11-5113-cv

United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-and-

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

Plaintiffs-Intervenors-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant,

-and-

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

Defendants.

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

BRIEF OF APPELLANT CITY OF NEW YORK

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OVERVIEW

This employment discrimination case began as a narrow disparate-impact challenge to two objective employment tests. It has been misused as the vehicle for an unjustified judicial takeover of a municipal public-safety agency's hiring structure.

By disregarding key evidence and black-letter legal principles, the District Court engaged in impermissible fact-finding when it granted summary judgment against the City of New York ("the City") and ruled that, as a matter of law, it intentionally discriminated against minority candidates for its Fire Department ("FDNY") through use of the exams at issue. Under the Court's faulty analysis, any rational jury would necessarily find that the City deliberately used facially neutral exams to suppress black employment even as it conducted a targeted multi-million-dollar minority recruitment campaign, enlisted Columbia University to study methods of maximizing FDNY diversity, 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. As a result of that erroneous ruling, the District Court views the City as a "fiefdom" rife with deliberate race discrimination, whose decision-makers ostensibly conspired to keep the FDNY a "bastion of white male privilege" by purposely using civil-service exams to screen out black applicants.

Based on that erroneous summary judgment ruling, the Court imposed a ten-year injunctive order that affects every aspect of the FDNY's hiring process, not just the design of its employment exams. In addition to the Special Master previously appointed to oversee test-development, to which the City has no objection, the Court enjoined the City from taking "any step in any process for the selection of entry-level firefighters" without the prior approval of a new Court Monitor. Among other burdensome requirements, the Injunction requires the Monitor's personal attendance at all FDNY's post-exam character and fitness review meetings, and mandates that all City employees create written documents detailing all conversations about firefighter candidates' backgrounds.

Along the way, the Court lost any semblance of neutrality. It took on the roles of witness and advocate for Intervenors, and issued factual findings on the purported need for systemic relief that were both infected by its earlier legal mistake at summary judgment and were otherwise clearly erroneous. Accordingly, the Injunction must be vacated, and this Court should remand the case for trial before a neutral arbiter.

JURISDICTIONAL STATEMENT

The City appeals from an injunctive order ("the Injunction") of the United States District Court for the Eastern District of New York (Garaufis,

U.S.D.J.), entered December 9, 2011 (SPA151-80).[1] Jurisdiction in the District Court was based on 42 U.S.C. §§ 2000e-5, 2000e-6, 1981 and 1983, and the Equal Protection Clause of the 14th Amendment.

This Court has jurisdiction over the appeal from the Injunction under 28 U.S.C. § 1292(a)(1), and to review the order granting summary judgment on intentional discrimination.[2] Since "the district court fully adjudicated the [Intervenors'] substantive claims in ordering injunctive relief, it is proper for a court of appeals to review the merits of the case 'in precisely the same manner as [it] would … on appeal from a final judgment.'" *EEOC v. Johnson & Higgins, Inc.,* 91 F.3d 1529, 1534 (2d Cir. 1996), *cert. denied*, 522 U.S. 808 (1997) (brackets and ellipsis in original), *quoting HBE Leasing Corp. v. Frank*, 48 F.3d 623, 632-33 (2d Cir. 1995). Also, because the Court relied heavily on the finding of intent to justify the Injunction, the two orders are "inextricably intertwined," and meaningful review of the latter requires scrutiny of the former. *See Lamar Adver. of Penn., LLC v. Town of Orchard Park,* 356 F.3d 365, 371-72 (2d Cir. 2004).

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[1] Numbers in parentheses following the letter "A" refer to pages in the Joint Appendix, and those following "SPA" refer to pages in the Special Appendix.

[2] The City does not seek review of the District Court's earlier ruling at summary judgment that the same examination-related practices gave rise to disparate impact liability under Title VII. Motions for backpay and various forms of damages are currently pending before the District Court, and are also not the subject of this appeal.

The appeal is timely. The District Court issued the final Injunction on December 8, 2011. The City's amended notice of appeal was filed on December 9, 2011 (A6430). *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE CASE

In May 2007, the Federal Government instituted this action against the City under Title VII, alleging solely that the written entry-level firefighter exams administered in 1999 and 2002 had an unjustified disparate impact on black and Hispanic test-takers insofar as they were used as pass/fail and rank-ordering devices (A94-107). Plaintiffs-intervenors-appellees the Vulcan Society, *et al.* ("Intervenors" or "Vulcans") intervened to add a charge that the use of these same two exams constituted intentional discrimination (A116-38). The Government has never adopted that theory. Although Intervenors later moved to amend their complaint to challenge additional aspects of the City's hiring practices, the District Court denied the motion (A163-74).

Thereafter, Plaintiff and Intervenors moved for partial summary judgment on the claims of disparate impact (A176-413). On July 22, 2009, the District Court ruled that the two challenged exams and the rank-ordering of results disproportionately impacted black and Hispanic applicants, and that the City did not satisfy its burden of demonstrating that they were "job-related" and "consistent with business necessity" (A428-520). The Court later appointed a Special Master

to oversee the City's development of a new exam (*see* SPA153). The City does not challenge the disparate impact ruling, the remedy requiring the development of a new exam, or the appointment of a Special Master to coordinate those efforts.

The City moved to dismiss the Vulcans' intentional discrimination claims (A574-75), and Intervenors filed a cross-motion for partial summary judgment on the issue of intent (A826). On January 13, 2010, the District Court entered partial summary judgment in favor of the Vulcans, ruling that the City's design and use of the same two faulty tests constituted intentional discrimination as a matter of law. In doing so, the District Court ruled that the City's contrary evidence was irrelevant and unpersuasive (A1371-1440).

Intervenors then moved for the additional injunctive relief at issue on this appeal. They sought to alter a host of different aspects of the FDNY's hiring structure, including minority recruitment, the reduction of "voluntary attrition" among black applicants (i.e., the dropout rate after exam registration and/or administration), character and fitness review, and EEO investigations among FDNY employees, as well as appointment of a Court Monitor to oversee compliance (A1791-1852). The Government took no position on the motion (A2355-64). After a lengthy remedial hearing, the District Court issued the disputed order in three phases. The findings of fact were entered on September 30, 2011 (SPA2-82). The conclusions of law and a proposed injunction were entered

on October 5, 2011 (SPA84-145). The final injunction was entered on December 8, 2011 (SPA151-80).

STATEMENT OF THE ISSUES

1. Should the Injunction be vacated where the District Court erred in summarily finding that the City intentionally discriminated?

2. In any event, should the Injunction be vacated where the scope of relief bears little or no relation to employment exams, the only factual predicate for liability?

3. Alternatively, should the Injunction be vacated where the findings of fact were infected by legal error and were clearly erroneous, and where the City was deprived of a neutral arbiter?

4. Should this case be reassigned on remand to preserve the appearance of justice where the District Court Judge firmly believes that the City intentionally discriminated?

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

Entry-level firefighter in the FDNY is a civil-service position which must be filled by competitive examination wherever practicable. N.Y. Const., Art V, §6. The Department of Citywide Administrative Services ("DCAS") is responsible for designing and administering all civil-service exams required for City employment, including the entry-level firefighter exam (A124).

The discrimination findings in this action's liability phase are based only on the written portions of two open competitive tests, Examination 7029 and Examination 2043 (A428-520; A1371-1440). Each exam also included a Physical Performance Test ("PPT"), which was given only to candidates who passed the written test (A126-27). Candidates who passed both the written and the physical test-components were then rank-ordered based on their combined performance, plus any applicable bonus points (A127-28; A195). As relevant here, New York City residents received five bonus points (A195; A206).

The City administered Exam 7029 in February 1999 and used its eligibility list through December 2004 (A95-96). Based on the FDNY's projected employment needs, DCAS set the passing score for the written test at 84.7% (A97). The eligibility list was unexpectedly exhausted due to the September 11, 2001 attacks and their unprecedented effects on FDNY staffing in the following years (A968-69).

Exam 2043 was administered in December 2002 and was used to appoint firefighters through January 2008 (A96). The City reduced the passing score for Exam 2043 to 70%, the default passing score for civil-service tests (A98; A413).

II. THE LIABILITY PHASE

(A)

The Complaints

In May 2007, the Federal Government instituted this action against the City under Title VII (A94-107). The Government did not allege intentional discrimination; rather, it challenged only the written portions of Exams 7029 and 2043, arguing that they disproportionately impacted black and Hispanic applicants by disqualifying candidates who failed the written test and by rank-ordering those who passed. The complaint alleged that these devices were not "justified by business necessity" because the exams were not sufficiently "job-related" within the meaning of Title VII (*id.*).

Subsequently, the Vulcans intervened and successfully moved for class certification (A116-38). Intervenors added intentional discrimination allegations to this case, pleading a pattern-or-practice claim of disparate treatment under Title VII and various other anti-discrimination statutes. They asserted that the City deliberately used the two written exams to screen out black applicants (*id.*). The Government never adopted this theory.

Significantly, neither complaint asserted discrimination in any aspect of FDNY hiring besides the written tests. In 2008, Intervenors sought to amend their complaint to challenge additional practices, including recruitment of test-takers and character review of candidates on the eligibility lists (A163-65). The

Court denied the motion, because Intervenors' participation in the case had been conditioned on their acceptance of the issues put forth by Plaintiff – the legality of the written exams – and they had agreed to add only a claim that those same acts constituted intentional discrimination (A167-74).

(B)

The Disparate Impact Ruling

After extensive discovery, Plaintiff and Intervenors moved for summary judgment on their respective claims of disparate impact (A176-413). On July 22, 2009, the District Court ruled that the two challenged uses of each written exam – pass/fail and rank ordering – disproportionately affected black and Hispanic applicants, and that the City could not demonstrate that they were "job-related" and "consistent with business necessity" (A428-520). While the City does not challenge that decision on this appeal, parts of the disparate impact decision are pertinent to the later ruling on intent.

First, the District Court recognized that the process of designing employment exams is "complex" and that multiple-choice tests are "typically intended to apply objective standards to employment decisions" (A435). The Court also observed that it is "natural" to assume that "the best performers on an employment test must be the best people for the job," and therefore rank-ordering

often "satisfies a felt need for objectivity" even if that assumption is belied by a close assessment of the exam's quality (A435).

In ruling that statistical evidence offered by movants made out a prima facie case of disparate impact, the District Court rejected the City's request that it apply the "80% Rule" set forth in the EEOC's Uniform Guidelines on Employee Selection Procedures ("the Guidelines"), opting instead to use the standard deviation model put forth by the movants (A440-462). As the Court acknowledged, under the Guidelines, the use of Exam 2043 in 2002 to distinguish between passing and failing candidates did not disparately impact black applicants, as the rate of black candidates who passed was 87.8% the rate of passing white candidates (A445; A451-52).[3]

The Court reviewed the DCAS test-development process, which was substantially similar for both disputed exams. It noted that a job analysis had previously been performed by expert psychometrician Dr. Frank Landy, who then used it to compile a list of tasks inherent to the entry-level firefighter job (A464;

[3] The 80% Rule reads: "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. § 1607.4D; *see EEOC v. Joint Apprenticeship Comm. of the Joint Indus. Bd. of the Elec. Indus.*, 186 F.3d 110, 118 (2d Cir. 1998). The passing rate for Hispanic candidates on both disputed exams was also undisputedly more than 80% of that of whites (A219; A225).

A484). The two in-house DCAS test developers of Exams 7029 and 2043 began with Landy's job analysis, interviewed incumbent firefighters to update his task list, and convened a focus group of firefighters to rate the importance of the various tasks (A464-66).

DCAS then assembled twelve firefighters into a "Linking Panel," in an attempt to link task "clusters" important to the entry-level firefighter job to necessary abilities. The "clusters" included search and rescue, incident-scene evaluation, ventilation, and salvage. Panel members were asked to "link" these tasks with 18 abilities, including written and oral comprehension and expression, memorization, problem sensitivity, deductive and inductive reasoning, and spatial orientation (A466-70).

Notwithstanding the shortcomings it identified in DCAS's methodology, the Court acknowledged that the City's job analysis had been "aimed at" identifying the tasks performed by an entry-level firefighter, and that the exam questions were "intended" to evaluate nine cognitive abilities, each of which bore "some relationship to the job" (A482; A492). It also observed that DCAS had not tested for certain important skills, like oral comprehension and expression, in the belief that it was not "feasible" to do so in a multiple-choice format (A470-71). Similarly, although the Court ruled that the City could not establish job-relatedness for the passing score of either exam, it recognized that the

City set the passing grade for Exam 7029 based exclusively on the FDNY's anticipated hiring needs, while for Exam 2043, it simply used the civil service default score (A506-07).

Ultimately, the District Court concluded that the City was liable for disparate impact because neither exam was designed well enough to establish sufficient job-relatedness. However, as reflected in the Court's decision, each test was facially neutral, resulted from a fairly elaborate test-construction process, and was intended in all respects to be job-related.

(C)

The Motion and Cross-Motion on the Intentional Discrimination Claims.

(1)

The City's Motion to Dismiss

Thereafter, the City moved to dismiss the Vulcans' intentional discrimination claims, arguing that the complaint contained no plausible non-conclusory allegation that the City had used the tests because of, rather than in spite of, their adverse impact upon minorities (A574; Mem. of Law in Support of Motion, dated Sept. 18, 2009, ECF No. 323). Intervenors cross-moved for summary judgment on the issue of intent (Mot. for Summary Judgment on Intentional Discrimination Claims dated Oct. 30, 2009, ECF No. 343).

In support of its motion, the City adduced evidence that as of January 2003, the FDNY had implemented 14 of 16 recommended actions by the City's Equal Employment Practices Commission ("EEPC"), the City agency responsible for auditing compliance with equal opportunity laws, and was in "partial compliance" with several others (A610-708).[4] The Commission had subsequently issued a report to the Mayor's Office in April 2003 that the FDNY had not performed a requested validation study of Exam 7029, but had taken the steps described below to increase diversity (*id.*).

High-ranking FDNY officials met regularly with an Advisory Committee, formed by the City and including the Vulcan Society, to confer on recruitment strategies (A619; A641; A650; *see also* A658-69). In 1999, during the lead-up to Exam 7029, the FDNY placed English- and Spanish-language advertisements in minority-oriented newspapers, television and radio stations, and sent recruiters to local college campuses, high schools and community organizations with substantial minority populations (A620). For Exam 2043, such efforts were increased. In 2002, the FDNY launched a $2.7 million media campaign aimed at minority recruitment (A694). The FDNY's Recruitment and

[4] To the extent the EEPC found noncompliance, it was based primarily upon insufficient supporting documentation.

Diversity Unit ("the Unit"), by then budgeted at $1.6 million, assigned 20 trained recruiters per day to perform outreach in diverse neighborhoods, and spent some $120,000 in overtime pay, plus non-pecuniary incentives, for firefighters to participate in recruitment (A689-94; A702). The Unit collected nearly 20,000 expression-of-interest cards with contact information for potential candidates, almost 40% of whom self-identified as black (A697; A714).[5] It posted 700 recruiting posters per week on bus shelters and kiosks throughout the City, and asked black celebrities to record public service announcements for FDNY recruiting (A694). In 2002, the City extended the exam registration period for 30 days just to allow more time for minority candidates to register for Exam 2043 (A679; A714).

Indeed, the EEPC report appended a June 2004 determination of the federal Equal Opportunity Employment Commission ("EEOC"), which found that the relatively low percentage of blacks who took the written 2002 exam (7.7%) was not attributable to City inaction (A713-14).[6] The EEOC also found that although 85.6% of blacks who took the 2002 exam achieved a passing score, it still had a disparate impact on black applicants, and that the DCAS exam development

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[5] According to the 2000 census, 21.3% of the City's population was black (A714).

[6] In its report, the EEOC expressly reviewed only the more recent 2002 exam "for jurisdictional and practical reasons" but misidentified it as Exam 7029 (A713).

report did not include all necessary elements of a validation study (A714-15). Even so, the EEOC noted that the City had made extensive efforts to recruit diverse candidates in which the Vulcans had been fully involved, visiting "several hundred recruitment sites … during July, August and September [2002] to recruit minorities and women" (A714; *see* A702). Moreover, it found that the City had facilitated follow-up by the Vulcans to keep black candidates apprised of pre- and post-test opportunities, like tutoring and informational sessions (A714).

The EEPC's documentation also reflected that in 1998, shortly after the Emergency Medical Service merged with the FDNY, the City announced a preferential promotional examination to help its highly diverse workforce of paramedics and EMTs join the ranks of entry-level firefighters (A639; A652). Every promotional candidate who passed the exam was considered for a firefighter position before even the top-ranked entry-level test-taker, a concededly effective diversity device (A747-48).[7]

[7] *See Gallagher v. City of N.Y.*, 307 A.D.2d 76 (1st Dep't), *appeal denied*, 1 N.Y.3d 503 (2003). As obliquely referenced in the motion papers (A1300), the City defended the EMT promotional exam from a legal challenge. The State Supreme Court initially enjoined the City from using the exam, but the City successfully appealed to the Appellate Division, First Department. *Id.* In vacating the injunction, that Court recognized that the promotional exam was specifically designed to diversify the FDNY's ranks after "recruitment efforts in that regard had not proved successful," and that its eligibility list had "a greater percentage of minority candidates among those achieving a passing grade than the list compiled from the open competitive examination." *Id.* at 78-79.

The FDNY also submitted an Attrition Prevention Plan to the EEPC in October 2003, reflecting its efforts to reduce minority-candidate dropouts during the application process (A697). Using its computer database, the Unit contacted potential candidates with reminders of important dates in the process and notice of recruiting events (A697). Informational sessions were held at headquarters every week between July 8 and October 28, 2002, providing guidance on the exams, post-exam processing, and the benefits of the job (A699-701). One session was devoted to a presentation by the Vulcans (A700).

(2)

Intervenors' Cross-Motion for Summary Judgment

In support of their cross-motion for summary judgment on the issue of intent, Intervenors submitted the same statistical evidence giving rise to their disparate impact claim: the relative pass rate between blacks and whites for Exam 7029 (33.9 standard deviations), and for Exam 2043 (21.9 standard deviations); and the racial disparity in rank-ordering for each exam (6.5 standard deviations for Exam 7029; 9.6 for Exam 2043) (A797-98). They acknowledged, however, that the pass rate for black candidates on Exam 2043 was greater than 80% that of whites (A797).

