JOSÉ A. CABRANES, *Circuit Judge,* with whom Chief Judge JACOBS, Judge RAGGI, Judge WESLEY, Judge HALL, and Judge LIVINGSTON join, dissenting:

This appeal raises important questions of first impression in our Circuit—and indeed, in the nation—regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices. At its core, this case presents a straight-forward question: May a municipal employer disregard the results of a qualifying examination, which was carefully constructed to ensure race-neutrality, on the ground that the results of that examination yielded too many qualified applicants of one race and not enough of another? In a path-breaking opinion, which is nevertheless unpublished, the District Court answered this question in the affirmative, dismissing the case on summary judgment. A panel of this Court affirmed in a summary order containing a single substantive paragraph. *Ricci v. DeStefano*, No. 06-4996-cv (2d Cir. Feb. 15, 2008).[1] Three days prior to the filing of this opinion, the panel withdrew its summary order and filed a *per curiam* opinion adopting *in toto* the reasoning of the District Court, thereby making the District Court's opinion the law of the Circuit. *See Ricci v. DeStefano*, __ F.3d __ (2d Cir. 2008).

The use of *per curiam* opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straight-forward questions that do not require explanation or elaboration by the Court of Appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled. These questions include: Does the Equal Protection Clause prohibit a municipal employer from discarding examination results on the ground that "too many" applicants of one race received high scores and in the hope that a future test would yield more high-scoring applicants of other races? Does such a

[1] Reproduced as Appendix A.

practice constitute an unconstitutional racial quota or set-aside? Should the burden-shifting framework applicable to claims of pretextual discrimination ever apply to a claim of explicit race-based discrimination in violation of Title VII? If a municipal employer claims that a race-based action was undertaken in order to comply with Title VII, what showing must the employer make to substantiate that claim? Presented with an opportunity to address *en banc* questions of such "exceptional importance," Fed. R. App. P. 35(a)(2), a majority of this Court voted to avoid doing so.

I respectfully dissent from that decision, without expressing a view on the merits of the questions presented by this appeal, in the hope that the Supreme Court will resolve the issues of great significance raised by this case.

BACKGROUND

In late 2003, 118 applicants took a written and oral examination administered by the New Haven Fire Department ("NHFD") for promotion to the ranks of Captain and Lieutenant. Forty-one applicants took the Captain examination, of whom twenty-five were white, eight black, and eight Hispanic. Based on the examination results and New Haven's protocol for civil service promotions, it appeared, at the time that the tests were scored, that "no blacks and at most two Hispanics would be eligible for promotion" to Captain. *Ricci v. DeStefano*, No. 04cv1109, at 3 (D. Conn. Sept. 28, 2006).[2] With respect to the Lieutenant examination, the racial composition of the seventy-seven applicants was as follows: forty-three whites, nineteen blacks, and fifteen Hispanics. The examination results indicated that no blacks or Hispanics would be promoted to the rank of Lieutenant. Between January and March 2004, the New Haven Civil Service Board ("CSB") held hearings to determine whether to certify the examination results and confer promotions according to those results. Despite the substantial efforts undertaken by the examination designer to ensure that it would be race-neutral, the City of New Haven

[2] Reproduced as Appendix B.

(the "City") frankly stated its fear that, if the results were certified, it would face an employment discrimination lawsuit from non-white applicants who were not promoted. The CSB did not certify the examination results, and no promotions were made.

Eighteen candidates—seventeen whites and one Hispanic—brought an action in the U.S. District Court for the District of Connecticut. They alleged in their complaint that the City and several municipal officials—acting in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and other provisions of federal and state law—disregarded the results of two promotional examinations that produced "too many" eligible white candidates and "too few" eligible non-white candidates. On cross-motions for summary judgment, the District Court (Janet Bond Arterton, *Judge*) granted defendants' motion for summary judgment, denied plaintiffs' motion, and directed the Clerk of Court to close the case.

