

No. 07-2052

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ARTHUR L. LEWIS, JR., *et al.*,)
) On appeal from the U.S. District
Plaintiffs-Appellees,) Court for the Northern District of
) Illinois, Eastern Division
v.)
) No. 98 C 5596
CITY OF CHICAGO,)
) The Honorable Joan B. Gottschall,
Defendant-Appellant.) Presiding Judge

BRIEF ON REMAND OF PLAINTIFFS-APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 07-2052

Short caption: Lewis, et al. v. City of Chicago

1. The full name of every party that the attorney represents in the case:

Arthur L. Lewis, Jr.; Gregory S. Foster, Jr.; Arthur C. Charleston, III;
Pamela B. Adams; William R. Muzzall; Phillippe H. Victor; Crawford
M. Smith; Aldron R. Reed; African American Fire Fighters League of
Chicago, Inc.

2. The names of all law firms whose partners or associates have appeared for the party in the district court or are expected to appear for the party in this Court:

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NAACP Legal Defense and Educational Fund
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3. If the party or amicus is a corporation:

- (i) identify all its parent corporations, if any: not applicable
- (ii) list any publicly-held company that owns 10% or more of the party's or amicus' stock: not applicable.

Dated: January 3, 2011

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JURISDICTIONAL STATEMENT

The City's jurisdictional statement is complete and correct.

ISSUES PRESENTED

In its July 22, 2010 Order, this Court stated that it will “resolve[]” the following “two issues that remain open after the Supreme Court’s decision”:

- (1) Whether the City of Chicago preserved the argument that plaintiffs failed to prove that use of the eligibility list had disparate impact.
- (2) Whether the City preserved the argument that the first round of hiring occurred outside the charging period even for the earliest EEOC charge.

CA7R.66.¹

STATEMENT OF THE CASE

This is a hiring discrimination class action against the City of Chicago under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Plaintiffs are a class of more than 6,000 African-American applicants for entry-level firefighter positions who scored 65 or above and therefore passed an examination administered by the City in 1995. A6. Because these applicants did not score 89

¹ We cite to the district court's record as “R.____” and this Court's docket as CA7R.____.” We cite to the City's appendix as “A____.”

or above, however, the City did not select any of them to fill positions in ten classes (and a portion of an eleventh class) of firefighter candidates hired from 1996 to 2002. *Id.*² From the outset, the City admitted that its use of the 89 cutoff score had a “severe disparate impact” on African-American applicants. *Id.* (quoting R.223, Ex. A at 2) After denying the City’s motion for summary judgment on timeliness grounds, A102-A103, the district court found that the City’s practice of hiring only applicants who scored 89 or above was not job-related or consistent with business necessity, A81. The district court therefore held the City liable for disparate-impact discrimination in violation of Title VII. *Id.* Based on uncontested evidence that the City would have hired 132.4 additional African-American applicants in its eleven hiring rounds between 1996 and 2002 but for its discriminatory hiring practice, A32-33, the district court issued a remedial order and entered a final judgment against the City. A18-A30.

The City chose not to appeal the merits of the district court’s liability finding or the terms of its remedial decree. A14. The sole ruling from which the City appealed was the district court’s determination that plaintiffs timely filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) “within three hundred days after the alleged unlawful employment practice

² The City made exceptions for certain paramedics and military veterans with scores below 89. A6, A58. Plaintiffs follow the convention adopted in this litigation and refer to the City’s practice of hiring “only” applicants who scored 89 or above. *See, e.g.*, A4, A6, A7, A55.

occurred.” 42 U.S.C. §2000e-5(e)(1); A14.³ The district court stayed its judgment pending appeal. R.425. This Court reversed, holding that plaintiffs’ EEOC charge was untimely because it was filed more than 300 days after the only disparate-impact violation in this case: the City’s announcement that it initially intended to hire only applicants who scored 89 or above and its adoption of an eligibility list embodying the score cutoffs. A11-A17.

After this Court denied rehearing, CA7R.53, plaintiffs filed a certiorari petition, which was granted, CA7R.56-58. The Supreme Court reversed, holding that plaintiffs had a cognizable Title VII disparate-impact claim each time the City used its exclusionary hiring practice to fill a new class of firefighters. A1-A10. On remand, this Court stated that it will “resolve[]” the two narrow legal questions of issue preservation left open by the Supreme Court. CA7R.66.

STATEMENT OF FACTS

The City’s statement of facts discusses much of the background of this case, which will not be repeated, but it is selective and fails to describe essential elements of the proceedings that are vital to resolving the two narrow legal questions of waiver left open by the Supreme Court.

Plaintiffs’ complaint, the City’s answer, and class certification. As plaintiffs announced in the very first sentence of their September 1998 complaint,

³ Although multiple EEOC charges were filed, plaintiffs refer to “charge” in the singular because it is only the first-filed charge that matters for timeliness purposes. A7 n.4.

“[t]his action challenges race discrimination by defendant City of Chicago in its hiring of firefighters.”⁴ R.1 at 1. Plaintiffs pleaded facts sufficient to establish that the City’s repeated hiring of only applicants who scored 89 or above caused a disparate impact on African-Americans in the multiple firefighter classes selected as of the date that the complaint was filed. For instance, the complaint states that “only approximately 8% of the firefighters hired as a result of the 1995 examination have been African-American.” *Id.* at 8. In its answer, filed two months later, the City responded that African-Americans were actually 9.5% of applicants already hired, R.11 at 13, but this figure is still starkly below the percentage of test-passers (*i.e.*, applicants with scores of 65 or above) who were African-American, R.233 at 3.⁵

In December 1999, the district court certified, without objection, a class that was defined with a focus on the disparate impact of the 89 cutoff score in the City’s multiple rounds of hiring:

[A]ll African-American firefighter applicants who took and passed the 1995 written firefighter examination who received a score of 65 or greater but less than 89, but who, as a result of their test scores, have been and continue to be denied the opportunity to take the physical performance test and to be hired as firefighters.

⁴ To the extent that the City’s jurisdictional statement includes a contrary characterization of plaintiffs’ complaint, it is incorrect. Cf. City’s Remand Br. 1.

⁵ In its April 2002 amended answer, the City pointed out, based on new data, that the percentage of African-Americans “hired to date from the results of the 1995 firefighter test” was 9.2%, down from 9.5% at the time of its initial answer. R.163 at 2, 16; R.166.

R.58 at 3; R.59.

The district court's timeliness ruling. In February 2000, the City sought summary judgment on the ground that plaintiffs' EEOC charge was untimely because it was filed more than 300 days after the City announced its hiring practice and adopted an eligibility list. R.64 at 5. Plaintiffs disagreed and offered, *inter alia*, the following two reasons why their charge was timely. First, they asserted a "systemic" continuing-violation theory:

[W]here there is evidence that the alleged violations are ongoing in nature, an EEOC charge may be timely filed as to all acts encompassed by the discriminatory policy *so long as the charge is filed within the statutory charge-filing period following the last occurrence of discrimination pursuant to that policy.*

R.74 at 5. Second, plaintiffs set forth the basic premise of the present-violation theory that the Supreme Court ultimately adopted:

Each time the City selects candidates to proceed in the hiring process based on these test results, and refuses to consider members of the plaintiff class, a specific discriminatory act occurs. *Each of these acts is a fresh violation* for purposes of the statute of limitations.

Id. at 7 (emphasis added).

In May 2000, the district court denied the City's motion for summary judgment. A102-A103. The district court adopted a "continuing violation doctrine" of timeliness, A89-A90, concluding that if "the City's examination had a disparate impact on African-American candidates, then the City's ongoing use of

the examination's results -- rather than some other, non-discriminatory criteria for candidate selection -- has the same disparate impact," A95, and thus the City's "ongoing reliance on those results" would violate Title VII, A102. The district court therefore determined that it "need not address the other arguments raised by plaintiffs," A102, although it agreed with plaintiffs that "[t]he disparate impact is not limited to the initial promulgation of the examination results, but arises every time the City decides to hire based on the results of the discriminatory examination," A100.

Pre-trial and post-trial admissions. In the parties' joint statement of stipulated facts attached to their joint final pretrial order filed in December 2003, they stipulated that the 89 cutoff score "had a severe disparate impact against African Americans." R.223, Ex. A at 2. The City's sole merits defense was that its use of the 89 cutoff score was job-related.

When the City responded in April 2004 to the proposed findings of fact submitted by plaintiffs following the liability phase of the trial, it underscored that its concession regarding disparate impact encompassed an admission of disparate impact in its multiple rounds of hiring using the 89 cutoff score. R.245 at 4-6.

Plaintiffs proposed the following factual finding:

[F]or seven years, from 1996 through 2002, with exceptions for certain veterans and for certain CFD paramedics, the City selected for further processing, and made job offers to, only the 7 percent of the applicant pool that had scored above the 89 cut score. This practice

had an admitted and severe disparate impact against African Americans. It very disproportionately eliminated African Americans from consideration for the firefighter job.

