No. 15-17001
No. 15-17043

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR GUERRERO,
Plaintiff/Appellee,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,
Defendants/Appellants.

On Appeal from a Judgment of the United States District Court
For the Northern District of California
Hon. William Alsup, District Judge
D.C. No. 3:13-cv-05671-WHA

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL EMPLOYMENT LAW PROJECT, AND THE LEADERSHIP CONFERENCE FOR CIVIL AND HUMAN RIGHTS IN SUPPORT OF PLAINTIFF/APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that each is a tax-exempt non-profit corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTEREST OF *AMICI CURIAE*[1]

Amici are non-profit organizations dedicated to, *inter alia*, eradicating workplace discrimination that affects racial and ethnic minorities, women, and other disadvantaged groups.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit organization that was established to assist African Americans and other people of color in securing their civil and constitutional rights through the prosecution of lawsuits challenging racial discrimination. For over seventy-five years, LDF has represented parties in litigation before the United States Supreme Court and the lower federal courts, on matters of race discrimination in general and employment discrimination in particular, including in *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); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). LDF has focused its employment discrimination work particularly upon class actions in order to secure systemic change.

The National Employment Law Project (NELP) is a non-profit research and advocacy organization with over forty-five years of experience advancing the employment rights of low-wage and unemployed workers. NELP seeks to ensure

[1] Through an agreement between plaintiff's counsel and defense counsel, all parties have consented to the filing of this amicus brief.

that all workers—especially the most vulnerable ones—receive the full protection of employment laws and that the laws evolve to meet the needs of the changing workforce.

NELP's Second Chance Labor Project specializes in the employment rights of people with arrest and conviction records and promotes the enforcement of federal, state, and local antidiscrimination laws to reduce employment barriers for workers with records. NELP has testified before Congress and numerous state legislatures and has published extensively on several major areas of criminal background check law and policy. NELP's report "65 Million 'Need Not Apply': The Case for Reforming Background Checks for Employment" (March 2011) documents the unprecedented growth of criminal background checks for employment and has been widely cited in both the media and academic journals. Other NELP publications focusing on criminal background checks include "Wanted: Accurate FBI Background Checks for Employment" (July 2013), the "Fair Chance – Ban the Box Toolkit" (March 2015), and the "Ban the Box State and Local Guide" (updated April 2016) (all available at www.nelp.org).

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership

Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and it believes that every person in the United States deserves to be free from discrimination.

The Leadership Conference has long advocated for the removal of barriers to reintegration like education, housing and employment for the nearly 1 in 3 Americans with an arrest or conviction record. Each year nearly 700,000 individuals are released from prison and jails and they face seemingly insurmountable obstacles to their successful reintegration back into community and securing employment is one of the most important ways to reduce recidivism.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Two parallel trends are contributing to the impoverishment of minority communities throughout the United States: mass incarceration and the serious collateral consequences imposed upon those with criminal convictions.[2] Due to longstanding racial disparities in the criminal justice system, mass incarceration has saddled spectacular numbers of Black and Latino Americans with criminal records. Further, the use of criminal history screens in employment has excluded many people of color with prior convictions from the workforce or has significantly limited their access to employment. Because criminal records do not accurately predict workplace behavior, and because the information upon which background checks are based is often of questionable value, the widespread reliance on criminal history screens in employment has caused minority communities to lose a massive and unfair amount of income and capital.

[2] These collateral civil sanctions can affect an individual's right to vote, acquire housing, receive public assistance, and obtain student loans. *See, e.g.*, The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2014), *http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states* (voting); Corinne Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, Human Rights Watch (2004), *available at https://www.hrw.org/sites/default/files/reports/usa1104.pdf* (housing); 21 U.S.C. § 862a (2014) (authorizing imposition of penalties including a lifetime ban on receipt of cash benefits or food stamps for individuals with drug convictions); 20 U.S.C. § 1091(r)(1) (2015) (codifying the 1998 amendment to the Higher Education Act of 1965 restricting federal financial aid and guaranteed loans for individuals with drug convictions).