In a forty-eight page opinion, the District Court observed that (1) "[p]laintiffs' evidence—and defendants' own arguments—show that the City's reasons for advocating non-certification [of the examination results] were related to the racial distribution of the results" and (2) "[a] jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the [eligibility] lists to be certified." *Ricci*, No. 04cv1109, at 20-21. The District Court recognized the exceptional circumstances presented by the case, noting that it "presents the opposite scenario of the usual challenge to an employment or promotional examination, as plaintiffs attack not the use of allegedly racially discriminatory exam results, but defendants' reason for their *refusal* to use the results." *Id.* at 22. Applying the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the District Court held that "[d]efendants' motivation to avoid making promotions based on a test with a racially disparate impact, even in a

political context, does not, as a matter of law, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim." *Ricci*, No. 04cv1109, at 39-40 (footnote omitted).

The District Court further concluded that defendants had not violated plaintiffs' rights under the Equal Protection Clause by, as plaintiffs alleged, "employing a race-based classification system for promotion or, alternatively, by applying facially neutral promotion criteria in a racially discriminatory manner." *Id.* at 40, 44. Although it is not disputed that the decision to discard the examination results was based on racial considerations, the District Court determined as a matter of law that no racial discrimination had occurred "because [all of] the test results were discarded and nobody was promoted," *id.* at 42, and because "[n]othing in the record in this case suggests that the City defendants or CSB acted 'because of' discriminatory animus toward plaintiffs or other non-minority applicants for promotion," *id.* at 43. The District Court also rejected plaintiffs' civil rights conspiracy and First Amendment claims and declined supplemental jurisdiction over a state law tort claim.

On appeal, the parties submitted briefs of eighty-six pages each and a six-volume joint appendix of over 1,800 pages; plaintiffs' reply brief was thirty-two pages long. Two *amici* briefs were filed and oral argument, on December 10, 2007, lasted over an hour (an unusually long argument in the practice of our Circuit). More than two months after oral argument, on February 15, 2008, the panel affirmed the District Court's ruling in a summary order containing a single substantive paragraph. The operative portion of the summary order read as follows:

> We affirm, substantially for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below. In this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII

when confronted with test results that had a disproportionate racial impact, its actions were protected.

The judgment of the district court is AFFIRMED.

See App. A. Four months later, and three days prior to the publication of this opinion, the panel withdrew its summary order and published a *per curiam* opinion that contained the same operative text as the summary order, with the addition of a citation to the District Court's opinion in the Westlaw and LexisNexis databases. This *per curiam* opinion adopted *in toto* the reasoning of the District Court, without further elaboration or substantive comment, and thereby converted a lengthy, unpublished district court opinion, grappling with significant constitutional and statutory claims of first impression, into the law of this Circuit. It did so, moreover, in an opinion that lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal. Indeed, the opinion contains no reference whatsoever to the constitutional claims at the core of this case, and a casual reader of the opinion could be excused for wondering whether a learning disability played at least as much a role in this case as the alleged racial discrimination. This perfunctory disposition rests uneasily with the weighty issues presented by this appeal.[3]

Prior to the entry of the *per curiam* opinion and in light of the "question[s] of exceptional importance," Fed. R. App. P. 35(a)(2), raised in this appeal, the Court considered a motion for *en banc* review. A majority of this Court declined to take up the appeal.

DISCUSSION

[3] Judge Parker's observation that "[t]he adherence of a Court of Appeals to the decision and reasoning of a district court is anything but novel" cannot be gainsaid. In appropriate cases, such a disposition is entirely unobjectionable. Where significant questions of unsettled law are raised on appeal, however, a failure to address those questions—or even recognize their existence—should not be the approved modus operandi of the U.S. Court of Appeals.