R.238 at 3 (internal citation omitted). In response, the City's only factual quibble was that "the well qualified list was used for less than six years, not seven." R.245 at 6. The City brushed aside the need for the district court to make this finding, stating that "adverse impact has never been disputed in this case and it was not an issue at trial." *Id.* at 5-6.⁶ Moreover, in its own post-trial proposed conclusions of law, the City's entire treatment of what it called "The First Prong: Plaintiffs' Prima Facie Case" consisted of a single proposed conclusion of law: "The 1995 firefighter examination had an adverse impact on African-American candidates." R.244 at 2.

The district court's liability ruling. After an eight-day bench trial on liability, the district court issued a March 2005 order in which it recognized that "the disparate impact of the 1995 Test is not in dispute" because "the parties have stipulated that the 1995 Test, used with a cut-off score set at 89, had a severe disparate impact on African-American firefighter candidates." A68. Based on the City's concession, the district court also stated that "[t]he disparate impact of the 1995 Test on African-American firefighter candidates has caused...fewer African-Americans being hired for the position of firefighter." A65. The district court then

⁶ To be precise, this statement was contained in another admission incorporated by reference into the City's response to this proposed factual finding. *Id.* at 5-6.

proceeded to reject the City's defense that its hiring practice was job-related and, accordingly, held that the City violated Title VII's disparate-impact prohibition. A68-A81.

Further timeliness proceedings prior to the remedial hearing. On two occasions after the liability trial but before the district court issued a remedial order, the timeliness issue resurfaced. First, in their February 2005 response to the City's submission of supplemental authority on timeliness, plaintiffs stated: "[E]ach time the City uses results of the 1995 exam to seat a new class in the Fire Academy, it engages in a discrete and independently discriminatory act against members of the *Lewis* class...." R.270 at 4.

Then in early 2006, the district court *sua sponte* asked the parties to submit proposed questions of law for a possible interlocutory appeal on timeliness. R.301. Plaintiffs stated that it was "important" that the following question "be presented to the Seventh Circuit" as an alternative basis for sustaining the timeliness ruling:

Whether successive rounds of hiring by an employer, in reliance on a predetermined "cut score" that is neither job related nor consistent with business necessity, are periodic implementations of the adverse cut-score decision and therefore discrete discriminatory acts, each giving rise to a new claim for statute of limitations purposes.

R.310 at 1-2. The City proposed only one question:

Whether, in a Title VII disparate impact employment case, the statute of limitations begins to run when an employer notifies applicants who took an employment entrance examination that it will use a certain cut-off score to determine which applicants to hire first, when the cut

score has an adverse impact on a protected minority group and is adhered to as each new class is hired.

R.304 at 1. Significantly, the City stressed that it “has always conceded that the cut score of 89 had adverse impact on African-American applicants.” *Id.* at 2.

The district court declined to certify an interlocutory appeal. R.308.

The district court’s remedial decree. In remedial proceedings, the City did not contest disparate impact in its multiple rounds of hiring only applicants who scored 89 or above. To the contrary, the City agreed with the evidence adduced by plaintiffs that the City’s exclusionary practice caused a shortfall in the number of African-Americans hired in each of the ten classes (and a portion of an eleventh class) selected from 1996 to 2002. R.366 at 1-4, Ex. B; R.371 at 6.

Moreover, in its proposed findings and conclusions with respect to remedies, the City took the position that remedial relief calculations should be based on the “shortfall” in African-American hires in each of the classes selected using the 89 cutoff score. R.380 at 6. The City referenced a chart in the proposed findings and conclusions of law submitted by the Chicago Fire Fighters Union Local No. 2, an intervening defendant. *See id.* (citing R.378 at 4). As the Union explained, the chart summarized the uncontested findings of plaintiffs’ expert and “show[ed] not just an aggregate shortfall...but also show[ed] the number of African-Americans who would have been hired in each candidate class but for the City’s discriminatory selection practices.” R.378 at 3.

Based on this uncontested “shortfall” evidence in each of the eleven classes selected between 1996 and 2002, the district court found, as a necessary predicate for its calculation of classwide relief, that “but for the manner in which the City hired firefighters based on the 1995 Firefighters Examination, which discriminated against African Americans,” an additional 132.4 firefighter positions “would have been filled by African Americans.” A23. On this basis, the district court required, *inter alia*, the hiring of 132 randomly-selected class members and the payment of backpay to the class based on the lost wages and benefits of the 132.4 African-American applicants who, but for the discriminatory cutoff score, would have been hired sooner. A19-A30; *see also* A32-A33.

The district court’s April 2007 remedial order, which represented the final judgment for appeal purposes, also incorporated by reference its ruling on liability and reiterated: “On March 22, 2005 the Court entered a judgment of liability against defendant, City of Chicago (‘the City’), having found that the manner in which the City hired firefighters based on the 1995 written Firefighters Examination discriminated against African Americans.” A20.⁷

The district court’s order granting a stay pending appeal. The City filed a notice of appeal in May 2007, and moved in the district court for a stay pending appeal. R.407; R.410. In support of its motion, the City stated that it intended to

⁷ In a separate remedial order issued in March 2007, the district court also reiterated its liability ruling on similar terms. A32.

appeal only “the district court’s decision denying summary judgment for the City on the statute of limitations issue.” R.411 at 3. The City also explained that its sole challenge to the district court’s timeliness ruling would be that plaintiffs’ EEOC charge was untimely because it was filed more than 300 days after the only action that violated Title VII -- the City’s announcement of its “decision as to how [it would] use the results of the test.” *Id.* at 7-8.

In response, plaintiffs pointed out that the “City’s application for a stay fails to address” the question of “[w]hether each round of entry-level firefighter hiring by the City constitutes a separate discriminatory act starting a new limitations clock.” R.416 at 5. In its reply, the City recognized, but expressed its disagreement with, plaintiffs’ “position that each use of the results of the test constituted a ‘separate discrete discriminatory act.’” R.417 at 4 (quoting R.416 at 5). The district court granted the stay. R.424; R.425.

Prior proceedings before this Court. As it promised in the stay proceedings, the City chose to appeal neither the merits of the district court’s finding of a Title VII disparate-impact violation nor the terms of its remedial decree. CA7R.18 at 4. The only ruling that the City challenged was the district court’s determination that plaintiffs’ EEOC charge was timely filed. *Id.* The City argued that plaintiffs’ claim accrued, once and for all, in January 1996, when it announced that it intended to hire only applicants who scored 89 or above and

adopted an eligibility list embodying the score cutoffs. *Id.* at 14, 18-19, 27-28, 36. Because no charge was filed within 300 days of this action, the City contended that plaintiffs' suit must be dismissed on timeliness grounds. *Id.* at 16.

The City did not argue in its opening brief that, if this Court rejected the district court's continuing-violation theory of timeliness and instead adopted a present-violation theory, the City still should prevail because plaintiffs never adequately proved disparate impact in hiring. Nor did the City argue that, if this Court adopted a present-violation theory, the judgment must be modified with respect to the relief awarded for jobs lost in the first class hired because that hiring round occurred more than 300 days before plaintiffs filed their EEOC charge. The City failed to make these alternative arguments even though it recognized in its opening brief that both plaintiffs and the district court had embraced the present-violation theory that the Supreme Court ultimately adopted:

Specifically, plaintiffs and the district court surmised that each time the City used the hiring eligibility list to call applicants in the "well qualified" category to continue the hiring process -- and the list was used in that way from May 1996 to November 2001 -- was a fresh violation....

Id. at 20.

At the very outset of their appellate brief, plaintiffs emphasized their "present violation" argument. CA7R.24 at 7. They stated that "*each time* the city hired on the basis of its discriminatory test and cutoff score, *a fresh violation*

occurred.” Id. (emphasis added); *see also id.* at 12-15. Plaintiffs also noted that, under this present-violation theory, their EEOC charge was “at least timely as to all classes but the first.” *Id.* at 7, 12.

In its reply, the City acknowledged plaintiffs’ “primary reliance” on the present-violation theory of timeliness and that plaintiffs challenged both “the decision how to use the list, and each use of the list.” CA7R.36 at 3-4. But the City did not argue anywhere in its reply that plaintiffs failed adequately to demonstrate disparate impact in its multiple rounds of hiring. To the contrary, it made clear that it “challenge[d] no factual findings.” *Id.* at 2. The City did, however, point out for the very first time -- albeit in a perfunctory manner -- that plaintiffs’ present-violation theory “would, if accepted, require modification of the judgment.” *Id.* at 3. Although the City’s reply does not elaborate, its citations suggest that this modification would be required because plaintiffs’ EEOC charge was untimely with respect to the first class. *Id.* (citing CA7R.24 at 7, 12).

This Court reversed, holding that “plaintiffs were injured, and their claim accrued, when they were placed in the ‘qualified’ category of the hiring list on the basis of their score in the firefighters’ test.” A16. Accordingly, this Court remanded with directions to the district court to enter judgment for the City. A17.

