Case No. 18-10638

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATE OF TEXAS,

Plaintiff-Appellee / Cross-Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, VICTORIA LIPNIC, in her official capacity as Acting Chair of the EEOC; JEFFERSON B. SESSIONS, III, in his official capacity as Attorney General for the United States,

Defendants-Appellants / Cross-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, 5:13-cv-255 (Hon. Sam R. Cummings)

BRIEF OF *AMICI CURIAE* BEVERLY HARRISON, TEXAS STATE CONFERENCE OF THE NAACP, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF NO PARTY AND REVERSAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29.2, *amici curiae* provide this supplemental certificate of interested persons to fully disclose all the persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 that have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Beverly Harrison (*amicus curiae*)

2. NAACP Legal Defense & Educational Fund, Inc. (LDF) (*amicus curiae*)

3. National Employment Law Project (NELP) (*amicus curiae*)

4. Texas State Conference of the NAACP (Texas NAACP) (*amicus curiae*)

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12. Dana Lossia (counsel for *amici curiae*)

Amici NAACP Legal Defense & Educational Fund, Inc., and National Employment Law Project, Inc. certify that they are 501(c)(3) non-profit corporations. *Amicus* Texas State Conference of the NAACP is a nongovernmental corporation. None of these *amici* has a corporate parent or is owned in whole or in part by any publicly held corporation.

s/ Leah C. Aden
Leah C. Aden
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IDENTITY & INTEREST OF *AMICI CURIAE*

Amici curiae are civil rights organizations and a directly impacted individual in Texas, all of whom have a demonstrated interest in protecting the rights of those who seek employment in the State of Texas, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").

Amicus Beverly Harrison is a 62-year-old Black woman who resides in Dallas, Texas and was terminated from a job with Dallas County Schools in 2013 because of a conviction in 1975. *Amicus* the Texas State Conference of the NAACP is a non-profit civil rights organization in Texas that advocates for the rights of Black Americans, including those with conviction records. *Amicus* the NAACP Legal Defense & Educational Fund, Inc. is a non-profit, non-partisan law organization, which advocates for racial justice, including the civil rights of Black people with records to have opportunities for employment. *Amicus* the National Employment Law Project is a non-profit legal research and advocacy organization that specializes in the employment rights of people with arrest and conviction records.

Additional information about *Amici* appears in the Appendix. All parties consent to the filing of this brief.[1]

[1] No party's counsel authored this brief either in whole or in part. No party, party's counsel, or person or entity other than *Amici*, *Amici's* members, and their counsel contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

INTRODUCTION & SUMMARY OF ARGUMENT

At precisely no point in the life of this nearly five-year-old litigation has the State of Texas properly established—as is its burden—Article III standing to pursue its claims. Texas has, in effect, sought an advisory opinion declaring that its hiring practices related to conviction records—covering potentially *thousands* of existing policies as well as hypothetical, future policies—are lawful pursuant to Title VII. But without a real case or controversy, the State of Texas has had no business in federal court on its claims, whether today or in November 2013, when it first filed this litigation.

While this case therefore can—and should—be decided on its many technical deficiencies, *Amici* also write, in the event that this Court reaches the merits, to defend the Guidance, particularly in light of the Department of Justice's ("Department") recent about-face on the issue of disparate impact analysis under Title VII. As the Department readily acknowledged as recently as 2017, and on many prior occasions, the Guidance is reasonable and consistent with decades-old Equal Employment Opportunity Commission ("EEOC") policy and reflects longstanding federal case law from multiple circuits. As such, the 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions ("Guidance") deserves far more than a sterile, pro-forma defense.

Beyond the technically deficient and meritless claims in this litigation, Texas has ignored the many harms that flow from blanket hiring exclusions of people with felony records, like those that it has preemptively and prematurely sought to have declared lawful. *Amici* believe it is critical for the Court—again, should it reach the merits—to have an understanding of the breadth and depth of the case's impact on millions of Americans, including the disproportionate number of Black and Latino Texans who have criminal histories.

People with records are not simply "felons" or "criminals," as Texas has labeled them throughout this litigation. They are family members, friends, and neighbors. They form a large portion of the U.S. population: nearly 1 in 3 adults.

Employment barriers faced by people with records too often deprive them of a means to support themselves, their families, and their communities. Their resulting unemployment weakens our national, state, and local economies and drives up recidivism rates. Furthermore, through overbroad hiring restrictions, employers needlessly screen out a hard-working segment of the talent pool, as exemplified by the experiences of *Amicus* Ms. Harrison.

Justice is not served when laws are assessed blindly, without knowledge of their disparate and negative impacts, including on communities of color. *Amici* offer information to assist this Court in fully reckoning with the legal and public policy implications of its decision and the district court's ruling below. *Amici* respectfully

request that the district court's grant of partial summary judgment in favor of Texas be reversed and the injunctive relief afforded to Texas be vacated.