The core issue presented by this case—the scope of a municipal employer's authority to disregard examination results based *solely* on the race of the successful applicants—is not addressed by any precedent of the Supreme Court or our Circuit. Plaintiffs alleged that the City's actions violated, *inter alia*, their rights under the Equal Protection Clause and Title VII. The District Court disagreed, but did so without the benefit of pertinent guidance from a higher court. The questions raised by the instant appeal clearly merit further review.[4]

A. The Equal Protection Clause

Plaintiffs claim that the City's decision to discard the examination results was race-based discrimination in violation of the Equal Protection Clause because it was undertaken solely to reduce the number of high-scoring white applicants and increase the number of eligible non-white candidates. Defendants contend that their decision, though race-based, was necessary because compliance with federal anti-discrimination laws required them to reduce the number of eligible white candidates. *See Ricci*, No. 04cv1109, at 20-21; Appellee Br. at 15-20, 30-31. The Supreme Court has addressed a government entity's claim that race-based decisions were necessary to redress a racial imbalance in the closely analogous context of government contracts. In *City of Richmond v. J. A. Croson Co.*, the Supreme Court held that: "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts . . . ." 488 U.S. 469, 499 (1989). The Court further observed that:

> [W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. The history of racial classifications in this country suggests that blind judicial

[4] Indeed, in his opinion concurring in the *denial* of *en banc* review, Judge Katzmann recognizes as much, observing that this appeal "presents difficult issues."

> deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.

Id. at 500-01 (internal citations omitted). More recently, the Supreme Court has identified "three general propositions with respect to governmental racial classifications." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995). They are:

> First, skepticism: Any preference based on racial or ethnic criteria must necessarily receive a most searching examination. Second, consistency: The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification, *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Taken together, these three propositions lead to the conclusion that *any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.*

Id. at 223-24 (quotation marks, internal citations, and brackets omitted) (emphasis added).

Whether the District Court's judgment comports with these propositions is a question of immense importance that is not addressed in the panel's *per curiam* opinion. The District Court's ruling rested in part on the premise that "where a test is administered and scored in the same manner for all applicants, plaintiffs cannot make out a claim that the exam was a facially neutral test used in a discriminatory manner." *Ricci*, No. 04cv1109, at 42. Neutral administration and scoring—even against the backdrop of race-conscious *design* of an employment examination, *see Hayden v. County of Nassau*, 180 F.3d 42, 50 (2d Cir. 1999)—is one thing. But neutral administration and scoring that is followed by race-based treatment of examination results is surely something else entirely. Where, as here, examination results are *disregarded* on the ground that too many candidates of one race qualified for promotion on the basis of those results, the fact of neutral administration and scoring may not necessarily immunize defendants from the claims of civil rights violations brought by plaintiffs. If it did, municipal employers could reject the results of an employment examination whenever those results

failed to yield a desired racial outcome—*i.e.*, failed to satisfy a racial quota. *Croson* and *Adarand* establish that racial quotas are impermissible under the Constitution absent specific findings of past discrimination that are not in the record here. Whether *Croson* and *Adarand* preclude the actions challenged in this case, or whether *Hayden* can fairly be read to compel judgment in defendants' favor as a matter of law, are questions that admit no easy answer. As such, they require the careful analysis of a full opinion of an appellate court, not abbreviated disposition.

The District Court held that the test was administered in the same manner for all applicants because the City discarded the scores of all exam-takers. Insofar as the decision to not certify the results was based on the race of the high-scoring applicants, however, it is arguable that the deck was stacked against applicants of that race: If too many white applicants obtained high scores, the City stood ready to nullify the results in the hope that non-white applicants would score relatively higher on a subsequent examination.[5] Whether such action amounts to an impermissible racial quota was not addressed in the District Court's opinion or in the decisions issued by the panel, which do not even note that this action arises under the Equal Protection Clause of the Fourteenth Amendment. *See* App. A (summary order of Feb. 15, 2008); *per curiam* opinion filed on June 9, 2008.