This Court denied plaintiffs’ petition for rehearing. CA7R.53.

Supreme Court proceedings. The Supreme Court granted plaintiffs’ petition for certiorari, which presented only one question: whether plaintiffs’ EEOC charge was timely under the present-violation theory. Pet. Br. i.⁸ This was the only theory plaintiffs pressed in their opening merits brief. *Id.* at 18-19. In response, the City reasserted its argument that the sole violation of Title VII occurred when it announced the 89 cutoff score and adopted an eligibility list embodying the score cutoffs. Resp. Br. 30-31. The City pointed out that “[p]etitioners’ current theory does not reach the [eligibility] list’s adoption or even first use,” meaning that even if petitioners prevailed, “a remand would be necessary to modify [the] judgment.” *Id.* at 30 n.5. In addition, it was here that the City raised for the very first time its argument that plaintiffs “never proved, or even attempted to prove, that use of the [eligibility] list had disparate impact.” *Id.* at 32.

In reply, plaintiffs made clear that they did not oppose a remand to address the first class issue. Pet. Reply Br. 21 n.13. They also highlighted, in reply to the City’s new challenge to the adequacy of proof of disparate impact, the uncontested evidence in the district court as to “the shortfall number of African American applicants who would have been hired in each class but for the City’s use of its discriminatory hiring practice.” *Id.* at 14 (citing R.371 at 6).

⁸ Supreme Court briefs in this case are all available at <http://www.scotusblog.com/case-files/cases/lewis-v-city-of-chicago/>.

In its May 2010 ruling, the Supreme Court sided with plaintiffs. First, the Court clarified that the employment practice challenged in this case was the City's "exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance" in the firefighter hiring process. A8. Second, the Court recognized that this practice was used repeatedly: the City "made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters." *Id.* Thus, the issue before the Court was "whether a plaintiff who does not file a timely charge challenging the *adoption* of a practice -- here, an employer's decision to exclude employment applicants who did not achieve a certain score on an examination -- may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice." A5-A6; Pet. Br. i.

Applying a straightforward interpretation of Title VII's statutory text, the Court answered that question in the affirmative, holding that a plaintiff can mount a cognizable disparate-impact challenge to a hiring practice each time the practice is used to hire certain applicants and exclude others. A8-A9 (citing 42 U.S.C. §2000e-2(k)(1)(A)(i)). The Supreme Court rejected the premise advocated by the City that "the exclusion of petitioners when selecting classes of firefighters followed inevitably from the earlier decision to adopt the cutoff score" and therefore "no new violations could have occurred." *Id.*

Because “[t]he only question presented...[was] whether the claim petitioners brought is cognizable,” A9, the Court ended its inquiry without addressing the City’s contention that plaintiffs never “adequately proved” that the City’s “use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters...caused a disparate impact,” A8. Rather, the Supreme Court left that issue open on remand, provided that the City properly preserved it. A9.

The Supreme Court noted another potential loose end: “The first round of hiring firefighters occurred outside the charging period even for the earliest EEOC charge. Yet the District Court, applying the continuing-violation theory, awarded relief based on those acts.” A10. On remand, the Supreme Court directed this Court “to determine, to the extent the point was properly preserved, whether the judgment must be modified” with respect to the first class. *Id.*

SUMMARY OF THE ARGUMENT

On remand from the Supreme Court, this Court agreed to resolve only two narrow legal questions: whether the City preserved a challenge to the adequacy of plaintiffs’ proof of disparate impact and whether the City preserved the argument that relief for jobs lost in the first hiring class should be deleted from the remedy. The answer to each question is no.

The City admitted on multiple occasions in the district court that its hiring practice caused a disparate impact. Then it chose not to appeal that issue or any

aspect of the final remedial order, which provided relief to plaintiffs based on undisputed evidence that in each of the eleven classes selected in full or partial reliance on the 89 cutoff score, additional African-American firefighters would have been hired but for the City's discriminatory practice. The City's decisions resulted from its deliberate strategic choice to place all of its eggs in the basket of its "one accrual" timeliness defense. It lost that bet when the Supreme Court unanimously rejected its argument that the one and only Title VII violation occurred when the City adopted an eligibility list based on the 89 cutoff score; instead, the Supreme Court held that plaintiffs could establish a cognizable disparate-impact claim each time the City hired new firefighters.

The time to ask this Court to address issues other than timeliness has long passed, and the City is therefore foreclosed from doing so. Virtually every waiver doctrine squarely applies. The City made multiple admissions in the district court. Not only were those admissions binding, but the points that were admitted were not preserved in the district court and therefore were waived. They were waived again when the City failed to raise the issues in its opening brief in the prior proceedings before this Court.

Even though the City made a strategic choice not to raise, either in the district court or in the prior proceedings before this Court, any challenge to the adequacy of plaintiffs' proof of disparate impact or the relief awarded for jobs lost

in the first class -- and decided instead to bet all-or-nothing on a timeliness defense that the Supreme Court unanimously rejected -- the City nonetheless seeks to avoid the implications of its waiver by raising a host of unavailing excuses. The City's excuses rest either on misstatements regarding the record or incorrect application of waiver doctrine. The remainder of the City's submission attempts to re-litigate its contention that its only Title VII disparate-impact violation was the adoption of an eligibility list. But that merits argument has no place in this remand. Even if it did, it is foreclosed because it is precisely the issue that the City litigated and lost unanimously in the Supreme Court.

This Court should reject the City's diversionary tactics, affirm the original judgment of the district court, and remand for the limited purpose of permitting the district court to adjust the remedial decree to fully account for the more than three years that have passed since it was entered. A decade of waiver is more than enough. Plaintiffs must now be made whole for the City's violations of our nation's core equal employment mandate.

ARGUMENT

Because the district court made no ruling on the two narrow legal questions that the Supreme Court left open on remand, this Court's review is *de novo*.

I. The City waived any challenge to the adequacy of plaintiff's proof of disparate impact.

The first issue on remand arises from the limited scope of the Supreme Court's review. The Court made clear that "[t]he only question presented to us is whether the claim petitioners brought is cognizable" under Title VII's disparate-impact prohibition. A9. Answering that question in the affirmative, the Supreme Court explained:

Although the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list, it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters. [Petitioners' allegation] that this exclusion caused a disparate impact..., based on the City's actual implementation of its policy, stated a cognizable claim.

A8. As the Supreme Court stressed, however, plaintiffs were still required to prove their allegation that the City's exclusionary hiring practice, in fact, caused a disparate impact not only when it "adopted the eligibility list (embodying the score cutoffs)" but also when it "made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters." *Id.* But "[w]hether" plaintiffs "adequately proved" disparate impact was not before the Court. *Id.*

Accordingly, after acknowledging that "the City stipulated that the cutoff score caused disparate impact," the Supreme Court did not consider the City's claim that "petitioners never proved, or even attempted to prove, that *use* of the [eligibility] list," A9 -- *i.e.*, the list "embodying the score cutoffs," A8 -- "had

disparate impact,” A9 (internal citation and quotation marks omitted; alteration in original). Instead, it directed: “If the Court of Appeals determines that this argument has been preserved it may be available on remand.” *Id.*

This narrow question of issue preservation is easily resolved. It is too late for the City to challenge the adequacy of plaintiffs’ proof of disparate impact because it utterly failed to preserve -- and, indeed, waived -- any such challenge in the district court and in the prior proceedings before this Court.

A. The City waived this issue in the district court.

The City repeatedly and irrevocably conceded the entire issue of whether plaintiffs had established disparate impact in its pre-trial submissions, post-trial proposed findings of fact, and evidentiary pleadings. *See, e.g.*, R.64 at 9 n.6; R.223, Ex. A at 2; R.245 at 4-6. From the outset of this litigation, including plaintiffs’ complaint, the City’s answer, and the district court’s class certification ruling, it was clear that this action challenged the City’s repeated use of its hiring practice to fill firefighter jobs and not simply its creation of an eligibility list categorizing applicants as “well qualified” or merely “qualified.” *See, e.g.*, R.1; R.11; R.58; R.59. Nevertheless, the City never once mentioned that its repeated concessions as to disparate impact extended only to the disparate impact of its use of the 89 cutoff score to create an eligibility list and not to the disparate impact

caused by its subsequent use of that cutoff score to select multiple classes of firefighter candidates.