ARGUMENT

I. TEXAS HAS FAILED TO ESTABLISH ARTICLE III STANDING TO CHALLENGE THE GUIDANCE.

Texas has not—and cannot—establish standing in this case, which is fatal to its efforts to obtain relief in this litigation. The "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). The State of Texas, as the party asserting federal jurisdiction, carries the burden of establishing standing. *See id.* at 342; *Williams v. Parker*, 843 F.3d 617, 620 (5th Cir. 2016) (noting that "[s]tanding is a threshold issue," which courts "consider before examining the merits.").

In many respects, *Amici* agree with the arguments made by the Department demonstrating that Texas's allegations are insufficient to establish an injury-in-fact required for standing. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 95, (1983) ("[T]he injury or threat of injury must be 'real and immediate,' not 'conjectural' or 'hypothetical.'") For example, the EEOC is not permitted under Title VII to issue substantive rules, *Edelman v. Lynchburg College*, 535 U.S. 106, 122 (2002), which

necessarily means that the Guidance is not binding on Texas because it lacks the "force and effect of law." *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1200–01 (2015) (citation omitted); *see also* DOJ Br. 18. In addition, a world without the Guidance would not remedy the alleged injury articulated by Texas because existing federal law—namely, Title VII—prohibits racial discrimination in hiring and establishes disparate impact liability.[2] *See* DOJ Br. 18, 19; *see also* 42 U.S.C. § 2000e-2; *Lujan*, 504 U.S. at 560–61 (explaining that an injury must be redressable by a court for a plaintiff to establish standing). Texas, therefore, has not left the realm of the hypothetical, and has not satisfied the "irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560.

Amici also underscore that it is of no consequence—at least for purposes of standing—that the Department is expressing different views than the EEOC with respect to the analysis of disparate impact claims in the Guidance. DOJ Br. 20-23. Whether there is disagreement or consensus, the crux of the issue is that Texas has not demonstrated any cognizable injury, much less one that "fairly can be traced" to the actions of the EEOC or the Department. *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41 (1976).

[2] As the Department argues, the Guidance is not final agency action because it is not "determinative of issues or rights" nor does it "foreclose alternate courses of action or conclusively affect rights of private parties." DOJ Br. 28-30; *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908-09 (5th Cir. 1983).

II. THE 2012 GUIDANCE REPRESENTS A VALID INTERPRETATION OF TITLE VII.

Given that Texas lacks standing, *Amici* contend, as does the Department, that this Court does not have jurisdiction to examine the merits of the Guidance. DOJ Br. 23. But in the event that the Court does reach the merits, and in light of the Department's newly professed differences with the EEOC regarding disparate impact liability, *Amici* write to support the EEOC's view of Title VII as expressed in the Guidance, which is both reasonable and entitled to deference.

A. The Department's New Views on Disparate Impact Liability Find No Support in Title VII's Language or Jurisprudence.

As an initial matter, it bears emphasizing that the Department's abrupt shift in position on disparate impact liability is exactly that: abrupt and in tension with its own recently held views, including in this very case. In its brief for this Court, the Department states—rather remarkably—that it "does not believe that nationwide data regarding arrest or conviction rates is probative of whether a particular employer's policy has a prohibited disparate impact." DOJ Br. at 22. Yet in September 2017, the Department persuasively argued to the district court in this case that:

> "[T]he Guidance is also reasonable in its discussion of disparate impact liability. First, the Guidance sets forth the basic legal standards applicable to Title VII disparate impact claims, citing the statute and Supreme Court precedent. It then goes on to apply that analysis to the use of criminal background information in employment decisions, reasoning that Title VII disparate impact liability would be shown

> where 'a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.' This statement, again, is an elementary legal proposition."[3]

Moreover, in 2014, the Department contended in this litigation that "depriving individuals of employment opportunities on the basis of their criminal histories can constitute disparate-impact race discrimination"[4] and, in support of that point, cited several cases in which the probative value of statistical trends in showing disparate impact was acknowledged. *See Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1293–94 (8th Cir. 1975) (outlining three ways to establish a prima facie case of disparate racial impact, including statistical evidence showing that "blacks as a class (or at least blacks in a specified geographical area) are excluded by the employment practice in question at a substantially higher rate than whites."); *Waldon v. Cincinnati Pub. Sch.*, 941 F. Supp. 2d 884, 888 (S.D. Ohio 2013) (explaining that "[d]isparate impact results from facially neutral employment practices that have a disproportionately negative effect on certain protected groups and which cannot be

[3] *See* ROA.1552-53. As of the filing of this brief, *Amici* could not access the full record on appeal, even after filing a Notice of Appearance and contacting the Clerk's office. *Amici* attempted to identify the precise record cites based on a review of the district court's docket sheet filed by Defendants-Appellants which identified the ROA starting page number for each document. To the extent that *Amici* have mis-calculated these record cites by one or more pages, *Amici* welcome the opportunity to file a supplemental brief correcting those cites.