Intervenors also acknowledged that the passing grade for Exam 7029 was set to match the FDNY's expected hiring needs, although they asserted that

the City was aware that the pass rate would increase disparate impact on blacks (A811; A964-69). They conceded that the passing grade for Exam 2043 reflected the default civil-service score (A796). According to their proof, the City opted to use public resources to design a better exam for future use rather than perform a validity study on Exam 2043, and hired a "professional psychometrician" prior to August 2006 to construct Exam 6019 (A812; A818-19; A1197-98; A1213). Indeed, the Intervenors' submission acknowledged that Exam 6019, given in 2007, produced an eligibility list in which 38% of those who passed were members of racial minority groups, as were 33% of the top 4,000 scorers – those most likely to be hired (A1197-98).

Intervenors put forth evidence that: (1) in the 1970s, the City was found liable for the disparate impact of its entry-level firefighter exam on black applicants (*Vulcan Soc'y v. Civ. Serv. Comm'n,* 490 F.2d 387 [2d Cir. 1973]); (2) since that ruling, the percentage of African-Americans in the FDNY remained at approximately 3-4%, while the City's black population ranged from 21-29%; (3) the City had additional notice of the importance of test-design from the ruling in *Guardians Ass'n of N.Y.C. Police Dep't, Inc. v. Civ. Serv. Comm'n,,* 630 F.2d 79 (2d Cir. 1980); (4) various entities, including the EEPC, raised concerns about the FDNY's racial imbalance with City officials; (5) except for its lower passing score, Exam 2043 was designed in much the same way as Exam 7029; (6) the test-

construction methods for both exams fell short of *Guardians*' standards; (7) the City's EEO policy required the FDNY and DCAS to examine all selection devices for compliance with EEO laws, but each maintained that a post-exam validity study was the other agency's responsibility; (8) fire departments in other large cities have a markedly higher diversity rate than the FDNY, as do the other uniformed services in the City (A788-824).

Intervenors did not allege that the two open competitive exams were facially discriminatory, that white applicants were ever excused from passing the exam, or that white test-takers were given any race-based preference on the eligibility list. Their proof showed that high-ranking City officials had recognized the low rate of diversity among firefighters and expressed the desire to improve it through greater recruitment and other means unrelated to the exams (A793; A815; A817).

(3)

The City's Opposition to Summary Judgment

In opposition, the City submitted evidence demonstrating that it did not intend to discriminate but instead had attempted to design valid examinations in good faith, and had otherwise adopted programs to enhance diversity within the FDNY.

First, two expert psychometricians, after reviewing the DCAS test development reports for Exams 7029 and 2043, opined that both exams were constructed in accordance with "standard job analytic and test development procedures" (A1261-62). The DCAS workers who designed the disputed Exams submitted affidavits stating that they designed the tests in accordance with what they believed to be proper test-construction principles, and had never intended to exclude or discriminate against minorities, but they also acknowledged that they had not consulted with counsel or reviewed relevant legal precedent (A1333-35). The City submitted evidence that DCAS believed it was not feasible to test for some job-related abilities in a multiple-choice format, and a different format would have been extremely costly considering the thousands of applicants who took these exams (A1229-30; A1263).

Second, the City adduced evidence that it had taken steps to improve its tests and its racial hiring statistics (A1272). Again, the proof showed that the pass rate for blacks taking Exam 2043 satisfied the EEOC's 80% rule, unlike the earlier Exam (A1242-45). After the 2007 administration of the professionally designed Exam 6019, the diversity of one incoming probationary-firefighter class had reached approximately 30%, in part due to the highly successful EMT promotional exam (A747-49).

The City also furnished additional documentation of its other efforts to enhance firefighter diversity. First, once the state courts approved the EMT promotional path, the City seized the opportunity to offer the preferential promotional exams more often, every 18 months (A1272; A1284; A1300). The FDNY hired a full-time Director for its Recruitment Unit in 2002 (A1305). By 2005-06, funding for recruitment reached $1.3 million and $1.4 million, respectively, plus an additional $1 million allocated to pre-exam advertising (A1286-87; A1292). The Recruitment Unit was "fortified" with a greatly expanded full-time staff, and the campaign for the 2007 exam began farther in advance and was more extensive – and more successful – than ever before (A1286-87; A1292-96; A1319).

In 2002, the City also enlisted Columbia University's School of International and Public Affairs to analyze and recommend improvements to its diversity initiative ("the Columbia Study") (A1272-74). The Columbia Study arose in conjunction with the FDNY's "Strategic Plan" to rebuild and strengthen after 9/11, which identified enhancing diversity as one of its top six priorities (A1271-74; A1304-07; A1319-31).

The City's proof also referenced its youth initiatives, developed to foster mentoring relationships and promote the long-term idea of FDNY employment among inner-city youths. In 2003, the FDNY partnered with the

City's Department of Education to create the FDNY High School for Fire and Life Safety ("FDNY HS"). Located in East New York, this 99% minority high school incorporates firefighting and EMT studies with a traditional educational curriculum (A1276-77). Mentored and taught by FDNY incumbents and retirees, students work to improve fire safety in their community and can earn EMT certificates along with their high-school diplomas (*id.*). The FDNY Exploring Program is a career education program, staffed by FDNY personnel working on overtime, who teach youths fire safety skills and familiarize them with the requirements for joining the FDNY's ranks (A1274-75).[8]

(D)

The District Court Rules at Summary Judgment that the City Intentionally Discriminated Against Black Applicants.

Treating the pending motions as competing motions for summary judgment, the District Court concluded that the Vulcans had made out a prima

[8] The City also submitted evidence concerning the Fire Cadet Program, a diversity initiative instituted in the 1990s and later discontinued due to resistance at the state level (A626; A639-40; A1274). The City had tried and failed to convince the State Civil Service Commission to create a non-competitive "cadet" civil-service title with a promotional path to firefighter (A1274; A1284). Consequently, cadets had to be hired as EMTs, serve for at least a year, and then take the promotional examination for firefighter (A1284). Since EMTs were already a diverse population (A639), in the spring of 2002 the FDNY decided it was a better use of resources to discontinue the expensive Cadet program and instead give more frequent EMT exams, and adapt the mentoring approach to its other youth initiatives (A1274-75; A1285; A1300-01).

facie case of a pattern-or-practice of intentional discrimination, while the City "abjured its responsibility" to present any evidence that was relevant to its burden of proof (A1403).

(1)

The Prima Facie Case

First, the Court concluded that Intervenors' statistical evidence was sufficient to establish a prima facie pattern-or-practice of purposeful discrimination (A1398-1401). The Court went on to consider Intervenors' anecdotal evidence, which consisted of "historical" and "comparative" evidence rather than specific instances of discriminatory animus (A1401).

Regarding the historical evidence, the Court noted that the City was aware of the importance of employment test design by virtue of the 1972 *Vulcan Society* litigation and the 1980 *Guardians* decision (A1381; A1401). The Court observed that once the 3:1 racial hiring obligation imposed by the 1972 *Vulcan Society* Litigation expired in 1977, the FDNY "abandoned" that racial quota in favor of the results of its employment exams (A1385). Although Intervenors offered no evidence about the validity of the tests given between 1977 and 1999, the Court ruled that the City had not improved its testing procedures, finding the 1999 and 2002 exams to be "strikingly similar" to those ruled unlawful in *Vulcan*

Society, and relying on statistical evidence of the FDNY's low diversity in the intervening era (A1381-86).

As to the "comparative evidence," the Court set forth the minority composition in fire departments of other American cities, as well as the City's other uniformed services, all of which were markedly higher than the FDNY's (A1386-88). The Court criticized the City for failing to improve its tests in the face of complaints about Exam 7029, including the use of Exam 2043, which the Court found to be no improvement because it was constructed using the same procedures (A1402-03, A1407). The Court did not note at this juncture that the racial disparity in the pass/fail rate of Exam 2043 fell within the Guidelines' "80% Rule."

(2)

The Court Deems the City's Lack of Statistical Proof Fatal.

Because "the City [did] not attempt to meet or undermine Intervenors' statistical evidence," the Court categorically rejected every part of the City's proof (A1407). The Court thus imposed an impossible burden on the City, since, as noted, it had earlier adopted Intervenors' statistical evidence in its ruling on disparate impact. Now, the Court ruled that the City could not "construct a competing account of its behavior" to dispute allegations it had discriminated

intentionally (A1407). Thus, the Court concluded that, without the need for further analysis, Intervenors were entitled to summary judgment (A1407).

(3)

The Court Alternatively Rejects the City's Evidence as Irrelevant and Unpersuasive.

Although it considered the City's non-statistical evidence irrelevant, the Court went on to analyze the "probative value" of that evidence, solely to "serve the interests of completeness and finality" (*id.*). As to DCAS's attempts to design valid exams, the Court ruled that the City could not prove that their racial impact was "merely the unfortunate by-product of a legitimate, neutral policy" unless it also proved the defense to disparate impact – namely, that the exams were "job related" and "consistent with business necessity" (A1407-09). As the Court noted, however, it had precluded that defense in its previous disparate impact ruling (A1409).

Focusing only on the exams' discriminatory effects, the Court next rejected all evidence of the City's endeavors to diversify its workforce, including its preferential promotional EMT exams and youth initiatives, as "incredible or inapposite" (A1409-10). The Court made no mention of the aforementioned Columbia Study that the City had solicited. Similarly, while it characterized the City's recruitment campaign as "laudable," the Court found that "[i]f more blacks

were taking the exam as a result of the City's recruitment efforts, then more blacks were being illegally harmed" (A1409-10).

(4)

The Court's Conclusions

Based on the foregoing, the Court flatly rejected the possibility that the faulty tests resulted from "benign neglect, well-intentioned dithering," or even "bureaucratic failure" (A1423). Instead, it concluded, as a matter of law, that the City had engaged a pattern of purposeful discrimination from February 2001 through January 2008 (A1399; A1410). Further, in basing the passing score for Exam 7029 on the FDNY's projected hiring needs, the Court found that the City had intentionally discriminated, under the following reasoning (A1418-19):

> [H]ad white test takers failed the exam at the same rate as black test takers, only 7,783 white applicants would have passed. The result would have been a deficit of 3,830 firefighters, leaving the FDNY unable to replenish or expand its ranks. Presumably, in that situation the City would have lowered the cutoff score to increase the number of firefighters; the vital point is that in the instant situation it did not lower the cutoff score to increase the number of blacks. In other words, the City enforced a consequence against black applicants … that it would not, and could not, have enforced against whites. The City's willingness to treat black applicants differently – to tolerate adverse outcomes against one race that it would not tolerate against another – is, if not the textbook definition of discriminatory intent, its nearly indistinguishable synonym.

III. THE REMEDIAL PHASE

(A)

The District Court Appoints a Special Master to Oversee Compliance Relief.

In May 2010, the District Court announced it would appoint a Special Master to oversee the development of a new exam and solicited nominees from the parties, who conferred and submitted a list of suggested candidates.[9] On May 26, 2010, the Court rejected the parties' recommendations and *sua sponte* appointed the Honorable Robert Morgenthau (A1699-1703).

On May 28, 2010, the City informed the Court that it intended to seek Mr. Morgenthau's recusal on the grounds that a reasonable person, knowing all the facts of his relationship with the City and its current high-ranking officials, would "reasonably question his impartiality" (A1705-42). While acknowledging Morgenthau's "unquestionably distinguished career" as "one of the great prosecutors of this country," the City cited "the perception that [he] may be less than impartial" due to his publicly acrimonious history with the Mayor, the Corporation Counsel, the FDNY, and the City itself (A1705-06).

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[9] Although the jointly submitted list is not reflected in the Court's docket, upon information and belief one candidate was unanimously endorsed by all three parties.

As the City noted, media coverage had already connected Morgenthau's appointment with a "public spat" occurring less than a year before (A1706-07; A1717). At that time, the Mayor and Corporation Counsel suggested that Morgenthau had misappropriated certain funds collected by his office, after which Mr. Morgenthau publicly leveled a barnyard epithet at the Mayor (A1706-07; A1711-42). The press also rehashed the story arising from the 2007 Deutsche Bank-building fire, which had resulted in Morgenthau convening a grand jury to consider levying criminal charges against the City itself, as well as high-ranking FDNY officials (*id.*). News outlets like the *New York Times*, the *Wall Street Journal*, and the *New York Law Journal* had characterized Morgenthau's relationship with the Mayor and Corporation Counsel as "chilly," "strained," "less than cordial," and "adversarial," and noted that the Court had "bypassed" all nominees submitted by both sides (A1711-15; A1722). The Court's choice was reported as a "stinging rebuke," a "bitter pill," and an "ignominy" for the City and the Mayor (A1712; A1717).[10]

After the City raised its concerns, Mr. Morgenthau voluntarily stepped down as Special Master (A1750-51). However, the Court issued an order sharply

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[10] Moreover, the City observed that Mr. Morgenthau had no real expertise with federal procedural rules, mediation, employment law, or the intricacies of employment-exam design (A1708). Since criminal law had long been his primary area of practice, the City maintained that his relevant skills did not outweigh the likelihood of perceived bias (*id.*).

criticizing the City for, *inter alia*, maligning Mr. Morgenthau's integrity (A1746-48). Quoting the City's letter out of context, the Court accused the City – incorrectly – of suggesting that he was actually biased (A1747).

Ultimately, the District Court appointed the Honorable Mary Jo White to oversee test development. As the Court has recognized, throughout the ensuing 18 months, the City has been working cooperatively and expeditiously with the parties and Special Master White to construct a new exam (SPA106-07).

(B)

The Court Imposes an Interim Hiring Injunction.

The City's most recent eligibility list, generated in 2007 from Exam 6019, was unprecedented in its diversity. Of its top 4,000 candidates – those most likely to be hired – over 30% were members of minority groups (A1197-98; A2955). In July 2008, the City used Exam 6019's list and its corresponding EMT promotional list to hire one class of 311 firefighter candidates, 101 of whom were black or Hispanic (A747-49; A1197-98).

A citywide hiring freeze, brought on by the national financial crisis, temporarily suspended further hiring (A1495; A1532). However, by the spring of 2010, ordinary attrition among firefighters reached a level requiring substantial outlays of overtime pay to maintain collectively-bargained staffing levels, making new hiring the more cost-effective option (*see* Order Regarding Interim Hiring,

Sept. 13, 2010, ECF No. 527). The City therefore sought the District Court's permission to hire, as it had been directed to do (A1659; Ltr. from J. Lemonedes to USDJ, June 29, 2010, ECF No. 456).

In July 2010, after holding an interim relief hearing, the District Court determined that Exam 6019 also had a disparate impact on blacks and Hispanics and lacked sufficient validity to satisfy *Guardians* standards, despite its improved results and although it had been designed by two expert psychometricians (Mem. & Order, August 4, 2010, ECF No. 505). The Court therefore enjoined the City from using the 6019 eligibility list unless it adjusted the rankings on a race-conscious basis, or abandoned rank-ordering altogether (Order Regarding Interim Hiring, Sept. 13, 2010, ECF No. 527). As a matter of policy, the City ultimately declined to do either, opting instead to postpone hiring until the completion of the new exam (Ltr. from M. Cardozo to USDC, Sept. 17, 2010, ECF No. 532).

(C)

Intervenors' Motion for Additional Injunctive Relief.

On December 9, 2010, Intervenors moved for "additional" injunctive relief far beyond a replacement for the written test, seeking appointment of a second Master to overhaul virtually all of the City's hiring and EEO practices. In relevant part, they sought close oversight of: (1) limitations on the FDNY's use of arrest records in gauging the character and fitness of firefighter candidates,

including specific record-keeping requirements; (2) enhanced recruitment; (3) mandated steps to reduce the dropout rate among minority candidates being considered for appointment; and (4) changes to the FDNY's investigation of and discipline for EEO complaints among firefighters (A1795-1814). The motion was chiefly predicated on the finding of intentional discrimination, expressly invoking the Court's earlier observation that the finding of intent would "likely require supplemental forms of relief" (A1792; A1795).

For its part, the Government disavowed the need for additional relief to remedy disparate impact (A2354-64; A2623-24). Noting that the motion was primarily based on a theory it had never advanced, the Government took no position on it, but sought parity for Hispanic candidates if any relief was entered for black applicants (*id.*).

In opposition, the City pointed out that the requested relief was not designed to address faulty exams, the only practice at issue in the action. Further, the City highlighted that the Court had previously denied Intervenors permission to amend their complaint to challenge the very practices they were now seeking to revamp (Deft.'s Pre-Trial Mem. of Law Concerning Mot. for Add'l Inj. Relief, at 1-5, ECF No. 687). The City also argued that respect for federalism should prevent the Court from interfering with a municipality's personnel practices that had never been alleged in the complaint, much less proven, to violate federal law

(*id*. at 6-11). Finally, the City maintained that much of the equitable relief sought was unnecessary, insofar as it had already been independently implemented by the FDNY (*id.; see* A1868-2330).

(D)

The Hearing on Additional Injunctive Relief.

At the remedial hearing, the following facts, undisputed except where noted, were adduced. The Government did not participate in the hearing. In addition to witnesses the parties called, the District Court itself called three of its own, two over the City's objection: Assistant Commissioner for EEO Lyndelle Phillips, Deputy Commissioner White, and finally Commissioner Cassano (A2975; A3005-06; A3329). The City maintained that by calling its own witnesses the Court compromised its neutrality (A3338-44).

(1)

Character and Fitness Review

a. General Structure. To qualify for appointment, a firefighter applicant must meet age and educational requirements, speak fluent English, hold U.S. citizenship and a valid driver's license, and may not have a felony conviction or a less-than-honorable military discharge (A2679-80; A2749). The FDNY's Candidate Investigation Division ("CID") conducts background checks on

candidates considered for appointment after passing the entrance exam (A2679-80).