The City's repeated and unequivocal statements that its hiring practice based on the 89 cutoff score had a disparate impact on African-Americans are "conclusive" judicial admissions that had "the effect of withdrawing" any facts with respect to disparate impact "from contention." *Solon v. Gary Cmty. Sch. Corp.*, 180 F.3d 844, 858 (7th Cir. 1999) (citations and quotation marks omitted). If the City had wanted to argue that, although the 89 cutoff score had a disparate impact in the categorization of applicants, it did not, in the end, produce a disparate impact with respect to the numbers of African-Americans who were actually selected to fill multiple classes of firefighters, it was required to identify this as a contested factual issue and litigate the matter at trial. *See Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) ("If the employer discerns fallacies or deficiencies in the [disparate-impact] data offered by the plaintiff, he is free to adduce countervailing evidence of his own."). Yet the City not only failed to identify disparate impact as a contested issue in the final pretrial order, it did the opposite by stipulating to the existence of disparate impact. *See* R.223, Ex. A at 2. The City therefore abandoned -- forever -- its right to dispute the adequacy of plaintiffs' proof of disparate impact. *See SNA Nut Co. v. Häagen-Dazs Co.*, 302 F.3d 725, 732 (7th Cir. 2002); *Nagy v. Riblet Prods. Corp.*, 79 F.3d 572, 575 (7th Cir. 1996).

The City underscored that its concession encompassed an admission of disparate impact in the outcome of its multiple rounds of hiring when it responded in April 2004 to plaintiffs' proposed finding of fact, submitted following the liability phase of the trial. R.245. Plaintiffs proposed a factual finding that over a multi-year period "the City selected for further processing, and made job offers to, only the 7 percent of the applicant pool that had scored above the 89 cut score" and that "[t]his practice had an admitted and severe adverse impact against African Americans" in that "[i]t very disproportionately eliminated" them "from consideration for the firefighter job." R.238 at 3. The City responded that the district court need not make this finding because "adverse impact has never been disputed in this case and it was not an issue at trial." R.245 at 5-6; *supra* at 7. Moreover, in its own post-trial proposed conclusions of law, the City again conceded the entire issue of disparate impact and did not advance a single factual statement suggesting in any way that the record failed to support the disparate-impact prong of plaintiffs' claim. R.244 at 2. Relying on the City's wholesale and unqualified concession of disparate impact, the district court stated in its March 2005 liability ruling that "[t]he disparate impact of the 1995 Test on African-American firefighter candidates has caused...fewer African-Americans being hired for the position of firefighter." A65; *see also* A68, A80-81.

The City redoubled its abandonment of any challenge to disparate impact during the remedial phase of the trial. The City agreed, R.371 at 6, with evidence provided by plaintiffs' expert, showing that in each class hired from 1996 through 2002, the City's practice of hiring only applicants who scored 89 or above caused a "shortfall" of African-Americans hired, R.366 at 1-4, Ex. B. Moreover, in its proposed findings and conclusions with respect to remedies, the City took the position that the remedy should be calculated based on this class-by-class "shortfall" in African-American hires. R.380 at 6.

This agreed "shortfall" evidence was the basis for the district court's findings in its April 2007 injunctive order of relief, which represented the final judgment in the case for appeal purposes, and incorporated by reference its prior March 2005 ruling on liability. A18-A20. As a necessary factual predicate for its calculation of classwide relief, the district court found that "but for the manner in which the City hired firefighters based on the 1995 Firefighters Examination, which discriminated against African Americans," an additional 132.4 firefighter positions "would have been filled by African Americans." A23. The court proceeded to break down these "shortfall positions" by class, based on the undisputed evidence that in each one of the eleven classes filled in full or partial

reliance on the 89 cutoff score, additional African-American firefighters would have been hired but for the City's discrimination. *Id.*⁹

The City's failure, throughout the district court proceedings, to raise any challenge to the disparate impact caused by its hiring practice constitutes waiver -- and not merely forfeiture as the City contends. *Cf.* City's Remand Br. 36 n.12. Waiver is shown where, as here, a party "chose, as a matter of strategy, not to present an argument." *United States v. Garcia*, 580 F.3d 528, 541 (7th Cir. 2009).¹⁰ From the outset, the City made a tactical decision to put all its eggs in the basket of its "one accrual" timeliness defense. That defense rested on a single premise: From the day that the City announced its policy of hiring only those applicants who scored 89 or above and adopted an eligibility list embodying the score cutoffs, plaintiffs should have filed EEOC charges because, by that point, they knew that they had lost their chance to be hired (at least for many years and probably forever) due to a hiring criterion that had an obvious, and publicly

⁹ Accordingly, even if the City preserved this disparate-impact argument (which it did not), its adequacy-of-proof challenge is meritless because plaintiffs proved, the record contains undisputed evidence of, and the district court's remedial order was predicated upon its finding as to the "shortfall positions" that would have been filled by African-American applicants in each round of hiring but for the City's reliance on the discriminatory cutoff score.

¹⁰ By contrast, "[f]orfeiture occurs by accident, neglect, or inadvertent failure to timely assert a right." *United States v. Woods*, 301 F.3d 556, 560 (7th Cir. 2002). But even if the City merely forfeited its argument, it would not be entitled to relief from its forfeiture, because it has "ma[de] no attempt to identify a plain error that would justify [relief]." *Solis v. Current Dev. Corp.*, 557 F.3d 772, 777 (7th Cir. 2009). The City has shown neither exceptional circumstances nor that its substantial rights have been affected, and it is relief from forfeiture, not the forfeiture itself, that would work a miscarriage of justice by preventing a remedy for the City's violation of Title VII. *See Woods*, 301 F.3d at 560; *see also infra* at 40.

acknowledged, disparate impact against African-American applicants. CA7R.18 at 18-19. If the City had contested the adequacy of the disparate-impact evidence with respect to its multiple rounds of hiring, it would have fatally undercut this premise. That is, if the City had questioned whether or not the 89 cutoff score would cause a disparate impact in its subsequent rounds of hiring, it could not have reasonably claimed that plaintiffs should have known that they had a disparate-impact hiring claim back when the City announced its hiring practice. Thus, as a matter of litigation strategy, the City chose not to contest -- and therefore waived -- the merits issue of the adequacy of the disparate-impact evidence. *See Garcia*, 580 F.3d at 541.

Accordingly, even before this case first reached this Court, the City's waiver in the district court waived any appeal challenging the adequacy of the disparate-impact evidence in the multiple rounds of hiring. *See Econ. Folding Box Corp. v. Anchor Frozen Foods Corp.*, 515 F.3d 718, 720 (7th Cir. 2008). "Appellate review is not designed to serve as an unsuccessful party's second bite at the apple -- an opportunity to raise issues and arguments that were not brought forth below...even when [as here] the issue is an element of a plaintiff's prima facie case." *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 728 (7th Cir. 2004).

B. The City also waived this issue in the prior proceedings before this Court.

Even if the City had preserved a challenge to the adequacy of plaintiffs' proof of disparate impact in the district court, the City waived this issue when the case was previously before this Court. The City's exclusive argument on appeal was that plaintiffs' EEOC charge was untimely because a cause of action under Title VII accrued only once: when the City announced its decision to hire based on the 89 cutoff score and adopted the eligibility list embodying the score cutoffs. CA7R.18 at 14, 18-19, 27-28, 36; CA7R.36 at 1, 4.

The City certainly could have raised, as an alternative to this "one accrual" timeliness defense, the argument it now seeks to assert -- *i.e.*, even if each round of hiring counts as a new accrual, judgment must still be entered against plaintiffs because there was insufficient evidence of disparate impact associated with the City's multiple rounds of hiring. City's Remand Br. 18. But the City made no such argument in its prior opening brief -- or at any other point during the prior proceedings before this Court -- and therefore failed to preserve the issue. *See, e.g., Georgou v. Fritzshall*, 178 F.3d 453, 456-57 (7th Cir. 1999) ("an appellant must present in the opening brief all grounds of appeal"); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997). As in the district court, the City's failure to preserve any challenge to the adequacy of plaintiffs' proof of

disparate impact resulted from its strategic choice to pursue only its “one accrual” timeliness defense and, thus, constitutes waiver. *Garcia*, 580 F.3d at 541.

It is far too late for the City to press its doubly waived disparate-impact argument on remand. “Under the doctrine of the law of the case, a ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case.” *Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003) (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996)). This Court has made clear that “parties cannot use the accident of remand as an opportunity to reopen waived issues.” *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001); accord *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 685-86 (7th Cir. 2008).

II. The City waived any challenge to relief awarded for jobs lost in the first class hired.

The second issue left open by the Supreme Court is whether “to the extent that point was properly preserved” by the City, the district court’s judgment should be modified to exclude any relief for a disparate-impact violation in the first round of hiring because plaintiffs’ EEOC charge was not filed within 300 days of that hiring round. A10. This Court agreed to resolve “whether the City preserved the argument.” CA7R.66. The answer is clearly no. The City did not raise this issue

at any point either in the district court or in its opening brief in the prior proceedings before this Court.

“It is axiomatic that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal.” *Christmas v. Sanders*, 759 F.2d 1284, 1291 (7th Cir. 1985); *accord Econ. Folding Box Corp.*, 515 F.3d at 720. The City does not dispute that it failed to argue in the district court that the remedy should exclude relief for the first class. To the contrary, as the City admits, it *agreed* to the inclusion of relief for the “shortfall” in hiring of African-Americans from the first class. City’s Remand Br. 44 (citing R.366 at 1-4, Ex. B; R.371 at 6; A23).