[4] *See* ROA.526; *see also supra* note 3.

justified by business necessity" and that "[u]nlike disparate treatment, disparate impact … is based on statistical evidence of systematic discrimination").

In short, while the Department's position has drastically changed, the relevant statutory provisions of Title VII have not. Nor have there been—despite the Department's reliance on a single decades-old plurality opinion in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)—any significant *new* developments in Title VII jurisprudence that would support a departure from the EEOC's views on disparate impact liability, as articulated in the Guidance. DOJ Br. 21. The discussion of Title VII below fortifies this point.

B. Courts Have Long Held that Facially-Neutral Hiring Policies that Exclude Applicants with Conviction or Arrest Records Can Violate Title VII.

Nearly 50 years ago, the Supreme Court in *Griggs v. Duke Power Co.* first acknowledged that disparate impact claims challenging facially-neutral employment policies could succeed under Title VII. 401 U.S. 424 (1971). There, Duke Power Company adopted a facially-neutral policy requiring individuals to pass two aptitude tests and have a high school education. *Id.* at 428. Noting that Congress's aim in enacting Title VII was to "achieve equality of employment opportunities and remove barriers" favoring white employees over other employees, the Court held that Title VII allows for disparate impact and disparate treatment claims. *Id.* at 429-31.

Congress later codified disparate impact analysis through the 1991 amendments to the Civil Rights Act of 1964. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat 1071 (stating that the purposes of the act include "codify[ing] the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power* Co., 401 U.S. 424 (1971), and in . . . other Supreme Court decisions"). Title VII now expressly protects against employment practices that are facially neutral yet have a disparate impact on the basis of race, color, religion, sex, or national origin *unless* the employer can show that the practice or policy is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2017). If the employer can show that the practice is job-related and consistent with business necessity, the complainant can still prevail by demonstrating the availability of a less discriminatory alternative employment practice. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2017).

After *Griggs*, federal courts have held that an employer's race-neutral policy against hiring individuals with a conviction record may violate Title VII under a disparate impact framework. Regardless of the outcome of this litigation, Title VII continues to prohibit any policy that Texas may employ to bar applicants with felony convictions—if such policies have a racially disparate impact and are not job related and consistent with business necessity—as even the Department concedes. DOJ Br. at 18, 19.

Indeed, more than 40 years ago, the Eighth Circuit in *Green v. Missouri Pacific Railroad* further refined the analysis in *Griggs* by identifying three factors which are relevant to performing a business necessity analysis of the link between a criminal conviction and a particular employment position: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought. 523 F.2d 1290, 1297 (8th Cir. 1975).[5] The *Green* court performed this analysis in the context of holding that Missouri Pacific Railroad's *absolute bar* on hiring *any* person convicted of a crime other than a minor traffic offense was discriminatory on the basis of race under Title VII. *Id.* at 1298-99.

More recently, in *El v. Southeastern Pennsylvania Transportation Authority (SEPTA),* the Third Circuit reiterated that hiring policies excluding people with records can violate Title VII if they have a disparate impact on people of color and are not job-related and consistent with business necessity. 479 F.3d 233, 239 (3d Cir. 2007). Although the panel affirmed summary judgment for the employer on grounds

[5] Prior to *Green*, federal courts recognized that an employer policy that was not "reasonable and related to job necessities" could violate Title VII. *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972). In *Richardson*, a Black individual with a prior conviction for theft was hired as a bellman, but was asked to take another position within the company upon discovery of his conviction. *Id.* at 520. Mr. Richardson rejected the offer and was discharged. *Id.* While recognizing that whether such a termination passes Title VII muster depends on the particular job, the court held in favor of the defendant, finding that the evidence presented demonstrated that the hotel rejected individuals with conviction records from positions that were considered "security sensitive," such as a bellman. *Id.* at 521.

of business necessity, it did so only after noting the relevance of the age, nature of the offense, and nature of the job, among other things, to a proper business necessity analysis. Specifically, the Third Circuit tailored its previous standard for business necessity from the "minimum qualifications necessary for successful performance of the job in question" to one that allows for a policy that "can distinguish between individual applicants that do and do not pose an unacceptable level of risk." *Id.* at 243, 245. The panel noted that summary judgment might have been properly denied if only the plaintiff had introduced certain additional evidence (such as expert testimony) undermining the defendant's business necessity defense.[6]

Thus, federal courts have long applied disparate impact analysis to cases where employers rejected job applicants because of their conviction record. The Eighth and Third Circuits, as well as numerous district courts, have acknowledged

6 Job applicants and employees have increasingly filed challenges to hiring decisions based on background checks. Just last year, in *Little v. Washington Metro Area Transit Authority* (*WMATA*), a federal court certified a class of affected job applicants with respect to plaintiffs' claim that WMATA's criminal background check policy is facially neutral, but has a disparate impact on Black applicants. Mem. & Op., *WMATA* at 1, 46-47, No. 1:14-cv-01289-RMC (D.D.C. Apr. 18, 2017), ECF No. 186; *see also* Class Lawsuit Settlement Agreement, *WMATA*, No. 1:14-cv-01289-RMC (D.D.C. Dec. 20. 2017), ECF No. 230-1 (settling claims of individuals and class representatives terminated, suspended, or denied employment as a result of the application of a criminal background screening policy).