The CID will only reject an application on objective grounds (A2680; A3391-92; A3383-84). If nothing questionable appears in the applicant's history, the applicant is approved and sent on for further processing, including medical and psychological screening (A2695). In the relatively rare case where the CID finds adverse information bearing on a candidate's character and fitness, but not requiring automatic disqualification, a "consideration report" is prepared and sent to the Personnel Review Board ("PRB") for a discretionary hiring decision (A2694; A2749-50; A3360). Such information includes, but is not limited to, arrests not resulting in convictions (A2694; A3360).

b. EEOC Guidelines on Arrests. The EEOC Guidelines allow any arrest not leading to conviction to be considered in an employment decision, although each raises only a "suspicion" of criminal wrongdoing (A5058). Where the position is "security sensitive" or "gives the employee easy access to the possessions of others," such arrests warrant especially "close scrutiny" (A5057). The employer is entitled to consider the nature and gravity of the alleged offenses, the time that has passed since the arrest, and the nature of the job (A5057). A

blanket policy against hiring applicants with such arrest histories is generally considered discriminatory (A5056).[11]

Because the employer must determine whether the applicant likely committed the underlying crime, the applicant must be given a meaningful opportunity to explain the circumstances of any arrest (A5058). The employer must then make "a reasonable effort to determine whether the explanation is credible" which need not include "an extensive investigation" (A5058). In weighing the applicant's credibility, the employer may consider the number of arrests incurred (A5062).

c. CID/PRB Practices and Procedures. The current director of the CID is Dean Tow, a white male investigator with 25 years of experience who also processed the eligibility lists for Exams 7029, 2043, and 6019 (A2677-79; A2709; A2745-46). Since October 2004, he has been supervised by FDNY's Assistant Commissioner for Human Resources Donay Queenan, who has extensive experience in civil-service personnel (A2678; A3351-56). At all relevant times, Queenan, a biracial woman, reported to Deputy Commissioner White, a black male

[11] Neither the parties nor the Court questioned the disqualification of candidates with a felony conviction, which is fully supported by state and local law. N.Y. Crim. Proc. Law § 160.50(d); N.Y.C. Admin. Code §§ 15-103(b), 15-116. In rare cases, a candidate with a felony conviction who obtains a certificate of good conduct from the state Parole Board may be considered for appointment (A2681).

who served previously as New York State's Human Rights Commissioner (A3354-56; A3259). Of the CID's current staff of ten investigators, six are black women, two are white men, and two are Hispanic women (A2747).

The CID begins processing candidates only after the employment test is scored and the eligibility list certified (A2681-82). It sends a packet of forms to the first 65-100 ranked candidates, summoning them to a group intake session (A2683-84; A2690-91; 85-86). The packet requires a complete educational, employment and military record, and documentation showing the disposition of any arrests (A2679-94). After interviewing and fingerprinting each candidate and ascertaining that the packet is complete, the CID investigator begins to verify the information provided (A2693).

The CID keeps coded administrative records of each applicant's disposition (A3405). Generally, "CNS" means that an otherwise qualified candidate was "considered and not selected" by the PRB; "DQ" means failure to meet objective qualifications; "FTC" means "failed to cooperate" by not providing requested documentation; and "FTR" means "failed to report" to a necessary appointment after several notifications (A2711; A3435-37; A3446).

Facts triggering PRB review include excessive driving infractions, a questionable employment history, a student disciplinary record, or any history of non-disqualifying arrests (A2698; A2711-12; A3360; A3382). Even arrests not

leading to conviction are cause for concern, as firefighters are peace officers who are authorized to enter premises, conduct inspections, execute warrants, and issue violations, and must obey a paramilitary chain of command (A3358-61; A3394; A3689; A5207-09; A5918; A5946-47; A6217). CID investigators must raise all derogatory facts they uncover with Tow, who generally has the authority to decide whether PRB review is needed (A2697-98; A3383-84).

Queenan instituted several new policies when she took over in fall 2004 (A3351; A3364). She eliminated the candidate's photograph from the consideration report, and required its cover sheet to reflect positive as well as negative factors (A3294; A3365-66). Also, whereas Tow previously could excuse non-disqualifying arrests, all candidates with arrest records are now uniformly reviewed by the PRB, whose members are not privy to the candidates' race (A2698-700; A2715; A3367; A3392-93; A3417-18). Finally, while Tow was once the only official to give the PRB a recommendation for or against appointment, Queenan and the Chief of Uniformed Personnel now also weigh in (A2702-03; A3359; A3382-83). In making his own recommendation, Tow considers "the whole person," not just the negative information (A2718).

Tow sometimes receives calls from FDNY incumbents regarding candidates under CID review (A2758-59). He never discloses any information, memorializes such contacts, or allows them to influence his judgment (*id.*).

Queenan, who has "very close interactions" with the whole CID staff (A3441), is familiar with EEOC Guidelines and has instructed Tow on the proper use of arrest records in making employment decisions (A2742-43; A3367; A3371; A3396-404). The CID investigator asks the candidate to explain the circumstances underlying each arrest and gauges his or her credibility (A2694; A2716; A2730; A3397; A3403-04). The candidate may provide documentation to dispute the allegations, and the CID occasionally contacts the arresting officer for more information (A2716-17; A2702; A3396-404; A3397-98).

The PRB is made up of eight high-ranking FDNY officials: the Executive Officer, the Chief of Fire Operations, the Chief of the Department, the Chief of Training, the Chief of Uniformed Personnel, and the First Deputy Commissioner, all whites as of the time of the hearing, as well as Deputy Commissioner White, who is black, and Queenan, who is biracial (A3284-85; A3355-56; A3420-22). Its uniformed members each have 20 or more years of experience on the job (A3357).

Periodically, the PRB convenes, discusses consideration reports that have been distributed to them, and votes on a recommendation to the Fire Commissioner, keeping a tally of each vote (A2704; A3291; A3359-62). Aside from appointment or rejection, recommendations may include referral for a staff chief interview, holding the candidate for future consideration if his record

improves, or hiring contingent upon a stipulation (A3287; A3362-63; A3378). In a typical stipulation, the applicant agrees to automatic termination if problems recur within two years, along with measures like random drug testing (A3287; A3363). The Commissioner is not bound by the PRB's majority vote but usually follows it (A3427).

Rather than written rules, PRB members rely on their collective experience to assess whether a candidate's history shows the requisite character and integrity to wield the powers of a peace officer (A3288-89; A3393-94). If reviewing an arrest history, they weigh the credibility of the candidate's explanation, his age at the time of the arrest, the passage of time since each arrest, the nature and gravity of the charges, and any countervailing evidence of stability or rehabilitation (A3286-89; A3361; A3371; A3402-03; A3429-30; A3686-88; *see* A6206; A5686-893). Although the PRB could conceivably reject a candidate solely for a single non-disqualifying arrest, it has not done so in recent history (A3364; A3393-94).

Race plays no part in PRB deliberations (A2766; A3378; A3643; A3646). Consideration reports contain no racial or ethnic information, and refer to the candidate by list number (A3366; A3430). Queenan has never detected a racial inconsistency in decision-making, and if she did, she would point it out during deliberations (A3428-29).

FDNY incumbents sometimes learn that their friends or family are undergoing review, and contact individual PRB members to advocate for them (A2761-64; A3291-93; A3699-700; A4879-80). White generally receives such calls from Vulcan Society and Hispanic Society members (A3291-93). While there is no formal rule, PRB members often disclose when such calls have been made, but that does not affect deliberations (A3291-93; A3424-25; A3699-700). PRB members also sometimes know the applicants personally, or know of them. The testimony was equivocal as to whether those candidates are more likely to be approved (A2762; A3425-26).

The "CNS" disposition is the FDNY's only use of the so-called "one-in-three" rule, a provision of New York's Civil Service Law allowing an employer to hire one of the three highest-ranking candidates on an eligibility list (A3368-69; A3376). Like all City agencies, the FDNY sends a letter to a rejected candidate that does not elucidate the reason for rejection (A3368; A3375). However, a candidate may review his own consideration report and underlying application file through a Freedom of Information Law request (A3370; A3373). Also, a candidate who believes he was denied employment due to an arrest history is entitled to an explanation for the rejection under New York's Correction Law (A3373). While there is no internal appeal of a CNS disposition, the candidate may obtain review in state court through a CPLR Article 78 proceeding or by filing

a civil-rights complaint with agencies like the EEOC (A3360-70; A3374; A3445-46).

d. Individual Consideration Reports. Intervenors entered five consideration reports in evidence, each of which predated Queenan's arrival and the changes she implemented. In February and July 2004, Tow recommended hiring a white candidate and rejecting a Hispanic candidate who both had domestic violence arrests on their records and had provided similar explanations for the arrests (A2721-25; A4741-93). While Tow could not justify the divergence in his assessments (A2732-36), he testified without contradiction that the PRB had nevertheless approved both candidates for appointment (A2737). The Hispanic candidate was ultimately not hired because he failed to report for his medical exam (A2737).

In two other consideration reports dating from 2000-02, Tow and his predecessor recommended the appointment of two white police officers who had been tried and acquitted for their involvement in the 1999 Amadou Diallo shooting (A2726-29; A4795-830). No comparable black applicant's report was put forth.

Another report dating back to 2000 concerned a black candidate with three arrests on his record; one guilty plea to disorderly conduct and two arrests for possession of narcotics with intent to sell, both of which were dismissed (A2729-31; A4832-53). No comparable white candidate's file was put forth. Tow's

predecessor recommended against appointment because the candidate displayed "selective amnesia" in explaining the circumstances, raising questions about his credibility (A2730; A4832-53). When the candidate was not appointed, he filed a federal EEOC complaint, which was dismissed (A2737-38; A6214). The City's answer to the EEOC charge provided a full explanation of the reasons for the rejection, including the PRB's simultaneous rejection of 25 other candidates: 21 whites, three blacks, and one Hispanic (A6216-22).

After establishing that the Vulcan Society does not advocate for appointment of an applicant with a lengthy arrest record (A5671-72), the City sought to enter five consideration reports in evidence, all of which concerned black applicants on the most recent eligibility list who had received a "CNS" disposition (A4349-51; A5686-893). Each rejected candidate had numerous arrests in his history as well as other derogatory information, and one had failed to disclose some of his arrests (A5686-893). Although the Court had accepted the same type of evidence from the Vulcans, it refused to admit the City's, stating that they had been "cherry-picked" by the defense "because they were black" (A4349-51).

e. Statistical Evidence. The PRB exercises its authority to refuse appointment very sparingly. Indeed, Intervenors' expert, Dr. Joel Wiesen, admitted that it was difficult to analyze statistical significance with such small sample sizes (A2808-09). Of the thousands of applicants on the 7029 eligibility

list of 1999, only 18 black and 60 white candidates received the "CNS" code (A2778; A4656; A4873). The two more recent exams produced even smaller pools. From the 2043 eligibility list generated in 2002, only 2 black and 52 white candidates received the code (A2789; A3458; A5656-60). For Exam 6019, given in 2007, it was 8 blacks and 26 whites (A4227; A4873). Thus, over the last decade, only 10 black applicants were "considered and not selected" by the PRB for any reason, including arrests.

According to Wiesen, there was a statistical significance of six standard deviations in the percentage of black applicants receiving the CNS code on the 1999 list as compared to white (A2778-79). However, on the 2043 exam given in 2002, he admitted that whites were actually *more* likely than blacks to be considered and not selected, although not to a statistically significant degree (A2787-90; A2793-94; *see* 3457; A5660).

As to the 6019 list from 2007, while the City put forth compelling evidence that there was no statistically significant racial difference in the use of the CNS code, Intervenors' proof was muddled. Wiesen's first analysis showed no significant impact on blacks, but he performed a second, "somewhat more refined," analysis showing racial impact (A2791-92; A2799-800; A2803-04). The City did not receive the revised analysis until the hearing, after asking Wiesen on cross-examination why his report did not contain an analysis on the most recent

exam (A2791-92). At that point, the District Court ruled that the City had "opened the door" to the evidence and permitted Wiesen to submit the untimely revised report (A2792; A2799-800).

The City's expert, Dr. Christopher Erath, pointed out several shortcomings in Wiesen's methods, many of which Wiesen conceded (A2794-99; A3455-94; A5656-58).[12] Erath concluded that even using Wiesen's revised methodology, which was still flawed, there was no statistically significant racial difference on the 6019 list (A3460-65; A3488; A3493). On cross-examination, Intervenors challenged Erath on his own failure to set forth the total number of applicants considered by the PRB (A3464-94). Erath explained that due to the delayed production of Wiesen's revised report, he had not had time to do so (A3486-87). The City later sought to introduce Erath's rebuttal report, which revealed that 26 black and 136 white candidates on the 6019 list were reviewed by the PRB; and only eight blacks and 28 whites received the "CNS" code (A4226-33). Erath concluded the difference was statistically insignificant (*id.*).

[12] Rather than reviewing the original records of the CID and PRB, Wiesen had based his analysis strictly on the "CNS" code (A4656-57; A4873). Therefore, he had no data on the pool of candidates who were referred to the PRB, and could not meaningfully calculate the rate of rejection by race (A2783; A2796-97; A2806-07). Further, Wiesen had no data on whether each "CNS" disposition was based on an arrest history or other negative information, or both (A2796-97; A2806-07; A3405).

Having allowed Wiesen's untimely report, the District Court originally ruled it would accept Erath's rebuttal (A2799-800; A4202-03). However, once both reports were filed, the District Court reversed itself, struck all expert testimony regarding the disparate impact of "CNS" dispositions on the 6019 list, struck Wiesen's report and precluded Erath's rebuttal (A4235-37).

f. NYPD arrest statistics. Intervenors introduced statistical evidence of the race of NYPD arrestees over the last five years, which had been compiled by the City during discovery in an unrelated action, *Floyd v. City of New York* (A4866-71; A2810-15). The statistics showed that 48.96% of arrestees between 2005 and 2009 were black, 34.27% were Latino, and 11.96% were white (A4866-71). The City objected to their admission as irrelevant, pointing out that the statistics did not reveal how often a single individual of any race incurred multiple arrests, or how many arrestees would have been disqualified on other grounds, such as age, citizenship, fluency in English, educational level, or previous felony convictions (A2813-15; A2824-27). The District Court reserved decision on the objection, but ultimately admitted and relied extensively on the statistics (A2813-15; SPA55-59).

(2)

Recruitment

a. <u>Current Recruitment</u>. Michele Maglione started working for the FDNY as Director of Recruitment in April 2006 and was promoted to Assistant Commissioner in January 2010 (A2924-25). She oversees the Recruitment and Diversity Unit ("the Unit"), the diversity training program, and the Exploring Program, and acts as liaison with the FDNY High School (A2925).

An experienced grass-roots organizer, Maglione currently supervises a diverse recruiting staff of 64 people, including more than 30 temporary workers who staff the Unit's phone bank (A2926; A2934-35; A3030-35; A3286; A5160-61). Shortly after the registration period for the current exam opened on July 15, 2011, a similarly diverse group of ten full-time firefighters and four light-duty recruiters were also detailed to the Unit (A2927-30; A3036-37; A5160-61). As needed, Maglione may, on an overtime basis, call upon a "cadre" of more than 780 firefighters specially trained in recruitment (A2927-28; A3036-37). She believes in standby recruiters because full-timers are only needed during heavy recruiting periods, and overtime assignments bring "fresh energy" to the Unit (A2928; A2936).

The Unit held more than 6100 recruitment events since January 2010 (A2928; A2932). Recruiters were deployed to high-traffic spots in minority

neighborhoods, like shopping malls and employment centers, carrying the message that a firefighter has "the best job in the world with the best benefits in the world" (A2985-86; A2943; A3076-79; A5154). All told, the Unit helped 130,000 potential candidates complete expression-of-interest cards containing current phone numbers and email addresses, which were entered into the Unit's computerized database (A2952; A3013).

Using the database and the phone bank, the Unit later contacted those subjects to encourage them to register for the exam (A2981-82; 345-46). Phone bank personnel are trained to answer questions about all aspects of the application process and the job (A2982). If the subject equivocates, further calls are made to persuade them to register for the exam (A2983; A5156). Days after registration opened, the Unit sent out an "email blast" with graphics and a link to a promotional video, both of which featured black and Hispanic firefighters, and links to various websites, including the FDNY's Twitter and Facebook accounts (A2983-84; A3041-46; A5144; A5650). Recruiters began carrying laptop computers equipped with Wi-Fi access, and sold Visa gift cards so that applicants who lacked credit cards could pay the exam fee online (A2943-44; A3075-76).

As in past years, the Arnell Group, a "top-flight ad agency," donated its media services to assist the FDNY, in this case $56,000 worth of media production and placement (A2954; A3053-55; A3061-62). Working with a private

advertising firm under contract with the City, Arnell helped the FDNY place ads featuring ethnically diverse FDNY firefighters in periodicals such as *El Diaro* and *The Amsterdam News* (A3058-60; A3066; A5139-42; A5146-52; A5650-54). Similar images were displayed on the FDNY website (A3080-81; A5652-54). Maglione also solicited "earned media" coverage on outlets like New York 1 (A3066-72; A5158).[13]

Maglione described the Unit as "resource heavy" (A2935). She submits an annual budget request and generally gets the funds she seeks (A2964-65). By the date of her testimony, her Unit had spent a total of $4.5 million on the campaign (A2965).[14] Her baseline budget is $1.3 million, plus $2.5 million spent thus far in overtime pay, with permission to exceed the FDNY's overtime cap (A2936-37; A2957-59; A3074). Her advertising budget is $1.4 million, and the Deputy Mayor for Operations had recently approved an additional $300,000 for media (A2937-40; A2965-66; A3693-95; A5146-52; A5157).

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[13] "Earned media" refers to news coverage of campaign events or the campaign itself. One black firefighter called by Intervenors demonstrated its effectiveness during the 2002 campaign (A3942).

[14] The FDNY has a total budget of $1.6 billion, 90% of which is devoted to public safety-related field operations (A3634).

Maglione is included in quarterly Strategic Plan meetings, where she personally briefs the Commissioner on her efforts to meet diversification goals, and she characterized the FDNY administration as "unbelievably supportive" to her Unit (A2963-65; A2968-69). Since diversity receives high priority, as evidenced by the resources devoted to it and its inclusion in the Strategic Plan, she does not believe a fixed minimum budget for recruitment is necessary (A2968-69). Rather than numeric hiring goals, her objective is simply to improve the outcome of each campaign (A2967).

In January 2008, Maglione sent an email to her superiors reporting the "precarious" condition of the Unit's vehicles (A2958-59; A4693). The vehicles were replaced in 2008-09 (A2959-61). Currently, the Unit has five dedicated vehicles, two of which were donated by Howard Koppel, a member of the FDNY Foundation Board, and fleet vehicles may be requested as needed (A2960-61).

When registration for the upcoming Exam 2000 closed, 22.99% of registrants self-identified as black, and 22.97% as Hispanic (A6414; SPA26-27). The City's labor pool of blacks of the appropriate age is 21.8% (A4345; A5678-84).

b. Recruitment History. The FDNY's recruitment efforts have steadily increased over the past ten years. In 2002, the FDNY's database of expression-of-interest cards contained about 23,000 names; by 2006, it increased to

51,000, and it reached 130,000 in 2011 (A3013). The percentage of minority registrants nearly doubled from 23% in 2002 to 40.9% in 2006 (A2955).