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment practices that have a racially disparate impact unless the employer can show that the practice "is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2016). This appeal presents a critically important question of first impression in the Ninth Circuit: how to apply the "business necessity" standard of Title VII to employment screens that utilize criminal history information to make hiring, termination, or other work-related decisions.[3] In short, the Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII[4] (hereinafter, "Guidance") sets forth a thoroughly researched and documented framework for applying the "business necessity" standard that is being relied on by the majority of employers, and is entitled to this Court's deference for the reasons detailed below.

The Guidance bears all of the hallmarks of an administrative interpretation that merits judicial deference. First, the Guidance is consistent with four decades of EEOC enforcement practice on the proper use of criminal history screens by employers. Second, the Guidance was developed in a thorough manner,

[3] This Court has previously recognized that there is no legitimate business necessity for screens based on an applicant or employee's arrest record. *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972).
[4] EEOC Enforcement Guidance No. 915.002 (Apr. 25, 2012), *http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf*.

incorporating the agency's decades of experience, judicial analysis, social scientific research on recidivism, and extensive input from members of the public. Third, the Guidance is logically sound and consistent with Supreme Court and Ninth Circuit law on disparate impact and selection devices. *See The Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003) (en banc) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) for the appropriate factors to be considered in granting deference).

For all these reasons, the district court deferred to the Guidance in performing the business necessity analysis, and amici urge this Court to do the same. The EEOC's Guidance identifies three factors, first defined in *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975), which are relevant to assessing 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. Guidance at 15. The Guidance suggests that individualized assessment of a particular applicant's circumstances is often necessary to ensure an appropriately close fit between the criminal history screen and the risks that an employer seeks to measure, and presents the relevant information that employers should consider in that individualized assessment,

drawing on social science research and input from employer and employee advocates. *Id.* at 17-20.

Because the Guidance is a sound interpretation of Title VII developed through a rigorous process, this Court should defer to its approach to business necessity for criminal history screens and affirm the district court's judgment.

ARGUMENT

I. The Widespread Use of Criminal Background Checks by Employers Has a Devastating and Disproportionate Effect on Minority Communities.

Over the past forty years, an unprecedented number of Americans have been convicted of crimes. Law enforcement authorities have made a quarter of a billion arrests in the past twenty years alone, depositing the names of over 77 million individuals into the FBI's master criminal database.[5] Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J., Aug. 8, 2014, *http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402*. While, in 1974, some 218,466 men and women were in jail and prison in this country, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners 1925-81* 2 (1982), by 2014, the number had spiked to nearly 1.6 million, E. Ann Carson, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2014* 1 (2015). At the same time, another 744,000 people were in local jails, and 4.7 million Americans were under criminal justice supervision such as probation or parole. Danielle Kaeble et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States, 2014* 1-2 (2015). These numbers are not only domestically unprecedented;

[5] Similarly, NELP has calculated that 70 million American adults have arrest or conviction records. Nat'l Emp't Law Project, *Research Supports Fair Chance Policies* (2016), *http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf*.

they are an international outlier. The United States comprises about five percent of the world's population but now holds 25% of its prison population. Marc Mauer, *Race to Incarcerate* 15-41 (1999).

Communities of color have long been arrested, convicted and incarcerated at disproportionately high rates. African Americans account for 12% of the population, 27% of all arrests, and 44% of those convicted of felonies. Federal Bureau of Investigation, *Uniform Crime Reports, Crime in The United States* (2003). Although "only" eight percent of the working-age population possesses a felony record, Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 938 (2003), the figure is undoubtedly much higher for African-American men, who have a 33% likelihood of incarceration during their lifetime. Thomas P. Bonczar, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (2003). And this disparity has grown over time. In the 1920s, African Americans were three times as likely as Whites to be imprisoned. Patrick E. Langan, U.S. Dep't of Justice, Bureau of Justice Statistics, *Race of Prisoners Admitted to State and Federal Institutions, 1926-1986* 7 (1991). By 2014, this disparity had grown significantly: African Americans were six times

as likely as Whites to be imprisoned, and Latinos were nearly 2.5 times as likely as Whites to be imprisoned.[6] Carson, *supra* p. 8, at 15.