Similarly, in *Houser v. Pritzker*, a federal court denied a defendant's motion to dismiss and granted the plaintiffs' class certification motion in a challenge to the U.S. Census Bureau's consideration of arrest and conviction records in its hiring process. 28 F. Supp. 3d. 222, 254-55 (S.D.N.Y. 2014); *see also Rogers v. Pearland Indep. Sch. Dist.*, 827 F.3d 403 (5th Cir. 2016) (considering, but granting summary judgment on, pro se plaintiff's claims that defendant's hiring policy related to felony convictions resulted in an improper disparate impact on people of color pursuant to Title VII).

that such policies violate Title VII, as they must, when they have a disparate impact on people of color and are not job related and consistent with business necessity.

C. The Guidance Is Entitled to Deference.

As discussed above, the Guidance reflects the EEOC's longstanding and reasonable interpretation of Title VII and federal jurisprudence. On this point, and in the event that this Court reaches the merits, *Amici* underscore that the EEOC's interpretation of Title VII, as embodied in the Guidance, is entitled to *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also EEOC v. Com. Office Prod. Co.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation of Title VII, for which it has primary enforcement responsibility . . . need only be reasonable to be entitled to deference."). Indeed, a recent district court concluded that the Guidance was worthy of such deference. *See Guerrero v. Cal. Dep't of Corrs. & Rehab.*, 119 F. Supp. 3d 1065, 1079 (N.D. Cal. 2015), *aff'd in part, rev'd in part and remanded*, No. 15-17001, 2017 WL 2963531 (9th Cir. July 12, 2017) (holding the Guidance is "entitled to deference because thoroughness is clearly evident in its consideration, its reasoning is valid, and it is consistent with earlier pronouncements.").

III. EMPLOYMENT POLICIES THAT CATEGORICALLY EXCLUDE INDIVIDUALS WITH FELONY AND OTHER CONVICTION RECORDS ARE COUNTERPRODUCTIVE IN EVERY RESPECT.

Finally, *Amici* write to situate this case in a real-world context. Barriers to employment for people with records serve none of us well. These individuals form a significant share of the U.S. population: across the country, more than 70 million people—or nearly 1 in 3 adults—have an arrest or conviction record, and 700,000 people re-enter their communities following a term of incarceration each year.[7] In Texas, which has one of the highest rates of incarceration *in the world*,[8] nearly 164,000 individuals are behind bars,[9] and 375,000 people are under community supervision, including parole and probation.[10] In 2016 alone, more than 76,000 people were released from Texas incarceration to rejoin their communities.[11] All told, across the state, more than 14 million people have an arrest or a conviction

[7] Anastasia Christman & Michelle Natividad Rodriguez, Nat'l Emp't Law Project, *Research Supports Fair Chance Policies* 1 & n.1 (Aug. 1, 2016), http://bit.ly/1sk48Nn; *see also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2016: A Criminal Justice Information Policy Report*, Table 1 (Feb. 2018), https://bit.ly/2pnzMKx.
[8] Peter Wagner & Wendy Sawyer, Prison Policy Initiative, *States of Incarceration: The Global Context 2018* (June 2018), https://bit.ly/2JwCN7e.
[9] E. Ann Carson, U.S. Bureau of Justice Statistics, Full Report, *Prisoners in 2016*, at 4 (Aug. 2018), https://bit.ly/2qUGY4Y.
[10] Tex. Dep't of Criminal Justice, *Statistical Report Fiscal Year 2016* 6, http://bit.ly/2hPaQvo.
[11] Carson, *supra* note 9, at 11.

record,[12] approximately 2 million people have a felony record, and more than 670,000 people have a prison record.[13]

But these already large numbers are likely to grow, as more than one million Texans are arrested, for the first time, every year.[14] These trends—decades in the making—have landed the most direct blow to Black and Latino communities, largely due to the widely discredited "war on drugs" and the era of mass incarceration.[15] Nationally, Black individuals are arrested at a rate that is two times their proportion of the general population,[16] such that, overall, 1 in 3 Black men can expect to go to prison in their lifetime.[17] Moreover, 1 in 87 working-age white men are currently in