Several of Intervenors' witnesses helped establish the growth of the FDNY's recruiting program. Sheldon Wright, a retired black FDNY firefighter, ran the Unit from January through May 2002 under White's supervision, and was rehired as a recruiting consultant after his retirement (A3182). Wright had eight firefighters at his disposal and others working on overtime (A3180-82). John Coombs, current president of the Vulcan Society and a 12-year FDNY veteran, was also involved in the 2002 campaign (A2832). Along with 20 other firefighters assigned to light duty, Coombs spent 45-50 hours per week visiting venues throughout the City, distributing flyers and applications, and speaking about his experiences as a firefighter (A2832-39).

In 2002, the Unit held 278 recruitment events at churches, malls, schools and colleges, and also ran television and radio ads featuring black firefighters (A3013; A3181). Problems with basic resources and training were usually remedied when they came to light (A2833-40). Coombs was brought in once a week to brainstorm about different recruiting venues, and the Unit was always receptive to such suggestions (A2840). He said the then-director of the Unit, Tarese Johnson, "worked real hard" to get the Unit into minority neighborhoods at churches, youth groups, subway stations, basketball courts, and

shopping malls (A2840-41). The Arnell Group donated its time to produce advertisements with the "Heroes Wanted" theme (A2841). Coombs recalled a "blitz" putting posters up all over the City (A2841). The Vulcans raised money and volunteered their time to supplement the FDNY's recruiting efforts (A2841-45; A3817-21). Both the FDNY and the Vulcans provided free tutorials for the written and physical portions of the exam (A3818-19; A3957-58).

The campaign for Exam 6019, which began in 2006, employed greater resources (A2844; A2955; A3821-22; A3868). The Unit had an advertising budget of $1 million, plus $1.7 million for overtime (A2937). Twenty-six hundred recruitment events were held (A2937). Seeking experienced recruiters, the FDNY asked Coombs to participate (A2844). There were greater resources, full-time staffing, more use of media, and more available vehicles (A2844-45). The FDNY offered a free tutorial for the written exam, and the City Council gave the Vulcans $10,000 to improve their own tutoring course (A2847-49; A2988; A3684-85). In holding their own recruiting events, the Vulcans had to be careful not to duplicate the FDNY recruiters' efforts (A2846).

When test results came out for Exam 6019 in 2007, 33% of those scoring in the top 4,000 of the eligibility list were people of color, more than double the percentage in that category after the 2002 exam (A2955).

(3)

Voluntary Attrition

Since each eligibility list is used for four years, candidates are instructed upon registration to keep DCAS apprised of their current contact information, now including email addresses (A2744; A2748). Many pursue other careers before and after taking the exam (A3768-69; A3815; A3888). A substantial number voluntarily discontinue their candidacy by failing to report or failing to cooperate after several notices (A2682-84; A3435-36).

Intervenors introduced an exhibit analyzing the race of candidates who had "failed to report" ("FTR") on the Exam 6019 eligibility list (A2684; A4739). The analysis had been prepared by a City expert during the interim hiring hearing in 2010, when the City was faced only with allegations that its testing procedures were discriminatory (A2685). It demonstrated that approximately 37% of candidates receiving the FTR code were black, about 33% were Hispanic, and about 28% were white (A4739). In November 2006, one CID investigator opined that minority candidates often lacked contacts in the FDNY who could guide them over "hurdles" in the long application process, and were therefore more likely to feel "intimidated" and drop out (A4735-37).

Before 2006, neither the FDNY nor DCAS made efforts to contact a candidate who failed to appear, or whose CID packet was returned as non-

deliverable (A2684-89). However, after the Columbia Study reported the higher drop-out rate among minorities, the Unit began making systematic reminder calls before the written test (A2977-80). In 2008, the CID started providing all "no-show" candidate files to the Unit, where Maglione makes personal efforts by phone and email to persuade those candidates to follow through (A2684; A2752; A3087-88; A3436-38). The Unit also reached out to those who passed the written exam and invited them to attend the free 12-week prep class for the physical exam (A2980-81).

In the current campaign, the Unit planned to contact candidates by phone and email to ensure receipt of exam admission cards and notice of the free tutorial for the written test, as well as informational sessions throughout the City that fostered mentorship relationships between incumbents and applicants (A3085-86). Again, "robo-calls" will be made on the eve of the exam, with Commissioner Cassano's voice exhorting candidates to show up (A3085-87).

(4)

The EEO Office

The District Court also looked into the workings of the EEO Office, which, among other things, investigates employee complaints, conducts EEO training, and inspects FDNY facilities for compliance with EEO standards.

a. Training. The FDNY currently employs at least 25 trained EEO instructors, who instruct personnel on laws protecting equality in the workplace (A2848-49; A2862). Attendance at each annual three-hour session is mandatory for all employees (A2849; A2853-54; A3550-51).[15]

Employees are asked to complete anonymous evaluations of the training after each session (A3551-54). Coombs, an EEO instructor since 2004, felt that the comments reflected a negative attitude toward EEO training among many members (A2849-57). *Sua sponte*, the Court ordered the City to produce the last 12 years of those written evaluations to Intervenors (A2857-61). The City produced the voluminous documents on short notice, as directed (A4343). None was placed in evidence, nor was any further testimony elicited on the topic.

b. EEO Investigations. Lyndelle Phillips, a black woman, has been the FDNY's Assistant Commissioner for EEO since 2006 (A3503). She oversees the investigation of discrimination complaints, EEO training initiatives, and the provision of reasonable accommodations (A3504). She was called to the stand by the Court over the City's objection (A2974-75; A3343-44).

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[15] EEO training should not be confused with diversity training, in which new recruits are taught to respect diversity in the workplace (A2969-71; A3088-91). Each firefighter undergoes diversity training when they first join the FDNY, and may be retrained if transferred to a new post (A3088-91; A3095-96). The FDNY hired an outside consultant from the Cornell School of Industrial Labor Relations to instruct facilitators in how to provide such training (A3090-91).

When an EEO complaint is filed, the assigned attorney-investigator ascertains whether its allegations implicate EEO protections, and if so, interviews the parties and any witnesses, makes a factual determination that the complaint is substantiated or unsubstantiated, and drafts a report and recommendation to the Commissioner (A3538-39). Recommendations include additional EEO training, advisory or counseling memos, or referral to the FDNY's Bureau of Investigations and Trials ("BITS") for disciplinary action (A3540-44). The Commissioner may sign off on the recommended action or seek further information (A3540).

Staff turnover has been high in the EEO office since Phillips took over (A3507-08; A3581-82). According to Phillips, each of the departing attorneys "found new jobs and moved on" (A3508). Due to the financial crisis of 2008-09, a hiring freeze temporarily prevented vacant positions from being filled (A3509-11; A3521). As Phillips explained, "every unit had taken a hit" (A3515). In 2010, Phillips received permission to hire, and was interviewing applicants for three vacant lines (A3228-29; A3440; A3581-82).

The City's EEO policy generally requires that all EEO investigations be resolved within 90 days of the complaint, unless there are special circumstances like witness unavailability or lack of staffing (A3210-11; A3557). DCAS monitors the number, outcome and timeliness of EEO complaint investigations by all mayoral agencies (A3202; A4709-31). In or before fiscal year 2006, the FDNY's

EEO office accumulated a substantial backlog of aged EEO complaints (A3210-12; A3216-22; A3519; A3556-57; A4709-33; A4882-91; A4921-5016).[16] This was not unique among mayoral agencies, and DCAS conducted a review – wholly independent of the instant litigation – to help those agencies improve their investigation practices (A3211; A3239).

By 2010, through improved recordkeeping and a concerted investigation effort, the number of aged complaints was reduced by 70% (A3222-27; A3236-27; A3519-20; A3570-71).[17] Phillips began personally reviewing intake reports to ensure that only true EEO-based complaints were opened, with others being resolved or referred to more appropriate channels (A3222-23; A3535-40). To devote more time to investigations, in 2009 she curtailed compliance inspections except in the summer, when interns supplemented her staff (A3515-16; A3548-49; A3538-39).

Although the EEO office once had a dedicated vehicle to travel to inspection locations, a city-wide initiative discontinued that practice (A3516-17). Currently, when EEO staff members need to travel by car, they request shared fleet

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[16] In 2005, the FDNY hired four new investigators and several additional support staff in an attempt to address the backlog (A4733).

[17] The FDNY has a staff of about 16,000 employees, including uniformed firefighters, EMT personnel, and civilians (A3634).

vehicles (A3517). The new practice makes for more efficient allocation of resources, since the vehicle does not stand idle when not in use by the EEO (A3702).

(5)

Treatment in the Workplace

Most of the black firefighters who testified for Intervenors recounted their treatment at the FDNY in positive terms. A spirit of "teamwork" prevails both at fire scenes and in the firehouse, where firefighters work together on cooking, cleaning, laundry, and firehouse repairs (A2880; A3840-41; *see also* A3958-60). Black firefighters described the FDNY as a "family" or a "fraternity," with a "communal" atmosphere of "brotherhood" (A3169; A3953; A4118). Fellow firefighters are always willing to switch shifts with them, enabling full enjoyment of flexible scheduling, one of the prime benefits of the job (A2864-67; A3771-78; A3835; A3891; A3947).

However, the FDNY is not free of racial tension (A3855-58; A3873-74). In 1998, two FDNY firefighters participated in the Broad Channel Labor Day parade on a float that mocked stereotypes of African-Americans (A4342). *See generally Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006). In one firehouse, a Vulcan Society poster announcing a memorial service for black firefighters who died on 9/11 was defaced with graffiti, including "What about the white guys?"

(A4707; A3850-54; A3874-76; A3880-83). One former firefighter, Lanaird Granger, testified that he experienced several instances of discriminatory treatment, including a January 19, 2005 incident in which he found a noose near his gear in his firehouse (A4078-155).[18]

The FDNY took action following these incidents. The participants in the Broad Channel parade were brought up on disciplinary charges and dismissed (A4342). The officer who defaced the Vulcan Society poster admitted his actions and was unofficially disciplined (A3880-83). As to the noose incident, once the EEO office learned of the complaint, it conducted a thorough investigation, recommended that one officer stand trial on disciplinary charges, and required all members of Granger's firehouse to undergo a special EEO training session (A4104-05; A4132; A6231-59; A5137).[19] Then-Commissioner Scoppetta issued a letter to all members condemning the act and warning them that similar conduct was never to happen again (A4152-55; A5137).

[18] Two other black firefighters were assigned to the same firehouse as Granger. Neither reported any race-related problems to the Vulcan Society, as concededly would have been likely had there been any similar incidents (A5676-77).

[19] The investigation was delayed because Granger did not report the incident to the EEO office, which learned of it when Granger and the Vulcans held a televised press conference three weeks after the event (A4118-19; A4125-27; A6231).

(6)

Testimony of the Commissioner

Fire Commissioner Cassano was the third witness called by the presiding judge, the second over the City's objection (A3338-39). Cassano discussed his personal participation in recruitment, including a recent radio appearance on former Mayor David Dinkins' radio show and his visits to minority churches (A3640-41). His goal was to diversify the FDNY as much as possible while recruiting the best candidates (A3674-75). In the past, the FDNY's branding strategy had focused on the excitement of the job ("Heroes Wanted") rather than its employment benefits, which the Columbia Study had discovered to be more effective with young people of color, and which were therefore stressed in recent campaigns (A3665-66; A5571-72). Cassano also recognized the logic in the Columbia Study's suggestion that minorities, who were less likely to have friends and family in the FDNY, might be less likely to seek employment there (A3663-64). Indeed, he said, the FDNY's vigorous recruitment was designed to counteract that possibility (A3663-64). Likewise, as recommended by the Study, efforts were being made to maintain supportive contact with applicants during the post-exam process (A3676-77).

Having called Cassano as a Court witness, the District Court cross-examined him at length (A3698-712), first challenging the requirement that the

EEO Office use fleet vehicles (A3701-02). Cassano explained that since the EEO Office only used its dedicated City vehicle sporadically, efficiency was better served by the use of the motor pool (A3702). The Judge then commented that he had personally witnessed a car accident on the Brooklyn-Queens Expressway that morning involving an FDNY Prius, assumed that "someone was obviously going to work with his City car," and was "concerned" that FDNY employees used City cars to commute, while "EEO is not able to have a dedicated vehicle for its own use" (A3702-03). Cassano suggested that a staff member might have taken a City car home after attending a nighttime recruiting event (A3703).[20]

Next, over the City's objection, the Judge introduced a document in evidence that he had personally downloaded from the FDNY's website regarding "Medal Day 2011" (A3707; A3731-36; A6270-337).[21] Pointing out that 18 of the 35 officers who had received medals "had a family connection to the FDNY," the Judge asked Cassano why so many medal recipients came from firefighting families (A3707-09). He then showed Cassano photos of high-ranking FDNY officials pictured in the document and asked whether there were "any African-

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[20] Upon the City's objection, the Judge later struck the testimony regarding his observation of the car accident, but not the ensuing line of questioning (A3732-36).

[21] The "Medal Day" exhibit had been pre-marked as Court's Exhibit 2 because the Judge had come prepared with yet another documentary exhibit of his own, which he deemed unnecessary to introduce because the parties elicited the information to which it pertained (A3732).

Americans who hold any of those positions currently in the Fire Department" (A3709-11).

Steering the hearing in another new direction, the Court then asked Cassano what steps he would take if he learned that "senior uniformed officials" were "writing columns in the newspaper" that were "resistant to efforts to integrate" or "criticizing the process or the litigation here" (A3711). Cassano pointed out that there were First Amendment concerns, but the Judge pressed him on how he would foster a "positive compliance atmosphere about civil rights and full employment opportunity" (A3712). Cassano responded that he would not prohibit the official from expressing his views, but would explain that the columns were "not helpful" (A3712).

(7)

Summations

At summation, Intervenors cited the Court's previous summary judgment ruling on disparate treatment at length (A4400-03; A4406-07; A4425). They argued that it was "essential" for the Court to consider the FDNY's supposed history of intentional discrimination in assessing the need for injunctive relief (A4400-41). Intervenors conceded that the FDNY was making efforts on its own to recruit minorities (A4404; A4406-08), reduce voluntary attrition (A4414), and solve problems in its EEO office (A4403-04). Still, they maintained that the City

was not committed to increasing diversity and could not be trusted to continue these initiatives.

The Government, which had remained silent throughout the hearing, stated that it joined only in the applications for compliance monitoring and an injunction prohibiting retaliation against anyone who participated in this action, since most equitable relief needed to address disparate impact had already been ordered – chiefly, the design of a new exam (A4426-34). The Government asserted its intent to monitor the City's compliance with anti-discrimination laws, and asked the Court simply to retain jurisdiction over the case for the life of the next two eligibility lists (A4434).

During the City's summation, the District Court questioned the City's willingness to increase diversity in light of its refusal to forestall "this unpleasant litigation" with settlement (A4435-36).

DECISION APPEALED FROM

(A)

The Factual Findings and Legal Conclusions

The District Court expressly stated that its factual findings were "influenced by" its previous summary judgment ruling on intentional discrimination (SPA3, n.1). Consequently, it predicated the need for further equitable relief on the belief that "the FDNY has not remained segregated-in-fact for over forty years by accident" (SPA85). Indeed, the Court emphasized that its

remedy was needed to address the "systematic[] exclu[sion]" of black and Hispanic applicants from the FDNY, "deliberately undertaken" by City officials to keep the FDNY a "bastion of white male privilege," which represented a "shameful blight on the record of six mayors of this City" (SPA16; SPA85-86). While also asserting that the relief was equally appropriate to address the disparate impact of the entrance exams (SPA102-03), the Court cited its prior decision granting summary judgment on intent at length (SPA3, SPA36; SPA85-88; SPA91-94; SPA101; SPA103; SPA133).

The Court outlined the extensive and successful efforts of the current campaign, and expressly found that the FDNY significantly improved each of the three recruitment drives since 2002 (SPA18-29). Despite these recognized efforts, the Court charged that the City "lack[ed] … an attitude of voluntary compliance" with the previous liability rulings (SPA101), and found the current campaign to "smack of litigation gamesmanship" (SPA36-37). It also faulted the City for accepting "handouts" from "well-meaning private citizens and corporations" (SPA37). While highly complimentary to Maglione's work, the Court noted that she was "one relatively junior bureaucrat in the City's leadership" (SPA36). In the Court's view, higher placed decision-makers could not be trusted to continue eliminating vestiges of deliberate discrimination, despite their implicit

acknowledgement of the importance of recruiting by "trumpet[ing]" their increased success in that area (SPA36-38).

The Court also concluded that the FDNY purposefully "used" and "promote[d]" voluntary attrition as a "pervasive screening and selection device[]" which had a disparate impact on minorities (SPA14-16). However, it noted that the Unit had taken "commendabl[e]" steps since 2007 to combat voluntary attrition, which concededly "show[ed] promise" (SPA16-17).

The Court went on to find that the EEO office was "hobbled by serious resource deficiencies," believing that recent staffing additions were "little more than a token bid to placate the court" (SPA81-82). The Court criticized the temporary discontinuance of EEO compliance inspections, the Unit's use of pool vehicles, and the initiative to better target investigative resources by assessing complaints at intake for EEO jurisdiction (SPA70-77; SPA79-82).

Regarding the character and fitness review process, the Court found that the FDNY's use of arrest records violated the EEOC Guidelines, asserting that the CID's only investigation of the underlying facts is "essentially limited to paperclipping records together" (SPA50-55). It was distressed by mandatory PRB review of arrest records, which it found inconsistent with Tow's assurance that he considered "the whole person" when making his recommendation to the PRB, but

was equally disturbed by Tow's "unfettered" discretion to send a file to the PRB for its review of other negative information (SPA45; SPA52).

The Court did not find that the PRB ever treated a black applicant inequitably, and made no mention of the low number of "CNS" rejections for black candidates. Yet it characterized the PRB as not only an "enigmatic institution" but also a "black box" which "permits arbitrary decision-making unguided by rules or training and without the possibility of meaningful review" (SPA48; SPA61). The Court was troubled by the lack of "written guideline[s] or polic[ies]" in CID/PRB decision-making (SPA49; SPA52). It also charged the FDNY with preventing "a scientifically rigorous assessment" of the racial impact of its discretionary hiring, by failing to keep an "easily accessible" record of the number of candidates evaluated and approved by the PRB (SPA78).

