11-5113 (L)

No. 12-491 (XAP)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VULCAN SOCIETY, CANDIDO NUNEZ, ROGER GREGG, MARCUS HAYWOOD,
Appellees / Cross-Appellants

UNITED STATES OF AMERICA,
Appellee

v.

MICHAEL BLOOMBERG, MAYOR, NEW YORK FIRE COMMISSIONER NICHOLAS SCOPPETTA, in their individual and official capacities, CITY OF NEW YORK,
Appellants / Cross-Appellees

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

BRIEF OF AMICUS CURIAE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF AFFIRMING THE JUDGMENT IN FAVOR OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization established under New York law more than seven decades ago to assist African Americans and other people of color in securing their civil and constitutional rights. Since the enactment of Title VII of the Civil Rights Act of 1964, LDF has worked to enforce this landmark statute, challenging discriminatory practices of both private and public employers, including in the original Vulcan Society litigation. *See Vulcan Soc'y of N.Y.C. Fire Dep't, Inc. v. Civil Serv. Comm'n*, 490 F.2d 387 (2d Cir. 1973); *see also Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *United States v. Brennan*, 650 F.3d 65 (2d Cir. 2011).

[1] This brief is filed with the consent of all parties. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for the amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Employment discrimination has proved more difficult to eliminate in firefighting than in perhaps any other employment sector. Six years after the passage of the landmark Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, Congress extended Title VII to cover municipal employers because it was particularly concerned by the pervasive exclusion of African Americans and other minorities from fire departments nationwide. While some fire departments across the nation have made limited progress "to reflect the communities they serve, employment as a New York City firefighter—arguably 'the best job in the world'—has remained a stubborn bastion of white male privilege," as this case vividly illustrates. SA85.[2]

The federal courts have played a critical role in the long struggle to eradicate discrimination in firefighting because they have been able to make full use of the broad equitable powers that Congress authorized, when it enacted Title VII in 1964, and later augmented, when it amended the statute in 1972. It is well established that these equitable powers are equally robust and necessary to fulfill Congress's goal of eliminating barriers to equal employment opportunity, whether a court is crafting a remedy for intentional discrimination or for practices that are

[2] "SA__" and "JA__" refer, respectively, to the Special Appendix and Joint Appendix filed with the City's opening brief.

"discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

Misconstruing decades of precedent and clear congressional intent, the City seeks to curtail the authority of courts to effectively remedy Title VII violations. It bears emphasis that, in this appeal, the City does not contest, City Br. 3 n.2, 5, 9, the district court's liability finding that two entry-level firefighter examinations, as they were utilized from 1999 to 2007, had a severe and unjustified disparate impact on African-American and Latino applicants. JA428-520. Yet, according to the City, the only lawful remedies for this uncontested disparate-impact discrimination were those portions of the December 2011 remedial injunction barring future use of the challenged examinations and requiring the development and administration of a new test that complies with Title VII. SA156-58; City Br. 5, 94.[3]

Notwithstanding the City's argument to the contrary, the district court's additional injunctive relief does *not* constitute an abuse of discretion. City Br. 67. Specifically, the City challenges the provisions in the December 2011 remedial injunction that require it to: (a) evaluate its recruitment strategies and identify best

[3] Moreover, this appeal does not address the district court's more recent remedial order awarding aggregate gross backpay damages of $128,696,803 (subject to mitigation) and priority hiring of 293 candidates from among the African Americans and Latinos who sat for the challenged examinations and were not hired. *See United States v. City of New York*, --- F. Supp. 2d ---, No. 07 Civ. 2067, 2012 WL 745560 (E.D.N.Y. Mar. 8, 2012).

practices for outreach to African-American and Latino candidates; (b) combat high attrition rates, especially for African-American and Latino applicants who pass the written examination but are deterred by the lengthy period that elapses before they proceed to subsequent stages in the hiring process; (c) revise post-exam screening procedures, especially the City's standardless use of arrest records to exclude applicants who were arrested but never convicted, a practice which negatively affects African-American and Latino applicants because they are more likely to have been arrested in the City than whites; and (d) retain an independent consultant to recommend changes within the FDNY's chronically under-resourced Equal Employment Opportunity office, and the City as a whole, in order to eliminate barriers to compliance with equal employment opportunity law. According to the City, these portions of the remedial injunction, which it characterizes as "affirmative relief," exceed the scope of the uncontested disparate-impact liability finding and cannot be supported by the district court's intentional discrimination finding because that ruling is flawed and must be reversed. City Br. 84-95.