[12] *Survey of State Criminal History Information Systems*, *supra* note 7, at Table 1.
[13] Michael Massoglia, Sarah K.S. Shannon, Jason Schnittker, Melissa Thompson, Christopher Uggen, & Sara Wakefield, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948 to 2010* (Demography, Vol. 54, Sept. 2017), https://bit.ly/2CH25NM (The estimates cited, which span from 1980-2010, are based on an unpublished dataset provided to NELP by the authors of the paper. Raw numbers are estimates based on life table analysis, not a census-like enumeration.)
[14] Helen Gaebler, *Criminal Records in the Digital Age: A Review of Current Practices and Recommendations for Reform in Texas* 4 (William Wayne Justice Ctr. for Public Interest Law, Univ. of Tex. School of Law, Mar. 2013), http://bit.ly/2y0Awej.
[15] *See, e.g.*, Exec. Office of the President, *Economic Perspectives on Incarceration and the Criminal Justice System* 27-30 (Apr. 2016), http://bit.ly/2y0VMko; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2010).
[16] *Compare* Fed. Bureau of Investigation, *Crime in the United States, 2016: Table 21A* (2017), https://bit.ly/2gqjj4N (noting 26.9% of 2016 arrests were of Black or African American people), *with* U.S. Census Bureau, *Comparative Demographic Estimates*, https://bit.ly/2NZn0Nt (approximately 13% of the U.S. population was Black or African American in 2016).
[17] The Sentencing Project, *Trends in U.S. Corrections* 5 (June 2018), https://bit.ly/2Cw7pUl.

prison or jail, compared with 1 in 36 Hispanic men and 1 in 12 Black men of the same age range.[18] More than 60% of people in prison today are people of color.[19]

Texas is not immune from the racial disparities that permeate the criminal justice system: Black Texans constitute 27% of drug arrests and 36% of the state prison and jail population; yet they make up only 11% of the state's adult population.[20] In light of these statistics, employment policies that ban individuals with conviction records from securing jobs, which Texas thus far unsuccessfully has sought court sanction of through this litigation, potentially harm millions of Texans and disproportionately harm communities and individuals of color.

A. Policies that Render Employment Unattainable for People with Records Weaken Our Economy.

Public policies that exclude people with records from employment represent a triple threat to individual workers, employers, and the economy.

At the individual level, the importance of keeping people who have been involved in the criminal justice system connected to the workforce cannot be overstated because the stigma associated with a conviction record—even for minor offenses—is difficult to wash away, particularly in the employment context. According to one recent study, the unemployment rate in 2008 (the most recent year

[18] Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 4 (2010), http://bit.ly/1YjcAau.
[19] *Trends in U.S. Corrections, supra* note 17, at 5.
[20] *See, e.g.*, Gaebler, *supra* note 14, at 10.

for which data are available) of formerly incarcerated people was nearly five times higher than the general unemployment rate, and even higher than the worst years of the Great Depression.[21] This should not be entirely surprising: today, nearly 9 in 10 employers conduct background checks on some or all job candidates.[22] When these background checks reveal a record, the applicant's job prospects plummet: the callback rate for white applicants drops by half, from 34% to 17%, and by almost two-thirds, from 14% to 5%, for Black candidates.[23] This is not news in Texas. The Legislature has recognized that job seekers with conviction records receive less than half as many job offers as other applicants.[24]

Even for individuals who are able to find work following release, there is a price to be paid, as a history of incarceration operates as a lifelong drag on economic security. Formerly incarcerated men can expect to work nine fewer weeks per year and earn 40% less annually, for an overall loss of $179,000 even before the age of 50.[25] In the year after an incarcerated father is released, family income drops by 15%

[21] Lucius Couloute & Daniel Kopf, Prison Policy Initiative, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People* (July 2018), https://bit.ly/2Jbib0t.
[22] Soc'y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3 (Jul. 19, 2012), http://bit.ly/2mhlrzh.
[23] Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 955-58 (Mar. 2003), http://bit.ly/1vNQBJk.
[24] Senfronia Thompson, Judiciary & Civ. Juris. Comm. Rep., *Bill Analysis of H.B. 1188* (2013), http://bit.ly/2ijNbUb.
[25] Western & Pettit, *supra* note 18, at 11-12.

relative to pre-incarceration levels.[26] People with records also are often excluded (on account of state law) from occupations that require a license to work, which tend to be some of the fastest growing and highest paying careers.[27] This exacerbates income inequality: the wage advantage enjoyed by licensed workers relative to comparable unlicensed workers increases with age, rising from about $1.60 per hour at age 25 to $3.50 per hour at age 64.[28] That same study also indicates that "[b]ecause employers tend to pay lower wages to workers with felony convictions, a licensing requirement that bans those with criminal records can produce a larger wage premium by separating those with convictions from those without them."[29] In other words, employment policies of the sort that Texas has enacted make a bad problem worse.

