



**Testimony of Todd A. Cox
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**Before the United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections**

**Hearing on
“The Need for More Responsible Regulatory and Enforcement
Policies at the EEOC”**

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Good morning Chairman Byrne, Ranking Member Takano, and members of the Subcommittee. My name is Todd Cox and I am the Director of Policy for the NAACP Legal Defense & Educational Fund, Inc. (“LDF” or the “Legal Defense Fund”). Thank you for the opportunity to testify in this morning’s hearing to express our views regarding the regulatory and enforcement priorities of the United States Equal Employment Opportunity Commission (“EEOC” or the “Commission”). As I will explain in greater detail during my testimony, the EEOC has, throughout its nearly 52-year existence, played a pivotal role in assuring that all Americans have access to equal opportunity in the workforce and that there are adequate protections in place so that unlawful employment discrimination is quickly identified and remedied. An important part of that role has been the EEOC’s regulatory and enforcement policies and activities, including its systemic litigation and its work in emerging areas of discrimination, such as the use of criminal background checks in employment. Despite the tremendous strides we have made as a nation towards equal opportunity, the EEOC continues to remain an incredibly important and necessary federal agency.

LDF, which was founded by Thurgood Marshall in 1940, is the nation’s oldest civil rights law organization. Throughout our history, we have relied on the Constitution, as well as federal and state civil rights laws, to pursue equality and justice for African Americans and other people of color, and have worked to enforce anti-discrimination principles in the areas of employment, public accommodations, education, housing, political participation, and criminal justice.

In just over one month, we will celebrate the 53rd anniversary of the Civil Rights Act of 1964, signed into law July 2, 1964. Without question, the Civil Rights Act of 1964 is one of the most important pieces of civil rights legislation ever enacted by Congress to ensure that our country keeps its promise of equality and justice. While the Civil Rights Act of 1964 included a number of anti-discrimination provisions, including the prohibition of discrimination in public accommodations, it is perhaps best known for Title VII, which outlawed discrimination in employment on the basis of race, color, religion, sex, or national origin.¹ As Professor Robert Belton, a former LDF lawyer who litigated some of the first cases under Title VII and became a renowned employment discrimination scholar, observed: “Of the eleven titles in the Civil Rights Act of 1964, Title VII has emerged as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality.”² The creation of the EEOC as the agency charged with receiving, investigating and referring complaints of employment discrimination for litigation, was a core aspect of the bipartisan compromise that resulted in Title VII.

Since the enactment of Title VII, LDF has worked to enforce this landmark statute, challenging discriminatory practices of both private and public employers, and serving on the front lines of many great civil rights battles seeking equal opportunity in employment for all.³ From this vantage point, the Legal Defense Fund has had a unique opportunity to observe the work of

¹ 42 U.S.C. §§2000e et seq.

² Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. and Emp. L.J. 431, 432 (2005).

³ See, e.g., *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

the EEOC and to assess its effectiveness. Indeed, beginning in 1965 when the EEOC opened its doors for the first time, we litigated many of the seminal cases that initially interpreted the meaning and scope of Title VII, including *Griggs v. Duke Power Company*⁴ and *Albemarle Paper Company v. Moody*.⁵ And within the first year of the EEOC's operation, LDF filed nearly a thousand complaints of racial discrimination with the Commission under the leadership of our second President and Director-Counsel Jack Greenberg.⁶ As a result of this history, we fully understand and appreciate the critical role that Title VII has played in literally changing the face and composition of the American workforce.

Today, we too often accept the integration of the American workforce without recognizing the role that the EEOC and Title VII have played in helping to open doors to employment and opportunity that were closed simply because of an applicant's or worker's race or gender. We forget that it is only within the last 52 years—my lifetime—that American workers have enjoyed legal protection from discrimination based on race, sex, national origin and color. Just as the Civil Rights Act of 1964 made possible the diversity we have come to take for granted in restaurants, and in courthouses and hotels throughout this country, so too did Title VII and the EEOC make possible the diversity in the American workforce that is reflected in offices, factories, stores and businesses throughout this country.

The EEOC, like Title VII more generally, was designed to achieve its goals, as much as possible, through cooperation, voluntary compliance, and informal conciliation.⁷ However, it has also been long recognized, especially by the Equal Employment Opportunity Act of 1972,⁸ which significantly expanded the EEOC's enforcement authority, that the Commission also needs to rely on litigation as another tool to ensure that employers are complying with federal anti-discrimination laws.