Based on the *Floyd* arrest statistics, the Court went on to find a "significant risk" that the FDNY's "improper" use of arrest records would "more likely than not" disadvantage black applicants (SPA41; SPA55-59). It recognized some "significant distinctions" between the universe of black arrestees and the eligible labor pool, but found it implausible that they undermined its conclusion, primarily because City had "introduced no evidence" to demonstrate the materiality of such differences (SPA57-59).

(B)

The Injunction's Provisions

As a remedy, the District Court appointed a Court Monitor with a minimum ten-year mandate to oversee and approve a "comprehensive top-to-bottom assessment" of the FDNY's entire hiring structure, as well as a restructuring of the EEO Office's handling of complaints from all FDNY employees, including civilians (SPA151-80). The Injunction forbids the City from commencing any step toward hiring without the Monitor's express permission (SPA156). It mandates the promulgation of written policies and procedures for discretionary hiring decisions (SPA164-66), requires "interactive training" in equal opportunity laws for all members of the CID and PRB before background checks may be commenced (SPA166), and enjoins the PRB from convening unless the Court Monitor is physically present (SPA166-67). The CID and all other City employees are prohibited from discussing FDNY background checks among themselves or with others unless they create an immediate written record, the contents of which are spelled out in exhaustive detail (SPA163-64). The order directs the retention and preservation of broad categories of documents and requires six-month reminders of these obligations to all employees subject to them (SPA164; SPA171-72).

Three independent consultants must be retained by the City, all subject to the Monitor's approval: an EEO consultant, an interactive EEO trainer for the CID and PRB, and – despite Maglione's recognized accomplishments – a recruitment consultant (SPA159; SPA166; SPA168). The City is subject to minute instructions on how it must use the consultants' services to study and correct perceived deficiencies in FDNY hiring procedures (SPA160-62; SPA168-71). The City must develop a plan to reduce voluntary minority attrition (SPA161), a plan to overhaul the FDNY's EEO office (SPA168-70), and a plan to improve recruitment (SPA159-60). While the Injunction purports to allow the City to devise its own plans to improve its practices, it specifies plan objectives, regulates procedures for plan development, and conditions ultimate implementation on Court approval in light of the Monitor's recommendation (*id.*).

Certain written court submissions required under the Injunction must be personally signed by the Mayor (SPA160-71, ¶¶ 29, 35, 45, 50). All other such documents must be signed by the Fire Commissioner and the Corporation Counsel, who must certify that the Mayor has reviewed and approved their contents (SPA157). The Monitor is granted broad authority "to obtain access to individuals, documents, places, or things" as well as "programs, services, facilities and premises" under the City's control (SPA160; SPA175). He is empowered to direct document production or deposition of any City official "on short notice"

(SPA176). Contempt sanctions may be imposed for noncompliance with any of the Injunction's provisions (SPA173).

SUMMARY OF THE ARGUMENT

The Injunction is faulty on several grounds, each of which is dispositive, but the cumulative effect of which certainly compels reversal.

The Court fundamentally erred in granting Intervenors summary judgment on their intentional discrimination claim, and that erroneous ruling is the linchpin of the Injunction. The City presented evidence that it did not intentionally discriminate, including evidence that the written exams were facially neutral and were designed with attention to the Guidelines, not to discriminate against minority candidates. That is enough to create an issue of disputed fact to defeat summary judgment. The City also submitted substantial evidence of its affirmative efforts to promote the hiring of diverse candidates, which the District Court erroneously rejected as irrelevant. The Court conflated the analysis for disparate treatment and disparate impact claims, erroneously concluded that the City was obligated to refute Intervenors' statistical evidence with competing statistics, and failed to give the City the benefit of inferences arising from its varied initiatives to increase the number of minority firefighters. Point I, *infra*.

The Injunction also should be set aside because there is a disconnect between the alleged violations at issue and the relief granted by the Court. The

portions of the Injunction that go beyond ordering the City to design a new employment exam constitute an abuse of discretion, as there is no causal or logical nexus between the flawed written examinations – the only practice found to have violated Title VII – and the other relief granted. Where the employer is a municipality, such overbreadth also violates fundamental principles of federalism. Point II, *infra*.

Additionally, the findings of fact underlying the Injunction were clearly erroneous in many material respects, in part due to the conduct of the District Court Judge, who displayed partiality in assessing the parties' proof, and allowed his own extrajudicial experiences and investigation to cloud what should have been a dispassionate appraisal of evidence. This conduct requires reversal of the Injunction. At the least, the record calls for assignment to a different Judge for trial to preserve public confidence in a fair outcome. Points III and IV, *infra*.

POINT I

ERRORS IN THE INTENTIONAL DISCRIMINATION RULING REQUIRE REVERSAL OF THE INJUNCTION NOW BEING APPEALED.

The City's response to Intervenors' prima facie proof was sufficient to defeat summary judgment as to intentional discrimination on three independent grounds: (1) its hiring decisions relied exclusively on facially neutral practices, (2) it made repeated attempts to design valid job-related exams, and (3) there was ample anecdotal evidence of the City's efforts to increase its "bottom line" of minority employees. On summary judgment, the Court's role is not to weigh competing evidence, but to determine whether the City's proof created a disputed issue of material fact. The Court based the Injunction's systemic affirmative relief on its conclusion that the City intentionally discriminated against minority candidates. Because that ruling was wrong, the Injunction must be set aside with it.

(A)

Standard of Review

The grant of summary judgment is reviewed *de novo*. *Wachovia Bank, N.A. v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 171 (2d Cir. 2011). In deciding such a motion, the District Court's objective must be "carefully limited" to "issue-finding" rather than "issue-resolution." *Gallo v.*

Prudential Residential Servs. Ltd. Pshp., 22 F.3d 1219, 1224 (2d Cir. 1994). Since summary judgment is a drastic remedy that eliminates a party's right to present its case to the fact-finder, it may be granted only where there is no material factual dispute. *E.g., Nationwide Life Ins. Co. v. Bankers Leasing Ass'n,* 182 F.3d 157, 160-61 (2d Cir. 1999). Moreover, the Court must construe the evidence "in the light most favorable to the party against which summary judgment was granted and draw[] all reasonable inferences in its favor." *Wachovia*, 661 F.3d at 171.

Given these principles, summary judgment in favor of the party who must prove discriminatory motive is "rarely" warranted. *Hunt v. Cromartie*, 526 U.S. 541, 553, n.9 (1999). Consequently, there is a significant dearth of precedent in which this Court has been called upon to review the grant of summary judgment to a movant on such a claim.

Indeed, summary judgment is generally improper for either party where intent to discriminate is in dispute, and is always inappropriate "when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt*, 526 U.S. at 553; *accord*, *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010). Just as a District Court should not justify the grant of summary judgment to an employer by "trusting innocent explanations for individual strands of evidence," *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010), so too a court must refrain from attributing racial malevolence to conduct that could

rationally be found to have resulted from benign intent. *See Guardians*, 630 F.2d at 111-12.

(B)

The District Court Erroneously Ruled that the City Failed to Meet its Burden at Summary Judgment.

(1)

The Defendant's Burden on a Claim of Disparate Treatment.

The proponent of a class action alleging a pattern-or-practice of intentional discrimination must ultimately establish that the defendant was motivated to take the challenged action at least in part "because of" its adverse effects on the protected class, and that discrimination was the defendant's standard operating procedure. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 93-94 (2003); *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977); *Ottaviani v. State Univ. of N.Y.*, 875 F.2d 365, 369-70 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). At summary judgment, the movant's burden in a pattern-or-practice disparate treatment case is quite different from an individual claim because the "heavy reliance on statistical evidence distinguishes such a claim from an individual disparate treatment claim proceeding under the *McDonnell Douglas* framework." *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 158 n.5 (2d Cir. 2001).

The defendant's burden, however, remains much the same. Upon a prima facie showing of a pattern-or-practice of intentional discrimination, the burden of production – but not persuasion – shifts to the defendant, who must put forth facts which, if believed by the trier of fact, would demonstrate that the movant's proof is either "'inaccurate *or* insignificant.'" *Id.* at 159 (emphasis added) (*quoting Teamsters,* 431 U.S. at 360). Thus, an employer is not obligated to challenge the movant's statistics, but instead may rely on "'anecdotal and other non-statistical evidence tending to rebut the inference of discrimination.'" *Id.* at 159 (quoting 1 Arthur Larson et al., *Employment Discrimination* § 9.03[2], at 9-23 to 9-24 (2d ed. 2001)); *Ardrey v. United Parcel Service,* 798 F.2d 679, 684 (4th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) (quoting *Coates v. Johnson & Johnson,* 756 F.2d 524, 532-33 [7th Cir. 1985]).

A defendant's prima facie burden is significantly less demanding where intentional discrimination rather than disparate impact is the operative theory, whether in a pattern-or-practice class action or an individual claim. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 1001-05 (1988) (Blackmun, J., concurring in part); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 668-69 (1989) (Stevens, J., dissenting); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259-60 (1981); *Ste. Marie v. E. R.R. Ass'n*, 650 F.2d 395, 399 (2d Cir. 1981). While such evidence is "simply not enough" to withstand summary judgment on a

disparate impact claim, an employer accused of intentional discrimination "need only dispute that it had any such intent … by offering *any* legitimate, nondiscriminatory justification" for its employment practices. *Watson,* 487 U.S. at 1004; *accord, Burdine*, 450 U.S. at 260. Consequently, the Supreme Court has cautioned that "courts must be careful to distinguish" between disparate impact and disparate treatment when assessing an employer's proof at summary judgment. *Raytheon Co. v. Hernandez,* 540 U.S. 44, 53 (2003); *cf. Ste. Marie*., 650 F.2d at 399 (applying same principle to proof at trial). In a pattern-or-practice case, an employer may carry its burden by articulating a legitimate business reason that explains every disputed decision. *Ardrey*, 798 F.2d at 683-84.

(2)

The City Met its Burden as a Matter of Law Because its Exams Were Facially Neutral.

The City met that burden here by presenting evidence that it relied upon facially neutral employment exams for its hiring decisions. The fact those exams had an impermissible disparate impact on minorities neither compels nor supports entry of summary judgment as to the City's intent to discriminate against minority candidates. *See Washington v. Davis*, 426 U.S. 229, 245-46 (1976); *Ste. Marie,* 650 F.2d at 399; *Griffin v. Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1270 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). In fact, in *Ste. Marie*, this Court held that the lower court made a "basic

error" analyzing a disparate treatment claim by "applying the burden which a defendant would bear in rebutting a prima facie case of disparate impact." 650 F.2d at 399 n. 2.[22] The District Court made that same error here (A1407-10).

In *Raytheon*, 540 U.S. at 53, the Supreme Court squarely held that an employer's proffer of a "neutral, generally applicable" employment policy "plainly" satisfies its obligation to rebut a disparate treatment claim at summary judgment, even if that policy has a disparate impact on a protected class. In such a case, a court is "obliged to conclude" that the facially neutral policy is, "by definition, a legitimate, nondiscriminatory reason" for the disputed employment decision. *Id.* at 51-52 (*citing McDonnell Douglas*, 411 U.S. at 804); *see Ardrey*, 798 F.2d at 683-84.

There is no dispute that the open competitive multiple-choice exams here were facially neutral and evenly applied. Consequently, had the District Court followed the Supreme Court's admonition in *Raytheon*, it would have rejected Intervenors motion and conducted a trial on the intentional discrimination

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[22] As this Court has held, where the employer defends against a suit based solely on a charge of disparate treatment by proffering a facially neutral employment policy that has a disproportionate impact on the protected class, the plaintiff may not shift to a disparate impact theory. *Ste. Marie*, 650 F.2d at 399 n.2. Even circuits that would allow the movant to retreat to a disparate impact theory agree that showing a facially neutral policy satisfied the employer's burden as to disparate treatment liability. *Segar*, 738 F.2d at 1270-71 ("when an employer defends a disparate treatment challenge by claiming that a specific employment practice [having

(*footnote cont'd on following page*)

claims. On these grounds alone, the District Court's grant of summary judgment for Intervenors must be vacated.

(C)

Evidence of the City's Attempts to Comply with the Guidelines and Improve its Testing Procedures Also Created an Issue of Fact as to Intent.

(1)

The City's Attempts to Design a Valid Examination Undermine the Grant of Summary Judgment on Intentional Discrimination.

Facial neutrality aside, summary judgment also should have been denied on the issue of discriminatory treatment because, as reflected in the District Court's previous disparate impact ruling and as amplified by the summary judgment record, good faith attempts were made to create valid employment tests.

The District Court ruled that by failing to heed this Court's detailed ruling regarding test construction in *Guardians,* 630 F.2d 79, the City deliberately discriminated (A1401; 1408-09). However, *Guardians* stands for the proposition that repeated unsuccessful attempts to fashion a valid, job-related employment exam are inadequate to compel a finding of purposeful discrimination, even where

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a disparate impact] causes the observed disparity … this defense sufficiently rebuts the plaintiffs' initial case of disparate treatment…"); *Griffin*, 755 F.2d at 1528 (agreeing with *Segar's* analysis).

the employer disregards warnings that the exam might create an undue burden on minority applicants. *Id.* at 111-12. Noting that Title VII specifically sanctioned the use of valid employment examinations, *Guardians* held that "[p]ersistent use of exams with disparate racial effects would support an inference of intentional discrimination if proper test construction were not even attempted," but not where the City "made extensive efforts to understand and apply the Guidelines and develop a test they hoped would have the requisite validity." *Id.*

The same is true here. In designing the disputed exams, DCAS updated and supplemented a job analysis performed by an expert psychometrician, prepared "an extensive task list based on panels and job questionnaires with incumbent firefighters," and assembled "Linking Panels" to attempt to link "clusters" of job-related skills to necessary abilities (A464-70; A484). Indeed, the District Court previously found that both exams were *intended* to assess at least nine abilities that were related to the entry-level firefighter job, and even acknowledged that the City arguably succeeded in testing those abilities to a limited extent (A470-71; A482; A492). The DCAS test designers averred that they had no intention of discriminating against minority candidates, and the City's expert report opined that they had followed "standard job analytic and test development procedures" (A1333-35; A1261-62). These considerable efforts to

adhere to Guidelines principles, at a minimum, created a disputed issue of material fact that should have been resolved at a trial.

This Court also recognized in *Guardians* that the City's choice to attempt another "in-house" police exam rather than retain the services of an outside expert, while "somewhat questionable" given its poor track record, could have been motivated by "a bureaucratic preference for internal procedures, a need to save money, a naive self-confidence, or simply a desire to try again," none of which provided "a basis for inferring a conscious intention or even a reckless willingness to violate the law." *Id.*, at 112 n.32. In the same vein, the District Court recognized in its disparate impact decision that the process of designing employment examinations is "complex," that multiple-choice examinations are "typically intended to apply objective standards to employment decisions," that it is a "natural" assumption that "the best performers on an employment test must be the best people for the job," and that the rank-ordering of candidates often "satisfies a felt need for objectivity" (A435). Yet, in considering disparate treatment, the Court closed its eyes to all such benign motivations, thereby failing to give the City the benefit of all inferences arising from the record evidence.

(2)

The Record Permits the Inference that the City's Testing Procedures Improved Significantly Since this Court's 1972 Decision in Vulcan Society.

The District Court furthermore drew a series of inferences against the City when it assessed the "historical" evidence concerning firefighter exams. It characterized Exams 7029 and 2043 as "strikingly similar" to the firefighter's test at issue in *Vulcan Society*, 490 F.2d at 393, highlighting that in all three instances, "applicants were required to take a written examination, which was administered approximately every four years; those who scored below [a certain grade] were disqualified, while those who passed were placed on an 'eligible list' in order of their scores" (A1382).

These oversimplifications disregarded significant distinctions between that earlier test and those at issue here. First, while the test designer in *Vulcan* admitted that neither he nor anyone else conducted a job analysis, 490 F.2d at 396, in this case a privately retained expert psychometrician performed a job analysis that was updated and refined by DCAS (A464-66; A484). Also, the 1970s exam contained sections designed to test vocabulary, as well as knowledge of civic affairs and city government, all patently unrelated to a firefighter's job. *Id.* at 393. Exams 7029 and 2043, in contrast, were designed exclusively to assess skills like

spatial orientation, memorization, written comprehension and expression, deductive and inductive reasoning, and the like (A466-70; A482; A492).

Further, in 2006, during the very period that the Court held the City liable for intentionally discriminating, the City engaged an expert psychometrician to devise what it hoped would be a better test (A812; A1197-98; A1213; *see* A747-49). The fact that the City thus tried to improve its test-construction procedures was pertinent to disprove the theory that it used the faulty exams purposely to screen out minorities. *See Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1948 (2009); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). While the resulting Exam 6019 was later found to also lack sufficient validity to satisfy the *Guardians* standards, it still produced the most diverse eligibility list in FDNY history (A1753; A1197-98; *see also* A2955).[23]

Additionally, the Court took pains to view an objective test-scoring decision as evidence of a direct intent to prefer whites over minorities. The Court

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[23] The District Court's discussion of the historical evidence was also incomplete. It omitted any mention of the World Trade Center attack's effect on the FDNY's hiring needs and use of Exams 7029 and 2043, even though it figured prominently in the time period at issue. The eligibility list for Exam 7029, certified in February 1999, was unexpectedly exhausted after 9/11, when the FDNY was reeling from the 343 members killed on that day and the high rate of attrition in the months that followed (A968-69). The City's need to replenish the ranks of firefighters was thus unusually urgent. In December 2002, the City administered Exam 2043, a very similar test, while staffing needs were still pressing (*id.*; A96). Indeed, during the remedial hearing, White testified that Exam 2043 was prepared "very rapidly," prompting the District Court to note that September 11th had created "special circumstances" affecting that test (A3268-69).

held that when the City set the passing score for Exam 7029, it engaged in "the textbook definition of discriminatory intent" or "its nearly indistinguishable synonym" (A1418-19). That passing score was undisputedly set at a number intended to supply the FDNY's anticipated hiring needs (A506-07; A811; A964-69).

To find purposeful racism, the Court reasoned that the City exhibited "indifference" to lower-scoring blacks by refusing to adjust the passing score to ameliorate disparate impact, yet would have been compelled to lower that benchmark if "white test takers [had] failed the exam at the same rate as black test takers," just to fill its ranks (A1418-19). That logic is very obviously flawed. The supposed inconsistency reflects nothing but faithful adherence to objective, race-blind hiring criteria. It neither compels nor supports the conclusion that the City discriminated intentionally. A scoring modification to satisfy hiring needs would have widened the pool of *all* candidates. It is in fact the "textbook definition" of a neutral, generally applicable hiring policy.

