**RESPONSES TO QUESTIONS FROM SENATOR HATCH**

Dear Senator Hatch:

Please find below my responses to your written questions dated July 17, 2009:

1. **Do you agree with Judge Sotomayor's view that standardized tests have inherent cultural bias in them?**

If it is Judge Sotomayor's view that all standardized tests are inherently culturally biased, I disagree. Data show that some standardized tests have been culturally biased. This bias was recognized decades ago, but since that time considerable effort has gone into eradicating the biases. While not all tests have eliminated all vestiges of bias, an assertion that standardized tests have inherent cultural bias in 2009 is inaccurate. Moreover, in the *Ricci* case no probative evidence of cultural bias was adduced. In fact, it is arguable that if the New Haven exam contained any bias, it was a bias in favor of minorities, who were oversampled in preparing the exam and who were overrepresented on the oral exam panels. Finally, the Supreme Court found no evidence that the fire fighters exam was not job related and consistent with business necessity.

2. **Was it proper to issue a summary order in the *Ricci* case? Was it proper to issue a per curiam opinion in the *Ricci* case.**

No. Second Circuit Local Rule 32.1 provides as follows:

Dispositions by summary order

a) Use of summary orders. The demands of contemporary case loads require the Court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision (*sic*) is unanimous *and each judge of the panel believes that no jurisprudential purpose would be served by an opinion, i.e. a ruling having precedential effect*, the ruling may be made by summary order instead of by opinion. (emphasis added)

The *Ricci* case involved both constitutional and statutory issues of extraordinary importance and impact. Consider that the Supreme Court receives thousands of petitions for

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certiorari each term. Approximately one percent (1%) of such petitions are granted. Clearly, the Justices of the Supreme Court discerned that a reasoned opinion in the *Ricci* case would have a jurisprudential purpose. It is, therefore, inconceivable that each judge on the panel believed that its disposition of the *Ricci* case would have no jurisprudential purpose.

Furthermore, per curiam decisions are normally issued in cases that are non-controversial. It is respectfully submitted that a first year law student would immediately perceive that the issues in the *Ricci* case were extremely controversial and that a decision thereon would have a jurisprudential purpose.

**3. Judge Sotomayor claimed that she was following established precedent when she issued the *Ricci* decision. Is that true?**

No. A review of the Title VII and Equal Protection Clause cases decided by both the 2nd Circuit and the Supreme Court reveals no "established precedent" dispositive of the issues in the *Ricci* decision. As the district court in the *Ricci* case noted, the facts presented the obverse of the traditional *McDonnell Douglas v. Green* analysis. The facts in *Ricci* were peculiar and a matter of first impression. As the Supreme Court stated, "[t]he action presents two provisions of Title VII to be interpreted and reconciled, *with few, if any, precedents* in the court of appeals discussing the issue." *Ricci v. DeStefano,* 557 U.S. ___ (2009) at 16. (emphasis added)

**4. Had there been a case in the 2nd Circuit, or the Supreme Court, that dealt with a conflict between disparate impact and disparate treatment?**

The Supreme Court has dealt with the tension between disparate impact and disparate treatment, but only in the context of the Equal Protection Clause of the Fourteenth Amendment—*not* in the context of Title VII, as was the case in *Ricci*. See *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). Moreover, the facts in the *Ricci* case were one of first impression.



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The 2nd Circuit noted the conflict between disparate treatment and disparate impact in *Hayden v. County of Nassau*, 180 F.3d 42 (2nd Circuit 1999). *Hayden*, however, dealt with a public employers' redesign of a test to comply with a consent decree. It did not concern an employer's act of intentional disparate treatment to avoid disparate impact litigation. *Hayden* is wholly distinguishable from *Ricci* and would not provide precedent to permit disposition of *Ricci* by a means of summary order.



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