For the reasons stated by Plaintiffs-Intervenors, Vulcan Soc'y Br. 98-134, this Court should uphold the district court's finding that the City's long-standing reliance on discriminatory testing procedures constituted a pattern and practice of intentional discrimination against African-American applicants in violation of Title VII and the Equal Protection Clause of the U.S. Constitution. JA1372, JA1410-31.

Indeed, the FDNY's discriminatory practices are exactly the sort of conduct highlighted in the legislative history of the 1972 amendments to justify extending coverage of Title VII to municipal employers. The long history of federal judicial intervention to address discrimination in the FDNY began the following year, when Judge Weinfeld held that the City's firefighter hiring examinations unlawfully discriminated against African-American and Latino applicants. *Vulcan Soc'y of N.Y.C. Fire Dep't, Inc. v. Civil Serv. Comm'n*, 360 F. Supp. 1265, 1277 (S.D.N.Y.), *aff'd in relevant part*, 490 F.2d 387 (2d Cir. 1973). Despite that finding and an aggressive remedy, the City purposefully and persistently obstructed efforts to rectify its unfair hiring practices. JA1402, JA1421-27. As a result, the percentage of African-American firefighters in the FDNY stood at just 3.4% when this case was filed in 2007. JA1386.

While the December 2011 remedial injunction is fully supported by the district court's finding of intentional discrimination, amicus LDF respectfully suggests that it may be unnecessary to resolve the City's challenge to that ruling. This Court can affirm on the alternate grounds that all of the injunctive relief ordered by the district court constitutes an appropriate remedy for the uncontested disparate-impact violation. *See Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 481 (2d Cir. 2011) (affirming judgment on alternate grounds). To the extent that there are limitations on affirmative relief, they apply only to long-term hiring

quotas or other preferential treatment of individual employees or applicants based on race—a type of remedy that the district court has not ordered in this case. Indeed, the race-neutral injunctive relief that the City challenges is far more modest than the remedy upheld by this Court decades ago in the original *Vulcan Society* litigation. *See* 490 F.2d at 391, 398-99.

ARGUMENT

I. Entrenched discrimination in firefighting was a key factor that prompted Congress to extend Title VII to public employers in 1972.

Widespread racial discrimination in public employment generally—and in fire departments in particular—prompted Congress to extend Title VII to state and local government employers in 1972, as the congressional record and other contemporaneous evidence makes clear. The district court's liability findings and remedial injunction must be viewed in light of this history.

A. In 1972, Congress found rampant exclusion of African Americans from fire departments nationwide.

As originally enacted, Title VII exempted state and local employers. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (1964). Immediately following the statute's enactment, this exemption was identified as a serious shortcoming. *See, e.g.*, 112 Cong. Rec. 6091-94 (1966) (statement of Sen. Javits); *Equal Employment Opportunities Enforcement Act: Hearings on S. 2453 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 91st

Cong. 73 (1969) (statement of Jack Greenberg, Director-Counsel, NAACP Legal Defense & Educational Fund, Inc.); *id.* at 167-68 (statement of Howard Glickstein, Staff Director, U.S. Commission on Civil Rights).

In 1972, Congress amended Title VII and redefined "employer" to include state and local governments, governmental agencies, and political subdivisions. *See* Equal Employment Opportunity Act of 1972 (the "1972 Act"), Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972). In adopting this amendment, Congress found that "widespread discrimination against minorities exists in State and local government employment, and . . . the existence of this discrimination is perpetuated by . . . both institutional and overt discriminatory practices." H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2152. Congress further determined that "employment discrimination in State and local governments is more pervasive than in the private sector." *Id.*; *see also* S. Rep. No. 92-415, at 10 (1971), *reprinted in* S. Comm. on Labor and Pub. Welfare, 92d Cong., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 419 (1972).

Congress singled out fire departments as among the most egregious employers that justified extension of Title VII: "Barriers to equal employment are greater in police and fire departments than in any other area of State and local government. . . . Negroes are not employed in significant numbers in police and

fire departments." 118 Cong. Rec. 1817 (1972) (quoting U.S. Comm'n on Civil Rights, *For ALL the people . . . By ALL the people: A Report on Equal Opportunity in State and Local Government Employment* 119 (1969) [hereinafter 1969 USCCR Report]).[4]

Well into the 1960s, those few African Americans who were hired were frequently assigned to segregated firehouses. *See, e.g.*, 1969 USCCR Report 71; *McNamara v. City of Chicago*, 959 F. Supp. 870, 874 (N.D. Ill. 1997) (Chicago maintained segregated firefighting companies until 1965), *aff'd*, 138 F.3d 1219 (7th Cir. 1998); *Harper v. Mayor & City Council of Baltimore*, 359 F. Supp. 1187, 1195 n.11 (D. Md.) ("Segregation persisted in the Baltimore Fire Department for more than a decade after [*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)]."), *aff'd in relevant part sub nom. Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973).