Such policies also disadvantage employers, who are left with a smaller pool of qualified workers. An emerging body of research demonstrates that people with records make good employees. One study found that employees with criminal records are less likely to leave voluntarily, generally have a longer tenure, and are

[26] *Id.* at 21.
[27] Beth Avery & Michelle Natividad Rodriguez, Nat'l Emp't Law Project, *Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Records* 11 (April 2016), https://bit.ly/2Mm53af (noting that Texas has more than 100 occupational license laws that automatically disqualifies people with records.)
[28] Ryan Nunn, The Brookings Institution, *How Occupational Licensing Matters for Wages and Careers*, (Mar. 2018), https://brook.gs/2oQwcJ5
[29] *Id.*

no more likely than people without records to be terminated involuntarily.[30] Another study of individuals with a felony record serving in the U.S. military found that they were promoted more quickly and to higher ranks than other enlistees and were no more likely than service members without records to be discharged for negative reasons.[31] *Amicus* Ms. Harrison's post-conviction employment record—as a dedicated professional for 28 years with the City of Dallas and thereafter as a home health aide for several years—bolsters the conclusion that this research supports.

Moreover, these consequences, which flow directly from policies excluding people with records from employment, accrue and impair overall economic vitality. Specifically, the stigmatization of people with felony records effectively reduces the annual U.S. gross domestic product by an estimated $78 to $87 billion.[32] Under these punitive policies, taxpayers lose as well. A 2011 study found that putting just 100 formerly incarcerated persons back to work increased their lifetime earnings by $55 million, their income tax contributions by $1.9 million, and government sales tax revenues by $770,000, while saving more than $2 million annually by keeping them

[30] Dylan Minor, Nicola Persico & Deborah M. Weiss, *Criminal Background and Job Performance? Evidence from America's Largest Employer* 2, 14 (May 1, 2017), http://bit.ly/2vJT5jR.
[31] Jennifer Lundquist, et al., *Does a Criminal Past Predict Worker Performance?* 2 (Dec. 2, 2016) (unpublished manuscript), http://bit.ly/2lloRle.
[32] Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies* 1 (June 2016), http://bit.ly/2atNJBu (relying on 2014 data).

out of the justice system.[33] Another study estimated that increasing employment for individuals released from Florida prisons by 50% would save $86 million annually in costs related to future recidivism.[34]

B. Policies that Render Employment Unattainable for People with Records Undermine Public Safety.

Prohibitions against hiring individuals with conviction records, such as those implemented by Texas, do not make communities safer. To the contrary, empirical evidence shows that employment reduces crime.[35] Indeed, research published in 2011 revealed that employment was the *single most important* influence on reducing recidivism by the formerly incarcerated subjects of the study; two years after release, nearly twice as many employed individuals had avoided another interaction with the criminal justice system when compared with their unemployed counterparts.[36]

It also matters—from a public safety perspective—that people with records have access to good-paying jobs because higher wages translate to lower recidivism. One study calculated that the likelihood of re-incarceration was 8% for those earning

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[33] Econ. League of Greater Phila., *Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia* 11-13, 18 (Sept. 2011), http://bit.ly/2m2dei3.

[34] Am. Civil Liberties Union, *Back to Business: How Hiring Formerly Incarcerated Job Seekers Benefits Your Company* 10 (2017), http://bit.ly/2sforzk (citing a study finding that providing job training and employment to previously incarcerated individuals in the State of Washington returned more than $2,600 to taxpayers).

[35] *See, e.g.*, Chrystal S. Yang, *Local Labor Markets and Criminal Recidivism*, 147 J. Pub. Econ. 16 (Dec. 2016), http://bit.ly/2ziISLQ (finding that releasing incarcerated individuals into a local labor market with lower unemployment and higher wages decreased the risk of recidivism).

[36] Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 Just. Q. 382, 397-98 (Apr. 2011), http://bit.ly/2kirpkj.

more than $10 per hour, 16% for those earning less than $7 per hour, and 23% for those who remained unemployed.[37] Public safety is not advanced by exclusionary hiring policies such as those that Texas defends.

C. Policies that Render Employment Unattainable for People with Records Come at the Expense of Communities and Families.

Blanket exclusions of people with felony and other conviction records harm families—men, women, and children—all across the State of Texas. Today, *nearly half* of all children in America have at least one parent with a record, which—on account of the counterproductive policies that Texas maintains—necessarily means that the damaging impacts of a record touch multiple generations.[38] In the context of one family, an incarcerated parent is has devastating effects. But in the aggregate, mass incarceration destabilizes entire communities; more than 120,000 mothers and 1.1 million fathers are behind bars across the United States.[39] When these individuals return to their communities, economic strife is the natural result of state policies that dangle employment out of reach. For example, interviews with family members of formerly incarcerated men revealed that 83% had provided the recently released person with financial support, half described providing this support as "pretty or very

[37] Christy Visher, et al., Urban Inst., *Employment after Prison: A Longitudinal Study of Releasees in Three States*, 8 (October 2008), http://urbn.is/2yPIXHN.
[38] Rebecca Vallas, et al., Ctr. for Am. Progress, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children* 1 (Dec. 2015), http://ampr.gs/2g9hdWF.
[39] Western & Pettit, *supra* note 18, at 18.

hard," and 30% were facing "financial hardships."[40] Policies that erect barriers to employment for people with records take their toll at the worst possible time: the very moment when these individuals are seeking to regain their footing.