While the number of Americans—and, particularly, African-Americans and Latinos—receiving criminal records was growing at an alarming rate, the background-check industry kept pace and ensured that criminal records were made readily available to potential employers. The advent of the internet and advances in information technology facilitated ready access to criminal records. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 Criminology 327, 329 (May 1, 2009). Around the same time, state legislatures began encouraging background checks for employees in myriad industries. U.S. Dep't of Justice, Bureau of Justice Statistics, *Compendium of State Privacy and Security Legislation: 2002 Overview* 9 (Nov. 2003). Today, many states make criminal records available on the internet, and there are "hundreds, perhaps even thousands" of companies that provide criminal records information to users. Blumstein & Nakamura, *supra*, at 329.

[6] These statistics are driven, in part, by disparate and discriminatory enforcement of the law. For instance, African Americans are four times more likely than whites to be arrested for marijuana possession even though the two groups use marijuana at a similar rate. Am. Civil Liberties Union, *The War on Marijuana in Black and White* (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

The background check companies have found a willing market: while employers performed criminal background checks on just 51% of workers in 1996, Soc'y for Human Res. Mgmt., *Workplace Violence Survey* 19 (Jan. 2004), they now perform background checks on nearly 90% of applicants, Evren Esen, Soc'y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 2 (July 19, 2012).

The impact of these numerous background checks is both obvious and profound: employers are reluctant to hire people with criminal records, and people with criminal records face significant economic limitations when they cannot secure employment. Indeed, survey data shows that nearly two-thirds of employers say that they "probably or definitely would not" hire an individual with a criminal record. Devah Pager & Bruce Western, Nat'l Inst. of Justice, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* 20 (2009). Similarly, studies show that an individual with a criminal record is only half as likely to get a callback or interview as a similarly situated individual without a record.[7] Pager, *supra* p. 9 (examining rate of callbacks); Scott Decker et al., *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for*

[7] In fact, 60% of previously incarcerated individuals are still unemployed a year after their release. Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, Sent'g & Corr., Nov. 2000, at 1.

Employment, U.S. Department of Justice (Jan. 2014) (addressing effect on interviews).

The economic consequences of freezing these individuals out of labor markets and relegating them to lesser jobs are staggering. Previously incarcerated men take home an average of 40% less pay each year than those never incarcerated. Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 6 (2010). By age 48, their lost earnings amount to nearly $179,000. *Id.* These lost and diminished earnings add up. Each year, young people lose $4 to $7 billion in lifetime earnings because of juvenile incarceration. Marc Schindler et al., Justice Pol'y Inst., *Sticker Shock: Calculating the Full Price for Youth Incarceration* at 3 (2014). And the economic cost of unemployed individuals with felony convictions—a figure that understates the problem because most individuals with a record do not have a felony conviction—has been estimated at $57 to $65 billion per year, or approximately half a percent of GDP. John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, Ctr. For Econ. & Pol'y Research, at 1 (Nov. 2010).

The weight of this economic calamity falls heavily on the shoulders of African Americans. Not only are African Americans overrepresented in the criminal justice system, but Black job seekers with convictions are penalized by employers more harshly than whites. Although a criminal record reduces the

chances of a callback or job offer by approximately 50% across all races, the "criminal records penalty suffered by white applicants (30%) is roughly half the size of the penalty for blacks with a record (60%)." Pager & Western, *supra* p. 11, at 4. Similarly, another study finds that white men with a felony record were half as likely as white men without a record to receive a callback after applying for a job, while African Americans with a felony record were only one third as likely to receive a callback as those without a record. Pager, *supra* p. 9, at 955-57. This disadvantage is not limited solely to finding a job. Research also indicates that wages rise more slowly for formerly-incarcerated African Americans compared to Whites following their release from prison. Christopher Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth* 15 (2008), *http://www.npc.umich.edu/publications/u/working_paper08-16.pdf*. The resultant racial economic effects are stark. Incarceration reduces the total lifetime earnings of white males by two percent, Latino males by six percent, and Black males by nine percent. Western & Pettit, *supra* p. 12, at 4.