These segregative and racially exclusive practices were reinforced by the unique work environment in fire departments. *See* 1969 USCCR Report 87 ("[T]he unusual working arrangement of firemen has given rise to many forms of prejudiced attitudes and treatment."). Firefighters are typically assigned to work twenty-four-hour shifts and must live and eat at their fire station while on duty.

[4] As the Supreme Court has noted, in extending Title VII to state and local employers, Congress relied heavily upon the 1969 USCCR Report, which detailed pervasive racial discrimination in public employment and particularly in firefighting. *Connecticut v. Teal*, 457 U.S. 440, 449-50 n.10 (1982) (noting Congress's reliance on the 1969 USCCR Report).

See Mems v. City of St. Paul, Dep't of Fire & Safety Servs., 327 F.3d 771, 775 (8th Cir. 2003); Denise M. Hulett et al., *Enhancing Women's Inclusion in Firefighting in the USA*, 8 Int'l J. of Diversity in Organisations, Communities & Nations 189, 190 (2008). While these facets of firefighting—combined with its prestige, good pay, job security, and valuable societal contribution—have made it a desirable job for many Americans, they have also created an organizational culture particularly resistant to racial integration. Thus, even after fire departments officially desegregated, African-American firefighters were routinely barred from using the same living and sleeping quarters as whites. For example, after Washington, D.C. firehouses were desegregated in the 1960s, black firefighters were required for more than a decade to sleep in designated "C" beds and eat from separate "C" dishes and "C" utensils, for "Colored." *Hammon v. Barry*, 813 F.2d 412, 434 (D.C. Cir. 1987); *see also* 1969 USCCR Report 71, 89 (finding that the only black firefighter employed in San Francisco in 1967 was required to carry his own mattress between stations during his training period).

Of particular relevance here, Congress concluded that segregation and hiring barriers were often paired with widespread refusal to recruit African-American candidates: "[F]ire departments have discouraged minority persons from joining their ranks by failure to recruit effectively and by permitting unequal treatment on the job including unequal promotional opportunities, discriminatory job

assignments, and harassment by fellow workers." 118 Cong. Rec. 1817 (1972) (quoting 1969 USCCR Report 120). Congress also cited specific barriers to fair employment in fire departments, including the use of "selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities." *Id.* (quoting 1969 USCCR Report 119).

Finally, Congress was especially concerned that continued discrimination in firefighting and other highly visible jobs impaired government performance and democratic accountability: "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities . . . with the result that the credibility of the government's claim to represent all the people equally is negated." H.R. Rep. No. 92-238, 1972 U.S.C.C.A.N. at 2153.

B. Racial exclusion in the FDNY was severe prior to the 1972 Act and has persisted.

New York was no exception to this widespread pattern of racial discrimination in firefighting. In 1963, just 4.15% of all FDNY employees, in any title, were African American. JA1386. In the period leading up to the 1972 Act, not only did the FDNY manipulate hiring procedures to screen out African-American applicants, but it frequently excluded those who were hired from coveted positions, such as drivers and fire inspectors, and instead "[r]elegated [them] to . . . the toughest, most dangerous, and least public assignments." David

A. Goldberg, Courage Under Fire: African American Firefighters and the Struggle for Racial Equality 73, 125-29 (Feb. 2006) (unpublished Ph.D. dissertation, University of Massachusetts Amherst). In addition, African-American firefighters regularly experienced harassment and physical threats from both white counterparts and senior management. *Id*. at 73.

Not much changed after the 1972 Act went into effect. In 1973, when the Vulcan Society won its original litigation against the City, African Americans and Latinos accounted for just 5% of the firefighting force, although they made up 32% of the city's population. *Vulcan Soc'y*, 360 F. Supp. at 1269. "The subsequent history of the FDNY demonstrates that whatever practical effect Judge Weinfeld's injunction may have had on minority hiring dissipated shortly after the injunction expired" in 1977. JA1386. Strikingly, the percentage of African-American firefighters in the FDNY was approximately the same when this case was filed in 2007 as it was in 1973. *Id*. ("Between 1991 and 2007, black firefighters never constituted more than 3.9% of the force, and by the time this case was filed in 2007, the percentage of black firefighters in the FDNY had dropped to 3.4%.").

