11-5113 (L)

No. 12-491 (XAP)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Appellees / Cross-Appellants

UNITED STATES OF AMERICA,

Appellee

v.

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

Appellants / Cross-Appellees

_____

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

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

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THOMAS E. PEREZ
Assistant Attorney General

DENNIS J. DIMSEY
LISA J. STARK
HOLLY A. THOMAS
Attorneys
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4491

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REGULATION:

MISCELLANEOUS:

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

In appeal No. 11-5113, defendant City of New York (City) challenges an order holding that it intentionally discriminated against African American applicants in hiring entry-level firefighters in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 1981 and 1983; and New

York State and New York City human rights laws. In addition, the City challenges the permanent injunction entered following an evidentiary hearing designed to determine appropriate relief for those violations. The district court had subject matter jurisdiction under 28 U.S.C. 1331, 1343, 1367, and 1443. The district court issued its permanent injunction on December 8, 2011. The following day, the City filed a timely notice of appeal. J.A. 6430-6431.[1]

In appeal No. 12-491, plaintiffs-intervenors challenge a partial final judgment entered by the district court on February 1, 2012, pursuant to Federal Rule of Civil Procedure 54(b), dismissing defendants Mayor Michael Bloomberg and former New York Fire Commissioner Nicholas Scoppetta on the basis of qualified immunity as to plaintiffs-intervenors' disparate treatment claims. R. 803. Plaintiffs-intervenors filed a timely notice of appeal the next day. R. 804.

This Court consolidated the City's and plaintiffs-intervenors' appeals. The Court has jurisdiction over the City's appeal pursuant to 28 U.S.C. 1292(a)(1), and the plaintiffs-intervenors' cross-appeal pursuant to 28 U.S.C. 1291.

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[1] "R. __" refers to the number of a pleading listed on the district court docket sheet. "J.A. __" refers to the page number in the Joint Appendix that the City filed with its opening brief. "S.A. __" refers to the page number in the Special Appendix that the City filed with its opening brief. "Br. __" refers to the page number of the City's opening brief filed with this Court.

STATEMENT OF THE ISSUES

The brief for the United States as appellee will address the following three issues:

1. Whether the City's appeal implicates its liability for disparate impact discrimination in violation of Title VII.

2. Whether, in a Title VII case challenging disparate impact in testing and involving a long-standing history of discrimination, a district court may award broad affirmative relief that requires the defendant to do more than simply develop a new examination.

3. Whether this Court should reassign this case to a different district judge on remand, where the City's allegations are inadequate to demonstrate that Judge Garaufis was biased or appeared partial, and where reassignment would unfairly delay relief to victims of the City's disparate impact discrimination, waste judicial resources, and potentially postpone the City's use of a lawful, nondiscriminatory selection procedure to hire entry-level firefighters.

STATEMENT OF THE CASE

A. Overview

This case is a complex employment discrimination action that has been pending in the district court for nearly five years. The United States initiated the lawsuit by filing a complaint that alleged that the City's use of two written, entry-

level hiring examinations had a disparate impact on African American and Hispanic applicants in violation of Title VII, and sought injunctive and monetary relief. J.A. 94-107. Plaintiffs-intervenors, Vulcan Society, *et al.*, joined in that claim by way of a separate complaint. In July 2009, the district court granted summary judgment to the United States and plaintiffs-intervenors, and held that the City violated Title VII because its use of the challenged examinations had an impermissible discriminatory effect on the basis of race and national origin and was not job-related or consistent with business necessity. J.A. 428-520. This appeal does not implicate that ruling, or the specific relief that the United States requested for the City's disparate impact discrimination.

In a separate complaint, plaintiffs-intervenors alleged, *inter alia*, that the City's use of the same two challenged examinations intentionally discriminated against African American applicants in violation of Title VII, the Equal Protection Clause, and State and City human rights laws. J.A. 116-136. In January 2010, the district court granted summary judgment to plaintiffs-intervenors on their disparate treatment claims. J.A. 1371-1440. In December 2011, following an evidentiary hearing held to determine appropriate relief for the City's violations, the district court entered a detailed permanent injunction. S.A. 151-180.

In its appeal, the City challenges the award of summary judgment to plaintiffs-intervenors on their disparate treatment claims; contends that the district

court abused its discretion in entering the permanent injunction; and requests that this Court reassign this case to a different district court judge on remand. The United States does not address the City's first issue, because we did not join plaintiffs-intervenors' disparate treatment claims. For similar reasons, we take no position with respect to plaintiffs-intervenors' cross-appeal, which challenges the dismissal from their disparate treatment claims of two defendants on the ground of qualified immunity.

We hasten to add, however, that it would be incorrect for this Court to infer that our silence on these issues reflects disagreement with plaintiffs-intervenors' positions, or an endorsement of the City's. It does not. That the United States has not addressed certain issues in its brief should not be construed to reflect disagreement with plaintiffs-intervenors' arguments in any respect.

Nothing in the City's appeal challenges the district court's ruling on disparate impact. But, in challenging the district court's permanent injunction, the City asserts that a district court's remedial authority in Title VII testing cases is limited to ordering the defendant to develop a new examination. See, *e.g.*, Br. 67, 92. This assertion is directly at odds with controlling precedent establishing that courts have broad remedial authority to enter extensive affirmative relief – which extends well beyond ordering a defendant to devise a valid test – in disparate impact cases such as this one where there is a long, persistent history of

discrimination. Such relief may include increased recruitment of minority applicants, the appointment of a court monitor, measures to avoid minority attrition during the hiring process, and any other appropriate measures to assure that minorities are adequately represented in the Fire Department of the City of New York (FDNY or Department).

Finally, we strongly oppose the City's request that this Court reassign this case to a different district court judge on remand. To do so would unfairly interrupt and adversely affect the complex remedial proceedings ongoing in the district court related to the City's disparate impact discrimination. In addition, there is no justification for reassignment. Consequently, it would be error for this Court to order this case to be transferred to a different district judge on remand.

B. Factual Background

The FDNY is the largest fire department in the United States, and currently employs in excess of 11,000 uniformed firefighters. S.A. 2-82. Sadly, the City has a long, well-documented history of discriminating on the basis of race and national origin in hiring entry-level firefighters. In 1973, this Court held that the City's written and physical examinations for entry-level firefighters discriminated against African Americans and Hispanics in violation of the Equal Protection Clause of the Fourteenth Amendment. See *Vulcan Soc'y of New York City Fire Dep't, Inc.* v. *Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973); see also *Vulcan Soc'y of New*

York City Fire Dep't, Inc. v. *Civil Serv. Comm'n*, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973). At that time, minorities comprised 32% of the City's population, but only 5% of the Department's firefighters. *Ibid*.

For nearly 40 years, the gross underrepresentation of African Americans and Hispanics in the Department has continued unabated. In 2007, when the current lawsuit was initiated, only 3.4% and 6.7% (or 303 and 605) of the Department's firefighters were African American and Hispanic, respectively, while in 2002, 25% of the City's residents were African American and 27% Hispanic. J.A. 429. Indeed, the percentage of African American firefighters in the Department has actually *decreased* since the 1960s. See J.A. 1386, 1421 (in 1963, African Americans comprised 4.15% of the City's firefighters; in 1990, African Americans made up 4% of firefighters; in 2001, the FDNY had not even half as many African American firefighters as it did in 1965.) See also J.A. 792, 836 (indicating that as of December 31, 2000, African Americans comprised 3.8% of the FDNY).

As illustrated in the following charts, the underrepresentation of minority firefighters in the Department stands in marked contrast to other fire departments in many major cities throughout the nation, including Los Angeles, San Antonio, San Diego, Dallas, Houston, Chicago, and Philadelphia.

Ratio Of African American Representation In The FDNY Compared To Other Major Municipal Fire Departments[2]

City	Black Population (% of total population)	Black Firefighters (% of force)	Ratio of Black Representation in Municipal Fire Department to Black Representation in Municipal Population
Los Angeles	11.2	14.0	1.25
San Antonio	6.8	7.0	1.01
San Diego	7.9	7.7	0.97
Dallas	25.9	18.1	0.70
Houston	25.3	17.1	0.68
Philadelphia	43.2	26.3	0.61
Chicago	36.8	20.4	0.55
New York	26.6	2.9	0.11

As these statistics show, the FDNY has the lowest ratio (0.11) for African American firefighters among the eight major cities. The ratio of African American firefighters in New York City is only one-fifth of the city with the next lowest ranking (Chicago). In addition, even though African Americans constitute approximately the same percentage of the general population in Dallas and New York City (25.9% vs. 26.6%), the percentage of firefighters in Dallas who are African American is more than six times the percentage of African American firefighters within the Department.