(D)

The District Court Improperly Disregarded a Wealth of Evidence Relevant to the City's Lack of Discriminatory Intent.

The District Court also ignored the fundamental principle that in an intentional discrimination case, "the employer must be allowed some latitude to

introduce evidence which bears on [its] motive." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978). Contrary to the Court's belief, where an employer is accused of deliberately using a facially neutral device to disadvantage minority groups, its efforts to diversify its workforce bear upon the issue of intent, regardless of whether those efforts confront problems with the disputed device. *Id.*; *see Washington v. Davis*, 426 U.S. at 246; *Connecticut v. Teal*, 457 U.S. 440, 454 (1982); *Griggs v. Duke Power Co*., 401 U.S. 424, 432 (1971).

The City presented substantial proof that it was trying to increase minority hiring, not suppress it. Undisputed record evidence demonstrated that, purely at the City's behest, Columbia University undertook a comprehensive study of the FDNY's diversity strategies in 2002, when the FDNY included diversity in its "Strategic Plan" to rebuild after 9/11 (A1271-74; A1304-07; A1319-31). An employer seeking to improve its diversification methods by collaborating with a respected academic institution is not one that simultaneously uses employment tests as a device to screen out minorities. Yet the District Court did not even acknowledge the Columbia Study or its origin, much less consider whether it created an issue of fact.

Targeted recruitment efforts also help to negate any inference that an employer deliberately discriminated on the basis of race. *Davis*, 426 U.S. at 246. Consequently, the District Court erred in dismissing as irrelevant the detailed proof

of the City's recruitment campaigns, beginning in the late 1990s and intensifying through 2002 and 2006. The FDNY increasingly devoted manpower and advertising dollars to a concerted effort to reach minority applicants, assembling an extensive database – 40% black in 2002 – of individuals who expressed an interest in the FDNY (A620; A689-94; A697; A702; A714; A1305; A1286-87; A1292-96; A1319). Indeed, the City extended the 2002 exam registration just to reach more minority applicants (A679; A714). The input of the Vulcans, as well as other fraternal organizations on the Advisory Committee, was not only welcomed but actively sought (A641; A650-51; A700; A714). Efforts were even made to discourage minority attrition during the application period (A697; A699-701) The District Court refused to even consider these facts, in the mistaken belief that evidence of intent was irrelevant unless it bore directly on the exams (A1409-10).

Alternatively, the Court ruled that since the exams had a discriminatory effect, minority recruitment could not hope to accomplish the goal of diversity (A1409). The Court thus lost sight of the only relevant issue for a disparate treatment claim, which is whether the City *intended* to broaden diversity, not whether it would succeed. *Watson*, 487 U.S. at 1002. Further, since the burden of persuasion on the issue of intent remains at all times with the movant, it was error for the Court to discount the City's evidence at summary judgment as unpersuasive. *St. Mary's*, 509 U.S. at 507; *Burdine*, 450 U.S. at 254. Instead, the

Court should have assumed that a fact-finder would draw all inferences in the City's favor.

Also, in *Griggs*, 401 U.S. at 432, the Supreme Court commented that the employer's lack of discriminatory intent was "suggested" by "special efforts to help the undereducated employees" satisfy the diploma requirement that was held to have a disparate impact on blacks. Here, the EMT promotional exam analogously gave preferential hiring status to a heavy concentration of black and Hispanic firefighter applicants (A1272; A1284; A1300). Similarly, the five-point residency bonus predominantly helped minority candidates supplement their test scores (A206). Just as in *Griggs*, these special efforts to help minorities gain a higher ranking on the eligibility lists relative to whites shed significant light on the City's desire to diversify the FDNY's ranks, and therefore compelled a trial on the issue of intent.

The District Court categorically rejected this evidence, erroneously ruling that the City could not defeat summary judgment by "construct[ing] a competing account of its behavior," but rather was limited to "attempt[ing] to meet or undermine Intervenors' statistical evidence" in order to "attack the sufficiency or force of the plaintiffs' proof" (A1407-08). That analysis betrayed the Court's misapprehension of the City's burden of proof at summary judgment. Evidence demonstrating a "competing account" of an employer's behavior and motivation is

precisely the type of evidence that challenges the "force" of the movant's proof, and shows that the prima facie evidence of discriminatory intent is "insignificant." *Teamsters*, 431 U.S. at 360. Indeed, there are no "particular limits on the types of evidence an employer may use" to create an issue of fact as to discriminatory purpose. *Id*. at n. 46; *see Robinson,* 267 F.3d at 159.

"[A] non-discriminatory 'bottom line'" is also relevant to "assist an employer in rebutting the inference that particular action had been intentionally discriminatory." *Teal*, 457 U.S. at 454; *accord, Furnco*, 438 U.S. at 580. The District Court's treatment of this subject further demonstrated its unwillingness to draw all reasonable inferences in favor of the City. The Court noted the City's success in diversifying its other uniformed services, including the NYPD, but this positive evidence was not used to refute the allegation of purposeful discrimination. Instead, the Court drew an inference favoring Intervenors, and concluded that even while the City was successfully diversifying its other uniformed services, it was also trying to suppress the number of minority firefighters (A1388; A1420-21).

A neutral fact-finder might draw other conclusions from the City's improvements and should have been given the opportunity to do so. Since the City is the employer of *all* its uniformed services, a fact-finder could rationally conclude that the City's successful increase of its "bottom line" of minority

employees in other agencies showed that the FDNY's statistics were not the result of a concerted effort to screen out diverse applicants.

In short, a party may not be confined to any particular type of evidence in disputing invidious intent, and statistics are not the only form of proof entitled to consideration by the fact-finder. Here, since the City was bound by the Court's previous adoption of Intervenors' statistical model in its disparate impact ruling, those principles are thrown into sharp relief. By rejecting all the City's other forms of evidence, the Court effectively converted a disparate impact finding into a basis for disparate treatment liability as a matter of law. In its alternate analysis, it contravened basic principles of law by shifting the burden of persuasion to the City, and by failing to draw all inferences in the City's favor.

(E)

Reversal of Summary Judgment on Intentional Discrimination Compels Vacatur of the Injunction.

(1)

The Court Expressly Relied on the Intentional Discrimination Finding in Fashioning Additional Injunctive Relief.

Despite the District Court's secondary assertion that the Injunction was an appropriate remedy for disparate impact (SPA102-03), the injunctive order must fall along with the Court's mistaken belief that the City's intent to discriminate was an established fact, rather than an unproven premise.

First, Title VII presumptively limits affirmative relief – that is, relief designed to remedy the effects of discrimination that may not be cured by compliance or compensatory relief – to cases of intentional discrimination. 42 U.S.C. § 2000e-5(g). A mistaken determination of intent therefore throws immediate doubt on any affirmative relief awarded. *Guardians,* 630 F.2d at 111-12; *see Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC,* 478 U.S. 421, 475-76 (1986).

Second, in evaluating the evidence put forth at the remedial hearing, the District Court was admittedly "influenced" by its staunch but legally unsupported belief that City officials had long engaged in a deliberate pattern of discrimination (SPA3 n.1). The content and tone of the factual findings confirm that the Court, being so firmly convinced of that unproven fact, viewed the City's evidence with a jaundiced eye (*e.g*., SPA25; SPA34-39; SPA50-55; SPA61; SPA78-79).

Likewise, the Decision justifying the Injunction is permeated by reliance on the erroneous determination of discriminatory intent (SPA85-86; SPA88; SPA91-102). Together, the two orders underlying the Injunction contain more than a dozen citations to the previous disparate treatment opinion. The Injunction is therefore irredeemably tainted by the Court's legal error on the issue of discriminatory intent.

Furthermore, Intervenors repeatedly used the finding of intent to persuade the Court that systemic relief was necessary, even as they asserted that the remedies were appropriate in either event. Among other examples, they asked the Court to impose "transparency" in the PRB's decision-making "in the context of the Court's finding that there was intentional discrimination for many years in [the FDNY]", and urged the Court to "impose some direction in the recruiting area" despite the FDNY's conceded achievements, "because of the long period … of intentional discrimination" (A2672; A4400-06; *see also* A4425). That the Court paid lip service to the longstanding disparate impact of FDNY exams can therefore give this Court no confidence that the injunctive relief would have been so encompassing absent the legal error finding intent as a matter of law.

(2)

Affirmative Relief is Otherwise Unjustified Given the City's Substantial and Meaningful Steps to Cure the Disparate Impact of the Exams.

Nor could the Injunction be justified on this record without a finding of intent. To be sure, disparate impact liability has been held in rare cases to provide a basis for affirmative relief, but only where coupled with "persistent or egregious" discriminatory conduct. *Local 28,* 478 U.S. at 475; *Berkman v. New*

York, 705 F.2d 584, 596 (2d Cir. 1983); *see Guardians*, 630 F.2d at 112-13.[24] Courts have typically found conduct supporting broad affirmative relief where an employer long engaged in *systemic* discrimination, was held in contempt of court for circumventing orders mandating compliance relief, and/or engaged in "foot-dragging" in complying with desegregation orders. *See Local 28*, 478 U.S. at 476-77; *United States v. Paradise*, 480 U.S. 149, 169 (1987); *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm.*, 94 F.3d 1366, 1371 (9th Cir. 1996), *cert. denied*, 520 U.S. 1187 (1997).

The District Court tried to cast the City as a recalcitrant litigant by pointing to the City's belated production of discovery during an earlier phase of this action, its officials' long-held belief that the tests were valid, and its purportedly unbroken 40-year pattern of discriminatory testing (SPA84-103). But the type of "persistent and egregious discrimination" that has been held to support affirmative relief is far more pernicious than evenly administered but poorly designed exams, or delayed compliance with document production orders.

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[24] Affirmative remedies may be upheld in other circumstances if they are limited to temporary or "interim" hiring measures prior to institution of a valid selection procedure. *E.g., Guardians*, 630 F.2d at 110. That alternate analysis is patently inapplicable to the Injunction at issue, because it has a minimum 10-year life-span and its provisions pertaining to hiring will be implemented only *after* administration of the upcoming exam, which is being developed under the auspices of Special Master White.

In *Local 28*, 478 U.S. at 476-477, the record was "replete" with instances of the defendants' "bad faith attempts to prevent or delay affirmative action," including contempt sanctions for failing to comply with court orders to end discriminatory treatment. In *Eldredge,* 94 F.3d at 1371, the defendant continued for 21 years and over the course of three appeals to defend a system that had been held violative of Title VII. In *Paradise*, 480 U.S. at 156-57, after the initial injunction was entered, the defendants artificially restricted the size of their workforce and reduced new hiring "for the purpose of frustrating or delaying full relief to the plaintiff class[,]" and engaged in "social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing, and discipline of blacks harsher than that given whites for similar misconduct[.]"

Here, there is nothing remotely similar. To be sure, the City was held liable under Title VII once before for the disparate effect of its firefighter entrance exam, 40 years ago. *Vulcan Society*, 490 F.2d at 387. But the City fully complied with its legal obligations – including the five-year 3:1 hiring quota – resulting from that litigation. None of the exams between the previous litigation and the 1999 exam were challenged or found to be invalid. *See id.* at 392, n.4 ("[d]iscrimination in the invidious sense exists only if [disparate racial] effects are not the result of job-related tests"). Further, despite the District Court's assertion that high City officials

ignored "clear evidence of disparate impact" (SPA95), the City had good reason to believe that the 2002 exam's pass rate was not discriminatory, as it satisfied the "80% rule" of the EEOC Guidelines (A445; A451-52; A797; A1242-45). Far from artificially restricting its workforce to avoid compliance with court orders, the City declared an end to its hiring freeze – caused by the 2008 nationwide financial crisis – only *after* the Court imposed liability (A1757). And for over a year, the City has been fully cooperating with the parties and the Special Master to devise a new job-related examination, as even the Court has recognized (SPA106-07).

In *Bridgeport Guardians, Inc. v. Members of Bridgeport Civ. Serv. Comm'n*, 482 F.2d 1333, 1340 (2d Cir. 1973), this Court upheld part of an affirmative injunctive order aimed at correcting a police entrance exam with a disparate impact on blacks. However, it did so only in light of additional factors not present here. The Court specifically relied not only on the defendants' failure to correct the design of its "archaic" and invalid exam, but on their failure to take other steps to diversify the police department's workforce (*id.*):

> A second factor to be weighed is that with the exception of a single abortive effort in 1968, the [defendants] have failed to take positive steps to recruit minority personnel. Greater numbers could surely be attracted if realistic efforts were made in the minority neighborhoods and in the media they patronize, to educate minority youth to the advantages and opportunities of a police career.

In sharp distinction, the record here is replete with evidence that the City has "taken meaningful steps to eradicate the effects" of its entrance exams. *Rios v. Enter. Ass'n Steamfitters Local 638 etc.,* 501 F.2d 622, 631-32 (2d Cir. 1974). Examples include not only the targeted minority recruitment that could have changed the outcome of *Bridgeport* (A620; A1286-87; A1292-96; A1305; A1319), but also the City's initiation of the Columbia Study (A1272-74), the establishment of the FDNY high school in a heavily minority neighborhood (A1276-77; A1286), City-residency bonus points on exams (A195; A206), the high diversity of the most recent Exam 6019 eligibility list (A1197-98; A2955), and the City's frequent administration of the EMT promotional test, which confers preferential status on a heavy concentration of minority applicants (A639; A652; A1272; A1300). As to the latter device, moreover, the City did not passively accede to an initial state-court injunction prohibiting its use. Instead, it filed an appeal, prevailed in the Appellate Division, and successfully defended against further appellate review. *Gallagher*, 307 A.D.2d at 76.

The remedial-hearing record shows that efforts like these have only increased. Most notably, minority recruitment efforts have been steadily improving for at least the past 10 years (*see, e.g.,* SPA18-29). Forty-four percent of registrants at the close of registration for the upcoming exam were black or Hispanic (A6414; SPA26-27), and Queenan's initiatives have decisively

extinguished any disparate impact that the discretionary hiring process conceivably had on the handful of black applicants previously affected by it (A3294; A3365-67; A3417-18; A4873; A5656-60).

Additionally, while FDNY firefighters are predominantly white, minorities are hardly deprived of a voice in hiring. Queenan, White, and Phillips – all people of color – played pivotal roles in the practices affected by the Injunction. The FDNY's staff of CID investigators, who make the preliminary credibility determination of an applicant's explanation of past arrests, is also highly diverse (A2747). Further, the FDNY has consistently involved the Vulcan Society and diverse firefighters in recruitment efforts (*e.g.*, A2832-41; A2939-40; A3067; A3182). The Court was distressed that FDNY incumbents sometimes lobby the PRB for special consideration of friends or family under review, but the Vulcans, too, often prevail on at least one PRB member to advocate for certain candidates (A3291-93). Isolated instances of overt racism in the FDNY do not go unaddressed, and testimony from witnesses on the "front lines" shows that the typical black firefighter experiences his work environment as a "brotherhood" with a "fraternal" atmosphere (A3169; A3953; A4118; *see* A2880; A3840-43; A3771-78; A3880-83; A4342; A5137; A5676-77). Each of these factors further militates against any need for the affirmative relief awarded.

POINT II

THE DISTRICT COURT ABUSED ITS DISCRETION IN ENTERING AN INJUNCTIVE ORDER THAT FAR EXCEEDS THE SCOPE OF THE STATUTORY VIOLATION.

Even if the Court's grant of summary judgment on intentional discrimination were not erroneous, the Injunction would still have to be vacated because its provisions focus on practices that were never at issue in the liability phase of this action. Despite the broad equitable powers conferred by Title VII, the District Court lacked authority to order the FDNY to change practices that have nothing to do with the exams that formed the sole basis for both liability determinations.

(A)

The Injunction Exceeds the Scope of the Violation

A court's remedial powers under Title VII are not unlimited. "That the court's discretion is equitable in nature hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted).

It is a "settled rule" in all federal equity cases that "the nature of the violation determines the scope of the remedy." *Rizzo v. Goode,* 423 U.S. 362, 378-79 (1976) (citation and internal quotation marks omitted); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Milliken v. Bradley*,

418 U.S. 717, 738 (1974); *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir. 1984); *see Horne v. Flores*, 129 S. Ct. 2579, 2606 (2009). Courts acting to correct civil rights violations, accordingly, must ensure that injunctive remedies correspond to the nature and the scope of the violation. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 577-78 (1983); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *EEOC v. HBE Corp.*, 135 F.3d 543, 557-58 (8th Cir. 1998); *Bridgeport Guardians,* 482 F.2d at 1340-41. Broad remedial injunctions are warranted only where discriminatory practices are alleged and proven to be similarly wide-ranging. *See Paradise*, 480 U.S. at 170 (promotional quota was justified where "promotion, like hiring, ha[d] been a central concern of the District Court since the commencement of th[e] action"); *Sheet Metal Workers*, 478 U.S. at 429 (broad affirmative relief upheld where union intentionally discriminated in recruitment, selection, training, transfers, etc.).

Thus, where hiring practices but not promotional examinations were found to be discriminatory, this Court found "no justification … for extending the remedy to higher ranks," holding that "the nature of the violation" must "determine[] the scope of the remedy." *Bridgeport Guardians,* 482 F.2d at 1341. On similar grounds, in *Hayes v. N. State Law Enforcement Officers Ass'n,* 10 F.3d 207, 217 (4th Cir. 1993), the Fourth Circuit vacated the portion of an injunction

that was not specifically geared toward correcting the promotion of sergeants, the only challenged policy. In *HBE Corp*, 135 F.3d at 557-58, appointment of a third-party monitor was deemed an abuse of discretion where it was "broader than necessary" to prevent recurrence of the type of discriminatory misconduct found by the jury.

Here, the complaints' factual allegations were confined to the design and use of the City's written exams. Indeed, the Vulcans were granted leave to intervene only on the condition that they limit their allegations to the issues put forth by Plaintiff, with the sole addition being their claim that the same facts constituted intentional discrimination (A167-74). For that reason, the District Court refused to allow Intervenors to amend their complaint to challenge other elements of the City's hiring practices, including recruitment and character review, yet, years later, it entered an injunction directly relating to those practices (A163-74).

Since both findings of liability were based solely upon the written examinations, the Court certainly had the authority to order the City to devise a lawful method of testing, and to limit interim hiring until a valid examination was crafted. Indeed, those are the only injunctive remedies sought by the Government. But those liability rulings did not confer the power to interfere with practices which were neither alleged nor found to be discriminatory.