The District Court also held as a matter of law that none of the City's reasons for disregarding the examination results amounted to intentional discrimination because the City had

> acted based on the following concerns: that the test had a statistically adverse impact on African-American and Hispanic examinees; that promoting off of this list would undermine their goal of diversity in the Fire Department and would fail to develop managerial role models for aspiring firefighters; that *it would subject the City to public criticism*; and that it would likely subject the City to Title VII *lawsuits from minority applicants that, for political reasons, the City did not want to defend.*

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[5] In his opinion concurring in the denial of *en banc* review, Judge Parker concludes that the City "did not . . . confer any actual benefit on applicants on the basis of race." It is, at the very least, an open question whether discarding examination results on the basis of race so that members of certain races could have a "second chance" to compete constitutes the conferral or denial of a benefit on the basis of race.

Ricci, No. 04cv1109, at 43 (emphasis added). Leaving aside the propriety of the District Court's evaluation, on summary judgment, of the City's motives—a quintessential question of fact, *see, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 552-53 (1999)—it is at least arguable that the District Court failed to subject the City's justifications to the "most searching examination" prescribed by the *Adarand* Court. *See* 515 U.S. at 223. The record suggests that the District Court took the City's justifications at face value, as it appears Judge Parker has done in his opinion concurring in the denial of *en banc* review. An appellate court ought to consider whether this level of scrutiny is consistent with Justice O'Connor's observation, in *Croson*, that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." 488 U.S. at 493 (plurality opinion). Justice O'Connor's cautionary note on "racial politics" is particularly relevant in light of the District Court's observation that fear of "public criticism" and other "political reasons" factored into the City's decision. Whether the District Court subjected the City's claims to sufficient scrutiny—and whether the City's claims could have withstood such scrutiny—are vital "question[s] of exceptional importance," Fed. R. App. P. 35(a)(2), that warrant further review, both for the proper resolution of this case and for the guidance of other courts and municipalities in future cases.

B. Title VII

Plaintiffs urge that the City's race-based action also violated Title VII's prohibition of employment discrimination. *See* 42 U.S.C. § 2000e-2. The District Court dismissed plaintiffs' Title VII claim by applying the three-step burden-shifting framework for adjudicating claims of pretextual discrimination established by *McDonnell Douglas*. The dismissal of the Title VII claim on this basis raises two significant questions: (1) whether the *McDonnell Douglas* test for *pretextual* discrimination should be

applied to claims of discrimination that is *overt*, and (2) whether a race-based decision allegedly made to avoid perceived liability for racial discrimination is exempt from scrutiny under Title VII and, if not, what quantum of proof is required to substantiate such a defense.

Courts generally apply *McDonnell Douglas* in cases where plaintiffs "present[] no direct evidence of discriminatory treatment." *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir. 2005); *see also Graves v. Finch Pruyn & Co. Inc*, 457 F.3d 181, 187 (2d Cir. 2006). "If a plaintiff can convince the trier of fact that an impermissible criterion in fact entered into the employment decision, [however,] a somewhat different analysis takes place." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir. 1992). In that kind of "mixed-motive" case, the burden-shifting analysis set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), governs the claim. Under this framework,

> the plaintiff . . . must focus his proof directly at the question of discrimination and prove that an illegitimate factor had a motivating or substantial role in the employment decision. If the plaintiff convinces the factfinder that the illegitimate factor played such a role, the employee has proved that the decision was made at least in part because of the illegitimate factor. At this point the employee is entitled to succeed subject only to the employer's opportunity to prove its affirmative defense; that is, that it would have reached the same decision as to the employee's employment even in the absence of the impermissible factor.

Tyler, 958 F.2d at 1181 (internal citations, quotation marks, and brackets omitted); *see also Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 173-74 (2d Cir. 2006); *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997) ("Evidence potentially warranting a *Price Waterhouse* burden shift includes, *inter alia*, policy documents and evidence of statements or actions by decisionmakers that may be viewed as directly reflecting the alleged discriminatory attitude." (internal quotation marks omitted)).