The City also admits that -- in its opening brief in the prior proceedings before this Court -- it did not seek a modification of the remedy to delete relief for the first class. City’s Remand Br. 44. This, too, was a fatal error. The law in this Court is clear: “All arguments for reversal must appear in the [appellant’s] opening brief.” *Wilson v. O’Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (collecting cases); *accord Porco v. Trs. of Ind. Univ.*, 453 F.3d 390, 395 (7th Cir. 2006). Accordingly, even if the City had preserved its remedial argument with respect to the first class in the district court, the City separately has foreclosed further consideration of this issue on remand by failing to raise any such argument in its opening brief in the prior appellate proceedings. *Morris*, 259 F.3d at 898. As with

the City's failure to challenge the adequacy of plaintiffs' disparate-impact evidence, its failure to preserve any argument with respect to the first class was the result of its strategic decision to rely exclusively on its "one accrual" timeliness defense. Thus, this issue, too, is waived. *See Garcia*, 580 F.3d at 541; *see infra* at 34-35.

In sum, by failing to preserve a challenge specifically directed to the untimeliness of plaintiffs' EEOC charge as to the first class hired, either in the district court or in its prior opening appellate brief, the City lost the benefit of that defense. But this is no injustice. Every time the City hired using the discriminatory cutoff score, African-Americans suffered discrimination. The fact that no charge was timely filed as to the first class does *not* mean that the hiring of that class was non-discriminatory. The opposite is true. But for the City's practice of hiring firefighters based on a discriminatory cutoff score, twenty-one additional class members would have been hired into the first class. A23. Nor does the fact that no EEOC charge was timely filed mean that the City was powerless to correct the effect of its use of an admittedly discriminatory hiring practice. *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2675-77 (2009). Plaintiffs' failure to file an EEOC charge within 300 days put in jeopardy their ability to recover relief to which they were otherwise entitled; the City's failure to preserve its timeliness defense has simply brought things back to square one.

III. The City's litany of excuses for its waiver is contrary to the law and record of this case.

The City raises six excuses to avoid the consequences of its failure to preserve -- either in the district court or in its opening brief in the prior proceedings before this Court -- any challenge to the adequacy of plaintiffs' proof of disparate impact or to the relief awarded for jobs lost in the first class hired. The City's excuses are unpersuasive because they are contradicted by the record and by well-settled waiver jurisprudence.

First, the City claims that, even though the two arguments that it now raises on remand were unstated in the district court and in its prior opening appellate brief, it nonetheless preserved them by persistently asserting that the "only... possible violation...occurred in January 1996, when the list was adopted and announced." City's Remand Br. 43-44; *see also id.* at 38-40. Yet the City cites no authority to support the notion that an appellant's express preservation of one argument also preserves a second argument that the appellant never made in the district court or its opening brief on appeal. Nor could it. A party does not preserve an argument without expressly raising it, regardless of whether or not the argument may logically follow from its other submissions. *See Econ. Folding Box Corp.*, 515 F.3d at 720 (rejecting as a "nonstarter" a party's "attempt[] to circumvent our well-established waiver rule" by claiming that "it implicitly reserved" an argument); *Marcus v. Sullivan*, 926 F.2d 604, 616 (7th Cir. 1991)

(holding that an argument was waived because the party did not “explicitly mention” it); *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1526 (1st Cir. 1996) (finding new arguments waived on appeal even though the appellant “arguably did advance the seeds of its legal theories underlying its appellate arguments” in the district court).

Second, the City contends that there was no waiver because, at the time it filed its prior opening appellate brief, it had no reason to respond to the present-violation theory of timeliness (ultimately adopted by the Supreme Court) by challenging the 89 cutoff score’s disparate impact or the relief awarded for the first class. City’s Remand Br. 21, 36-38, 43-44. Under the City’s logic, “plaintiffs did not offer the present-violation theory until two years after the liability trial,” the district court “never addressed or adopted” the theory, and therefore it was “not required to imagine and then address in [its opening] brief all the potential alternative bases for affirmance plaintiffs might have mustered on appeal.” *Id.* at 43-44.

The City’s reasoning distorts the record in this case. The City did not have to “imagine” that plaintiffs would defend the timeliness ruling on the ground that every round of hiring was a fresh violation. Plaintiffs explicitly stated nineteen months before the City filed its opening brief -- in response to the district court’s *sua sponte* request for the parties to submit proposed questions of law for a

possible interlocutory appeal on timeliness -- that it was “important” that the present-violation theory be presented to this Court in any forthcoming appeal.

R.310 at 1-2. Plaintiffs made the same argument in their opposition to the City’s motion for a stay pending appeal. R.416 at 5. And well before those filings, the district court had recognized that:

The disparate impact is not limited to the initial promulgation of the examination results, but *arises every time the City decides to hire* based on the results of the discriminatory examination.

A100 (emphasis added). Moreover, for years prior to entry of the district court’s final judgment, plaintiffs consistently asserted this position. *See, e.g.*, R.74 at 7; R.270 at 4; *supra* at 5-8. For instance, in their March 2000 memorandum opposing the City’s motion for summary judgment on timeliness grounds, plaintiffs argued that “the City here commits a new violation of Title VII every time it makes a hiring decision based on the result of its discriminatory test.” R.74 at 7.¹¹ Indeed,

¹¹ Contrary to the City’s contention, plaintiffs’ memorandum did not “disavow” the present-violation theory as an alternative basis for upholding timeliness. *See* City’s Remand Br. 7, 38 (citing R.74 at 7-8). What plaintiffs disavowed was reliance on the “serial” continuing-violation theory discussed in *Selan v. Kiley*, 969 F.2d 560, 565 (7th Cir. 1992). In *Selan*, the plaintiff wished to challenge a series of completely distinct employment practices (a transfer, a reduction in responsibilities, a further reduction in responsibilities, and a removal of privileges), whose only common feature was that each was allegedly motivated by the same discriminatory animus. *See id.* at 566. This Court referred to the *Selan* plaintiff’s argument as a “serial” continuing-violation theory and distinguished *Selan* from “cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory,” often labeled “systemic” continuing violations. *Id.* at 565 & n.5. Here, plaintiffs’ memorandum argued that this case involved a “systemic,” not a “serial” continuing violation, as those terms were used in *Selan*. R.74 at 4-5, 7-8. This by no means disavowed the present-violation theory that the Supreme Court ultimately adopted and that plaintiffs staked out in this very memorandum. *Id.* at 7. To the extent that the terminology is imprecise, it is important to note that this memorandum was

as the City's opening brief in the prior proceedings before this Court reveals, the City knew full well that both plaintiffs and the district court saw the hiring of each class of firefighters as a "fresh violation." CA7R.18 at 20; *see supra* at 12-13.

Consequently, the City was on notice of plaintiffs' present-violation argument *and* that plaintiffs intended to press this argument in any forthcoming appeal. If the City had any grounds for challenging plaintiffs' showing of disparate impact in actual hiring or for arguing that no relief should be awarded for the discriminatory "shortfall" of African-Americans applicants hired in the first class, it should have raised those merits issues in its opening brief in the prior proceedings before this Court. Having chosen not to do so, the City waived those arguments and cannot be heard to challenge them now. *See Republic Tobacco*, 381 F.3d at 728. The City has not cited any authority endorsing its novel and completely unworkable theory that an appellant can wait until a remand from the Supreme Court to raise a fact-based defense that it never previously asserted in the litigation. To the contrary, courts have rejected the notion that an appellant can hold back its arguments for reversal for later use on remand, in the event that its primary argument fails. *See, e.g., Schering Corp.*, 89 F.3d at 358; *Palmer v. Kelly*, 17 F.3d 1490, 1496-97 (D.C. Cir. 1994).

filed before the Supreme Court clarified the continuing-violation theory in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Third, the City claims that “once plaintiffs raised the present-violation theory in their prior response brief in this court,” it was entitled to and did reply. City’s Remand Br. 37-38, 44. This argument is irrelevant to the outcome of the first remand question -- whether the City preserved any challenge to plaintiffs’ proof of disparate impact. The City remained silent on this issue throughout the prior proceedings before this Court, even after plaintiffs expressly asserted the present-violation theory as an alternative ground for affirmance. CA7R.24 at 7, 12-15. Indeed, the City’s reply brief clearly stated that it “d[id] not challenge the district court’s liability decision,” CA7R.36 at 7, or any “factual findings,” *id.* at 2.

With respect to the second remand question, the City’s perfunctory statement at the beginning of its reply brief in the prior proceedings before this Court, CA7R.36 at 3, was insufficient to preserve its argument that the judgment should be modified to delete the relief awarded for the jobs lost in the first class hired. *See Mahaffey v. Ramos*, 588 F.3d 1142, 1146 (7th Cir. 2009) (“Perfunctory, undeveloped arguments...are waived.”).