The FDNY, unfortunately, has purposely and persistently thwarted efforts to address its history of racial exclusion. Vulcan Soc'y Br. 8-36. To be sure, discriminatory practices persist elsewhere, and indeed, Congress relied specifically on widespread evidence of discrimination in firefighting to support its amendments

to Title VII in 1991. *See* H.R. Rep. No. 102-40(I), at 99-100 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 637-38. Nevertheless, the FDNY lags far behind other major American cities in terms of its dismally low rates of African-American and Latino firefighters. Vulcan Soc'y Br. 8-36; U.S. Br. 7-9 (charts demonstrating that New York has the lowest ratio of African-American and Latino firefighters among eight of the largest cities in the nation). Thus, the City's attempt to limit the scope of relief available here would frustrate Congress's intent to desegregate municipal employment generally and fire departments in particular. Indeed, absent an efficacious remedy, the FDNY, which is the largest fire department in the nation, seems impervious to meaningful changes that could redress its severe and pervasive discrimination.

II. Title VII vests courts with wide latitude to exercise their equitable powers to address disparate-impact discrimination.

To the extent that limited progress has been made in fire departments across the nation, it has required diligent and persistent judicial intervention. *See, e.g.*, *Lewis v. City of Chicago*, 643 F.3d 201 (7th Cir. 2011) (affirming scope of remedy for unjustified disparate impact on African Americans caused by Chicago's repeated utilization of a hiring examination administered sixteen years earlier); *Bradley v. City of Lynn*, 443 F. Supp. 2d. 145, 173-76 (D. Mass. 2006) (holding that Massachusetts violated Title VII by using state-wide firefighter hiring examinations that had an unjustified adverse impact on minority candidates and

noting that "not much has changed" since a prior judicial remedy thirty years earlier). In some municipalities where courts have successfully overseen implementation of broad remedial measures, firefighting is now a career path that is more accessible to communities of color. *See* Br. of Amicus Curiae Int'l Ass'n of Black Prof'l Firefighters, Part II (describing the success of court remedies in the San Francisco Fire Department). The importance of court-ordered remedies in furthering progress in other fire departments demonstrates the need for the appropriate exercise of equitable remedial authority to remedy the continuing effects of the uncontestedly discriminatory examinations that the City utilized from 1999 to 2007. JA428-520.

Where, as here, "'a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices.'" *Ass'n Against Discrimination in Emp't, Inc. v. City of Bridgeport*, 647 F.2d 256, 278 (2d Cir. 1981) (quoting *Rios v. Enter. Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622, 629 (2d Cir. 1974)); *see also Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 806 (3d Cir. 1991); *Berkman v. City of New York*, 705 F.2d 584, 594 (2d Cir. 1983); U.S. Br. 28-29. As the district court correctly recognized, *see* SA102-03, the "full range of equitable remedies [is] available in disparate impact cases as well" as disparate treatment cases. *In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1315 n.13

(11th Cir. 1999). Notwithstanding the City's contentions to the contrary, City Br. 84, this broad equitable authority to remedy *both* disparate-impact and disparate-treatment discrimination is well established by the Title VII's text, legislative history, and settled precedent.

A. The plain language and legislative history of Title VII establish Congress's intent to provide courts with broad authority to remedy employment discrimination in all forms.

1. With the Civil Rights Act of 1964, Congress unequivocally sought to root out employment discrimination in all forms. *See* H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401. To accomplish this goal, Congress included a broad remedial provision, section 706(g), which empowers courts not only to enjoin discriminatory conduct but also to "order such affirmative action as may be appropriate." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (codified, as amended, at 42 U.S.C. § 2000e-5(g)) [hereinafter section 706(g)].

When Congress amended Title VII in 1972, it made a revision that was just as critical as removing the exemption for fire departments and other municipal employers. *See* Part I.A *supra*. It expanded section 706(g) to authorize the courts to order "any other equitable relief as [they] deem[] appropriate," in addition to backpay, injunctive relief, "affirmative action," and other remedies originally authorized. 1972 Act, Pub. L. No. 92-261, § 4, 86 Stat. 103, 104-07 (1972). As

the legislative history illustrates, this amendment responded to concerns that "the machinery created by the Civil Rights Act of 1964 [was] not adequate" to ensure equal employment opportunity. H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2139. Congress therefore reaffirmed that Title VII's remedial provision was "intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible." 118 Cong. Rec. 7168 (1972); *see also* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 Hastings L.J. 1301, 1326 (1990) (noting that the additional remedial language inserted in section 706(g) in 1972 was "directed to increasing and confirming flexibility, rather than to restricting options for relief").