Criminal background checks also pose serious problems beyond their promotion of racially-disparate outcomes. The information they contain is often inaccurate. *See* Editorial, *Accuracy in Criminal Background Checks*, N.Y. Times, Aug. 9, 2012, at A18, *http://www.nytimes.com/2012/08/10/opinion/accuracy-in-criminal-background-checks.html*; Persis Yu & Sharon Dietrich, Nat'l Consumer

Law Ctr., *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 3 (Apr. 2012), *http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf*. Further, their utilization is based upon the questionable assumption that criminal records are a good predictor of recidivism.

Background data is often rife with errors and inaccuracies. Private companies that perform criminal background checks often purchase bulk records but fail to update them, or to verify information obtained, even from questionable sources. *Id*. at 3-4. The FBI suffers from similar issues. In 2012, the FBI conducted roughly 17 million background checks for employment, and approximately half of those lacked final disposition information. Nat'l Emp't Law Project, *Wanted: Accurate FBI Background Checks for Employment* (2013), *http://www.nelp.org/content/uploads/2015/02/Report-Wanted-Accurate-FBI-Background-Checks-Employment-1.pdf*. The inaccuracies with background data include mismatches between the subject of the report and the person who committed the crime, mischaracterizations of the crime reported, the improper inclusion of sealed information, and the omission of data regarding how the case was resolved. *See id.* Because African-Americans are arrested at a higher rate than whites, the omission of case resolution is more likely to negatively affect

them. *Id.* at 16 (noting a higher rate of appeals from African Americans subject to FBI background checks).

Further, a criminal record is a strikingly flawed predictor of whether an individual will commit a crime in the future. In 2012, only about one half of employers gave consideration to the age of an offense found on a background check, Esen *supra* p.11, yet age is a crucial determinant of whether the record holds any value in determining whether the individual will reoffend, *see* Alfred Blumstein & Kiminori Nakamura, *Extension of Current Estimates of Redemption Time: Robustness Testing, Out-of-State Arrests, and Racial Differences* at 41 (2012), *https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf*. After a relatively short time—three to four years for property offenders, four years for drug offenders, and four to seven years for violent offenders—the recidivism risk for individuals with convictions falls below the risk of the general population. *See id.* Thus, when an employer excludes all individuals with criminal records or excludes individuals without regard for the nature of their offenses or the time that has elapsed since commission, it is penalizing people without any empirical basis for its actions—and doing so in a way that is racially disparate and quite possibly based on flawed information.

II. The 2012 EEOC Enforcement Guidance on Employer Consideration of Arrest & Conviction Records Merits *Skidmore* Deference.

The question of whether, and under what circumstances, an employer can use criminal history screens to disqualify potential employees has become increasingly salient as advances in information technology have led larger numbers of employers to rely on such screens. Because the use of criminal history screens disproportionately disadvantages African-American and Latino applicants, their use implicates serious Title VII concerns. The district court addressed this issue in the context of California Department of Corrections and Rehabilitation's Question 75 and its disparate impact on Latino applicants.[8] In resolving the issue, the court deferred to the expertise reflected in the Guidance. Amici urge this court to do the same.

The Supreme Court and the Ninth Circuit have long recognized that the EEOC's interpretations of Title VII "are entitled to great deference," *EEOC v. Wal-Mart Stores Inc.*, 156 F.3d 989, 993 n.1 (9th Cir. 1998) (quoting *Albemarle*, 422 U.S. at 431), and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993) (quoting *Meritor Sav. Bank v. Vinson*,

[8] Mr. Guerrero was denied employment because he answered "yes" to Question 75 on the application for employment, whether he had used a false social security number. *See* Appellee's Br. at 5-8, 40-43.

477 U.S. 57, 64 (1986)). But because Congress did not grant authority to the EEOC to promulgate substantive legislative rules regarding Title VII, the Guidance is not binding. *Id.* at 1489.