Even if the City had developed this argument in its reply, it would have been too late. This Court has consistently held that “[a]rguments raised for the first time in the reply brief are waived.” *Estate of Phillips*, 123 F.3d at 597 (quoting *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508 n.5 (7th Cir. 1994)) (alteration in original); *Wilson*, 895 F.2d at 384. While plaintiffs do not quarrel

with the proposition that an appellant is entitled to reply to arguments raised by an appellee in its brief, none of the cases cited by the City permit an appellant to use its reply brief to attack an additional part of the judgment against it. *Cf.* City's Remand Br. 37. To the contrary, Judge Posner in his separate opinion in *Hussein v. Oshkosh Motor Truck Co.* made clear that "[a] reply brief is for replying, not for raising a new ground or, as in this case, challenging a part of the judgment that the appellant decided not to challenge in his opening brief." 816 F.2d 348, 360 (7th Cir. 1987). The City's belated objection to the district court's inclusion, in the remedial portion of its judgment, of relief to remedy the shortfall in African-Americans hired in the first class cannot be characterized as anything but a forbidden attack on "a part of the judgment" that the City did not preserve in the district court or in its opening brief in the prior proceedings before this Court.¹²

Fourth, the City contends that it was not required to raise any challenge to the adequacy of plaintiffs' proof of disparate impact or the relief awarded to the first class because the district court did not make findings on these issues. City's Remand Br. 23-25, 35-37. This is incorrect. As a predicate to the relief it

¹² The other cases cited by the City likewise fail to support its position. City's Remand Br. 37. In *Georgou*, 178 F.3d 453, this Court reiterated that "an appellant must present in the opening brief all grounds of appeal," and it held that arguments first raised by the appellants in their reply were forfeited. *Id.* at 456-57. In *United States v. Lowe*, 860 F.2d 1370 (7th Cir. 1988), this Court permitted an appellant to address in his reply an argument that was first raised by the appellee on appeal, but only because, unlike in this case, the appellant "fully preserved" the argument in the district court. *Id.* at 1375. Finally, *Maher v. City of Chicago*, 547 F.3d 817 (7th Cir. 2008), contains no reasoning on point.

awarded, the district court found that 132.4 “shortfall positions” resulted from the City’s repeated use of its discriminatory hiring practice, including 21.3 “shortfall positions” in the first class hired. A23; *see supra* at 9-10.

The City knows full well what these “shortfall positions” represent. In its remand brief, it stated that “the ‘shortfall’ in the 11 classes...reflected the difference between the number of African-Americans hired and the number that would have been hired if applicants had been drawn from the ‘well-qualified’ and ‘qualified’ categories.” City’s Remand Br. 20. And contrary to the City’s unsupported insinuation, *cf. id.* at 16, evidence and findings at the remedial phase of a bifurcated trial are just as good as findings at the liability phase; they are both part of the same trial, and until both phases have been decided, there is no appealable judgment. *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1285 (D.C. Cir. 1984) (“In a bifurcated trial the judgment on liability remains interlocutory, and thus subject to the trial court’s modification, until the remedial order issues.”) (citing *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47-48 (1943)). Because the district court found a class-by-class disparity between the number of African-Americans hired and the number who would have been hired but for the City’s use of the 89 cutoff score as a threshold hiring criterion, A23, the City was required to challenge that finding in its prior opening appellate brief or

live with it. *See Republic Tobacco Co.*, 381 F.3d at 728.¹³ Similarly, because the district court's remedial order included relief for the "shortfall positions" in the first class, the City was required to challenge that relief in its prior opening appellate brief or forever waive it.

Fifth, the City seeks to escape the import of its waiver by asserting that plaintiffs "waived waiver." City's Remand Br. 41, 45-46. With respect to the first remand issue, the City points to plaintiffs' summary in their Supreme Court reply brief of the uncontested record evidence of disparate impact in each of the City's multiple rounds of hiring. City's Remand Br. 41; Pet. Reply Br. 13. This summary was prompted by the City's Supreme Court merits brief, where it asserted for the very first time that plaintiffs' proof of disparate impact was

¹³ Even if the district court did not make class-by-class findings of disparate impact (which it did), plaintiffs were not required to obtain supplemental findings or cross appeal in order to press a present-violation theory of timeliness as an alternative ground for affirming the district court's judgment. *Cf.* City's Remand Br. 16, 24-25, 36. Plaintiffs, as "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of [the] judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). The City effectively concedes that, under this Court's precedent, a cross-appeal would have been inappropriate. *See* City's Remand Br. 24-25 n.4 (citing *Wellpoint, Inc. v. Comm'r of Internal Revenue*, 599 F.3d 641, 649-51 (7th Cir. 2010)); *see also* *Luna v. United States*, 454 F.3d 631, 635 (7th Cir. 2006); *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 173-74 (7th Cir. 1996). *Staub v. Proctor Hospital*, 560 F.3d 647, 656 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (2010), is not to the contrary. *Cf.* City's Remand Br. 36-37. In *Staub*, this Court addressed an appellant's, not an appellee's, alternative theories on appeal. 560 F.3d at 656. Because a cross-appeal was not required here, there is no need to address any tension between authority from other circuits and this Court's clear holding that the cross-appeal requirement is not jurisdictional. *Coe v. County of Cook*, 162 F.3d 491, 498 (7th Cir. 1998); City's Remand Br. 24-25 n.4. Finally, the City is incorrect, *cf. id.* at 16, 24-25, that the cross-appeal rule precludes this Court from remanding should it conclude that it would be beneficial for the district court to decide in the first instance factual questions pertinent to the issues that the Supreme Court left open. *See Dandridge*, 397 U.S. at 475 n.6; *Gooden v. Neal*, 17 F.3d 925, 935 (7th Cir. 1994).

inadequate. Resp. Br. 32, 40. The City's argument is unavailing. The Supreme Court was well aware of the arguments that both sides presented on this issue, but pointedly declined to address it because it was not before the Court. A9. If plaintiffs' summary of the evidentiary record waived waiver before the Supreme Court, there would have been no need for a remand to determine whether the City "preserved" the argument. *Id.* For the same reasons, plaintiffs did not waive the City's waiver when they acknowledged in their Supreme Court briefs that their EEOC charge was untimely with respect to the first class hired. Pet. Br. 8 n.3; Pet. Reply Br. 21 n.13; *cf.* City's Remand Br. 41.¹⁴

With respect to the first class, the City further suggests that its waiver was cured by plaintiffs' concession, in the brief that they filed in the prior proceedings before this Court, that their first EEOC charge was filed more than 300 days after the first class was hired. City's Remand Br. 45-46. The City has it backward. Regardless of whether plaintiffs' concession goes to the merits of the "first class" timeliness argument, this Court does not consider the merits of an argument unless it determines that the argument was properly preserved. *See, e.g., Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1126 (7th Cir. 1996) ("Ortiz has waived these arguments

¹⁴ The City also argues that plaintiffs "waived waiver" in their submission pursuant to Circuit Rule 54. City's Remand Br. 45-46. Yet, in that submission, plaintiffs expressly argued that the City waived both arguments at issue here. *See* CA7R.65 at 11-16. A party does not "waive waiver" when it argues waiver but also addresses the substance of the waived argument. *Cf. Riemer v. Ill. Dep't of Transp.*, 148 F.3d 800, 804 n.4 (7th Cir. 1998).

by failing to raise them before the district court, and we will not consider their relative merit.”). An acknowledgement that the opposing party’s argument may be meritorious does not cure waiver. If (as the City suggests) the merits of an argument automatically trumped consideration of whether the argument had been waived, the Supreme Court’s remand on this issue would have been pointless. But, as this Court has made clear, an argument can be waived even if it is “otherwise valid.” *Marcus*, 926 F.2d at 615; *accord Rizzo v. Sheahan*, 266 F.3d 705, 714 (7th Cir. 2001).

Moreover, the City fundamentally misapprehends the “waived waiver” doctrine. This Court has proceeded to address an argument raised by an appellant in its opening brief even though the argument was waived in the district court, when an appellee (instead of arguing waiver) addresses the merits of the waived argument. *Bell v. Daimler Chrysler Corp.*, 547 F.3d 796, 806 n.3 (7th Cir. 2008), cited by the City, is one example. *See* City’s Remand Br. 45-46. Yet this Court has previously rejected an attempt by the City to use the “waived waiver” doctrine to revive an unpreserved defense for the first time in a reply brief, regardless of what the other party said in its own brief. *Roche v. City of Chicago*, 24 F.3d 882, 887 n.7 (7th Cir. 1994). In *Roche*, the City contended “that through its reply brief it managed to adequately place a foot in a door that was opened by the appellees after being left shut by the City.” *Id.* Rejecting this contention, this Court

concluded that, “even if appellees had shouted from the hilltops..., it was for the City in its main arguments before the district court” to preserve its “theory of nonliability” by adequately developing it. *Id.* at 886-87 & n.7. So, too, here.¹⁵

Finally, this Court should not forgive the City’s waiver of its challenge to the adequacy of plaintiffs’ proof of disparate impact in the interests of justice. *Cf.* City’s Remand Br. 41-42. As explained above, *see supra* at 20-27, 34, it is simply not true that the City raised this argument “at the very first realistic opportunity.” City’s Remand Br. 42. The City had ample opportunity to raise and fully brief a challenge to the adequacy of plaintiffs’ proof of disparate impact in the district court and in the prior proceedings before this Court. Instead, the City made a strategic choice to stick with the “one accrual” timeliness argument as its sole defense until the case reached the Supreme Court.¹⁶

¹⁵ *Barnett v. Roper*, 541 F.3d 804, 807 (8th Cir. 2008), is persuasive authority on this point. The Eighth Circuit held that a state forfeited its objection to the timeliness of a habeas petition because it failed to plead a statute-of-limitations defense in its answer, even though the habeas petitioner subsequently conceded that his petition was filed late. *Id.* at 807. This was not a “narrow holding for habeas cases.” City’s Remand Br. 45. *Barnett* relied on generally applicable authority that “objections to untimeliness can no longer be raised after the case has been decided,” 541 F.3d at 807 (citing *Kontrick v. Ryan*, 540 U.S. 443, 459-60 (2004)), including *Kontrick*, a Supreme Court bankruptcy case, the reasoning of which has been applied in other contexts, *see, e.g., Eberhart v. United States*, 546 U.S. 12 (2005).