2. The Supreme Court has repeatedly relied on this legislative history as "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976); *see also Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 445-46 (1986) (acknowledging broad remedial powers vested to federal courts under Title VII); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977) (same); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420-21 (1975) (same). Similarly relying on pertinent legislative history, this Court concluded:

> [W]e are persuaded that Congress intended the federal courts to have resort to all of their traditional equity powers, direct and incidental, in aid of the enforcement of [Title VII]. Having stated its aim to eradicate employment discrimination, Congress made explicit statutory attempts to forestall possible efforts to frustrate the achievement of its goal.

Sheehan v. Purolator Courier Corp., 676 F.2d 877, 885 (2d Cir. 1981); *see also Wagner v. Taylor*, 836 F.2d 566, 572 (D.C. Cir. 1987) (observing that the legislative history makes clear that Congress vested courts with "broad statutory powers designed to effectuate and preserve the rights of Title VII claimants"); *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986).

The Supreme Court has also placed considerable weight on the fact that Congress modeled section 706(g), including its authorization of "affirmative action," after the remedial section of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(c). *See Franks*, 424 U.S. at 769-70; *Local 28*, 478 U.S. at 446 n.26. That provision provides the National Labor Relations Board with broad discretion not only to enjoin unlawful labor practices, but also to require employers to take affirmative measures that accomplish the NLRA's objectives. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). Tellingly, in *Franks*, the Supreme Court observed that, in light of the 1972 Act, section 706(g) now vests courts with even greater remedial powers than the NLRA. *Franks*, 424 U.S. at 769 n.29.

3. The expansive remedial authorization in section 706(g) as originally enacted is not limited to cases of intentional discrimination; nor does the even

broader remedial authorization added in 1972 distinguish between relief for disparate-treatment and disparate-impact discrimination, even though this amendment was enacted against the backdrop of the Supreme Court's seminal decision two years earlier in *Griggs*, 401 U.S. at 430 (holding that Title VII prohibits "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" that "operate to 'freeze' the status quo of prior discriminatory employment practices").

Four years after *Griggs* and two years after the 1972 Act, the Supreme Court confirmed that Title VII's broad remedial powers apply equally to disparate-impact and disparate-treatment cases. In *Albemarle Paper Co.*, the district court found that the company's employment tests and other policies had an unjustified adverse impact on the basis of race, but it declined to award backpay because there was no evidence of "bad faith." 422 U.S. at 413. Relying on the legislative history of the 1972 amendments, the Supreme Court rejected this reasoning as inconsistent with Congress's mandate. *Id*. at 420-21 (citing 118 Cong. Rec. 7168 (1972)). The Court emphasized what the legislative record makes clear: District courts have "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Id.* at 418 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). Thus, Title VII's remedial provision authorizes—and indeed, requires—

that district courts do much more than simply enjoin a test that has an unjustified and racially disparate impact.

Congress's firm commitment to broad judicial authority to redress disparate-impact discrimination is also evident in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (the "1991 Act"). Troubled by a string of Supreme Court decisions that limited the reach of Title VII, Congress sought to restore the strength of the statute to promote equal opportunity. H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, at 552. Congress underscored the disparate-impact holdings of *Albemarle* and *Griggs*—which the House Report called "the single most important Title VII decision"—by expressly enshrining them into the Act. *See id*. at 562.[5]

In sum, the plain text and legislative history of Title VII, as confirmed by settled precedent, firmly establish that Congress intended courts to have "'not merely the power but the duty" to use Title VII's remedial powers as fully as possible to eradicate both disparate-impact and disparate-treatment discrimination.

[5] In addition to reaffirming *Griggs*, the 1991 Act expanded remedies for intentional discrimination to include punitive damages in certain circumstances. *See* Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a). While the Act did not authorize such relief for disparate-impact discrimination, the legislative history makes clear that Congress "determined that victims of employment discrimination were entitled to *additional* remedies . . . without giving any indication that it wished to curtail previously available remedies." *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001) (emphasis in original).

Albemarle, 422 U.S. at 421 (citation and quotation marks omitted).

B. Section 706(g) authorizes, and courts frequently impose, affirmative relief to remedy disparate-impact violations.

As amended, section 706(g) vests district courts with the power, *inter alia*, to "enjoin the [employer] from engaging in [an] unlawful employment practice," to "order such affirmative action as may be appropriate," and to award "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). This Court has explained that Title VII remedies fall into three categories: compensatory relief, "designed to 'make whole' the victims of the defendant's discrimination"; compliance relief, "designed to erase the discriminatory effect of the challenged practice and to assure compliance with Title VII in the future"; and affirmative relief, "designed principally to remedy the effects of discrimination that may not be cured by the granting of compliance or compensatory relief." *Berkman*, 705 F.2d at 595-96; *Ass'n Against Discrimination in Emp't, Inc.*, 647 F.2d at 280.