The City hardly fares better as to its representation of Hispanic firefighters.

[2] See J.A. 1386 n.10-1387; population statistics reflect 2000 census numbers, and percentages of black firefighters are as of 1999.

Ratio Of Hispanic Representation In The FDNY Compared To Other Major Municipal Fire Departments[3]

City	Hispanic Population (% of total population)	Hispanic Firefighters (% of force)	Ratio of Hispanic Representation in Municipal Fire Department to Hispanic Representation in Municipal Population
San Antonio	58.7	43.0	0.73
Los Angeles	46.5	30.0	0.65
San Diego	25.4	15.7	0.62
Philadelphia	8.5	3.2	0.38
Houston	37.4	13.9	0.37
Chicago	26.0	8.6	0.33
Dallas	35.6	10.0	0.28
New York	27.0	2.8	0.10

Again, the FDNY has the lowest ratio (0.10) among the eight major cities. In addition, even though Hispanics constitute approximately the same percentage of the general population in Chicago and New York (26% vs. 27%), the percentage of Hispanic firefighters in Chicago is more than three times the percentage of Hispanic firefighters within the Department.

The Department's failure to diversify its workforce also stands in stark contrast to the New York Police Department (NYPD), as well as the New York Corrections and Sanitation Departments.

[3] Percentages of Hispanic firefighters are taken from R. 264-1 at 8 (Exh. D) and reflect statistics as of 1999. Population statistics are taken from J.A. 429 n.5 and the United States Census, and reflect numbers as of the year 2000.

Percentage Of African Americans And Hispanics In The FDNY Compared To Other New York City Uniformed Services Departments[4]

Department	Blacks (%)	Latinos (%)
Fire Department	3.8	3.2
Police Department	16.6	18.0
Sanitation Department	24.3	14.6
Correction Department	61.4	18.0

For example, the NYPD successfully hired significant numbers of minority police officers starting in the 1970s. J.A. 432 n.8. Even though the NYPD force was only 8.9% African American and 3.8% Hispanic in 1978, by June 2009, 18% of its officers were African American and 28.7% Hispanic. J.A. 432 n.8. Indeed, in July 2009, the NYPD announced that it had sworn in its most diverse Police Academy ever – a class of recruits that was 14.7% African American and 33.3% Hispanic. J.A. 432 n.8.

From February 1999 through December 2007, the City administered the two challenged examinations – numbered 7029 and 2043 – to slightly more than 34,000 white, African American, and Hispanic firefighter applicants, and hired more than 5300 entry-level firefighters based upon their results. J.A. 218-219, 224-225, 428, 430, 439. Although approximately 4200 Hispanic and 3100 African American

[4] See J.A. 792, 1388; chart reflects percentages as of December 31, 2000.

applicants took those examinations, the City appointed just 184 Hispanic and 461 African American firefighters using the challenged examinations. J.A. 430.

C. Procedural History

1. Disparate Impact Liability And Relief

a. In May 2007, the United States filed the present lawsuit against the City of New York. The United States alleged that the City's use of examinations 7029 and 2043 as pass/fail and rank-ordering devices to screen and hire entry-level firefighters had an unlawful disparate impact on African American and Hispanic applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* J.A. 94-107. The United States sought injunctive relief barring the City's use of the challenged examinations, and requested that the City be required to take "appropriate action to correct the present effects of its discriminatory policies and practices" and "make whole" those harmed by them. J.A. 105. See J.A. 104.

In September 2007, the Vulcan Society, an organization of African American firefighters founded in the 1940s to fight "blatant and open discrimination against firefighters of color," and three African American applicants who took the challenged examinations and were not hired, intervened as plaintiffs. J.A. 116-136. In their complaint, plaintiffs-intervenors joined the United States in alleging, *inter alia*, that the two challenged examinations had an unlawful disparate

impact on African American applicants in violation of Title VII. J.A. 116-136. Plaintiffs-intervenors also alleged that the use of the two examinations constituted intentional discrimination against African American applicants in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII, as well as State and City human rights laws. See Disparate Treatment Liability And Relief, pp. 18-23, *infra*. In addition, plaintiffs-intervenors added four defendants: the FDNY, the New York City Department of Citywide Administrative Services, Mayor Michael Bloomberg, and former New York City Fire Commissioner Nicholas Scoppetta. J.A. 116-136.

b. In July 2009, the district court awarded summary judgment to the United States and plaintiffs-intervenors on their disparate impact claims. J.A. 428-520. The court held that the two challenged examinations violated Title VII because they had an impermissible discriminatory effect on both African American and Hispanic applicants and were not job-related or consistent with business necessity. The court concluded that there is "no factual dispute on which to conduct a trial" as to whether the City's use of examinations 7029 and 2043 had a disparate impact on African American and Hispanic firefighter applicants, since the City "completely conceded" and does not dispute either the accuracy or practical significance of plaintiffs' statistical analysis. J.A. 454, 462-463 n.19. The court explained that the statistical "disparities are overwhelming," and show that "black and Hispanic

candidates disproportionately failed Written Exams 7029 and 2043, and were placed disproportionately lower on the eligibility lists created from those examinations" than white candidates. J.A. 453-454. "The significance of [p]laintiffs' statistics," the court added, "is bolstered by evidence that the disparities [had a] significant * * * practical [effect]" on minority hiring, and demonstrate that the challenged examinations "barred over a thousand additional black and Hispanic applicants from consideration for appointment as FDNY firefighters, and unfairly delayed the appointment of hundreds of black and Hispanic firefighters." J.A. 454, 519.

The court also ruled that "the evidence presented by the City [was] insufficient as a matter of law" "to raise a triable issue" "to justify its reliance on the challenged examinations," because the City failed to show that the tests were properly validated or that their use was consistent with business necessity. J.A. 434. The district court concluded that the "undisputed evidence paints an extremely troubling picture of * * * test construction and * * * content," with "severe deficiencies at every step of the [process]," which "culminated in the City's * * * arbitrarily rank[ing] firefighter candidates" and failing to select those best able to perform the job. J.A. 480-481.

Applying the multi-factor test set forth in *Guardians Ass'n of the New York City Police Department, Inc.* v. *Civil Service Commission*, 630 F.2d 79 (2d Cir.

1980), cert. denied, 452 U.S. 940 (1981), the court found that the City failed to satisfy its burden of showing: (1) a valid job analysis; (2) competent test development, including reliance on experts to develop and sample test questions; (3) appropriate test content that actually evaluated cognitive and non-cognitive abilities that are important for the job of firefighter and were intended to be tested; and (4) a relationship between the tasks and skills required to be a firefighter and the abilities measured by the examinations. J.A. 480-504. The district court also concluded that the City's ranking of firefighter candidates was "arbitrary," because it "failed to distinguish between qualified and unqualified candidates" and "the chosen cutoff scores * * * did not bear any relationship to the necessary job qualifications" or "future job performance." J.A. 519, 1380, 1384. Consequently, the court ruled that because plaintiffs "demonstrated the absence of any genuine issue of material fact with respect to their prima facie case of discrimination and the City's business-necessity defense, and because the undisputed evidence was insufficient to demonstrate that the City's pass/fail and rank-ordering practices were job related, * * * the City [is] liable as a matter of law for disparate-impact discrimination against black and Hispanic firefighter applicants." J.A. 1381.

c. In September 2009, the United States submitted a Proposed Relief Order that requested injunctive and monetary relief to remedy the City's disparate impact

discrimination. J.A. 533-563.[5] The United States sought injunctive relief in five areas, and requested an order requiring that: (1) the City refrain from using (a) the challenged examinations, or (b) any written examination without the prior approval of the court or that violates Title VII; (2) the City not retaliate against any person who has complained about discrimination on the basis of race or national origin in hiring entry-level firefighters, or who has sought relief in this case; (3) the City develop, in conjunction with the other parties and in accordance with specified guidelines and procedures, a new lawful selection procedure for hiring entry-level firefighters; (4) the City maintain and make available designated records for compliance monitoring; and (5) the district court retain jurisdiction over this case until the last of three benchmarks have been achieved – a period that would last at least until 12 months after termination of the second open-competitive firefighter eligibility list.[6] J.A. 533-563.