Administrative interpretations that are non-binding are entitled to deference as first outlined in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449 n.9 (2003); *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001). *Skidmore* deference respects "the 'specialized experience and broader investigations and information' available to the agency." *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139). To determine whether *Skidmore* deference is appropriate, a court examines the "interpretation's thoroughness, rational validity, and consistency with prior and subsequent pronouncements . . . [,] the 'logic[ ] and expertness' of an agency decision, the care used in reaching the decision, as well as the formality of the process used." *The Wilderness Soc'y*, 353 F.3d at, 1068. In line with these factors, this Court has cautioned against taking a "cynic[al]" approach to *Skidmore* deference, which might "suggest that how much deference we give to an EEOC Guideline depends on how much we agree with it, or even that we apply the Commission's Guidelines when we think they're right and don't when we think they're wrong." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1121 n.9 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000).

Application of the factors set forth in *Wilderness Society* strongly supports deference to the Guidance. For decades, the EEOC has applied Title VII requirements to criminal background check policies, including three policy statements issued in the 1980s and '90s. Recently, the EEOC engaged in a thorough review of the relevant case law and social science research to develop the 2012 Guidance, which applies the Commission's technical expertise to develop generalized rules that are consistent with this Court's law on business necessity.

Further, the devastating effect of criminal background checks on minority communities demands a clear set of principles for employers to follow and provides additional persuasive evidence for deference to the Guidance. The Guidance therefore merits *Skidmore* deference.

A. The EEOC's Criminal Records Guidance is Entitled to Deference Because it is Consistent with Past Pronouncements and Sufficiently Thorough.

1. The EEOC has scrutinized the disparate impact of criminal history screens and emphasized the need for careful analysis of business necessity for more than forty years.

Although the 2012 Guidance addresses the proper use of arrest and conviction records in employment decisions, it does not reflect a new area of EEOC involvement. To the contrary, the EEOC has offered direction to employers on this issue for more than four decades.

The EEOC first found a criminal history screen to have a racially discriminatory effect in 1972. *See* EEOC Decision No. 72-1497, 4 Fair Empl. Prac. Cas. (BNA) 849 (March 29, 1972). In that case, a worker was fired based on his conviction for a "serious crime" arising from his refusal to abide by racial segregation. The Commission noted: "clearly it is arbitrary and therefore unnecessary to treat all 'serious' convictions as being equally predictive of future employability, without reference to the particular factors of a particular case, such as job-relatedness of the conviction and the employee's immediate past employment history." Since that time, the EEOC has examined criminal history screens for their consistency with business necessity. *See* EEOC Decision Nos. 74-89, 78-03 78-10, 78-35, and 80-10. And since these early decisions, the EEOC has consistently examined how the employer considered the number and circumstances of offenses, the amount of time that has elapsed since the conviction, the applicant's employment history, and the applicant's efforts at rehabilitation. *See* EEOC Decision No. 78-10.

In 1987, the EEOC—while chaired by Supreme Court Justice Clarence Thomas—issued a policy statement on the use of conviction history screens by employers. *See Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e* et seq. *(1982),* EEOC (Feb. 4, 1987), *http://www.eeoc.gov/policy/docs/convict1.html.* That

statement reiterated the EEOC's "underlying position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics." *Id.* It also instructed employers to use three factors to determine whether a decision not to hire on the basis of a criminal record is justified by "business necessity": the nature of the offense, time elapsed since the offense, and nature of the job. *Id.* (citing *Green*, 523 F.2d at 1293-99). The EEOC followed with similar statements addressing employer use of conviction records a few months later in 1987 and again in 1990. *See Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, EEOC (July 29, 1987), *http://www.eeoc.gov/policy/docs/convict2.html*; *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, EEOC (Sept. 7, 1990), *http://www.eeoc.gov/policy/docs/arrest_records.html*.