The City contends that it was an abuse of discretion for the district court to award any "affirmative relief"; the only lawful aspects of the December 2011 remedial injunction, in the City's view, were those barring future use of the discriminatory examinations and requiring development and administration of a

new Title VII-compliant examination. City Br. 86-94.[6] To the extent that the City accurately characterizes the remaining portions of the remedial injunction as affirmative relief,[7] its assertion that Title VII "presumptively limits affirmative relief—[as opposed to] compliance or compensatory relief—to cases of intentional discrimination," City Br. 85, misconstrues well-established precedent.

First, the City's reliance on the text of section 706(g) is misplaced. City Br. 85. "The requirement that an employer have discriminated 'intentionally' in order for the provisions of § 706(g) to come into play means not that there must have been a discriminatory purpose, but only that the acts must have been deliberate, not accidental." *Ass'n Against Discrimination in Emp't*, 647 F.2d at 280 n.22; *accord In re Emp't Discrimination Litig. Against Ala.*, 198 F.3d at 1315 n.13 (section 706(g) "'requires only that the defendant meant to do what he did, that is, his

[6] These uncontested portions of the remedial injunction are indisputably compliance relief. *See Berkman*, 705 F.2d at 596. Moreover, although not the subject of this appeal, the backpay damages and priority hiring required by the district court's March 2012 order, *see City of New York*, 2012 WL 745560, are compensatory, and perhaps compliance, relief as well. *See Berkman*, 705 F.2d at 596 (compensatory relief includes backpay); *id.* at 595-96 ("To the extent that an order requires the hiring of a member of the plaintiff class—*i.e.*, a victim of the discrimination—it constitutes both compliance relief and compensatory relief.").

[7] Some of the remedies that the City challenges more properly could be characterized as compliance relief. As this Court has observed, compliance relief includes forward-looking remedies to bring the employer into compliance with Title VII. *See Berkman*, 705 F.2d at 596. That is precisely what the district court did when it ordered the City, *inter alia*, to maintain records of communications concerning firefighter candidates and reform its Equal Employment Opportunity office. SA163-64, SA168-71.

employment practice was not accidental'") (quoting *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 996 (5th Cir. 1969)); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 796 (4th Cir. 1971) (rejecting position that section 706(g) "requires that plaintiffs prove the existence of a discriminatory intent"); *see also* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 713 (1968) (willfulness requirement in section 706(g) was inserted to avoid liability for "[a]ccidental" or "inadvertent" acts); U.S. Br. 29-31.

Second, remedial injunctions upheld by this and other courts belie the City's assertion that affirmative relief for disparate-impact discrimination is "rare" or "presumptively" unlawful. City Br. 85-86. For instance, in *Berkman*, this Court expressly defined "affirmative relief" to include "the imposition of a requirement that the defendant actively recruit or train members of the Title VII-protected group." 705 F.2d at 596. Far from "rare," City Br. 86, targeted recruitment provisions, such as those in this case, are a common form of relief awarded to remedy Title VII disparate-impact violations. *See, e.g., NAACP v. Town of E. Haven*, 259 F.3d 113, 116-17 (2d Cir. 2001) (awarding attorneys' fees for decree requiring defendants "to increase awareness of job opportunities through advertising directed to the black community and communications with black community organizations"); *Newark Branch*, 940 F.2d at 806-08 (upholding decree

requiring defendants to engage in "affirmative activities" including "recruitment activities directed towards potential black applicants"); *Harrison v. Lewis*, 559 F. Supp. 943, 950-51 (D.D.C. 1983) (ordering affirmative relief, including "aggressive recruitment of qualified minorities" to remedy disparate-impact violation); *United States v. New York*, 475 F. Supp. 1103, 1110 (N.D.N.Y. 1979) (ordering affirmative relief, including recruitment "to attract members of the minority community," to remedy disparate-impact violation); *Dozier v. Chupka*, 395 F. Supp. 836, 859-60 (S.D. Ohio 1975) (ordering affirmative relief including recruitment, to remedy disparate-impact violation in municipal fire department); U.S. Br. 32-34. Indeed, aggressive recruitment is often essential to attract qualified minority candidates to an employer—and a line of work—with a long and well-known history of discrimination. *See, e.g.*, *Dozier*, 395 F. Supp. at 849, *see also supra* Part I. Here, absent affirmative efforts to attract minority candidates, African Americans and others may be deterred from applying, given the continuing effects of the uncontested disparate-impact finding.