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[5] We do not summarize the United States' or plaintiffs-intervenors' request for monetary relief or priority hiring, because they are not the subject of this appeal and many issues pertaining to such matters are still pending in district court.

[6] In February 2011, the United States filed a Revised Proposed Relief Order that sought essentially the same injunctive relief as originally requested, but reflected various agreements that had been reached by the parties. R. 619-5 (Exh. 4).

The parties subsequently filed a Joint Statement on Relief Phase Issues and agreed, *inter alia*, that the district court should retain jurisdiction over this case as the United States had proposed. J.A. 1500. The parties noted that if the City continues to use open competitive eligibility lists for a period of four years, as it has in the past, "the Court likely would retain jurisdiction for ten or more years." J.A. 1501.

d. In June 2010, after the City repeatedly failed to comply with discovery obligations and cooperate in the development of a new hiring examination, the court appointed Special Master Mary Jo White to oversee the City's compliance. R. 448. In the meantime, the City, in a series of letters beginning in May 2010, notified the district court and the parties that it intended, depending on the budget, to hire up to 600 new entry-level firefighters in calendar year 2010. J.A. 1627-1630. See R. 456 (letter dated June 29, 2010, from the City stating its intent to hire firefighters in late August or early September due to "the City's immediate hiring needs"). In a letter dated July 27, 2010, the City stated that on August 30, 2010, it would appoint approximately 300 firefighters in rank order using written examination 6019, administered in 2007 (R. 497) – even though the United States had previously warned in pleadings relating to interim hiring that doing so would have an adverse impact on African American and Hispanic applicants. R. 316 at 8-10.

Following a hearing, the district court ruled in August 2010 that examination 6019 violated Title VII because it had an unlawful disparate impact on African American and Hispanic applicants and was not job-related and consistent with business necessity. J.A. 1753-1789. To accommodate the City's desire to hire firefighters, the district court required the parties to meet with the Special Master to discuss ways that the City could lawfully use examination 6019 without violating Title VII. R. 521. In early September 2010, after the Special Master filed a report that outlined five lawful options for using examination 6019 to hire applicants, the district court invited the City to choose the procedure it favored. R. 521, 527. The City rejected all five alternatives and refused to express a preference for any of them. R. 532. Shortly thereafter, in a letter dated October 8, 2010, the City for the first time asserted that "delaying hiring is not an unacceptable alternative," and that it would not hire any entry-level firefighters until a new test was developed. R. 561 at 5. A week later, after briefing by the parties, the district court issued a permanent injunction barring the City from using examination 6019 to hire firefighters, unless it did so in accordance with one of the five prescribed methods. R. 569.

e. The parties, along with their experts, have developed a new entry-level hiring examination, which the City will administer through April 2012 to more than 60,000 registered applicants. S.A. 26. The parties expect the City's expert to

submit a final technical report regarding that examination to the Special Master by mid-September 2012. If the examination is approved by the district court, the City, for the first time in nearly 30 years, will use a nondiscriminatory selection procedure to hire entry-level firefighters that all parties agree actually measures abilities that are important to being a firefighter.

f. While this appeal has been pending, the district court has resolved various issues relating to monetary relief for the victims of the City's disparate impact discrimination. On March 8, 2012, the district court issued an order awarding $128,696,803 for backpay through 2010, to be distributed to the victims of the City's disparate impact discrimination – subject to proof by the City at individual hearings of mitigation based on a claimant's interim earnings. R. 825 at 46, 64. The court also appointed four special masters to conduct these hearings and determine the appropriate amount to be awarded to approximately 2200 of the 7100 minority applicants who took the challenged examinations and are now eligible for monetary relief. R. 825 at 2, 58.

2. Disparate Treatment Liability And Relief

a. In September 2007, plaintiffs-intervenors, Vulcan Society, *et al.*, filed a separate complaint in this action. They alleged, *inter alia*, that the City's use of the same two examinations that were challenged for their disparate impact also constituted intentional discrimination against African American applicants in

violation of Title VII, 42 U.S.C. 1981 and 1983, and New York State and City human rights laws. J.A. 116-136. Plaintiffs-intervenors contended that defendants "have been long-aware of the discriminatory impact on blacks of their examination process," and that their "continued reliance on and perpetuation of these racially discriminatory hiring processes constitute intentional race discrimination." J.A. 130.

In January 2010, the district court granted plaintiffs-intervenors summary judgment on their disparate treatment claims, and held that the City's administration and use of the challenged examinations constituted a pattern and practice of intentional discrimination against African American applicants. J.A. 1371-1440. The district court relied on the expert analyses and statistical evidence offered in support of the disparate impact claims – along with historical and anecdotal evidence – to conclude that "intentional discrimination [is] the [City's] 'standard operating procedure.'" J.A. 1395 (quoting *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977)). The court explained that "the City's use of discriminatory testing procedures to select uniformed service-members is a decades-old problem," of which "relevant decisionmakers have been aware." J.A. 1401-1402. These officials "have nonetheless refused to take steps to remedy [that problem,] despite a municipal law requiring them to assess the discriminatory impact of the FDNY's hiring practices and to explore viable

alternatives." J.A. 1401-1402. According to the district court, "[t]he history of the City's efforts to remedy its discriminatory firefighter hiring policies can be summarized as follows: 34 years of intransigence and deliberate indifference, bookended by identical judicial declarations that the City's hiring policies are illegal." J.A. 1421. The court also held that the City failed to adequately respond to plaintiffs-intervenors' prima facie case of intentional discrimination, because the City did not meet or undermine the validity of plaintiffs-intervenors' statistical evidence, and introduced no "anecdotal [or] other non-statistical evidence tending to rebut the inference of discrimination." J.A. 1403.

b. Plaintiffs-intervenors moved for equitable and monetary relief based on the City's liability for intentional discrimination against African American applicants. J.A. 2332-2353. Plaintiffs-intervenors sought injunctive relief in seven substantive areas and specifically requested, *inter alia*, that the district court order: (1) the appointment of a special monitor to oversee compliance; (2) frequent administration of firefighter examinations; (3) enhanced recruitment and advertising targeting minority applicants, managed by a recruitment consultant and increased staff; (4) reinstatement and expansion of the Fire Safety Cadet Program; (5) modification of the Department's post-exam screening process, including limitations on the use of arrest records to screen applicants and enhanced record keeping and monitoring of character and background evaluations; (6) monitoring

to prevent retaliation and workplace discrimination against African American firefighters; and (7) retention of jurisdiction, as previously requested by the United States. J.A. 2332-2353.

c. In August 2011, the district court held an evidentiary hearing to determine appropriate injunctive relief for the City's intentional discrimination. At the conclusion of the hearing and in response to inquiry from the district court, the United States pointed out that the case law provided the court with the discretion to order the injunctive relief requested by plaintiffs-intervenors.

On September 20, 2011, based on evidence introduced at the hearing, the district court issued detailed findings of fact to support its subsequent grant of injunctive relief. S.A. 2-82. The district court found that the Department's "post-examination screening" process – which often takes years to complete and results in an attrition rate of more than 50% of the applicants who are eligible to be hired based on their test scores – "create[s] a significant risk that black firefighter candidates will be disadvantaged" and ultimately not hired. S.A. 41. See S.A. 5, 8-9. The court stated that the Department's "use of voluntary candidate attrition, unless sufficiently mitigated by policies and practices designed to encourage firefighter candidates to participate and persevere through the hiring process, will serve to perpetuate the underrepresentation of blacks in the ranks of the FDNY." S.A. 16. The court also concluded that the absence of written guidelines and

records detailing how and why candidates who pass the hiring examinations are ultimately recommended for appointment "materially increases the risk that any recommendation will be arbitrary or based on impermissible factors, including race." S.A. 50. In addition, the court found that the absence of standards, training, or guidance to prevent the improper use of arrest records negatively affects both African American and Hispanic applicants, since they "are significantly more likely to have been arrested in New York City than white firefighter candidates." S.A. 55. See S.A. 56-57. Consequently, the district court reasoned that the Department's failures with regard to the improper use of arrest information "stand[s] as a barrier to the elimination of the principal vestige of the City's discrimination against black firefighter candidates – the underrepresentation of blacks within the FDNY." S.A. 56.

