and 296 and New York City Local Law 59 of 1986, as amended by Local Rule 39 of 1991, §§ 8-101, *et seq.*

Dated: February 2, 2012
New York, New York

LEVY RATNER, P.C.

By: Richard A. Levy
Robert H. Stroup
Dana E. Lossia
80 Eighth Avenue
New York, NY 10011
(212) 627-8100
(212) 627-8182 (fax)
rlevy@levyratner.com
rstroup@levyratner.com
dlossia@levyratner.com

CENTER FOR
CONSTITUTIONAL RIGHTS
Darius Charney
666 Broadway, 7th Floor
New York, NY 10012-2399
(212) 614-6438
(212) 614-6499 (fax)
dcharney@ccrjustice.org

SCOTT + SCOTT, LLP
Judith S. Scolnick
500 Fifth Avenue
New York, NY 10110
(212) 223-6444
(212) 223-6334 (fax)
jscolnick@scott-scott.com

56-001-00001: 10088322

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF**
COUNTY OF NEW YORK) **CM/ECF SERVICE**

I, Kersuze Morancy, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On April 6, 2012

deponent served the within: **Brief and Special Appendix for Plaintiffs-Appellees-Cross-Appellants**

upon:

PLEASE SEE THE ATTACHED SERVICE LIST

via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

Sworn to before me on April 6, 2012

____

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2015

Job #241353

SERVICE LIST:

United States Attorney's Office, Eastern District of New York
271 Cadman Plaza East 7th Floor
Brooklyn, NY 11201
718-254-6053

United States Department of Justice
950 Pennsylvania Avenue, NW 3710
Washington DC 20530
202-514-2195

United States Department of Justice
P.O. Box 14403, Ben Franklin Station
Washington DC 20044
202-514-4491

Attorneys for Plaintiff-Appellee

New York City Law Department
Michael A. Cardozo
Attorneys for Defendants-Appellants-Cross-Appellees
100 Church Street 6th Floor
New York, NY 10007
212-788-0800