Women in particular are hit hard by the kinds of hiring policies that Texas trumpets. The incarceration of women surged by 700% between 1980 and 2014.[41] This trend is compounded by another harsh reality: "women with a prison record are seen as having committed two offenses, one against the law and one against social expectations of how women are supposed to behave."[42] This has been demonstrated empirically, as one experimental study evidenced that nearly 60% of men with a prison record would have been called back for a job interview, whereas only 30% of women *with the same record* would have received such a callback.[43]

In sum, Texas advocates for counterproductive hiring bans at its own peril. Individuals with meaningful job opportunities are more likely to succeed as thriving, law-abiding, and contributing members of their families and communities.[44]

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[40] Rebecca L. Naser & Christy A. Visher, *Family Members' Experiences with Incarceration and Reentry*, 7 W. Criminology Rev. 20, 26 (2006), http://bit.ly/2xjaOT2.
[41] The Sentencing Project, *Incarcerated Women and Girls* 1 (Nov. 2015), http://bit.ly/2xXkccx.
[42] Scott H. Decker, et al., Nat'l Inst. of Justice, *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment* 57 (Jan. 2014); http://bit.ly/2w3mVT1.
[43] *Id.*
[44] Le'Ann Duran, et al., The Council of State Gov'ts Justice Ctr., *Integrated Reentry and Employment Strategies: Reducing Recidivism and Promoting Job Readiness* 2 (Sep. 2013), http://bit.ly/2gNND9F.

D. The Texas Legislature—Aware of the Damage to the Economy, Public Safety, and Families Wrought by Its Policies—Has Begun Taking Steps to Address Employment Barriers for Individuals with Records.

In the proceedings below, the State of Texas touted the "over 300 ways" in which a record can impact a person's "access to the privileges of everyday society." ROA.1678. This misreads, or misrepresents, the zeitgeist in Texas.

In some respects, Texas has begun to understand that removing obstacles to employment for people with records is beneficial to the state. For example, in 2013, with the backing of the Texas Association of Business, then-Governor Rick Perry signed into law House Bill 1188, which was passed with near unanimous bipartisan support in the Texas Legislature.[45] The law encourages employers to hire qualified applicants with records by limiting potential civil liability facing employers based on employee misconduct; the law makes clear that negligent hiring lawsuits cannot be based solely on an employee's conviction history. The State Legislature also amended the Texas Occupations Code nearly two decades ago to require licensing authorities to consider several factors when deciding whether to grant certain occupational licenses to people with conviction histories—many of the same factors contained in the Guidance.[46]

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[45] H.B. 1188, 85th Leg. (Tex. 2017), http://bit.ly/2hQmwOz; *see also* Maurice Chammah, *Business Association Scores Victories on Criminal Justice Agenda*, Tex. Trib., May 23, 2013, 6:00 AM, http://bit.ly/2wAODUh.

[46] *Compare* Guidance § 6, *with* Tex. Occ. Code §§ 53.022–53.023 (effective Sept. 1, 1999).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the district court's grant of partial summary judgment in favor of Texas and vacate that court's grant of injunctive relief.

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Respectfully submitted,

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APPENDIX

List of *Amici Curiae*

Amicus curiae **Beverly Harrison** resides in Dallas, Texas. She is a 62-year-old Black woman, mother, and grandmother who retired from the Dallas City Marshal's Office in 2009 after 28 years of service to the City of Dallas. Ms. Harrison has continued to work since her retirement to serve her community and supplement her income, including by serving as a certified nursing assistant and home health aide between 2009 and 2013 and working as a nursing attendant beginning in 2017. Until mid-September 2017, Ms. Harrison worked for the Dallas Independent School District as a school cafeteria employee.

In 2013, Ms. Harrison applied for a job with Dallas County Schools ("DCS") as a school crossing guard or bus monitor. Ms. Harrison received a conditional offer of employment from DCS and began work as a school crossing guard. After eight days on the job, however, DCS terminated Ms. Harrison's employment because of an entry that appeared on her background check report. In 1975, when she was 19 years old, Ms. Harrison pleaded no contest to the offense of aggravated assault, a third-degree felony, and was sentenced to five years of probation. However, in 1977, after two years of satisfactory compliance with the terms of her probation, the Dallas County Criminal Court issued an order discharging Ms. Harrison from probation early, setting aside the judgment of conviction, and "releas[ing her] from all penalties and disabilities resulting from the Judgment of Conviction." In the more

than 40 years since then, Ms. Harrison has never been convicted of a crime. Nonetheless, the entry from 1975 has rendered her ineligible to secure employment with DCS. DCS's denial of employment to Ms. Harrison, based on her decades-old conviction record, is the basis of a pending complaint with the EEOC alleging a violation of Title VII. Moreover, Ms. Harrison has been barred from other employment in Texas due to her criminal history. In 2017, Ms. Harrison learned that a home health agency would not employ her after it conducted a background check, even though, as above, she had already worked as a home health aide for several years. Ms. Harrison has reasonable fear that her conviction record may continue to render her ineligible for employment in Texas.