On November 9, 2011, the district court appointed Mark Cohen as court monitor. S.A. 147-149. On December 8, 2011, two months after circulating a draft remedial order and providing the parties an opportunity to comment, the district court issued the permanent injunction that is the subject of this appeal. S.A. 151-180.

The "General Terms" of that injunction include aspects of relief specifically sought by the United States, and bar the City from: (1) using the two challenged examinations; (2) retaliating against any person who has complained about

discrimination on the basis of race or national origin with regard to the hiring of entry-level firefighters, or who has sought relief in this case; and (3) discriminating on the basis of race or national origin against black or Hispanic applicants in hiring entry-level firefighters. The injunction also includes "Specific Remedial Measures" covering five substantive areas: Firefighter Test Development and Administration, Firefighter Candidate Recruitment, Attrition Mitigation Plan and Reassessment of Entry-Level Firefighter Selection, Post-Examination Firefighter Candidate Screening, and EEO Compliance Reform. In addition, the injunction has several provisions relating to document retention and preservation, discovery by the parties, sanctions, the court monitor, and retention of jurisdiction. S.A. 171-179.

3. Plaintiffs-Intervenors' Cross-Appeal

On February 1, 2012, while the City's appeal was pending, the district court entered a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b), dismissing defendants Mayor Bloomberg and former Fire Commissioner Scoppetta on the ground that they are entitled to qualified immunity as to plaintiffs-intervenors' disparate treatment claims. R. 803. Plaintiffs-intervenors appealed that order (R. 804), and on February 22, 2012, this Court granted their motion to consolidate that appeal (No. 12-491) with the City's challenge to the district

court's order holding the City liable for intentional discrimination and issuing the permanent injunction (No. 11-5113).

SUMMARY OF ARGUMENT

1. The City of New York requests this Court to reverse an order holding that it intentionally discriminated against African American applicants when it used two written examinations to hire entry-level firefighters, and to vacate a permanent injunction entered following an evidentiary hearing to determine appropriate relief for that discrimination. Plaintiffs-intervenors, in their cross-appeal, challenge the district court's grant of qualified immunity to two City officials (who were not named as defendants in the United States' complaint) with respect to plaintiffs-intervenors' disparate treatment claims. The merits of the parties' allegations relate solely to the disparate treatment aspect of the case, and accordingly do not implicate the district court's earlier finding of the City's Title VII disparate impact violation. See pp. 26-27, *infra.*

2. The City's attack on the remedial decree is based on an erroneous and overly restrictive view of a court's authority to order affirmative injunctive relief. The City's assertion (Br. 67, 92) that in Title VII cases involving unlawful tests, a district court's remedial authority is limited to ordering the defendant to design a new employment examination is erroneous as a matter of law. Governing precedent establishes that courts have broad authority to enter appropriate

affirmative relief to address not only the unlawful discriminatory test, but its adverse effects as well. This principle applies in disparate impact cases involving a long and pervasive history of discrimination, as well as in cases of intentional discrimination. Thus, in this case, it was within the district court's broad remedial authority to order affirmative injunctive relief, including increased recruitment of minority applicants; the appointment of a court monitor; measures to avoid minority attrition during the hiring process; and any other appropriate measures to assure that minorities are finally, adequately represented in the Department. In any event, this Court should not disturb the injunctive remedies sought below by the United States for the City's disparate impact discrimination because the City concedes that it is not challenging that relief in this appeal. See pp. 27-42, *infra.*

3. Moreover, we strenuously object for a variety of reasons to the City's contention that this Court should reassign this case to a different district court judge on remand. The City's claim, raised for the first time on appeal, that Judge Garaufis was "bias[ed] throughout the proceeding[s]" (Br. 119) is not properly preserved for review. In any event, the City's allegations are insufficient to demonstrate that Judge Garaufis was biased or appeared partial, and the record in fact demonstrates the opposite. To reassign this case on remand to a different judge – who is unfamiliar with its voluminous record and intricate procedural complexities – would unfairly delay the award of relief to the victims of the City's

disparate impact discrimination, waste judicial resources, and needlessly postpone the City's use of a lawful, nondiscriminatory selection procedure to hire firefighters. See pp. 42-54, *infra*.

ARGUMENT

I

THIS APPEAL DOES NOT IMPLICATE THE CITY'S LIABILITY FOR DISPARATE IMPACT DISCRIMINATION

The City's liability for disparate impact discrimination is not at issue in this appeal. In July 2009, the district court held that the City's use of two exams to hire entry-level firefighters had a disparate impact on African American and Hispanic applicants in violation of Title VII. J.A. 428-520. The City has not appealed that ruling, and repeatedly concedes that it does not seek its review. See, *e.g.*, Br. 3 n.2 ("The City does not seek review of the District Court's earlier ruling at summary judgment that * * * examination-related practices gave rise to disparate impact liability under Title VII."); Br. 5 ("[T]he City does not challenge the disparate impact ruling."); Br. 9 ("[T]he City does not challenge" "the District Court['s] rul[ing] that * * * [its] use[] of * * * exam[s] * * * disproportionately affected black and Hispanic applicants."); R. 825 at 62 ("the City's current appeal is not aimed at reversing the [district] court's disparate impact liability"). Accordingly, that holding is the law of the case. See, *e.g.*, *Bergerson* v. *New York State Office of*

Mental Health, 652 F.3d 277, 288 (2d Cir. 2011) ("While a district court has the authority to revise an interlocutory order * * * at any time before the entry of final judgment, * * * this Court has treated interlocutory decisions as law of the case.").[7]

II

IN A TITLE VII CASE INVOLVING A LONG-STANDING HISTORY OF DISCRIMINATION IN TESTING, A COURT MAY AWARD BROAD AFFIRMATIVE RELIEF THAT REQUIRES THE DEFENDANT TO DO MORE THAN SIMPLY DEVELOP A NEW EXAMINATON

The City's attack on the injunction is based on an erroneous and overly restrictive view of a court's authority to order appropriate injunctive relief in Title VII cases involving unlawful testing devices. The City contends (Br. 67) that any

[7] The City's brief nonetheless mischaracterizes the evidence and the district court's findings relating to its disparate impact liability. For example, contrary to the City's suggestion (Br. 10 n.3), the district court, consistent with this Court's precedent and the Uniform Guidelines on Employee Selection Procedures, properly considered both the "80% Rule" and standard deviation analysis to conclude that the City engaged in disparate impact discrimination. See J.A. 460-462. See also *EEOC* v. *Joint Apprenticeship Comm. of Joint Bd. of Elec. Indus.*, 186 F.3d 110, 118 (2d Cir. 1999), and 29 C.F.R. 1607.4D (authorizing a district court to consider the "80% Rule" or other statistical methods to prove disparate impact.). Similarly, the City's assertions (Br. 12, 19, 66) that the challenged examinations "resulted from a fairly elaborate test-construction process," "in accordance with 'standard job analytic and test development procedures,'" and were "designed with attention to the Guidelines," are contradicted by the undisputed evidence and express findings of the district court that the tests are not job-related and consistent with business necessity. See J.A. 462-518; see also pp. 12-14, *supra*.

portions of the injunction that "go beyond ordering * * * a new employment exam constitute an abuse of discretion." See also Br. 92 ("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 [the disparate impact and disparate treatment] liability determinations."). Contrary to the City's assertions, the district court here had broad equitable discretion to order affirmative relief that extended far beyond simply requiring development of a new employment examination.

1. "[T]he scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977); accord *Rios* v. *Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1175 (2d Cir. 1988) ("district court['s] broad power to fashion relief * * * is bounded by [the] purposes of Title VII"). "The primary purposes of Title VII are to prevent discrimination and achieve equal employment opportunity in the future and to make whole the victims of past discrimination." *Association Against Discrimination in Emp't, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 278 (2d Cir. 1981) (internal citation omitted), cert. denied, 455 U.S. 988 (1982).

Indeed, "the purpose of Congress in vesting broad equitable powers in Title VII courts [is] 'to make possible the "fashioning of the most complete relief

possible,"'" *Teamsters*, 431 U.S. at 364 (quoting *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975)), in order to "'eliminate the discriminatory effects' of a discriminatory selection process," *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 933 F.2d 1140, 1149 (2d Cir.) (quoting *Albermarle Paper*, 422 U.S. at 418), cert. denied, 502 U.S. 924 (1991). See also *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764 (1976). As this Court has repeatedly emphasized, "once a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices." *City of Bridgeport*, 647 F.2d at 278; *Rios*, 501 F.2d at 629. Accordingly, courts have "not merely the power but the duty to render a decree which so far as possible eliminates the discriminatory effects of the past as well as bar discrimination in the future." *Newark Branch, NAACP* v. *Town of Harrison*, 940 F.2d 792, 806-807 (3d Cir. 1991) (quoting *Teamsters*, 431 U.S. at 364-365); *City of Bridgeport*, 647 F.2d at 279.