There is no question that the EEOC has been incredibly successful in redressing various forms of employment discrimination. The Commission has been a driving force in dismantling segregated workplaces, removing unnecessary and discriminatory employment barriers and obstacles, and ensuring that the promise of equality at work could be realized for millions of Americans. The EEOC's local and regional offices have often been relied upon by communities of color and other historically marginalized populations for redressing discrimination and harassment often suffered on a daily basis. For example, in Birmingham, Alabama, the local EEOC office was known to many in the African-American community, not by its title or as a government agency, but simply as the "2121 Building," because this was the address one visited in downtown Birmingham if one was seeking protection from discrimination on the job.

⁴ 401 U.S. 424 (1971).

⁵ 422 U.S. 405 (1975).

⁶ Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*, 304-05 (1994).

⁷ See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) ("Congress, in enacting Title VII, chose cooperation and voluntary compliance . . . as the preferred means of achieving its goals.") (internal quotation marks and citation omitted).

⁸ 42 U.S.C. §2000a.

In fiscal year 2016 alone, the EEOC received nearly 92,000 charges of discrimination.⁹ Of those charges, 32,309 (or 35.3 percent) involved allegations of racial discrimination, 26,934 (or 29.4 percent) involved allegations of sex discrimination, 28,073 (or 30.7 percent) involved of discrimination based on disability status, and 20,857 (or 22.8 percent) involved allegations of age discrimination.¹⁰ In fiscal year 2016, the EEOC negotiated 4,927 settlements and successfully conciliated 764, and received 65,090 charges of discrimination with respect to Title VII alone.¹¹ During that same period, the Commission litigated 171 lawsuits under the array of federal statutes it has authority to enforce, including Title VII (84 lawsuits) and the American with Disabilities Act (“ADA”) (48 lawsuits), recovering \$52.2 million in monetary benefits for victims of discrimination.¹²

The number of charges filed with the EEOC, while high, does not come close to fully representing the millions of Americans who still endure unlawful discrimination and mistreatment in their workplaces. For example, recent national surveys show that approximately one out of every four working women and one out of every ten working men have experienced some form of harassment while on the job.¹³ Many of those workers, however, never report that harassment or file a charge of discrimination.

Nationwide, the unemployment rate is approximately 4.7 percent; for Latinos the rate is 5.6 percent, and for African Americans it is 8.1 percent. Discrimination in hiring remains a key factor for these large and unacceptable racial disparities. For example, an empirical study has demonstrated that resumes with “white sounding” names were 50 percent more likely to receive a callback than comparable resumes with “African-American sounding” names.¹⁴ In addition, employment discrimination has significant economic costs. More than 2 million workers leave their jobs each year due to workplace discrimination, costing U.S. employers \$64 billion annually.¹⁵

Despite the tremendous progress made toward increasing equal opportunity in employment, sadly our work on eliminating discrimination in the American workplace is far from over. The EEOC continues to play a critical role in the ongoing work of eradicating employment discrimination. This work goes to the very core of what we aspire to be as a nation—a place where no one can be barred from employment simply based on stereotypes about their fitness for work, racial animus or hostility. The ability to obtain employment, to be promoted at one’s place of employment based on the successful work performance, and to be appropriately and equally

⁹ Equal Opportunity Employment Comm’n, *Charge Statistics FY 1997 through FY 2016*, (2016), <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

¹⁰ *Id.*

¹¹ Equal Opportunity Employment Comm’n, *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC)* (includes concurrent charges with ADEA, ADA and EPA) FY 1997-FY 2016 (2016) <https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm>.

¹² Equal Opportunity Employment Comm’n, *EEOC Litigation Statistics, FY 1997 through FY 2016* (2016), <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

¹³ Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS, Nov. 16, 2011, <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>.

¹⁴ Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV., 991, 998 (2004).

¹⁵ Level Playing Field Institute, *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace*, (2007) <http://www.lpfi.org/wp-content/uploads/2015/05/cl-executive-summary.pdf>.

compensated for that work as similarly situated workers, goes to the principle of dignity that Title VII was designed to protect.

Discrimination still remains a pervasive problem in far too many workplaces all across the country. One need look only to recent EEOC court victories to understand that even the most pernicious forms of racism on the job unfortunately still exist. In 2012, a Texas jury awarded punitive damages to three African-American manufacturing employees subjected to racially offensive slurs and a noose in the workplace, including use of the “N” word by a top plant official who responded to complaints about the noose with the comment, “You people are too sensitive.”¹⁶ In 2013, a North Carolina jury unanimously found that African-American truck drivers, who were called the “N” word, “monkey” and “boy” and threatened with nooses by a manager and a co-worker, were harassed and retaliated against because of their race.¹⁷ In 2014, the EEOC secured relief for an African-American technician in Arkansas who was subjected to racially offensive language and visited at home in the middle of the night by two white co-workers threatening to kill him if he complained further about racial harassment.¹⁸

As an organization with an active employment discrimination docket, we at the Legal Defense Fund know only too well the extent to which employment discrimination against African Americans and other protected classes persists. In 2013, we settled a class action employment discrimination case against the national women’s clothing retailer Wet Seal; the lawsuit alleged that top executives at Wet Seal directed senior managers to get rid of African-American store managers and replace them with white employees for the sake of its “brand image.”¹⁹ For example, one senior Wet Seal executive ordered a district manager to “clean the entire store out” after observing numerous African-American employees working there.²⁰ One of the plaintiffs in the case, an African-American woman, observed the same executive express dismay that the plaintiff had been hired as a manager despite the fact that she did not have “blond hair and blue eyes.”

