

No. 11-1024

In the Supreme Court of the United States

CITY OF NEW HAVEN

Petitioner,

v.

MICHAEL BRISCOE,

Respondent.

**On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Second Circuit**

**BRIEF OF *AMICUS CURIAE* CATO INSTITUTE
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

May a lower court entertain a Title VII disparate-impact claim when this Court explicitly specified that the actions at issue would not subject the Petitioner to liability because they were taken to avoid a Title VII disparate-treatment claim?

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INTEREST OF *AMICI CURIAE*¹

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case is of central importance to Cato because it implicates the Institute's strong belief that employers have enough to worry about when it comes to Title VII employment-discrimination laws that they should not be held liable for following the direct order of a federal court in such a case.

STATEMENT OF THE CASE

In 2009, this Court held in *Ricci v. DeStefano* that an employer could not justify disparate-treatment discrimination under Title VII on the grounds that failing to discriminate would trigger disparate-impact liability under Title VII unless the employer had a "strong basis in evidence" that failing to discriminate would cause such disparate-impact liability. *See* 129 S. Ct. 2658, 2681 (2009). In doing so, the Court analyzed the record and concluded that the City of New Haven, Connecticut had no such "strong basis in evi-

¹ Pursuant to this Court's Rule 37.3(a), both parties were given timely notice of intent to file and have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution for the preparation or submission of this brief.

dence” to believe that it would face disparate–impact liability if it failed to discriminate against the employees who alleged disparate-treatment discrimination, and it ordered the City not to engage in such discrimination. *Id.* That is, this Court handed down a judgment that required the City to certify a specific set of test results, the lack of certification of which prompted the initial complaint. The City followed this Court’s order and certified the results.

This Court also anticipated the exact situation presented here. At the end of its opinion, the Court noted:

If, after it certifies the test results, the City faces a disparate–impact suit, then in light of our holding today it should be clear that the City would avoid disparate–impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Id.

Despite this language, Respondent brought a Title VII disparate-impact lawsuit against the City for following this Court’s judgment. The district court dismissed the case, but the Second Circuit reversed and reinstated Respondent’s suit.

Petitioner addresses various legal issues at play, including the doctrines of *stare decisis* and claim preclusion, the precise meaning of this Court’s holding in *Ricci*, and whether the strong-basis-in-evidence standard “goes the other way.” This brief will focus on the simple argument that compliance with Title VII

is complex and onerous enough for employers such that they should not be punished for abiding by court orders.

SUMMARY OF ARGUMENT

An employer should not be liable for following a court order, particularly when this Court explicitly specified how to avoid both disparate-treatment and disparate-impact claims under Title VII.

ARGUMENT

TITLE VII IS COMPLEX AND ONEROUS ENOUGH FOR EMPLOYERS SUCH THAT THEY SHOULD NOT BE PUNISHED FOR ABIDING BY COURT ORDERS

The *Ricci* case highlighted the quandaries employers can face in Title VII cases. If one thing is clear from this Court’s opinion in *Ricci*, and from sheer common sense, it is that employers should have a “right path” that, if followed, will not lead to liability—and will minimize the numbers of lawsuits that they will have to defend. The lower court’s opinion in this case precludes such a path and leads to inefficiency and confusion.

Whether this Court concludes that Respondent’s case is subject to claim preclusion, or that the strong-basis-in-evidence standard “goes the other way,” or simply that an employer cannot be held liable under Title VII for taking actions mandated by a court—the Third Circuit’s approach in *NAACP v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 484–85 (3d Cir. 2011)—it should grant the petition and reverse. The Third Circuit’s approach seems the most narrow, simple, and correct.

CONCLUSION

This Court should grant the petition and reverse the Second Circuit, perhaps summarily.

Respectfully submitted,

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