2. Citing 42 U.S.C. 2000e-5(g), the City nonetheless asserts (Br. 85) that "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."[8] The City's contention misconstrues the law.

The cited statutory provision provides:

> If the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice * * * the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include * * * reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate.

42 U.S.C. 2000e-5(g)(1) (emphasis added). By its terms, that provision does not state that affirmative relief can be ordered only when there is intentional discrimination. Instead, what the provision requires is simply that a party intentionally use an unlawful employment practice, whatever the basis for unlawfulness. Indeed, this Court has ruled that Section 2000e-5(g)'s language regarding "intentional" conduct is not a reference to "discriminatory purpose," and that discriminatory intent is not required for a court to order affirmative relief when a party intentionally uses an unlawful employment practice. *City of Bridgeport*, 647 F.2d at 280 n.22. Consequently, this Court's precedent refutes the City's

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[8] In *Berkman* v. *City of New York*, 705 F.2d 584, 596 (2d Cir. 1983), this Court defined "affirmative relief" as relief that is "designed * * * to remedy the effects of discrimination that may not be cured by the granting of compliance or compensatory relief. It may include * * * the imposition of a requirement that the defendant actively recruit * * * members of the Title VII-protected group."

assertion that affirmative relief is permissible only when there is disparate treatment.

3. Consistent with its interpretation of 42 U.S.C. 2000e-5(g), this Court, as the City acknowledges (Br. 86), has long recognized that affirmative relief is available in a case of disparate impact discrimination, when there is "persistent" or "egregious" discrimination. *Local 28 of Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 475 (1986). See *Berkman*, 705 F.2d at 596. See also *Guardians Ass'n of the N.Y. City Police Dep't, Inc.* v. *Civil Serv. Comm'n*, 630 F.2d 79, 112 (2d Cir. 1980) ("In the absence of intentional discrimination, affirmative relief requires some demonstrated pattern of significant prior discrimination."). Other circuits are in accord. See, *e.g.*, *Eldredge* v. *Carpenters 46 N. Cal. Cntys. Joint Apprenticeship & Training Comm.*, 94 F.3d 1366, 1370 (9th Cir. 1996) (Affirmative relief "may be appropriate where an employer * * * has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."), cert. denied, 520 U.S. 1187 (1997); *NAACP* v. *City of Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982) ("In cases presenting abundant evidence of consistent past discrimination, injunctive relief is *mandatory* absent clear and convincing proof that there is no

reasonable probability of further noncompliance with the law.").[9] The nature of such relief is "left largely to the broad discretion of the district court," and dictated by the evidence in the case. *Kilgo* v. *Bowman Transp., Inc.*, 789 F.2d 859, 880 (11th Cir. 1986); see also *United States* v. *Criminal Sheriff, Parish of Orleans*, 19 F.3d 238, 239 (5th Cir. 1994) ("[a] court has broad discretion to fashion remedies as the equities of a particular case compel"); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918, 931-932 (9th Cir.), cert. denied, 459 U.S. 971 (1982); *NAACP* v. *Allen*, 493 F.2d 614, 617 (5th Cir. 1974). Indeed, a court has discretion to impose appropriate relief "even though it may not have been sought in the pleadings." *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980).

For example, "[t]he power of the court under Title VII to order * * * advertising and recruitment efforts aimed at minority groups cannot be seriously

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[9] We note that there are numerous ways to establish that an employer has engaged in "long-standing" or "egregious" discrimination. An employer's discrimination is unquestionably both "long-standing" and "egregious" when a court finds that the employer has unlawfully discriminated and the employer fails to take corrective action and allows that discrimination to persist for many years. A prior court finding of discrimination, however, is not required for an employer's discrimination to be both "long-standing" and "egregious." Indeed, the underrepresentation of minorities in an employer's workforce can reflect "persistent" or "egregious" discrimination that justifies affirmative relief when the disparity between the percentage of minorities who have been hired and minorities in the general population or qualified applicant pool is particularly severe or substantial. See, *e.g.*, *City of Bridgeport*, 647 F.2d at 279; *Newark Branch*, 940 F.2d at 806-807; *City of Evergreen*, 693 F.2d at 1370.

questioned." *Franks* v. *Bowman Transp. Co*., 495 F.2d 398, 418 n.19 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976). As this Court held in *Berkman*, 705 F.2d at 596, an order "that the defendant actively recruit * * * members of the Title VII-protected group" "may be required where * * * the defendant has intentionally or egregiously engaged in a practice of discrimination that is likely to have discouraged members of the protected group from becoming members of the applicant pool at any stage." That is so even in a disparate impact case when there is no allegation that an employer's recruitment efforts have been discriminatory. *City of Bridgeport*, 647 F.2d at 269 (ordering City to "actively * * * recruit minority persons to compete for future vacancies" to remedy City's use of entry-level firefighter examinations that had a disparate impact on African American and Hispanic applicants); *EEOC* v. *Local 638*, 532 F.2d 821, 825, 829 (2d Cir. 1976) (requiring "extensive recruitment and publicity campaigns in minority neighborhoods" to remedy union membership and apprenticeship requirements that "disqualif[ied] blacks and Spanish-speaking applicants to a far greater extent than they disqualif[ied] nonminority applicants"); *NAACP* v. *Town of East Haven*, 259 F.3d 113, 117 (2d Cir. 2001) (describing remedial decree that ordered town to "increase awareness of job opportunities through advertising directed to the black community and communications with black community organizations" to remedy underrepresentation of African Americans in workforce,

even though there was no intentional discrimination and plaintiff was unable to identify any practice, procedure, or examination that caused the disparity), cert. denied, 534 U.S. 1129 (2002).

Other circuits agree. For example, in *Newark Branch*, 940 F.2d at 807, the Third Circuit ruled that the district court was justified in ordering affirmative recruitment efforts, including paid radio station advertising and public service announcements "in light of the long history and exclusionary effect of 'residents only' hiring" in the Town of Harrison for police, fire, and non-uniformed positions. In so doing, the court of appeals explicitly rejected defendant's argument that such affirmative measures were improper, since it had not "adopted a policy of intentional discrimination." *Id*. at 806. The court held that such relief "was appropriate in order to 'dissipate the lingering effects of pervasive discrimination.'" *Id.* at 807 (quoting *Local 28*, 478 U.S. at 476).

Moreover, just as a district court has discretion to order affirmative relief "[w]hen it * * * appears that the employer has discriminated *prior* to the use of the challenged selection procedure," it has the authority to order appropriate corrective measures when an employer's hiring practices *after* the use of the challenged device impermissibly limit the number of minorities that ultimately will be hired. *Guardians Ass'n*, 630 F.2d at 108 (emphasis added). See also *City of Evergreen*, 693 F.2d at 1370 ("[E]ven absent the threat of future discriminatory behavior, the

courts have a duty to correct and eliminate the present effects of past discrimination."); *Local 638*, 532 F.2d at 829 (approving requirement that "enjoin[s] the defendants * * * from repeating their past discriminatory practices" and "all future violations of Title VII"). Indeed, because "Title VII relief should at least assure compliance with the law" – including the "assur[ance] [of] the establishment of a lawful new procedure" to avoid disparate impact against minorities – a court clearly has the discretion in a case of disparate impact discrimination to order an employer to draft policies and standards relating to the various stages of the hiring process that are shown to likely disadvantage minorities. *Guardians Ass'n*, 630 F.2d at 108.

In addition, this Court has consistently emphasized that "the power of the federal courts to appoint special masters to monitor compliance with their remedial orders is well established." *United States* v. *Yonkers Bd. of Educ.*, 29 F.3d 40, 44 (2d Cir. 1994) (citing *New York State Ass'n for Retarded Children* v. *Carey*, 706 F.2d 956, 962-965 (2d Cir.), cert. denied, 464 U.S. 915 (1983)), cert. denied, 515 U.S. 1157 (1995); *Republic of Phillipines* v. *New York Land Co.*, 852 F.2d 33, 36 (2d Cir. 1988) (acknowledging the court's authority to appoint monitor). Indeed, this Court has repeatedly approved decrees appointing a special monitor when

there has been persistent disparate impact discrimination.[10] In fact, such relief is particularly appropriate when there has been resistance to compliance. See *Local 28*, 478 U.S. at 482. And at least one court of appeals has held that a "district court abused its discretion by declining to appoint a monitor to [e]nsure [defendant's] compliance" in a disparate impact case where the criteria for admission to an apprenticeship program disadvantaged the protected class. *Eldredge*, 94 F.3d at 1372.