If the situation were reversed – had the complaints alleged solely that the FDNY's discretionary hiring or recruitment violated Title VII – the District Court would have patently lacked authority to order the City to redesign its employment test, to enjoin it from taking steps toward test development outside the presence of a Court Monitor, or the like. Nor could the City have been forced to defend against an allegation of discriminatory exams if it were raised for the first time at the remedy stage. It follows that the converse is also true.

(B)

Federalism

Given the lack of a sufficient legal predicate, and especially in light of the detailed and specific nature of the relief granted against the City, the Injunction also violates fundamental principles of federalism. *See Lewis,* 518 U.S. at 389 (Thomas, J., concurring); *ACORN v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995). Where the exercise of authority by municipal officials is enjoined, "federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and the [locality]'s administration of its own law." *Rizzo*, 423 U.S. at 378 (citations and internal quotation marks omitted); *accord*, *Ass'n of Surrogates & Supreme Court Reporters v. New York*, 966 F.2d 75, 79 (2d Cir.) ("Federal courts must take care to exercise 'a proper respect for the integrity and function of local government institutions …'") (quoting *Jenkins*, 495

U.S. at 50), *reh'g granted & modified on other grounds*, 969 F.2d 1416 (2d Cir. 1992). Unless judicial intervention limits redress to the manner in which the locality was shown to have violated statutory or constitutional law, court-imposed injunctive orders offend sensitive concerns of federalism, especially insofar as they limit a locality's political branches' ability to determine the appropriate allocation of scarce public resources. *Swann,* 402 U.S. at 16; s*ee Horne*, 129 S. Ct. at 2593-94; *Lewis*, 518 U.S. at 385-86 (Thomas, J., concurring).

These concerns are heightened where, as here, federal courts interfere with a locality's discretion in how best to protect public safety. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006); *Locurto*, 447 F.3d at 178-79. Firefighters are peace officers who are empowered to enter private homes when the residents are not present, conduct safety inspections, and issue summonses (A3358-61; A3689). Further, the FDNY's quasi-military structure demands that a firefighter respond to authority with alacrity (A6217). The Fire Commissioner has the duty and necessary expertise to ensure, in the exercise of his sound discretion, that individuals holding such a position have the requisite integrity and character to command public trust. Absent a proper adjudication that he has abused that power, a federal judge may not intervene without disrupting the delicate balance guaranteed by the Constitution.

In a nod to the tenets of federalism, the District Court purported to allow the City to devise its own plans for improved practices in the first instance (SPA90-91). But in setting forth detailed and burdensome restrictions on the content of those plans and the manner in which they must be devised, the Court stripped the City of the essence of its discretion (SPA156-73).

The City is also subject to the District Court's approval of those plans, and the Court has already ranged far afield in its conception of the measures needed to eliminate past effects of discrimination. For instance, when Iraq War Medal of Honor winner Dakota Meyer sought to register late for the upcoming firefighter exam, the Court refused to allow the City to reopen registration to the general public for a short period, *despite Intervenors' consent*, on the theory that blacks might be disadvantaged because recruitment efforts had ended a few days before (*see* ECF Nos. 734-38). When the City intended to increase its filing fee for the upcoming firefighter exam from $30 to $54 as part of an across-the-board raise in all civil-service exam filing fees, the Court blocked the increase, notwithstanding the availability of hardship waivers (A2479-586; ECF No. 670). When documentary evidence at the remedial hearing briefly alluded to reports of cheating on the last firefighter exam (A4690), the Court launched a *sua sponte* inquiry into whether the FDNY had adequately investigated the allegations, absent any indication of race-connected issues (A3003-11; A3262-64; A3271; A3277-81).

A similar lack of restraint is evident in the Injunction. As the Government obliquely noted (A4434), nothing prevented the District Court from retaining jurisdiction over this case without also imposing a Court Monitor with the power of advance approval over the FDNY's hiring decisions, among other things. This far less intrusive measure would be sufficient to assure that the City will not revert to using poorly constructed exams.

POINT III

THE FINDINGS OF FACT UNDERLYING THE INJUNCTION SHOULD BE SET ASIDE.

In addition to its overbreadth, the Injunction must be vacated because the District Court's findings of fact at the remedial hearing cannot stand. Since the Court's findings were predicated on the material misapplication of law at summary judgment, they must be set aside. Any justification for deferential review is obviated. In any case, the findings are clearly erroneous. Finally, the District Court Judge lost any semblance of neutrality in his one-sided assessment of the evidence, and violated Fed. R. Evid. 605 when he took on the roles of witness and advocate for Intervenors. The City's loss of a neutral arbiter, and therefore its deprivation of a fair trial, is further underscored by other examples of partiality throughout the record.

(A)

Due to the Previous Erroneous Entry of Summary Judgment on Intentional Discrimination, *De Novo* Review of the Factual Findings Is Necessary.

An injunction is subject to reversal where the District Court abused its discretion, which occurs when there are "clearly erroneous findings of fact" or "the application of an incorrect legal standard." *Nicholson v. Scoppetta*, 344 F.3d 154, 165 (2d Cir. 2003) (citation and internal quotation marks omitted).

As set forth above (*see* pp. 85-86, *supra*), the District Court's factual findings from the remedial hearing were irreparably tainted by its legally erroneous determination of intent. Indeed, the Court expressly stated that its findings were "influenced" by his determination that the City was guilty of intentional discrimination (SPA3 n.1). No deference is owed to findings of fact that are either "predicated on a misunderstanding of the governing rule of law" or "inseparable from the [legal] principles through which [they were] deduced." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 & n.17 (1984); *accord, Kelley v. S. Pac. Co.,* 419 U.S. 318, 323 (1974); *United States v. Singer Mfg. Co*., 374 U.S. 174, 195 n.9 (1963). Thus, if this Court does not vacate the Injunction for the other reasons set forth herein, it should review the findings *de novo*.

(B)

In Any Event, the Factual Findings Are Clearly Erroneous.

Even under the deferential clear-error standard ordinarily applicable to review of factual findings (*see* Fed. R. Civ. P 52[a][6]), the findings here must be set aside. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948).

This Court has "not hesitated" to find clear error where the trial court (1) "failed to synthesize the evidence" to account for "gaps" in a party's evidence, (2) incorrectly weighed the probative value of evidence, leading it to rely on speculation, or (3) did not consider all the relevant proof. *Locurto*, 447 F.3d at 181; *Doe v. Menefee*, 391 F.3d 147, 164 (2d Cir. 2004), *cert. denied*, 546 U.S. 961 (2005); *see Krizek v. CIGNA Group Ins*., 345 F.3d 91, 100 (2d Cir. 2003); *Ortega v. Duncan,* 333 F.3d 102, 106-07 (2d Cir. 2003). The District Court's assessment of the hearing evidence is rife with each of these types of defects.

(1)

Recruitment and Attrition Reduction

In the area of recruitment, the Court's findings were internally inconsistent. It recognized the increase in resources devoted to each of the three

recruitment drives since 2002, yet simultaneously accused the City of "litigation gamesmanship" in allocating unprecedented funding to its current campaign (SPA18-29; SPA36-37). Initiatives that started ten years ago and increased over the course of a decade cannot rationally be dismissed as mere litigation tactics.

Also, the Court failed to consider the 2002 inception of the Columbia Study when it criticized the City for lack of interest in diversity until this case began (A1273-74; A5264-65). The fact that the City independently sought Columbia's assistance in improving FDNY diversification strategies is not just relevant evidence, it is a firm testament to a longstanding commitment to diversity independent of and predating this litigation.[25] Further, many of the Study's recommendations prompted meaningful changes in the FDNY's practices, like the Unit's efforts to reduce voluntary attrition, and a new emphasis on job benefits in the FDNY's recruiting message, which Columbia found more effective with young people of color (A2977-80; A3665-66; A5571-72). These facts undercut the

[25] This action was commenced in 2007 (A94-107), and the City commissioned the Columbia Study just after 9/11 (A1272-74; A5264-65). At the hearing, Intervenors wrongly charged that the Study was undertaken only after they filed their EEOC complaint, which occurred in August 2002 (A711). The first volume ("Initial Findings") of the Study is undated, but its text references the Fire Academy's upcoming "December 2003 graduating class" (A5272) and also states that the Study was undertaken the previous January (A5265). If the District Court required more precise evidence on this issue, Professor Eimicke, who oversaw the report, would have been able to pinpoint the relevant date, but the Court precluded his testimony on questionable grounds (*see supra,* at p. 113).

District Court's central thesis ("the City is determined to change as little as possible"), yet factored not at all into its deliberations (SPA100).

Moreover, the Court contradicted itself by recognizing the City's increased recruitment efforts but then lamenting the City's supposed failure to improve its practices after entry of the liability rulings in 2009-10 (SPA101) ("Had the City's leadership shown the least bit of concern for the effect of the court's liability rulings … this would be a much different order"). The common theme in these findings is that close federal supervision was necessary to improve FDNY practices, but that finding cannot be justified both as a spur to combat supposed recalcitrance and as insurance that action dating from at least 2002 will continue.[26]

The Court also faulted the City for accepting donations toward the Unit's work ("handouts" from the public), ruling that this showed a lack of commitment to diversity (SPA37). That logic is confounding. The idea that the City's commitment would have been demonstrably stronger had it spurned voluntary contributions is irrational, as is the notion that a municipality must refuse pro bono generosity or risk federal takeover. At any rate, two vehicles and

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[26] Indeed, other FDNY diversity strategies date to the 1990s. The five-point city-residency bonus point was in place prior to 2000, and the EMT promotional exam was announced in 1998 (A618-22; A641; *Gallagher*, 307 A.D.2d at 78).

$56,000 in donated advertising services pale in comparison to the City's outlay of over five million dollars toward recruitment (A3062; A2960-61).

While recognizing "significant improvements" in recruiting, the Court asserted that "if left to its own devices" the City would "recruit as many black and Hispanic firefighter candidates as possible and subject them to a hiring process that has been proven to systematically … exclude blacks and Hispanics" (SPA100-01). But only the entrance exams were "proven" to discriminate against minority candidates, and the City was already working with Special Master White to address that problem (SPA106-07). And given the Court's unqualified approbation of Maglione's work, including her efforts to reduce voluntary minority attrition, the findings provide no basis for ordering the City to hire an independent recruitment consultant, or to devise detailed plans to improve its already vigorous efforts to recruit diverse candidates and support them throughout the application process (SPA18-29; SPA36; SPA159-62).

(2)

Character and Fitness Review

Regarding character and fitness review, the Court issued an elaborate and intrusive injunction to address a problem never shown to exist and which, even if the showing had been made, undisputedly affects just a handful of firefighter candidates (SPA163-68). In the past decade, *only ten black candidates* were

refused FDNY employment on a discretionary basis (A2789; A3458; A5656-60; A4227; A4873). It can hardly be clearer that the decisions of the CID or PRB have no significant deleterious effect on the racial composition of the FDNY.[27]

That aside, the Court overhauled the CID/PRB review process despite Intervenors' numerous failures of proof. In the face of consistent City testimony that discretionary rejections were generally based on the cumulative effect of negative factors (A3286-89; A3429-30; A3685-88), Intervenors never produced a "CNS" disposition that was based on a single arrest. Nor did they identify a single discrepancy in the FDNY's treatment of similarly-situated black and white candidates.[28] Indeed, their only two comparable consideration reports pertained to a white and a Hispanic candidate with domestic violence incidents in their past (A2721-25; A4741-93). That evidence revealed that the two-tiered system of the CID and PRB worked just as intended, as the CID's differing recommendations for two similar candidates were neutralized by the PRB's sound decision-making, so

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[27] Even on the previous eligibility list dating back to 1999, only 18 black candidates received the "CNS" disposition (A2778; A4656; A4873).

[28] It cannot be seriously maintained that an applicant with two felony arrests for possession of narcotic with intent to sell is similarly situated to either of the police officers who were tried and acquitted for their roles in the controversial Amadou Diallo shooting. *See Locurto*, 447 F.3d at 181 n.7 ("Whatever one's opinion of the actions of the officers in the Diallo case, it was the position of the NYPD and the Mayor that the officers were acting within the scope of their duties, and it is undisputed that the officers were acquitted in court of any wrongdoing"). Nor did the Court allude to those consideration reports in its decision.

that neither candidate received a "CNS" disposition (A2737). The Court made no mention of the unrebutted proof that the PRB approved the Hispanic candidate for hiring despite the CID's contrary recommendation (*id.*).

Compounding the prejudice, the Court refused to admit the countering consideration reports proffered by the City, on the extraordinary grounds that they had been "cherry-picked" by the defense (A4349-51). This was an adversarial proceeding. The fact that the City's evidence benefited the City was no basis to exclude it. If Intervenors could produce applicant files showing more lenient treatment of similar white candidates, they were free to do so. Their proffered consideration reports hardly aimed to paint a balanced picture, yet the Court admitted them, and then precluded the City from showing the countervailing side of the story.

Intervenors also failed to adduce statistical evidence of disparate impact of character review on blacks, except by reaching back to 1999, well before Queenan's tenure and the changes she instituted. Their expert conceded that on the 2002 eligibility list, whites were statistically more likely to be "considered and not selected" than blacks (A2787-94), and the City's expert thoroughly rebutted Intervenors' belated (and ultimately stricken) assertion of a statistically significant burden on blacks on the most recent Exam 6019 list (A4226-33; A4235-37).

Incredibly, the Court blamed the City for this failure of proof, finding that the FDNY was at fault for failing to record details regarding CID and PRB decision-making "in an easily accessible format" (SPA78). That ruling effectively shifted the burden to the City, the party opposing affirmative injunctive relief. It is also manifestly erroneous. By relying on the codes that indicate the general disposition of a candidate's application, rather than the individual applicants' files reviewed by the PRB, Intervenors elected to take a shortcut which proved unsuccessful. Indeed, Erath's excluded rebuttal report was prepared within days, yet it set forth and analyzed the appropriate statistical evidence (A4226-33). As there was no claim that the City had withheld requested discovery on this issue, Intervenors could have performed the same analysis, had it supported their case.

The Court then retreated to a theory that the City "more likely than not" would misuse arrest histories to the detriment of black applicants (SPA55). In the absence of material data, the Court relied on the raw numbers of arrests in the City broken down by race, reasoning that since more blacks are arrested than whites, the FDNY's "improper" use of arrest records would *ipso facto* have a greater effect on blacks (SPA55-59). That conclusion is clearly erroneous on several grounds.

First, the FDNY's use of arrest records conforms to the EEOC Guidelines. All the testimony established that the FDNY has no blanket

prohibition against hiring applicants with non-disqualifying arrests – that is, misdemeanor convictions or arrests not leading to conviction (A2737; A3286-89; A3361-64; A3393-94; A3429-30; A3685-88). Despite the Court's remonstrations, PRB consideration of all candidates with such arrest records is entirely proper, as the Guidelines endorse "close scrutiny" where, as here, the job is "security sensitive" or gives the employees easy access to the property of others (A5057). Also, since the PRB, unlike the CID, has been race-blind since 2004, its review shields the candidate from conscious or unconscious bias (A3365-66; A3294; A3417-18; A3430).

The Guidelines moreover provide that an employer need not perform an extensive investigation of the underlying facts (A5058). Each arrest constitutes a "suspicion" of criminal conduct, and the sheer number of arrests may be considered in gauging an applicant's credibility (A5058; A5062). The CID allows each candidate to explain the underlying circumstances, assesses his or her credibility, and, unless further investigation is necessary, prepares a consideration report for PRB review (A2694; A2730; A3361; A3397; A3403-04). The PRB, in turn, considers the nature and gravity of the offenses, their relationship to the nature of the job, the amount of time that has elapsed since the arrests, the applicant's age at the time of the arrests, the provided explanation, and any positive indications of stability or rehabilitation (A2737; A3286-89; A3393-403; A3429-

30; A3685-88) – the very factors set forth in the Guidelines, plus some others (A5057).

The Court focused on whether FDNY witnesses knew the Guidelines by name, which is immaterial, rather than whether they followed the principles set forth therein. Queenan's active influence over the CID's process and her pivotal role in the PRB's deliberations, coupled with her knowledge of the Guidelines, assures that their principles are used even if some members of the staff do not know of their derivation (A2718-19; A3441; A2742-43; A3367; A3371; A396-404).

Furthermore, any likelihood of disparate impact in the FDNY's use of arrest records was pure speculation, especially in light of the sparse number of black applicants rejected with the "CNS" code. The *Floyd* arrest statistics did not establish the likelihood of disparate impact, as they did not set forth the percentage of arrestees rendered objectively ineligible for FDNY employment in each racial category. Those statistics – compiled by the City in an unrelated lawsuit, for a completely different purpose, but offered here by Intervenors – did not reveal the subjects' age, educational background, fluency in English, national citizenship, or possession of a valid driver's license (A4866-71; A2813-27). Nor did they establish how many arrestees incurred multiple arrests or had a previous felony conviction (*id.*).

The inadequacy of Intervenors' evidence is unsurprising since arrest records were first injected into this case at the remedy stage, after the District Court had confined the issues to the written exams. After belatedly allowing the issue to be raised, the Court glossed over the material shortcomings in Intervenors' evidence (SPA57-58). Rather than seeking statistical data tailored to the issues at hand, Intervenors elected to rely on discovery from an unrelated action that was plainly insufficient for these purposes. Again, too, the Court improperly shifted the burden to the City, ruling that it should have submitted a more detailed statistical analysis rather than simply pointing out the shortcomings in Intervenors' proof (SPA58). Such an analysis would be well-nigh impossible, however, since aside from age, NYPD arrest data does not include the various bases for automatic disqualification from employment as a firefighter. Even assuming that a more detailed statistical analysis was possible, it was not the City's obligation to undertake it in the brief time allotted for preparing for the remedial hearing.[29]

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[29] The Court's conclusion in this regard was particularly prejudicial given that it reserved its ruling on the City's objection as to the arrest statistics until it issued its decision, giving the City vain hope that the flaws in the evidence would be seen for what they were (A2813-15). The Court never suggested that it required further evidence on the subject. In contrast, when the Court feared Intervenors might not be presenting sufficient proof to justify the relief at issue, it did not hesitate to augment both their witness list and the documentary evidence (*see infra* pp. 115-18).

The District Court also berated the PRB for not reducing the reasons underlying its hiring decisions to writing, in the belief that this practice precluded effective review (SPA59-60). But when one ostensibly aggrieved candidate filed an EEOC complaint charging that the use of his arrest record violated Title VII, the City's answer provided a thorough justification for his rejection, as well as the number and race of other candidates who were simultaneously considered and not selected (A6216-22). Here, again, the Court utterly disregarded significant documentary evidence.