C. Any limitations on affirmative relief apply only to long-term quotas for hiring or other individualized job benefits awarded based on race.

Affirmative relief is in no way limited, as the City contends, to those cases where disparate-impact liability is "coupled with 'persistent or egregious' discriminatory conduct." City Br. 86-87 (citing *Local 28*, 478 U.S. at 475-76;

Berkman, 705 F.2d at 596; *Guardians Ass'n of N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 112-13 (2d Cir. 1980)). The City misreads the authority upon which it relies, all of which concern a particular subset of affirmative relief that is not at issue here: long-term quotas and other "preferential relief" that results in the award of jobs and other employment benefits to individuals on the basis of race. *Local 28*, 478 U.S. at 444-45.

In *Local 28*, the Supreme Court concluded that "§ 706(g) does not prohibit a court from ordering, in appropriate circumstances, [such] affirmative race-conscious relief as a remedy for past discrimination." *Id.* at 445 (plurality opinion); *see also id.* at 483 (Powell, J., concurring in part and concurring in the judgment); *id.* at 499 (White, J., dissenting). The Court further "h[e]ld that such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *Id.* at 445 (plurality opinion); *see also id.* at 483 (Powell, J., concurring in part and concurring in the judgment). Yet, a plurality of the Justices were unwilling to rule out the appropriateness of such relief in other contexts. *Id.* at 476.

Through the lens of *Local 28*, it is clear that this Court's prior holdings in *Berkman* and *Guardians* amount to no more than an endorsement of the rule subsequently adopted by the Supreme Court. In *Berkman*, this Court did not hold

that *any* affirmative relief in a disparate-impact case requires an additional finding of a "long-continued pattern of egregious discrimination." 705 F.2d at 596. Rather, the Court held that this "persistent or egregious" standard applies to the subset of affirmative relief that was at issue in *Local 28*—namely, long-term quotas and other preferential relief to individuals based on their race. *Id.* In a subsequent ruling in *Berkman*, this Court clarified that it is the type of "[a]ffirmative relief *that accords enhanced hiring opportunities* to compensate for the effects of past discrimination [that] is available only under limited circumstances." *Berkman v. City of New York*, 812 F.2d 52, 61 (2d Cir. 1987) (emphasis added) (citing *Local 28*, 478 U.S. 421 (plurality opinion)). It follows that such limitations, including *Local 28*'s "persistent or egregious" standard, do not apply to other forms of affirmative relief—such as the facially race-neutral recruitment and other provisions in the December 2011 remedial injunction, none of which allocate individual employment benefits or burdens based on race.

This Court's decision in *Guardians* is not to the contrary. *See* 630 F.2d at 109. In *Berkman*, this Court relied on *Guardians*, as well as *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), simply to support its conclusion that "the relatively permanent use of a specified hiring ratio" to eradicate the vestiges of unlawful discrimination is limited to cases involving

persistent or egregious discrimination. *Berkman*, 705 F.2d at 596-97; *Guardians*, 630 F.2d at 109; *Kirkland*, 520 F.2d at 429-30.[8]

III. The limited award of affirmative relief was not an abuse of discretion.

A. The "persistent or egregious" standard does not apply.

The relief challenged by the City does not include a long-term quota or preferential hiring on the basis of race that would trigger *Local 28*'s "persistent or egregious standard." In fact, the district court expressly rejected "hiring quotas in any shape or form," SA103, even though they were arguably justifiable in the distinctive context of this case. *See Local 28*, 478 U.S. at 444-45, 481; *Guardians*, 630 F.2d at 108-09. Rather, the district court crafted a facially race-neutral remedial injunction focused on improving the policies by which firefighters are recruited as well as the post-exam screening processes. SA156-73. Section 706(g) authorized the district court to take this approach in light of its detailed factual findings, SA2-82, demonstrating that merely altering the written examinations would not fully remedy the continuing effects of the City's uncontested disparate-impact violations, regardless of whether that discrimination also can be deemed persistent or egregious. *See Berkman*, 705 F.2d at 596.

[8] Yet, as this Court further held in *Berkman*, even hiring targets *are* permissible in certain circumstances, even absent a finding of persistent or egregious discrimination, if they are temporarily limited and tailored to compensate for a finding of disparate-impact discrimination. *See* 705 F.2d at 596.