4. Although the City acknowledges that a history of persistent or egregious misconduct can be a basis for affirmative relief in disparate impact cases (Br. 86-87), it contends that it has not engaged in such behavior (Br. 87-91). The record, however, belies the City's contention.

The City does not dispute that there is a sustained and substantial underrepresentation of African Americans and Hispanics in the FDNY. More than three decades ago, this Court held that the City's use of entry-level examinations discriminated against African American and Hispanic firefighters in violation of

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[10] See, *e.g.*, *City of Bridgeport*, 647 F.2d at 269 n.9 (appointment of special master with designated responsibilities to remedy City's use of hiring examination for fire department that had a disparate impact on African American and Hispanic applicants); *Local 638*, 532 F.2d at 829 (appointment of administrator with "extensive supervisory power" to oversee union and apprenticeship committee that had utilized admission criteria that had disproportionate effect upon minority applicants).

the Equal Protection Clause. *Vulcan Soc'y of New York City Fire Dep't, Inc.* v. *Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973). See also *Vulcan Soc'y of New York City Fire Dep't, Inc.* v. *Civil Serv. Comm'n*, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973). Nonetheless, the underrepresentation of minority firefighters has persisted since then. As the district court found, "[t]he history of the City's efforts to remedy its discriminatory firefighter hiring policies can be summarized as follows: 34 years of intransigence and deliberate indifference, bookended by identical judicial declarations that the City's hiring policies are illegal." J.A. 1421.

Moreover, persistent underrepresentation of African Americans and Hispanics in the Department is substantial, and stands in stark contrast to the representation of those minorities in fire departments in major cities throughout the country, as well as the City's other uniformed services or departments. As previously shown, see pp. 7-9, *supra*, the FDNY has a much smaller percentage of African American and Hispanic firefighters than the fire departments in Los Angeles, San Antonio, San Diego, Dallas, Houston, Chicago, and Philadelphia. The Department also has a much lower percentage of African American and Hispanics than the NYPD, as well as the New York Sanitation and Corrections Departments. See pp. 9-10, *supra*. In fact, the percentage of African Americans in the Department has steadily declined since the 1960s. See p. 7, *supra*.

In addition, the City has resisted complying with Title VII and sought to continue its knowing use of hiring examinations that result in disparate impact even in the midst of this current litigation. See pp. 16-17, *supra*. In June 2010, the district court was forced to appoint a special master because the City repeatedly failed to comply with its discovery obligations and cooperate in the development of a new hiring examination. A month later, the City announced its intent to hire 300 entry-level firefighters in rank order using the results from written examination 6019 despite the United States' warning that doing so would have a disparate impact on African American and Hispanic applicants. When the district court ruled that the City's plan would violate Title VII, but nonetheless proposed five options for using examination 6019 to hire firefighters in a manner that would not have a discriminatory effect on minority applicants, the City rejected all five proposals and rescinded its request to hire. Thus, on this record, the district court – contrary to the City's claim and consistent with this Court's precedent – clearly had the discretion to order affirmative relief, including increased recruitment of minority applicants, the appointment of a court monitor, measures to avoid minority attrition during the hiring process, and any other appropriate measures to assure that minorities are finally, adequately represented in the Department to fully and effectively remedy the City's sustained history of disparate impact discrimination. The Court should therefore reject the City's assertion that in a

Title VII disparate impact case involving testing, the court's remedial authority is limited to ordering the defendant to design a new, lawful examination.

5. Of course, where there is intentional discrimination, the scope of a district court's equitable powers is particularly broad, and this Court's authority to review it is "accordingly narrow." *Yonkers*, 29 F.3d at 43; see also *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). As this Court has explained, "[t]he district court, which has 'first hand experience with the parties and is best qualified to deal with the flinty, intractable realities of day-to-day implementation of constitutional commands,' must be given a great deal of flexibility and discretion in choosing the remedy best suited to curing the violation." *Yonkers*, 29 F.3d at 43 (quoting *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988)). Thus, if this Court affirms the award of summary judgment on plaintiffs-intervenors' disparate treatment claims, the Court should hold that the district court had the discretion to enter an injunction providing affirmative relief that is at least as broad as the remedies that are available for the City's disparate impact discrimination. See, *e.g.*, *Paxton* v. *Union Nat'l Bank*, 688 F.2d 552, 572-574 (8th Cir. 1982) (approving remedial decree in Title VII disparate treatment case that ordered bank to develop, *inter alia*, written job descriptions and draft promotional standards and procedures to resolve disputes relating to promotions), cert. denied, 460 U.S. 1083

(1983); see also *Kilgo*, 789 F.2d at 880 ("The district courts have not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.") (citation and internal quotation marks omitted). Accordingly, the City's assertion that the district court's remedial authority in this case is limited to ordering development of a new examination is baseless.

6. In any event, this Court should not disturb the injunctive relief specifically requested by the United States in the district court to remedy the City's disparate impact violation. On appeal, the City disavows any challenge to the injunctive relief sought by the United States to remedy the disparate impact discrimination. Indeed, the City explicitly concedes that the injunctive relief proposed by the United States is appropriate and has been properly ordered. See, *e.g.*, Br. 5 ("The City does not challenge * * * the remedy requiring the development of a new exam, or the appointment of a Special Master to coordinate those efforts."); Br. 94 ("[T]he [District] Court certainly had the authority to order the City to devise a lawful method of testing, and to limit hiring until a valid examination was crafted."). The City also notes that the parties' "[m]otions for backpay and various forms of damages are * * * not the subject of this appeal."

See Br. 3 n.2.[11] The City has also agreed with the United States' recommendation that the district court retain jurisdiction over this case until at least 12 months after the eligible lists from the next two administrations of the entry-level test have expired, and estimated that if the City "continues to use open-competitive eligibility lists for a period of four years, as it has in the past," the district court would "likely * * * retain jurisdiction for ten or more years." J.A. 1501.[12] Moreover, as to record keeping, the City has not challenged the remedy requested by the United States on appeal. Consequently, regardless of the outcome of the City's appeal, this Court at a minimum should leave in place those portions of the injunction that are consistent with the relief specifically requested by the United States for the disparate impact violation – *i.e.*, the remedies relating to compliance monitoring, record keeping, a prohibition against retaliation, and the use of any

[11] After the City filed its opening brief with this Court on January 17, 2012, the district court awarded the victims of the City's disparate impact violation more than $128 million for backpay. See p. 18, *supra*.

[12] The City has not challenged the General Terms of the Injunction that bar (1) retaliation against any person who has complained about discrimination on the basis of race or national origin with regard to the hiring of entry-level firefighters, or who has sought relief in this case; and (2) discrimination on the basis of race or national origin against African American or Hispanic applicants in the hiring of entry-level firefighters. See S.A. 157.

written examination for entry-level firefighters without the prior approval of the court.

III

THIS COURT SHOULD REFUSE TO REASSIGN THIS CASE TO A DIFFERENT DISTRICT COURT JUDGE ON REMAND

"Remanding a case to a different judge is a serious request rarely made and rarely granted." *United States* v. *Awadallah*, 436 F.3d 125, 135 (2d Cir. 2006); see also *United States* v. *Jacobs*, 955 F.2d 7, 10 (2d Cir. 1992) (reassignment upon remand is "an extraordinary remedy . . . [to] be reserved for the extraordinary case") (citation and internal quotation marks omitted). "It has long been regarded as normal and proper for a judge to sit in the same case upon its remand," *Liteky* v. *United States*, 510 U.S. 540, 551 (1994), and the "general rule" is that "cases remanded to a District Court for further proceedings are sent back without any direction[] * * * as to the judge before whom they are to be conducted," *Martens* v. *Thomann*, 273 F.3d 159, 174 (2d Cir. 2001) (Sotomayor, J.) (citation omitted). Thus, reassignment on remand is an exceptional remedy that "should occur only when the facts might reasonably cause an objective observer to question the judge's impartiality." *Spiegel* v. *Schulmann*, 604 F.3d 72, 83 (2d Cir. 2010) (quoting *United States* v. *Cole*, 496 F.3d 188, 195 (2d Cir. 2007)).