Amicus curiae the **Texas State Conference of the NAACP ("Texas NAACP")** is the oldest and one of the largest and most significant non-profit civil rights organizations in the State of Texas that promotes and protects the rights of Black Americans and other people of color. With over 70 adult branches across Texas and dozens more youth units, it has thousands of members who reside in every region of the state. Nationally, the NAACP has worked for over ten years to reduce barriers to employment for those with criminal records, advocating for "ban the box" laws and policies, engaging national employers, and educating communities across the country. Following this national directive, the Texas NAACP and its branches have worked to eliminate employers' categorical bans on hiring applicants with

felony convictions and other barriers faced by people with conviction and arrest records, including Texas NAACP members and other people of color. For example, during legislative sessions, the Texas NAACP has advocated for individuals with records in various ways, including by expending resources and time by staff and members fighting back against efforts to preempt fair chance hiring ordinances; advocating for Senate Bill 578 (2015), which would have required the Texas Department of Criminal Justice to provide comprehensive, county-specific reentry and reintegration resources to individuals released from prison; and advocating for House Bill 1510 (2015), which would have increased housing options for individuals with conviction records. Where Texas defends policies that categorically deny jobs to people with convictions, the Texas NAACP is forced to redirect resources away from its affirmative reentry work of conducting job searches and providing training for individuals and reallocate those resources toward helping its members and constituents secure employment and defending and enforcing antidiscrimination statutes such as Title VII, which renders such categorical bans illegal.

Amicus curiae the **NAACP Legal Defense & Educational Fund, Inc. ("LDF")** is a non-profit, non-partisan law organization, founded in 1940 under the leadership of Thurgood Marshall to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color. LDF has been involved in precedent-setting and other

important litigation challenging employment discrimination before federal and state courts. *See, e.g*., *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Hithon v. Tyson Foods, Inc*., 144 F. App'x 795 (11th Cir. 2005); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *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). In the unanimous decision in *Griggs v. Duke Power Co.*, which LDF litigated, the U.S. Supreme Court recognized the disparate impact theory of liability in the employment context. LDF also challenges policies that exclude individuals with criminal records from jobs. *See, e.g.*, *Waldon v. Cincinnati Pub. Schs.*, 941 F. Supp. 2d 884 (S.D. Ohio 2013) (denying defendants' motion to dismiss a disparate impact case alleging that Black former public school employees were terminated for having been convicted of specified crimes under Ohio law); Mem. & Op., *Little v. Wash. Metro Area Transit Auth. (WMATA)* at 1, 46-47, No. 1:14-cv-01289-RMC (D.D.C. Apr. 18, 2017), ECF No. 186 (certifying a class of affected job applicants with respect to plaintiffs' claim that WMATA's criminal background check policy is facially neutral, but has a disparate impact on Black applicants); *see also* Class Lawsuit Settlement Agreement, *WMATA*, No. 1:14-cv-01289-RMC (D.D.C. Dec. 20. 2017), ECF No. 230-1 (settling claims of individuals and class representatives terminated, suspended, or denied employment as a result of the application of a criminal background screening policy). LDF contributed to the

efforts that led a bipartisan EEOC to adopt the Guidance in 2012. At the heart of this case is Texas's challenge to the legality of the Guidance, which memorializes case law, like *Griggs*, and decades of EEOC policies that show that categorical bans on hiring people with convictions, such as the ones that Texas has asked be declared lawful, may violate Title VII to the extent that they disproportionally impact Black people and other protected groups and are not job-related and consistent with business necessity.

Amicus curiae the **National Employment Law Project, Inc. ("NELP")** is a non-profit legal research and advocacy organization with 45 years of experience advancing the rights of low-wage workers and those struggling to access the labor market. NELP seeks to ensure that vulnerable workers across the nation receive the full protection of employment laws. Specializing in the employment rights of people with arrest and conviction records, NELP has helped to lead the national movement to restore fairness to employment background checks. NELP works with allies in Texas and across the country to promote enforcement of antidiscrimination laws, like Title VII, and to reduce the barriers to employment faced by workers with records, such as categorical bans on hiring people with felony conviction histories or other records. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers with records. Like LDF, NELP was a leader in the efforts to encourage a bipartisan EEOC to adopt the 2012 Guidance. Both LDF and

NELP served as amici in *Guerrero v. Cal. Dep't of Corrs. & Rehab.*, arguing that the court should rely on the Guidance in determining whether particular employers' criminal background check policies unfairly exclude applicants of color. 119 F. Supp. 3d 1065 (N.D. Cal. 2015), *aff'd in part, rev'd in part and remanded,* No. 15-17001, 2017 WL 2963531 (9th Cir. July 12, 2017).

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s/ Leah C. Aden
Leah C. Aden

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