The district court's emphasis on improving the City's hiring processes in a facially race-neutral manner is evident from the recruitment relief included in the December 2011 remedial injunction. SA159-61. Specifically, the court ordered the City to retain a consultant to evaluate current recruitment strategies and to identify best practices for outreach to African Americans and Latinos. Such targeted recruitment is "[i]nclusive as opposed to exclusive" because it "serve[s] to broaden a pool of qualified applicants and to encourage equal opportunity." *Honadle v. Univ. of Vt. & State Agricultural Coll.*, 56 F. Supp. 2d 419, 428 (D. Vt. 1999). Yet such targeted recruitment stops far short of "impos[ing] burdens or benefits" based on race. *Id.* (collecting cases); *cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (defining "recruiting students and faculty in a targeted fashion" among a list of "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible").

For similar reasons, the district court's remedy to combat voluntary attrition in the post-exam screening process was facially race-neutral and thus did not trigger the "persistent or egregious" standard. As the district court found, the City's "position that firefighters should be selected on the basis of merit" is

undermined when so many well-qualified candidates drop out during the lengthy (sometimes lasting four to five years) post-exam screening process. SA5-18. Furthermore, this attrition disproportionately affects African Americans and Latinos who are significantly less likely than whites to have informal support mechanisms within the FDNY "encouraging them to persevere," because minority hiring was systemically limited by the uncontestedly discriminatory testing procedures utilized by the City for over a decade. SA9-16. While the district court directed the City to focus on reducing attrition in communities of color, SA161, the remedial injunction does not mandate that any particular African Americans or Latinos will receive a job or any other employment benefit based on their race; indeed, if implemented effectively, this affirmative relief will reduce attrition for candidates of all races. *Cf. Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (declining to apply a heightened standard of review for "an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made"). Likewise, the revisions ordered by the district court to address the City's standardless use of arrest records in the post-exam screening process was prompted by the unjustifiable disparate impact of these practices on minority candidates, but the required reforms should benefit all applicants, regardless of their race. SA55-57.

Accordingly, the district court did not abuse its discretion when it awarded a limited array of facially race-neutral, affirmative relief designed "to make [the City's] equal employment opportunity compliance activities effective, [and] to eliminate the barriers its hiring policies and practices have erected or maintained that serve to perpetuate the underrepresentation of blacks and Hispanics as firefighters in the FDNY." SA104.

B. In any event, the FDNY's discrimination was persistent *and* egregious.

Even if, as the City contends, City Br. 86-91, the "persistent or egregious" standard applies to the affirmative relief awarded here, both prongs are easily satisfied by the stark and long-standing underrepresentation of African Americans among the City's firefighters, coupled with the uncontested disparate-impact finding. *See Berkman*, 705 F.2d at 596; *Ass'n Against Discrimination in Emp't, Inc.*, 647 F.2d at 279. The district court found that, as of 2002, African Americans made up 25% of the City's population, but only 2.6% of the City's firefighters. JA429. Those statistics are worse than the numbers cited by this Court as evidence of a flagrant racial disparity that warranted the type of long-term hiring quota that the district court here expressly rejected. *See Guardians*, 630 F.2d at 113 (collecting cases and noting with approval a long-term hiring quota, where minorities constituted 25% of population, but only 3.6% of police force). Not only are African Americans grossly underrepresented among the City's firefighters, but

the proportion of the force that is African American has remained essentially unchanged for nearly forty years. *See* JA1386; *Vulcan Soc'y*, 360 F. Supp. at 1269; *see also* Part I.B *supra*.

Coupled with the district court's uncontested disparate-impact finding, such an extreme and long-standing disparity is sufficient to meet *Local 28*'s "persistent or egregious" standard. *See* U.S. Br. 32-33 & n.9, 36-39. That conclusion is consistent with one of the central purposes of disparate-impact liability: rooting out employers' prolonged reliance on discriminatory practices that operate as "'built-in headwinds' for minority groups." *Griggs*, 401 U.S. at 432. Summarizing "[t]he history of the City's efforts to remedy its discriminatory firefighter hiring policies . . . [as] 34 years of intransigence and deliberate indifference, bookended by identical judicial declarations that the City's hiring policies are illegal," JA1421, the district court properly concluded that affirmative relief was necessary if there is any hope that the nation's largest fire department will at last begin to make some progress towards Title VII's goal of fair hiring for all Americans.

CONCLUSION

For the foregoing reasons, as well as those outlined by the United States, as Appellee, and the Vulcan Society et al., as Appellees/Cross-Appellants, the portions of the district court's December 2011 remedial injunction challenged by the City should be affirmed.

Dated: April 13, 2012

Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that, pursuant to Docket No. 156, on April 17, 2012, I electronically re-filed the foregoing Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Affirming the Judgment in Favor of Appellees with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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