A. The City's Claim That The District Court Was "Bias[ed] Throughout The Proceeding[s]" Is Not Properly Preserved For Review

Although the City argues (Br. 119) that this Court should reassign the case to a different district court judge on remand because Judge Garaufis was biased throughout the proceedings, the City has not properly preserved its claim for review. A request to disqualify a judge on the grounds of improper partiality "must be made 'at the earliest possible moment' after obtaining information of possible bias." *United States* v. *Yonkers Bd. of Educ.*, 946 F.2d 180, 183 (2d Cir. 1991) (quoting *Apple* v. *Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987)). The timeliness requirement is intended "to prevent waste of judicial resources * * * and to ensure that a [party] does not 'hedg[e] its bets'" by waiting and complaining that a judge is biased only if and when an adverse decision is issued. *Yonkers*, 946 F.2d at 183 (quoting *Apple*, 829 F.2d at 334). Thus, when a party's challenge to a judge's objectivity is untimely, relief may be denied on that basis alone. See *United States* v. *Yu-Leung*, 51 F.3d 1116, 1119-1120 (2d Cir. 1995); *Polizzi* v. *United States*, 926 F.2d 1311, 1321 (2d Cir. 1991).

During the nearly five years this case has been pending in the district court, the City has never requested that Judge Garaufis recuse himself on the ground that "his impartiality might reasonably be questioned." 28 U.S.C. 455(a). Nor has the City offered an explanation for its failure, despite its reliance (Br. 100-121) on

events that occurred years before and during the August 2011 remedial hearing. Instead, the City waited until after Judge Garaufis entered the injunction at issue, and then complained for the first time on appeal that he was partial all along. Accordingly, the City's claim is waived, see *Yu-Leung*, 51 F.3d at 1119; *Polizzi*, 926 F.2d at 1321; *Yonkers Bd. of Educ.*, 946 F.2d at 183, or at best reviewed for "fundamental error" − which "is more egregious than * * * plain error" and certainly does not exist in this case, *Taylor* v. *Vermont Department of Education*, 313 F.3d 768, 795 (2d Cir. 2002).

B. Reassignment Of This Case To A Different District Court Judge On Remand Is Unjustified Because The City's Allegations Do Not Suggest, Much Less Demonstrate, That Judge Garaufis Was Biased Or Appeared Partial

The City contends (Br. 100-124) that this Court should reassign this case to a different district court judge on remand because Judge Garaufis allegedly: (1) erred in granting plaintiffs-intervenors summary judgment on their disparate treatment claims and abused his discretion in entering the permanent injunction; (2) committed clear error in finding the facts and focusing on certain evidence; (3) impermissibly expressed his views about the City's evidence and conduct; and (4) was not a neutral arbiter during the remedial phase of plaintiffs-intervenors' disparate treatment case. Because precedent dictates that the City's claims are plainly insufficient to establish that Judge Garaufis was, or appeared to be, biased, reassignment of this case to a different judge on remand is unwarranted.

1. Even if this Court were to agree with the City that the district court erroneously awarded summary judgment (see Br. Point I, pp. 68-91); granted overly broad relief (see Br. Point II, pp. 92-98); and wrongly evaluated evidence in support of that remedy (see Br. Point III (A) and (B), pp. 98-111), reassignment would be unjustified. After all, "adverse rulings, without more, will rarely suffice to provide a reasonable basis [to] question[] a judge's impartiality" or reassign a case. *Chen* v. *Chen Qualified Settlement Fund*, 552 F.3d 218, 227 (2d Cir. 2009).[13] As this Court has explained, "fundamental disagreements with [a judge] on questions of law * * * are no[t] [a] basis for reassignment." *Spiegel*, 604 F.3d at 83.[14] Consequently, the district court's rulings, even if incorrect, do not provide a basis to reassign this case.

2. To the extent that the City contends (Br. 98) that this case should be reassigned because the district court's "findings of fact * * * should be set aside" (Br. Point III (B) & IV, pp. 100-124), it has not demonstrated even that those

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[13] See also *Liteky*, 510 U.S. at 555 ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"); *Awadallah*, 436 F.3d at 137 ("If losses compromised the appearance of justice, this system would grind to a halt."); *United States* v. *Brennan*, 395 F.3d 59, 76 (2d Cir. 2005) (disagreement with district court's rulings provides "absolutely no basis for remand to a different judge").

[14] See also *Zerega Ave. Realty Corp.* v. *Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 215 (2d Cir. 2009); *United States* v. *Elfgeeh*, 515 F.3d 100, 137 (2d Cir. 2008).

findings were erroneous, much less that they were clearly erroneous -- and certainly has not come close to showing that Judge Garaufis was, or appeared to be, biased. For example, the City repeatedly complains (Br. 101, 103-110) that Judge Garaufis wrongly discounted studies and testimony that it offered, and focused on and drew conclusions from plaintiffs-intervenors' evidence. As fact-finder, Judge Garaufis properly "determine[s] for [himself] the weight of the evidence and the credibility of each of the witnesses," "decide[s] how much weight to give any evidence," and "draw[s] * * * such reasonable inferences or conclusions as [he] feel[s] are justified in light of [his] experience." 3 Kevin O'Malley *et al.*, Federal Jury Practice and Instructions §101.10, 101.40, 101.42 (2012). As judge, he is also entitled to exclude evidence or witnesses from testifying, particularly when they are belatedly proffered.

The fact that the City cites to evidence contrary to Judge Garaufis's findings (Br. 101-102, 104-108) does not suggest error. Indeed, this Court, under the clearly erroneous standard, "may not reverse * * * even though convinced * * * that [it] would have weighed the evidence differently," unless it is "left with the definite and firm conviction that a mistake has been made." *Oscar Gruss & Son, Inc.* v. *Hollander*, 337 F.3d 186, 193 (2d Cir. 2003) (citation omitted). In fact, since the City's allegations of erroneous fact-finding relate to only two subject-

areas covered by the injunction (see Br. 102-103), they hardly imply that Judge Garaufis was biased against the City throughout the proceedings.

3. Contrary to the City's contention (Br. 112), Judge Garaufis was certainly entitled "to express [his] opinion" about the City's conduct and evidence in his findings of fact, and his doing so does not reflect bias or provide a basis to reassign this case on remand. *Chen*, 552 F.3d at 227. "'[O]pinions held by judges as a result of what they learned in earlier proceedings' * * * are not ordinarily" a basis for disqualification of a judge or reassignment of a case. *United States* v. *Carlton*, 534 F.3d 97, 100 (2d Cir.) (quoting *Liteky*, 510 U.S. at 551), cert. denied, 555 U.S. 1038 (2008). That is because "claims of judicial bias must be based on extrajudicial matters" unless the circumstances are "so extreme as to display [a judge's] clear inability to render fair judgment." *Chen*, 552 F.3d at 227; *Liteky*, 510 U.S. at 551. As this Court has explained, "it [i]s not inappropriate for [a] [j]udge * * * to express [his] opinion" about evidence or a party's conduct, when those matters are "inextricably intertwined" with issues he must decide. *Chen*, 552 F.3d at 227-228. Here, because the issue of appropriate injunctive relief for the City's intentional discrimination required Judge Garaufis to assess the City's motives for conduct and the evidence the City presented, the district court's opinions in that regard merely "represent[ed] [its] honest assessment of the issues

relevant to the court's determination." *Ibid*.[15] Thus, they do not suggest a lack of judicial objectivity or justify reassignment.

4. The City's contention that Judge Garaufis was not a neutral arbiter during the August 2011 remedial hearing (Br. 111-118) is contradicted by precedent. "[A] district judge is not a spectator * * * [and] is required to ensure that problematic issues are raised and examined." *Awadallah*, 436 F.3d at 136.[16] In fulfilling that responsibility and "function to elicit all the material evidence and assist in making straight the path of justice," Rule 614 of the Federal Rules of Evidence expressly provides a district court with authority to call and interrogate witnesses. *Montrose Contracting Co.* v. *Westchester Cnty.*, 94 F.2d 580, 583 (2d Cir.), cert. denied, 304 U.S. 561 (1938); see also 29 Charles A. Wright *et al.*, Federal Practice and Procedure § 6234 (2011) (Rule 614(a) promotes "accurate factfinding" and "gives courts broad discretion to exercise its power to call

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[15] See, *e.g.*, *Pescatore* v. *Pan Am. World Airways*, 97 F.3d 1, 21 (2d Cir. 1996) (no reassignment because district court's erroneous reference to guilty verdict, "decision to silence defense counsel's efforts to mitigate the effect of plaintiff's counsel's" inflammatory comment, and questioning of witness does not indicate "bias").