Likewise, the Court was disturbed by testimony establishing that friends and relatives of applicants sometimes contacted CID or PRB members to advocate for their appointment, but never mentioned the fact that Vulcan Society members were among those who made these calls (A3291-93). Nor did the Court acknowledge that many key figures in FDNY character review are quite diverse. As previously noted, most CID investigators are people of color, as are Queenan and White (A2747; A3356). Queenan's input, especially, has positively impacted the review process, including the elimination of photos from consideration reports and the mandate of race-blind PRB review for all candidates with arrest records (A3294; 3365-66; A2715; A3392-93). While obviously alert to subtle forms of discrimination, Queenan has never perceived race to affect PRB deliberations, and would not hesitate to speak up if she did (A3429).

In sum, the Court's preoccupation with the need for "written guidelines" for the CID and PRB is perplexing. So too are the other detailed provisions directed at reforming the FDNY's character and fitness review process. The stated purpose of these measures is to protect against discriminatory hiring decisions by the FDNY. Yet no evidence was adduced of even a single discriminatory refusal to hire, let alone the kind of systemic problem that would warrant the detailed and intrusive equitable relief imposed here.

(C)

The City Was Deprived Of A Neutral Arbiter.

The nature and extent of the foregoing errors, especially the one-sided manner in which the evidence was analyzed, calls the District Court's impartiality into serious question, as does its preoccupation with press coverage surrounding the case. Further, the Court's overactive participation in the hearing violated Fed. R. Evid. 605, as the Judge effectively became both witness and advocate for Intervenors. Additional instances of bias in the record as a whole confirm the need for reversal and reassignment to a new judge.

(1)

Partiality During the Hearing

As the foregoing strongly suggests, the District Court displayed a pervasive propensity to excuse shortcomings in Intervenors' proof, and to discount, or simply ignore, all evidence that undercut the need for equitable relief.

The Columbia Study is once again a prime example. From the beginning of this action, the District Court has never considered the City's 2002 initiative in seeking Columbia University's help with diversification strategies. Aside from a single reference to the fact that the Study was a "collaborat[ion]" between Columbia and the City (SPA6), the Court failed to discuss or analyze the significance of the City's proactive steps to obtain Columbia's help. Even then, the Court cited only the dates of the two latest reports, while ignoring the date of their inception (*id.*).

Significantly, too, the Court freely used portions of the Study against the City, but never acknowledged that it had implemented several of the Study's recommendations (SPA7; SPA10-11; SPA31). Nor did the Court cite any of the Study's findings that placed the City in a positive light. The Study noted repeatedly that it was undertaken and conducted with the full support of the FDNY, and documented the increasing diversity of incoming firefighter classes (A5264-65; A5426; A5457; A5570; A5574). Moreover, it concluded, *inter alia,*

that "[t]he lack of diversity within the FDNY is not a result of active discrimination," that the FDNY had "dedicated substantial resources" to improving diversity "over the last three decades" and that the FDNY had displayed a "proactive approach" in tackling the problem (A5272-74; A5461-62).

Likewise, the Court ultimately precluded the City from calling Professor Eimicke, who oversaw the Columbia Study, as a witness (A4203; A4237). Contrary to Intervenors' contentions, the City had reserved the right to call Eimicke, who obviously had relevant evidence to offer (A4157-59; A4207; A4210-12). In addition to his intimate familiarity with FDNY recruitment and voluntary attrition over the past 10 years, he could have addressed the Court's concerns about the City's commitment to diversity and receptiveness to change (A4348-49). Eimicke was the only witness disallowed by the Court. In contrast, the Court deemed it necessary to call three witnesses of its own, asserting a judicial "obligation" to "seek out any and all sources of information [and] evidence" that might show a need for equitable relief (A3342). If that reasoning applied to proof that might militate *against* such a need, the Court should have welcomed Eimicke's testimony.

Similar issues surround the Court's evidentiary rulings regarding the statistical significance of "CNS" dispositions on the most recent eligibility list from Exam 6019 (A4205-07; A4212-13; A4235-37). The Court was perfectly

willing to accept untimely expert evidence when Intervenors asserted a disparate impact on black applicants (A2791-92; A2799-800; A4202-03). It was only after Erath's rebuttal report decisively disproved any significant racial disparity that the Court had a change of heart and struck both reports as untimely (A4235-36; A4226-33). Thereafter, the Court ruled that the FDNY's failure to keep "easily accessible records" precluded a "scientifically rigorous" analysis of the issue, although Erath had easily accessed those very records and performed just such an analysis (SPA78).

The Court also awarded Intervenors relief beyond what they sought. For instance, there was no request to completely enjoin City employees from orally discussing background investigations (A1805-11). Nor did Intervenors seek to restructure the EEO division as to FDNY's civilian employees (A1811-14). Further, the Injunction mandates that certain court submissions be personally signed by the Mayor; the rest require signatures by the Fire Commissioner and the Corporation Counsel, who must certify that the Mayor has reviewed and approved their contents (SPA157). Neither the findings of fact nor the record reveal a rationale for such unusual *sua sponte* relief.

Additional examples of partiality in the hearing are legion. The Court disregarded the scant number of black "CNS" rejections in the last decade (A2808-09; A2789; A3458; A5656-60; A4227; A4873). The Court admitted the

Intervenors' consideration reports, but excluded the City's on grounds of "cherry-picking" (A4351). The Court ignored the PRB's approval of the Hispanic applicant with a history of domestic violence (A2737; SPA49-50). The Court deemed the *Floyd* arrest statistics to be material despite their recognized shortcomings, then unexpectedly shifted to the City the burden to rebut this patently inadequate evidence (SPA57-58). The Court *sua sponte* ordered the FDNY to produce voluminous documents in the midst of the hearing, never acknowledged that Intervenors found nothing in them to support their claims – and then grounded its relief on DCAS's "recalcitrance" in producing discovery years before (A2857-61; A4343; SPA96-97). The Court found that the City "used" voluntary attrition (a candidate's decision to discontinue his application) as an intentional tactic to select firefighters (SPA14-16). Certain enhancements to City practices were characterized as "litigation gamesmanship" or "a token bid to placate the Court" (SPA36-37). Other obvious improvements, like uniform race-blind PRB review of candidates with arrest records, and public-private partnerships to achieve diversity goals, were misused to cast the City's efforts in a negative light (SPA37; SPA45; SPA52).

The picture that emerges is that of a Court bound and determined to justify closely supervised "top-to-bottom" injunctive relief. Where the City's proof showed that such relief was unnecessary, the Court excluded, struck or

ignored it. Where Intervenors' evidence fell short, the Court found a way to excuse or fix it.

(2)

Fed. R. Evid. 605

Indeed, the Court sought to bolster Intervenors' evidence by calling three City officials as Court witnesses, and by collecting and admitting its own documentary evidence. When a judge presiding over a bench trial gathers evidence to augment the record, he makes himself a witness in the case, thereby violating Fed. R. Evid. 605 and destroying the appearance of impartiality. *Price Bros. Co. v. Phila. Gear Corp*., 629 F.2d 444, 446 (6th Cir. 1980); *Lillie v. United States,* 953 F.2d 1188, 1191 (10th Cir. 1992); *see State v. Gokey*, 14 A.3d 243, 248-49 (Vt. 2010) (construing "substantially similar" state rule). Also, while a judge may call a witness whom the parties have chosen not to present (*see* Fed. R. Evid. 614[a]), it is "seldom very desirable" for him to exercise that power with even one witness, much less three. *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945); *see United States v. Brandt*, 196 F.2d 653, 656 (2d Cir. 1952). Even when a trial judge merely participates in the questioning of a witness, he must remain "balanced" so as not to "become an advocate" for one side. *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997).

Here, the Judge *sua sponte* ordered testimony from three City officials: White, Phillips, and finally Commissioner Cassano, whom he cross-examined at length (A2975; A3005-06; A3329; A3698-712). The Court cited all three witnesses' testimony at length as reasons for imposing the requested relief – especially Cassano's – yet Intervenors did not consider it important to call any of them. The Judge further compromised the City's right to a fair trial in supplementing the record with the "Medal Day" document that he downloaded from the Internet and used to interrogate Cassano, thereby making himself witness, advocate, and fact-finder (*supra*, pp. 58-59; A3707-11; A3731-36). *See Gokey*, 14 A.3d at 249 ("outside research is especially damaging when the judge sits as finder of fact"); *cf. United States v. Bari*, 599 F.3d 176, 179-81 (2d Cir. 2010) (not reversible error for a judge to conduct Internet research in a proceeding conducted under relaxed evidentiary rules).[30]

Moreover, in raising the Prius accident he had witnessed (A3701-03), the Judge injected his own extrajudicial experiences into the proceeding, which is "against basic principles," especially in a bench trial. *Chart House, Inc. v. Bornstein*, 636 F.2d 9, 11 n.4 (1st Cir. 1980); *accord, Fox v. West Palm Beach*, 383

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[30] Indeed, the Court had come prepared for Cassano's testimony with a second exhibit that he had planned to admit in evidence (A3732).

F.2d 189, 194-95 (5th Cir. 1967); *see In re Murchison*, 349 U.S. 133, 138 (1955). He also made the unsupported factual assumptions that the Prius driver was traveling from home to work, that he and others like him were allowed to regularly use FDNY vehicles to commute to work, and that such privileges might explain why the EEO unit was forced to use pool vehicles (A3702-03). This analysis demonstrated a predisposition to view his experiences in the light most damaging to the City.

To be sure, upon the City's objection, the Judge later struck the portion of the record that reflected his personal observation of the Prius, but not the ensuing line of questioning about vehicle allocation (A3732-36). In fact, he reacted sharply to the suggestion that his personal observations had colored his conduct of the hearing, insisting that he had only wanted the Commissioner to check on the driver's safety (*id.*). But the record speaks for itself about the purpose of his questioning. It also strains credulity that the Judge expected the highest-ranking official in the FDNY to personally ascertain the welfare of an employee involved in a minor car accident a few hours earlier. Just as a judge's "protestations of fairness and impartiality" in "matters which should be so evident as not to require mention" are insufficient in a jury trial to overcome manifest bias, *Crowe v. Di Manno*, 225 F.2d 652, 658 (1st Cir. 1955), the same should be the case where the Court is the trier of fact.

The confrontational nature of questions put solely to City witnesses (e.g., A2733-34; A2967; A2971; A3250; A3260; A3278-79; A3295; A3699; A3701-02; A3706-11) also shows that the Judge was an advocate for Intervenors. *Id.* at 656; *see Logue*, 103 F.3d at 1045. In remarkable contrast, the Judge was so fiercely protective of one of Intervenors' witnesses that he accused the City's counsel of "harass[ing]" and "intimidat[ing]" the witness by simply lodging objections during his testimony (A4095).

(c)

Bias Throughout the Proceeding

Upon a review of the whole record, *see United States v. Rosa*, 11 F.3d 315, 343 (2d Cir. 1993), *cert. denied*, 511 U.S. 1042 (1994), the foregoing examples of partiality are far from isolated. Perhaps most noteworthy is the District Court's categorical rejection of all of the City's evidence of intent at summary judgment (A1407). *Cf. United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) ("While judicial rulings alone almost never constitute valid basis for a bias or partiality motion, the district judge's failure to accord any weight to [the defendant]'s interests … adds to the appearance of bias in this case") (citation and internal quotation marks omitted).

Another example is the Court's original choice of Mr. Morgenthau as Special Master to oversee test development. While an undoubtedly distinguished

public servant, Mr. Morgenthau had a long, acrimonious, and well-known history of conflict with many City officials directly involved in this case, as well as the City itself (A1705-42). Even after the parties agreed on a nomination and made several back-up suggestions, the Judge disregarded them all and appointed an individual who would obviously cause deep consternation to the defendants, and create widespread public speculation of partiality. Tellingly, although the press roundly regarded the appointment as startlingly damaging to the City (A1711-23), it is apparent from the vituperative tone and content of the Court's ensuing order that the Judge would have adhered to his choice had Mr. Morgenthau not voluntarily relinquished the role (A1746-48). The whole episode speaks volumes about the Court's lack of detachment.

The Court again abandoned a neutral role and injected extrajudicial beliefs into a pre-trial conference on non-economic damages (A2436-37). Intervenors claim damages for loss of certain desirable attributes of firefighter employment, such as flexible work schedules. Some who unsuccessfully sought firefighter positions served in the NYPD as police officers instead. The Court reproved the City's counsel for asserting the intent to prove that police officers also have the benefit of flexible schedules, stating: "I was born in this area. I've lived here for 60 years. I know police officers. I know that one of the most difficult things about being a police officer is the way that the schedule changes …" (*id.*).

He continued: "[Y]ou want me to call witnesses about how difficult it is to live your life when you're a police officer in New York City?" (A2437).

Also troubling are the many indications that the Judge was influenced by press accounts of extrajudicial statements attributed to City officials, especially those he perceived as being critical of him. *See, e.g.*, A2645-46 ("[T]he Court has been criticized in the media by the mayor and the Office of the Corporation Counsel all along in this litigation.… [T]he Mayor goes on the radio attacking the Court. And the Corporation Counsel's representative attacks the Court instead of just saying we simply disagree, it's a whole thing"); *see also* A2424-25; A4432; A4440. The Court's questioning of Cassano about what steps he would take if "senior uniformed officials" were "writing columns in the newspaper" that "criticiz[ed] the process or the litigation here" is another thinly veiled example (A3711).

To be sure, a judge, unlike a juror, is presumptively able to overcome the effect of exposure to extrinsic information. *Cf. Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994). Nevertheless, the Court's preoccupation with press coverage reinforces the many other indications that the City was deprived of a fair and neutral fact-finder.

POINT IV

THE CASE SHOULD BE REASSIGNED TO A DIFFERENT JUDGE.

Even if the Judge's conduct did not rise to impermissible bias, this Court should exercise its administrative power to remand the case for trial before a different judge. Reassignment does not require this Court to "affix blame" or find "actual bias or prejudice," but is instead meant to protect against "the appearance of partiality" and to "preserve in the public mind the image of absolute impartiality and fairness of the judiciary." *Alexander v. Primerica Holdings*, 10 F.3d 155, 164 (3d Cir. 1993); *United States v. Torkington*, 874 F.2d 1441, 1446-47 (11th Cir. 1989); *see United States v. Londono*, 100 F.3d 236, 242 (2d Cir. 1996); *Microsoft*, 56 F.3d at 1463.

Three factors are relevant in determining whether reassignment is appropriate: (1) whether the original judge would reasonably have substantial difficulty in putting out of his mind previously expressed but erroneous findings, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication far outweighing the preservation of the appearance of fairness. *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 142 (2d Cir. 2007); *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam). Here, each factor strongly favors reassignment.

It is an understatement to say that this Judge has expressed firm views on the City's ostensible intent to discriminate, as well as the supposed need for close judicial oversight of systemic relief. To any reasonable observer, the vehemence of those beliefs would raise substantial doubt that he could fairly reevaluate the evidence on either issue. Thus, "the appearance of justice makes it appropriate that further proceedings be conducted by another judge." *Hispanics for Fair & Equitable Reapportionment v. Griffin,* 958 F.2d 24, 26 (2d Cir. 1992); *accord, United States v. Woltmann*, 610 F.3d 37, 43 (2d Cir. 2010); *Szafran v. Sandata Techs., Inc*., 205 Fed. Appx. 864, 869 (2d Cir. 2006); *United States v. Mendel*, 746 F.2d 155, 164 (2d Cir. 1984), *cert. denied,* 469 U.S. 1213 (1985). Especially because the Judge would sit as fact-finder upon remand, "reassignment is the preferable course, since it avoids any rub-off of earlier error." *Robin*, 553 F.2d at 10.

Further, premature pronouncements of a party's ill will are more likely to undermine public perception of justice when they are widely reported in the media. *See Haines v. Liggett Group, Inc.,* 975 F.2d 81, 97-98 (3d Cir. 1992). As the citations in the margin demonstrate, press coverage has already drawn public attention to the Court's attribution of malignancy in the City's motives, its

unrestrained zeal in overhauling the FDNY, and questions about the Judge's detachment.[31]

Nor will reassignment cause an unusual burden on judicial economy. In the Eastern District, Magistrate Judges routinely preside over pre-trial proceedings until a dispositive motion is made or the action is ready for trial. Reassignment would simply put the new judge in the commonplace position of learning the facts and applicable law for the first time at the final pretrial conference. Any cost to judicial economy after remand is therefore far outweighed by the likelihood that, absent reassignment, objective observers will doubt the sitting Judge's capacity to reverse course and still attain impartiality.

[31] *See, e.g.,* Alan Feuer, *A Fire Department Under Pressure to Diversify*, N.Y. Times, Aug. 26, 2011, http://www.nytimes.com/2011/08/28/nyregion/a-fire-department-under-pressure-to-diversify.html?pagewanted=3&sq=fdny%20discrimination&st=cse&scp=5 (juxtaposing the Judge's discussion of the Prius accident with his promise "not to micromanage" the FDNY); Editorial, *Fired Up and Unfair*, N.Y. Daily News, Oct. 8, 2011, http://www.nydailynews.com/opinion/judge-garaufis-line-accusing-mayor-bloomberg-intentionally-excluding-blacks-article-1.961224 ("Where dispassionate reason was called for, [the Judge] allowed blind anger to take hold…); Editorial, *King of the Fire Department*, N.Y. Post, Oct. 6, 2011, http://www.nypost.com/p/news/opinion/editorials/king_of_the_fire_department_6yLA1fLgbNGEsRbxSwNHgL (charging that the Judge's "animus" toward the FDNY "has been obvious from the moment he began hearing this case four years ago"); Steven Thrasher, *The FDNY, a "Bastion of White Male Privilege," Placed Under Permanent Injunction by Judge*, Village Voice, Oct. 5, 2011, http://blogs.villagevoice.com/runninscared/2011/10/fdny_injunction.php (celebrating the fact that, under the Injunction, "if the FDNY wants to do anything other than wipe its nose, it will have to ask the federal government for permission").

CONCLUSION

The summary judgment ruling on intentional discrimination should be reversed, the Injunction vacated as a result, and the case remanded to a different judge for trial of the issue of intentional discrimination. Even if the summary judgment ruling is affirmed, the Injunction should be vacated and the case remanded to a different judge for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order of December 23, 2011 because it contains 27,348 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: New York, New York
January 17, 2012

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