The EEOC began to reevaluate its policy statements after the Third Circuit indicated that the Commission should supplement its policy with more detailed research, analysis, and instructions for employers. *See El v. Se. Pa. Transp. Auth. (SEPTA)*, 479 F.3d 232, 244 (3rd Cir. 2007) (declining to defer to prior EEOC guidelines on the use of criminal records because they lacked thorough research and persuasive reasoning). At that time, the increased availability of criminal

background checks and new data on individuals' activities after a conviction signaled the need for updated guidance. *See What You Should Know About the EEOC and Arrest and Conviction Records*, EEOC, *http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm*. Although the EEOC's approach to criminal history screens has evolved over time to address new information and judicial analysis of the requirements of Title VII, the Commission has consistently recognized the disparate impact of criminal history screens and emphasized the need to closely examine the relevance of a particular conviction to employment.

2. The EEOC employed an extensive, transparent, and inclusive revision process for developing the 2012 Guidance.

When considering revisions to its previous policy statements on employer use of criminal records, the EEOC undertook a deliberative process that was broadly inclusive of the employer community, background check industry, and workers. That process included two public meetings, the solicitation of written public comments, meetings with stakeholder groups, and informational presentations at events across the country.

The EEOC held a first public meeting on the issue of criminal records on November 20, 2008. *See Meeting of November 20, 2008—Employment Discrimination Faced by Individuals with Arrest and Conviction Records*, EEOC, *http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm*. Eight expert panelists—

including professors and both worker and employer advocates—summarized data and research on the barriers faced by people with criminal records, issues that had arisen in background-check litigation, and employer interests and practices. *Id.* Over two and a half years later, on July 26, 2011, the EEOC held a second public meeting where it heard from nine panelists—including attorneys, government officials, and academics—on best practices for employers, existing government programs and policies, and relevant legal standards. *See Meeting of July 26, 2011—EEOC to Examine Arrest and Conviction Records as a Hiring Barrier*, EEOC, *http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm*.

Moreover, the EEOC invited public comment on all of the issues or matters discussed at the July 2011 meeting—a request that generated over 300 written comments[9] from individuals and stakeholder groups expressing a variety of views on how to revise the Guidance. *See What You Should Know*, *supra* p. 21. Based on an internal review by amicus NELP, approximately two-thirds of commenters supported revision of the policy statements. Employer perspectives were well represented through the comments and in meetings of individual commissioners and EEOC staff members with representatives from such stakeholder groups as the U.S. Chamber of Commerce, the Society for Human Resource Management, and

[9] The EEOC made the comments publicly available through its library. *See Meeting of July 26, 2011—EEOC to Examine Arrest and Conviction Records as a Hiring Barrier*.

HR Policy Association. *See id.* In addition, the EEOC shared information about the guidance revision at events across the country. *See id.*

The commissioners approved the new Guidance on April 25, 2012 in a bipartisan 4-to-1 vote. *See id.* Republican EEOC Commissioner Victoria Lipnic expressed her support for its content and for the process through which it was drafted and adopted. She explained that the Guidance would "provide increased clarity to employers and employees, while not imposing dramatically new requirements or changes in employer practices." Victoria A. Lipnic, Commissioner, EEOC, Statement at Hearing before the U.S. Comm'n on Civil Rights (Dec. 7, 2012) at 43-47, *http://www.eeoc.gov/eeoc/legislative/upload/appendices.pdf*. Moreover, she noted that "because of the public hearings the EEOC has held on this issue in recent years, and because I know that the Members of the Commission fully engaged a range of stakeholders, I was comfortable supporting the Revised Guidance." *Id.* She further asserted that, in contrast to the EEOC's previous guidance on criminal records, "the Revised Guidance includes far more detailed and substantive legal analysis, and accordingly should be afforded greater weight by reviewing courts." *Id.*

3. The 2012 EEOC Guidance is a product of thorough research and analysis.

In *El*, the Third Circuit declined to afford "*Skidmore* deference" to the EEOC's earlier guidelines on the use of criminal records in hiring because "the policy document itself d[id] not substantively analyze the statute," *El*, 479 F.3d at 244 (referencing *Skidmore* 323 U.S. at 140). The court explained that, pursuant to *Skidmore*, "the EEOC gets deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning." *Id.*

It is undeniable that the current Guidance is a product of thorough legal and data analysis. The 52-page Guidance incorporates and analyzes the most current data from authoritative sources such as the Federal Bureau of Investigation, U.S. Census Bureau, and Bureau of Justice Statistics, as well as recent publications by criminologists and legal advocates. *See, e.g.*, Guidance at 9-10 & 36-37 nn. 65-74. It reflects the wisdom of leading academics and advocates for both employers and workers, who offered their insight through expert panels and hundreds of submitted comments. In addition, and as discussed below, the Guidance accurately applies relevant case law and correctly interprets the text of Title VII.