[16] See *United States* v. *Filani*, 74 F.3d 378, 385 (2d Cir. 1996) ("[A] trial judge's duty to see the law correctly administered cannot be properly discharged if the judge remains inert."); see also *United States* v. *DiTomasso*, 817 F.2d 201, 221 (2d Cir. 1987); *United States* v. *Marzano*, 149 F.2d 923, 925 (2d Cir. 1945) (Hand, J.).

witnesses in a wide range of circumstances."). Thus, it is beyond dispute that Judge Garaufis was entitled to call witnesses during the August 2011 remedial hearing. In any event, the City has not alleged, must less demonstrated, that it suffered prejudice from the testimony of the three witnesses called by Judge Garaufis.

Accordingly, the City's allegations regarding judicial bias do not provide a basis to reassign this case. See *Liteky*, 510 U.S. at 556 (judge's rulings, questions to witnesses, "alleged 'anti-defendant-tone,' [and] cutting off of testimony said to be relevant to defendant's state of mind" did not establish bias or that judge's recusal was required under 28 U.S.C. 455); *Awadallah*, 436 F.3d at 135-136 (no reassignment on remand based on allegations that district court was not "an impartial arbiter" because it "raised issues *sua sponte* 'that were at least potentially beneficial to [the defense]'").

C. This Court Should Refuse To Reassign This Case To A Different Judge Pursuant To Its Supervisory Power

Alternatively, the City contends (Br. 122), that "[e]ven 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." This Court should decline the City's invitation.

To be sure, the Court may reassign a case to another district judge on remand pursuant to its supervisory powers. See 28 U.S.C. 2106. In doing so, this Court applies the precedent previously discussed (see pp. 42-49, *supra*), and focuses on an additional three factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Martens, 273 F.3d at 174 (quoting *Mackler Prods., Inc.* v. *Cohen*, 225 F.3d 136, 147 (2d Cir. 2000)); see also *United States* v. *Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) ("Absent proof of personal bias requiring recusa[l], * * * the principal factors considered by us in determining whether further proceedings should be conducted before a different judge" are those set forth above).

When a party, as here, requests reassignment in the midst of ongoing, complex civil litigation, the third factor – waste and duplication vs. preserving the appearance of fairness – unquestionably dominates the inquiry. For example, in *Martens*, 273 F.3d at 174-175, this Court, in an opinion written by then Judge Sotomayor, analyzed *only* the waste/duplication vs. fairness factor in deciding not to reassign a case in which it reversed three district court orders. The Court explained that even though "the appearance of fairness might be promoted by

reassignment," it was unwarranted because the case was "a large, complex, and long-lived class action suit with which [the] [j]udge * * * is intimately familiar," and reassigning the case "would necessarily engender a good deal of waste and duplication." *Ibid.*; see also *United States* v. *Stevens*, 192 F.3d 263, 269 (2d Cir. 1999) (reassignment on third remand for resentencing "would be particularly inappropriate," "because it would result in a loss of the benefit of this district court's familiarity" with the case).

This Court should not reassign this case on remand, because "[t]he district court is quite familiar with the parties, * * * issues" and "voluminous record[,]" and reassignment "would only result in a waste of judicial resources"; cause unfair hardship to victims of the City's disparate impact discrimination; and delay the City's use of a lawful, nondiscriminatory selection procedure to hire firefighters. *Juicy Whip, Inc.* v. *Orange Bang, Inc.*, 382 F.3d 1367, 1374 (Fed. Cir. 2004); *Jacobs*, 955 F.2d at 10. This case, like *Martens*, is a complicated Title VII action, and has been pending in the district court for several years. The enormity of the record and intricacy of the prior proceedings cannot be overstated. The district court docket sheet has 850 entries and spans 37 pages, not including the caption and list of parties and counsel. The Joint Appendix for this appeal is 23 volumes and more than 6400 pages, and the City has filed an oversized brief as appellant well in excess of 100 pages.

Moreover, were this Court to reassign this case on remand, it would undoubtedly take another judge many months to develop the understanding and expertise that Judge Garaufis has unquestionably acquired. See *Gaines* v. *Dougherty Cnty. Bd. of Educ.*, 775 F.2d 1565, 1570 n.11 (11th Cir. 1985) (reassignment of a case with a "history of complicated proceedings," "quite properly require[s] time" for a new judge to learn the record). The district court has already held numerous hearings, in addition to the eight-day hearing designed to determine appropriate relief for the City's disparate treatment discrimination.

Meanwhile, many crucial, complicated matters are pending in the district court that will require prompt resolution in the months ahead. Thousands of victims of the City's disparate impact discrimination currently await the award of specific and/or monetary relief. Most recently, in March 2012, the district court issued an order awarding $128,696,803 in backpay (subject to mitigation), and appointing four special masters to conduct individual hearings for the more than 2200 minority applicants who sat for the challenged examinations and are now entitled to monetary relief. R. 825 at 58, 64.

The City very recently began administering the new hiring exam, which the parties jointly developed and will continue to administer it through late April 2012. R. 841 at 5. Scoring is anticipated to be completed by August 2012, while the parties expect the City's expert to produce a final technical report in September

2012. Until the new test and results are approved by the district court, the City will not be hiring any entry-level firefighters. Thus, reassignment would delay the hiring of firefighters using a lawful, nondiscriminatory selection device.

Moreover, the remaining two factors of this Court's analysis weigh against reassignment. Should this Court reverse any of the district court's rulings, Judge Garaufis should have no difficulty "putting out of his mind * * * previously expressed views or findings determined to be erroneous." *Martens*, 273 F.3d at 174. Because plaintiffs-intervenors' disparate treatment claim was resolved on an award of summary judgment, rather than a trial, Judge Garaufis has not heard the testimony, much less had an opportunity to consider all the evidence that would be introduced during a trial to determine whether the City intentionally discriminated against African American applicants in hiring entry-level firefighters.

Finally, reassignment is unnecessary "to preserve the appearance of justice." *Martens*, 273 F.3d at 174. As the Court has recognized, a district court's deciding issues in a party's favor belies that party's conclusion that the judge compromised the appearance of justice and was biased against that party. *Awadallah*, 436 F.3d at 136. Judge Garaufis has ruled in the City's favor on many substantial issues in this case, including his dismissal of plaintiffs-intervenors' disparate treatment claims against two defendants on the basis of qualified immunity (J.A. 1433-1438); his order allowing the City to belatedly amend its Answer and mitigate the damage

award (R. 825 at 48-51); and his ruling in favor of the City on the issue of how to value fringe benefits (R. 825 at 37-40). Accordingly, under this Court's decisions, there is no reason for the Court to exercise its supervisory power to reassign this case to another district judge.[17]

[17] The numerous statements in the media regarding this case set out in the City's brief (see Br. 124 n.31) plainly have no relevance to any of the three factors this Court considers in determining whether to exercise its supervisory power to order reassignment.

CONCLUSION

This Court should hold that the district court's finding of a disparate impact violation is not at issue in this appeal. The Court should reject the City's assertions that the district court's remedial authority in this case is limited to ordering the development of a new employment examination, and that the district court lacked the authority to order affirmative injunctive relief. In any event, this Court should not disturb the portions of the injunction that are consistent with the relief sought by the United States for the disparate impact violation, as the City has disavowed any challenge to these components of the injunction. Finally, this Court should reject the City's request to reassign this case to a different district court judge on remand.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Lisa J. Stark
DENNIS J. DIMSEY
LISA J. STARK
HOLLY A. THOMAS
Attorneys
Department of Justice
Civil Rights Division, Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4491

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation imposed by Rule 28.1(e)(2)(B)(i). The brief was prepared using Microsoft Word 2007 and contains 12,307 words of proportionally-spaced text. The type face is Times New Roman, 14-point font.

s/ Lisa J. Stark
LISA J. STARK
Attorney

Dated: April 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2012, I electronically filed the foregoing Brief For The United States As Appellee with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I also certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Lisa J. Stark
LISA J. STARK
Attorney