¹⁶ The cases cited by the City are easily distinguishable. *Cf.* City’s Remand Br. 41-42. The waiver questions here do not involve a “pure issue of statutory interpretation” that was fully briefed on appeal, but rather factual challenges that were not addressed in the City’s prior opening appellate brief. *Cf. Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993). Moreover, this is not a case where a district court’s *sua sponte* resolution of an issue denied a party the chance to brief it in the district court, *cf. Sims-Madison v. Inland Paperboard & Packaging, Inc.*, 379 F.3d 445, 450 (7th Cir. 2004); *Worthington v. Wilson*, 8 F.3d 1253, 1257 (7th Cir. 1993); or where a party raised an issue in the district court but failed to develop it or

In sum, the City's excuses for its waiver of the two remand issues are unpersuasive and undercut by the law and the record.

IV. The City cannot escape its waiver by re-litigating an argument that it already lost unanimously in the Supreme Court.

While this Court directed the parties to address only two narrow questions of issue preservation, the bulk of the City's remand brief struggles to resurrect its argument that it used the discriminatory 89 cutoff score one time and one time only -- when it adopted the eligibility list. City's Remand Br. 15, 18, 22-23, 39-40.

Thereafter, in the City's view, all it did was to select applicants at random from the "well qualified" tier of the eligibility list; that list was washed clean because it was not challenged by a timely EEOC charge and must therefore be viewed as the legal equivalent of a non-discriminatory narrowing of the applicant pool. *Id.* at 26-27.

The problem with this contention is that the City presented the same argument to the Supreme Court, which unanimously rejected it. *Compare* City's Remand Br. 26-27, 39, *with* Resp. Br. 8-9, 11, 23-25, 40, *and* A8-A10. After identifying the challenged "employment practice" as "the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was

presented it in a different context, *cf. Dexia Credit Local v. Rogan*, 602 F.3d 879, 884 (7th Cir. 2010); *Fox v. Hayes*, 600 F.3d 819, 832 (7th Cir. 2010); *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998); *Alvarez v. City of Chicago*, 605 F.3d 445, 450 n.3 (7th Cir. 2010). Finally, the party seeking to escape the consequences of its waiver here is an appellant, not an appellee. *Cf. Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391 & n.1 (7th Cir. 2007).

exhausted) when selecting those who would advance,” the Supreme Court ruled unambiguously that a “cognizable” challenge to this practice’s disparate impact could be brought each time it was used to fill a new class of firefighters -- notwithstanding the fact that “the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list.” A8.

Moreover, the Supreme Court made clear that “[b]y enacting §2000e-2(k)(1)(A)(i), Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact...whether or not he has employed the same practice in the past,” A10, and even if, as in this case, the disparate impact of the subsequent uses “followed inevitably” from a prior disparate-impact violation, A8. The Supreme Court’s ruling therefore forecloses the City’s contention that the conceded disparate impact of the 89 cutoff score cannot serve as a predicate for plaintiffs’ claim that the City violated Title VII’s disparate-impact prohibition each time it hired only those applicants who scored 89 or above.

Straining against the logic of this ruling, the City argues that, for three reasons, the Supreme Court must have meant to leave open the City’s failed argument that the 89 cutoff score could be challenged only at the time that the eligibility list was adopted and, thus, in order to prevail, plaintiffs must identify something else -- something wholly apart from the 89 cutoff score -- that

disparately impacted African-Americans in the City's multiple rounds of hiring. City's Remand Br. 40.

First, the City extrapolates from a passage in the Supreme Court's decision in which the Court acknowledged the possibility that "the City's January 1996 decision to adopt the cutoff score (and to create a list of the applicants above it) gave rise to a freestanding disparate impact claim." A8. "If that is so," a matter the Court did not decide, then plaintiffs' failure to file a timely EEOC charge challenging that decision would have foreclosed any such freestanding claim, and the City would be "entitled to treat *that past act*" -- *i.e.*, the January 1996 decision to adopt the 89 cutoff score and create an eligibility list embodying the score cutoffs -- "as lawful." A8-A9 (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)) (emphasis added). In the City's view, "[b]y calling the past action 'lawful' and citing *Evans*," the Court intended to convey that the disparate impact caused by the 89 cutoff score was immunized from further legal challenge. City's Remand Br. 28.

This analysis completely misreads the Supreme Court's opinion. The Court was simply explaining that, once 300 days lapsed after the City's decision in January 1996 to adopt the eligibility list embodying the 89 cutoff score, plaintiffs no longer could raise a "freestanding" claim against that decision, assuming they could have done so in the first place. A8 (citing *Connecticut v. Teal*, 457 U.S. 440,

445-51 (1982)). In no way does the Court's conclusion foreclose plaintiffs' ability to challenge, on disparate-impact grounds, the City's repeated use of the 89 cutoff score (or the eligibility list "embodying the score cutoffs") to hire multiple classes of new firefighters. A8. Immediately after noting the "correct[ness]" of the City's premise that it could treat its uncharged decision to create the eligibility list as a "lawful" past act, A8-A9, the Court made clear the error in the City's logic: "But it does not follow that no new violation occurred -- and no new claims could arise -- when the City implemented that decision down the road." A9.

On this point, the Supreme Court's citation to *Teal* is telling. A8. In *Teal*, the Supreme Court held that African-American employees could bring a disparate-impact challenge to a written test that disproportionately "excluded" them from "further consideration" for promotions, even though, in the end, there was no disparate impact in actual promotions, based on a comparison between the racial composition of the full pool of test-takers and of those selected for the promotions, as a result of the employer's use of "an affirmative-action program." 457 U.S. at 443-44, 456. The "freestanding" claim suggested by the Supreme Court in this case is analogous to the claim in *Teal*; in each context, plaintiffs could assert a disparate-impact violation when they were eliminated from further consideration, whether or not there was proof of "bottom line" disparate impact in subsequent hiring. A8; *Teal*, 457 U.S. at 456.

The Supreme Court's quotation from *Evans* does not bolster the City's argument. As the City concedes, City's Remand Br. 28 n.7, the Supreme Court expressly distinguished this case from "*Evans* and a line of cases following it." A9 (citing *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); and *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980)). The Court made clear that these disparate-treatment cases have only limited relevance in a disparate-impact case: "As relevant here, those cases establish *only* that a Title VII plaintiff must show a 'present violation' within the limitations period." A9 (quoting *Evans*, 431 U.S. at 558) (emphasis added). In a disparate-impact case -- unlike a disparate-treatment case -- the harms caused by the use of a previously adopted hiring practice are not "the present effects of past discrimination" but "the present effects of present discrimination." *Id.*

Second, the City contends that 42 U.S.C. §2000e-2(k)(1)(B)(i) precludes plaintiffs from pointing to the disparate impact of the 89 cutoff score to prove disparate impact in the City's multiple rounds of hiring. City's Remand Br. 25-26, 29-30. Although this statutory provision predates this litigation, the City's attempt to rely on it is entirely new and, thus, has not been even colorably preserved. *See Republic Tobacco Co.*, 381 F.3d at 728. For this reason alone, the argument is foreclosed.