The *Ricci* plaintiffs offered evidence that an impermissible factor—their race—motivated defendants to discard the results of the employment examination. As the District Court itself candidly observed: "[p]laintiffs' evidence—and defendants' own arguments—show that the City's reasons for advocating non-certification [of the examination results] were related to the racial distribution of the

results" and "[a] jury could infer that the defendants were motivated by a concern that too many whites and not enough minorities would be promoted were the [eligibility] lists to be certified." *Ricci*, No. 04cv1109, at 20-21. The District Court's application of the *McDonnell Douglas* test for pretextual discrimination, its conclusion that plaintiffs cannot pass that test as a matter of law, and its failure to consider the possibility that defendants themselves might bear a burden of proof under the analysis set forth in *Price Waterhouse*, all raise serious concerns left unaddressed by the panel in its *per curiam* opinion and by the full Court, which declined *en banc* review of the appeal.

Assuming *arguendo* that a claim of overt racial discrimination is ever appropriately evaluated under the *McDonnell Douglas* framework for pretextual discrimination, the application of that framework to this case required a "reversal" of the usual roles assigned to plaintiffs and defendants in such cases. As the District Court observed:

> [T]his case presents the opposite scenario of the usual challenge to an employment or promotional examination . . . . Ordinarily, as contemplated by the statute, the "complaining party" bears the burden of proving a disparate impact, and the "respondent" bears the burden of "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity," or, alternatively, the "complaining party" may prevail by showing that an alternative employment practice with less disparate impact existed and that the respondent failed to utilize it. Here, the roles of the parties are in essence reversed, with the defendants, normally reflecting a "respondent" role in the Title VII disparate impact analysis, contending that use of the promotional exams, if they had been certified, would have had an adverse impact, and the plaintiffs, normally the "complaining party," arguing that the test results were sufficiently job-related to be defensible under the law.

Ricci, No. 04cv1109, at 22 (alteration in original) (internal citations omitted). Unlike the Court of Appeals, the District Court answered the exceptional, and difficult, questions presented, concluding that the City's expressed desire to comply with "the letter and the spirit of Title VII," *id.* at 22, constituted a non-pretextual reason for its action, *id.* at 39-40, and therefore no employment discrimination occurred. Under the District Court's rationale, it appears that any race-based employment decision undertaken to avoid a threatened or perceived Title VII lawsuit is immune from

scrutiny under Title VII.[6] This appears to be so, moreover, regardless of whether the employer has made any efforts to verify that a valid basis exists for the putative Title VII suit. Applying this rationale, the District Court concluded that the City, which had not conducted any study to determine whether latent racial bias had tainted the results of the promotion examination, could discard the results of the examination, *id.* at 25-26, in the hope that a future test would yield a preferable racial distribution, *id.* at 36. Regardless of how one may decide the matter, there can be little doubt that a decision of this Court thus sanctioning race-based employment decisions in the name of compliance with Title VII raises novel questions that are indisputably of "exceptional importance."

CONCLUSION

It is arguable that when an appeal raising novel questions of constitutional and statutory law is resolved by an opinion that tersely adopts the reasoning of a lower court—and does so without further legal analysis or even a full statement of the questions raised on appeal—those questions are insulated from further judicial review. It is arguable also that the decision of this Court to deny *en banc* review of this appeal supports that view. What is not arguable, however, is the fact that this Court has failed to grapple with the questions of exceptional importance raised in this appeal. If the *Ricci* plaintiffs are to obtain such an opinion from a reviewing court, they must now look to the Supreme Court. Their claims are worthy of that review.

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[6] Despite Judge Parker's assertion to the contrary, I do not charge the District Court with applying a "rubber stamp" to the City's race-based decisions. I simply question whether the Court of Appeals has set forth a standard for determining when such action is acceptable and when it violates the constitutional and statutory rights of citizens. If any fault is to be levied in this regard, it falls on our Court for failing to provide guidance, and not on the District Court which endeavored to confront this question of exceptional importance.

Appendix A