The revised Guidance has also proven to be a useful and manageable approach to employment screens, leading growing numbers of employers to adopt it. From late 2013 to early 2014, the background check company EmployeeScreenIQ surveyed almost 600 employer representatives regarding the

use of employment background checks. *See* Nick Fishman, EmployeeScreenIQ, *The Unvarnished Truth: 2014 Top Trends in Employment Background Checks* at 3 (2014). Only twelve percent of employers indicated that they had not adopted the Guidance. *Id.* at 13. In contrast, when responding to a similar survey when the guidance was first issued one year earlier, thirty-two percent of employers indicated compliance with the Guidance. *Id.* In response to its 2015 survey, EmployeeScreenIQ reported that, seventy-two percent of employers asserted that they perform "individualized assessments" of candidates with criminal records—up from sixty-four percent of respondents in 2014. *See* EmployeeScreenIQ, *Employment Screening 2015: Background Screening Trends & Practices* 14 (2015). This data indicates that "the EEOC's guidance continues to have a growing impact on employers' hiring practices." *Id.* In sum, because the Guidance was adopted after the EEOC performed a thorough and appropriate development process, and it is now routinely relied on by employers, the Guidance deserves this Court's deference.

B. The Guidance Is a Valid Application of Title VII Law on Business Necessity to the Particular Circumstance of Criminal History Screens.

The fact that the Guidance is consistent with both Supreme Court and Ninth Circuit case law on business necessity further demonstrates the validity of its reasoning. Under disparate impact theory, a plaintiff must show that a particular practice causes a disparate impact on members of a protected class, at which point

the burden of proof shifts to the employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e–2(k)(1)(A)(i). The business necessity defense requires any selection device that has a disparate impact on protected groups to have a "manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. In other words, an employment procedure that has a disparate impact on protected classes must "be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). Consistent with *Dothard*, the Guidance properly holds that a criminal history screen is only valid insofar as it "operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." Guidance at 14.

With this goal, the Guidance adopted the three factors approved in *Green* as the relevant considerations for determining whether a criminal history screen satisfies the business necessity requirement. Guidance at 15 (citing *Green*, 549 F.2d at 1160). The Guidance further requires, except for the most targeted screens, that the employer conduct an individualized assessment of an applicant's situation. This assessment must consider evidence of potential inaccuracies in a criminal record as well as further information about the criminal offense and any

rehabilitation that may indicate that an exclusion "does not properly apply to" a particular worker. Guidance at 18.

The first two factors adopted by the Guidance—the nature and gravity of the offense or conduct, and the nature of the job for which the applicant has applied—reflect the requirement, tracing back to *Griggs*, that an employer "must measure the person for the job and not the person in the abstract." 401 U.S. at 436. Thus, an employer cannot rely on a desire for more of a generalized trait, whether intelligence, strength, or character, without specifically identifying the relationship between an aspect of that trait and the needs of the job. *See Craig v. Los Angeles Cnty.*, 626 F.2d 659, 663 (9th Cir. 1980) (holding that a characteristic must be related to a job itself, rather than skill in pre-job training, to satisfy business necessity), *cert. denied*, 450 U.S. 919 (1981). In other contexts, this Court has described this job-analysis aspect of the business necessity defense as requiring the employer to "specify the particular trait or characteristic which the selection device is being used to identify or measure" and "determine that the particular trait or characteristic is an important element of work behavior." *Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 585 (9th Cir. 2000) (en banc). The Guidance mirrors this approach, requiring that an employer "identify the particular job(s) subject to the exclusion," examining "the nature of the job's duties . . . , identification of the job's essential functions, the circumstances under which the