But even if the argument had been preserved, it is meritless. Added to Title VII as part of the 1991 Civil Rights Act, the referenced subsection provides an exception to the general rule that a disparate-impact plaintiff “shall demonstrate that *each particular challenged employment practice* causes a disparate impact.” Civil Rights Act of 1991, Pub. L. No. 102-166, §105, 105 Stat. 1071, 1074 (42 U.S.C. §2000e-2(k)(1)(B)(i)) (emphasis added). Under that exception, if a plaintiff can show that “the elements” of an employer’s overall “decisionmaking process are not capable of separation for analysis,” then, for purposes of proving disparate impact, “the decisionmaking process may be analyzed as one employment practice.” 42 U.S.C. §2000e-2(k)(1)(B)(i).¹⁷ The City faults plaintiffs for not having made the showing necessary to trigger application of this statutory exception. City’s Remand Br. 26. But plaintiffs had no need to do so, because they are not challenging an overall “decisionmaking process” that includes multiple, distinct employment practices. 42 U.S.C. §2000e-2(k)(1)(B)(i); *cf.* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (rejecting a disparate-impact challenge to an overall decisionmaking process including

¹⁷ This subsection was a response to the Supreme Court’s holding in *Wards Cove Packing Co. v. Atonio* that plaintiffs may not challenge the overall disparate impact of an employer’s combined use of multiple, distinct employment practices but, instead, must “specifically show[] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.” 490 U.S. 642, 657 (1989). “Congress softened the holding of *Wards Cove* to allow a plaintiff to focus on an employer’s overall decision-making process as the cause of a disparate impact if the plaintiff can show that the elements of the employer’s decision-making process are not capable of separation for analysis.” *Smith v. Xerox Corp.*, 196 F.3d 358, 368 (2d Cir. 1999).

nepotism, separate hiring channels, rehiring preferences, and subjective decisionmaking).¹⁸ Instead, as the Supreme Court recognized, plaintiffs are challenging one very specific employment practice: “the exclusion of passing applicants who scored below 89 (until the supply of scores 89 or above was exhausted) when selecting those who would advance.” A8. As to this “particular challenged employment practice,” 42 U.S.C. §2000e-2(k)(1)(B)(i), plaintiffs proved, and the district court found, disparate impact each time it was used to fill a new class of firefighters. *See supra* at 9-10.

Third, the City argues that “there would have been no need for a remand” if all plaintiffs had to prove was that the City’s repeated use of the 89 cutoff score caused the hiring of a disproportionately low number of African-Americans relative to their proportion among otherwise qualified applicants. City’s Remand Br. 27. Given the City’s stipulation “that the 89-point cutoff had a ‘severe disparate impact against African Americans,’” A6, the City contends that the outcome would have been so clearly in plaintiffs’ favor that any remand would have been “wholly gratuitous.” City’s Remand Br. 27.

¹⁸ Courts have applied the statutory exception referenced by the City in circumstances very different from this case -- for instance, “[w]here the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, discretionary placements and promotions, the failure to follow set procedures and the absence of written policies or justifications for promotional decisions.” *McClain v. Lufkin Indus.*, 519 F.3d 264, 278 (5th Cir. 2008) (quoting *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 335 (N.D. Cal. 1992)).

The simple answer to the City's conundrum is that the adequacy of plaintiffs' proof of disparate impact was not before the Supreme Court. As the Court recognized, "[t]he only question presented to us is whether the claim petitioners brought is cognizable." A9. After answering that question in the affirmative, the Court stated that "our inquiry is at an end." *Id.* Rather than sorting through the parties' arguments about the state of the record below to resolve the merits of whether the City's use of the 89 cutoff score, in fact, caused disparate impact in its multiple rounds of hiring, the Court instructed that this issue could be raised on remand, provided that it was properly preserved. A9-A10.

Such a remand instruction is routine. When the Supreme Court reverses appellate court decisions, it commonly remands rather than addressing alternative arguments raised by the respondent -- or whether they were preserved -- especially where, as here, those alternative issues are not fairly included in the question presented. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004); *Archer v. Warner*, 538 U.S. 314, 322-23 (2003); *West v. Gibson*, 527 U.S. 212, 223 (1999); *cf. Sup. Ct. R. 14.1(a)* ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) ("A question which is merely 'complementary' or 'related' to the question

presented in the petition for certiorari is not “fairly included therein.”) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)).

In any event, it is important to note this remand was not “wholly gratuitous.” City’s Remand Br. 27. In principle, the adoption of a hiring practice could disproportionately exclude members of a protected group, without resulting in disproportionately low hiring of members of that group. *Cf. Teal*, 457 U.S. at 443-44. Imagine the following scenario: An employer imposes a height requirement to choose from among a pool of applicants consisting of half men, half women. This requirement eliminates from further consideration 30% of the women but none of the men. Nevertheless, in the end, for any number of reasons, half of the individuals ultimately hired are women and therefore the proportion of women hired exactly matches the proportion of women in the original applicant pool. In such a case, the height requirement would cause no disparate impact in the proportion of women hired from the original applicant pool -- notwithstanding its disparate impact as a screening device with respect to the original pool. Regardless of the “bottom line” outcome in actual hiring, however, the women who were disproportionately excluded from further consideration by the height requirement could raise a viable Title VII disparate-impact challenge to this screening device, if they timely charge the employer’s decision to adopt that device and therefore eliminate them from further consideration. *See id.* at 456. But if

those same women wait to file a charge until their employer uses the criterion to fill jobs and then find that there is no disparate impact in actual hiring (measuring the proportion of women in the full original applicant pool, short and tall, against the proportion of women hired), the Supreme Court's decision in this case makes clear that the women's challenge to the use of the employment practice in hiring would be meritless and their attack on the original classification would be untimely. A8-A9.

This is not such a case. The district court found -- on stipulated facts -- that the City's practice of hiring only those applicants who scored 89 or above resulted in a shortfall of African-American firefighters in each class hired while the City continued to use the 89 cutoff score. *See supra* at 9-10. But, in line with its own conventions, the Supreme Court chose not to consider whether these stipulated facts rendered the City's alternative arguments groundless or even whether they were preserved. *See, e.g., Archer*, 538 U.S. at 322-23. If the outcome is a "pointless and time-wasting remand," City's Remand Br. 27, that is not through any fault of the Supreme Court but entirely due to the City's persistence in asserting arguments contrary to the evidentiary record or already squarely rejected. The losers are the African-American plaintiffs who must wait still longer for their rightful opportunity to become firefighters.

In truth, it is the City's interpretation of the Supreme Court's instruction that would result in a "pointless and time-wasting remand." *Id.* Under the City's logic, plaintiffs could prevail only by showing disparate impact in the City's hiring from among the "well qualified" applicants. *Id.* at 23, 31. Yet even if the City somehow discriminated against the proportionally smaller number of African-American applicants who scored 89 or above, the current plaintiffs would have no standing to complain because the class is limited to test-passers who scored between 65 and 88. *See supra* at 4. It is unthinkable that the Supreme Court would have directed a remand to consider a claim as to which standing, and hence this Court's jurisdiction, is lacking.

Moreover, if the City were right, the Supreme Court's holding would have no corrective effect on the "puzzling results" of the City's arguments before that Court. A10. The Supreme Court recognized that "[u]nder the City's reading, if an employer adopts an unlawful practice and no timely charge is brought, it can continue using the practice indefinitely, with impunity, despite ongoing disparate impact." *Id.* But that is exactly what the City continues to claim it is entitled to -- impunity with respect to its repeated use of a discriminatory hiring practice.

CONCLUSION

Because the City did not preserve any challenge to plaintiffs' proof of disparate impact or any timeliness challenge with respect to the first class hired,

this Court should affirm the original judgment of the district court and remand for the limited purpose of permitting the district court to adjust the remedial decree to fully account for the more than three years that have passed since that decree was entered.¹⁹

Respectfully submitted,

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¹⁹ If this Court affirms the district court's original judgment, post-judgment interest should accrue from the date that judgment entered. *See* 28 U.S.C. §1961; Fed. R. App. P. 37(a). The City's contrary argument relies on Federal Rule of Appellate Procedure 37(b), which applies only if this Court vacates or reverses and directs a new judgment be entered. *Cf.* City's Remand Br. 46-47 (citing Fed. R. App. P. 37(b)). Even in those circumstances, when determining whether the original or subsequent judgment triggers post-judgment interest accrual, "equitable principles favor selecting the judgment which more fully compensates the prevailing party," as the Ninth Circuit recognized in a case cited by the City. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1021 (9th Cir. 2008); City's Remand Br. 47. In any event, post-judgment interest is not the sole reason why a limited adjustment to the remedial decree may be required, but plaintiffs submit that the district court is the appropriate forum to address pertinent factual developments in this regard.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)(i)

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief on Remand of Plaintiffs-Appellees complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i) since it contains 13,742 words, beginning with the words “JURISDICTIONAL STATEMENT” on page one and ending with the text of footnote 19 on page 52. In preparing this certificate, I relied on the word count of the word-processing system used to prepare the brief, which was Microsoft Word 2003.

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CERTIFICATE OF COMPLIANCE WITH 7TH CIR. R. 31(e)(1)

In accordance with 7th Cir. R. 31(e)(1), I certify that a digital version of the Brief on Remand of Plaintiffs-Appellees has been filed electronically with this Court.

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CERTIFICATE OF SERVICE

I certify that I caused two copies of the foregoing Brief on Remand of Plaintiffs-Appellees, and a virus-free disk containing a digital version of the Brief, to be served, by messenger, on counsel listed below, this fifth day of January, 2011.

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