



Talking About *Ricci*

The following memo offers framing and messaging recommendations for talking about the U.S. Supreme Court's decision in *Ricci v. DeStefano*. Our communications around this case should advance three goals:

1. **Preserve the viability and effectiveness of disparate impact law;**
2. Explain in brief, plain-spoken language **why the majority decision was incorrect, and the dissent correct;** and
3. **Deflect ideological attacks on Judge Sotomayor, who was a member of the Court of Appeals panel in this case.**

What did the Court actually decide?

The Supreme Court reversed the lower courts' decision by a 5-4 vote, with Justice Kennedy writing for the majority. The Court found that New Haven's failure to apply the results of the promotional test that it had given was a violation of Title VII's prohibition on discriminatory treatment—i.e., intentional discrimination.

The decision *does not* rule on the constitutionality of the disparate impact provision of Title VII. But it imposes a new standard for abandoning a selection procedure that produces discriminatory results: a "strong-basis-in-evidence" that the procedure would violate Title VII's disparate impact prohibition.

Importantly, the majority decision does not criticize the 2nd Circuit panel decision below—of which Judge Sotomayor was a panelist; instead, it briefly critiques the District Court's initial decision.

Four Justices dissented (Stevens, Souter, Ginsburg, Breyer), in an opinion by Justice Ginsburg. Justice Ginsburg's opinion makes the point that where, as here, a new standard is announced, the Court should have remanded the case to the court below.

Messages

We recommend four core messages:

1. We're **disappointed with the outcome in this case**, which imposes a **new standard on employers**.
 - As Justice Ginsburg wrote for the four dissenting Justices, no one has a right to be hired under a flawed selection process (and there were better tests used in other cities that could have been used here).

www.opportunityagenda.org

*Building the National Will
to Expand Opportunity in America.*

THE OPPORTUNITY AGENDA IS A PROJECT OF THE TIDES CENTER. All content Copyright 2005 The Opportunity Agenda.

New York
568 Broadway
Suite 302
New York, NY 10012
Tel: 212.334.4202
Fax: 212.334.2656



- The City of New Haven learned that its promotions process was likely flawed and discriminatory, and it set that process aside to find a more fair and effective one. The Supreme Court should have recognized that the steps New Haven took were fully consistent with our civil rights laws and Constitution.
2. At the same time, we think it's important that a majority of the Justices do still understand that **discrimination remains a serious problem in our society**, and that employers and government have a responsibility to take proactive measures to address it.
- There's no question that we've made a lot of progress in our country. But research and experience make clear that discrimination continues in different forms.
 - For example, research has found that identical resumes with African-American-sounding names like Jamal receive fewer call-backs than white-sounding names like Brad.
 - White job applicants with criminal records on their resume received more call-backs than identically-qualified African American applicants with no criminal record.
 - Fire Departments around the country, including in New Haven, have a long history of excluding minorities and women, and that history is often perpetuated today, through good ole boy networks.
 - We need strong civil rights laws that address these modern barriers to equal opportunity.
3. Despite today's disappointing ruling, **the law still requires employers to avoid policies that are discriminatory in practice**, and there is still a range of steps that employers can take voluntarily to make sure they are providing equal opportunity in the workplace.
- Specifically, for example, employers need to scrutinize their selection procedures closely for fairness and accuracy *before* administering them. And when there appears to be discrimination in practice, they need to collect additional information before acting either way.
4. The **President should act now** to give employers guidance on their equal opportunity obligations in light of this decision (through the Equal Employment Opportunity Commission, the Department of Justice, the Labor Department, and other relevant agencies).



Dealing with Criticism of the 2nd Circuit Panel Decision

We do not recommend proactively bringing up the Sotomayor nomination in communications about the *Ricci* decision. However, where it is raised by others, there are several important points to be made in response:

- The Supreme Court's decision in this case should have **no impact on the Sotomayor nomination**.
- The decision of the Court of Appeals, in which Judge Sotomayor participated, was **consistent with precedent in that circuit** and respected the city of New Haven's effort to abandon a flawed and potentially discriminatory selection process.
 - The Supreme Court in this case adopted a new standard for employers; something that Judge Sotomayor, as a lower court judge, was not in a position to do.
- Although the Supreme Court overturned the Court of Appeals' decision, **four members of the Supreme Court—appointed by both Republican and Democratic Presidents—agreed with Judge Sotomayor's outcome**.
- In addition, **a majority of the Justices agreed with the most important aspects of the lower court's reasoning**:
 - That employers are required to avoid practices that are discriminatory *in practice* as well as those that are intentionally discriminatory;
 - That employers should make every effort to comply with those laws voluntarily, including identifying and abandoning discriminatory policies by investing in careful examination of employment practices and looking for less-discriminatory alternatives.

A majority of the Supreme Court disagreed with the court below primarily on *how* to apply those principles to the complex facts of this case.

Regarding the “Judicial Activism Trap,” we have the opportunity to bury that argument with the Sotomayor nomination—but not by repeating it. We recommend *against* criticizing this decision as “conservative judicial activism,” which reinforces the conservative frame. Rather we recommend responding when judicial activism is raised by the other side that “**judicial activism**” is an old and discredited argument that no longer means anything—what Americans want are judges who are highly qualified and committed to the constitutional values of fairness and equal justice. We have that in Judge Sotomayor, as well as decades of experience and an understanding of the lives of everyday Americans.”

www.opportunityagenda.org

*Building the National Will
to Expand Opportunity in America.*

THE OPPORTUNITY AGENDA IS A PROJECT OF THE TIDES CENTER. All content Copyright 2005 The Opportunity Agenda.

New York
568 Broadway
Suite 302
New York, NY 10012
Tel: 212.334.4202
Fax: 212.334.2656