job is performed . . . , and the environment in which the job's duties are performed." Guidance at 16. This factor analyzes the particular risks at issue, and the first factor requires a link between those risks and the prior criminal convictions used to screen out an applicant. The particular elements and harm caused by a crime must be compared to the risks at issue for a particular position. A desire for better character, without further definition, is insufficient. *See El*, 479 F.3d at 244-45. For example, the fact that an applicant for a data entry position may have been convicted of distribution of a controlled substance will have little bearing on her ability to accurately and efficiently perform her duties.

The second factor adopted by the Guidance—the time that has passed since the offense, conduct and/or sentence—and the enumerated areas of focus for the individualized assessment ensure that a criminal history screen actually correlates with the risks that are relevant to a particular position. To survive Title VII scrutiny, a selection procedure must "genuinely predict or significantly correlate with successful job performance." *Contreras v. City of L.A.*, 656 F.2d 1267, 1276-77 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). As the Third Circuit recognized in considering a criminal history screen in *El*, the Supreme Court has "refused to accept bare or 'common-sense'-based assertions of business necessity

and instead required some level of empirical proof that challenged hiring criteria accurately predicted job performance." 479 F.3d at 240.[10]

Social science on recidivism has determined that the amount of time that has passed strongly affects the degree to which a prior criminal offense will be predictive of future misconduct. After several years, people who have committed crimes reach a "point of redemption," when the fact that they committed a prior offense is no longer predictive of their likelihood of criminal activity in the future. *See* Blumstein & Nakamura, *supra* p.15, at 26; Guidance at 15 n.118 (collecting other studies on this issue). More recent research has confirmed that redemption periods are consistent across the country, with the risk of re-offending resembling that for the general population after four to seven years for violent offenders, four years for drug offenders, and three to four years for property crimes. Blumstein & Nakamura, *supra* p. 15, at 41. Even the *El* court, which declined to find that a lifetime ban on people with certain convictions violated Title VII, noted its "reasonable inference that SEPTA has no real basis for asserting that its policy

[10] The typical way to validate selection procedures is through the use of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, *et seq.*, which are accorded heavy weight by this Circuit, *Ass'n of Mexican-Am. Educators*, 231 F.3d at 585 n.8. However, recognizing that the technical standards of the Uniform Guidelines require a degree of social science knowledge that is not necessarily available, the criminal-history Guidance draws on *Green* and research on recidivism, to present other factors that reflect the degree that prior criminal activity may pose a risk for workplace behavior.

accurately distinguishes between applicants that do and do not present an unacceptable level of risk." 479 F.3d at 248. The employer prevailed simply because the plaintiff did not present any contrary expert testimony or depose the employer's experts on the issue of business necessity. *Id.*

The specific factors identified by the Guidance as relevant for the individualized assessment are grounded in research on recidivism, including age at the time of conviction, evidence of problem-free work at the same or a different employer, consistent employment history, and efforts at rehabilitation. Guidance at 18 & nn. 122-24. Furthermore, as noted above, many commercially available criminal background screening services provide erroneous and confusing records, requiring an opportunity for an applicant to show that the criminal record is inaccurate. *Id.* If an employer does not take measures to individually assess applicants' criminal history information, it would be difficult to argue that its criminal history screen is meaningfully predictive of workplace performance. And without that predictive capacity, a criminal history screen will not satisfy Title VII's requirements for business necessity. *Contreras*, 656 F.2d at 1276-77.

In sum, the Guidance correctly reflects the law on the business necessity defense and incorporates important social science insight on the predictive power of prior criminal activity for future misconduct. The Guidance therefore merits deference.

CONCLUSION

The EEOC Guidance has been consistently applied, was thoroughly and formally developed, is a correct application of Title VII case law, and addresses a core area of racial inequality in employment. For all these reasons, this court should defer to the Guidance and affirm the decision of the district court.

Dated: April 27, 2016

Respectfully submitted,

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Dated: April 27, 2016

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