In 2010 we also successfully concluded our representation of thousands of African Americans in Chicago who were unlawfully denied jobs as firefighters in a case that worked its way up to the United States Supreme Court.²¹ And not long ago, the United States Court of Appeals for the Eleventh Circuit agreed with our position in *Ash v. Tysons Foods* that a white supervisor calling a black employee “boy” was evidence of racial animus that could support a finding of employment discrimination.²² Sadly, these are only a few of the countless other recent and present-day examples of continued discrimination and harassment in the workplace. LDF is

¹⁶ Press Release, U.S. Equal Employment Opportunity Comm’n, Jury Says AA Foundries Must Pay \$200,000 for Creating Racially Hostile Work Environment (Sept. 27, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/9-27-12g.cfm>.

¹⁷ Press Release, U.S. Equal Employment Opportunity Comm’n, Federal Court Grants Injunction Against A.C. Widenhouse in EEOC Race Harassment Case (Mar. 8, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/3-8-13.cfm>.

¹⁸ Press Release, U.S. Equal Employment Opportunity Comm’n, MMR Constructors Settles EEOC Racial Harassment Lawsuit (Jan. 27, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/1-27-14.cfm>.

¹⁹ Complaint at 8, *Cogdell v. Wet Seal*, No. 12-01138 (C.D. Cal. July 7, 2012).

²⁰ *Id.* at 7.

²¹ *Lewis v. City of Chicago, Ill.*, 560 U.S. 205 (2010).

²² *Ash v. Tyson Foods, Inc.*, 664 F.3d 883 (11th Cir. 2011).

actively investigating other allegations of employment discrimination and we will continue to pursue all available remedies to combat unlawful employment practices, including race- based harassment, but we need an EEOC that is active in its regulatory and enforcement role to help ensure that we effectively combat this discrimination.

LDF's and the EEOC's dockets also reflect the pervasive manner in which discrimination occurs in the 21st Century when it has become vanishingly rare to find a policy that explicitly discriminates on the basis of race. Last year, in support of an EEOC case, LDF filed an amicus brief in *EEOC v. Catastrophe Management Solutions* in the Eleventh Circuit Court of Appeals. The brief argued in support of a petition for rehearing en banc in this case, which considered whether Title VII's broad mandate to purge the workplace of racial discrimination reaches a policy that promotes racial stereotypes regarding beauty and professionalism. In this case, the employer withdrew an offer of employment to the charging party because she refused to cut her dreadlocks, using a grooming policy to give effect to its preference for white hair texture and against Black hair texture. This case remains a stark example of the racial discrimination that endures in the modern workplace, and the devastating consequences of racial stereotyping. We encourage the EEOC to continue to root out this type of discrimination through its regulatory and enforcement policies.

In particular, we commend the EEOC's decision to continue to prioritize the initiative revitalized under President George W. Bush's administration of focusing the Commission's resources on redressing systemic discrimination—i.e., pattern or practice, policy and/or class-wide investigations and litigation where the alleged discrimination has a widespread impact on an industry, employer, or geographic area. The EEOC's Systemic Task Force, which was established in 2005 under the direction of then-EEOC Chair Cari Dominquez and led by then- Commissioner Leslie Silverman, was premised on "the recognition that the Commission cannot effectively combat discrimination without a strong nationwide systemic program."²³ We could not agree more.

While individual claims have a place on the Commission's docket, it is imperative that the EEOC continue to maximize its impact by prioritizing systematic enforcement and litigation. The litigation of systemic discrimination claims is very costly, often complicated and is regularly protracted and hotly contested. Simply put, they are some of the hardest and most complex cases to litigate. And that is why they are precisely the types of cases which the federal government should be bringing. Our country cannot hope to rid the workplace of employment discrimination on an individual case-by-case basis. Moreover, many of these cases would never be prosecuted by the private bar or civil rights organizations with limited resources, especially when the discrimination is occurring in underserved communities or the likelihood of obtaining significant monetary relief is minimal. An emphasis on systemic enforcement makes perfect sense strategically because it allows the EEOC to address and remedy workplace discrimination on a large scale. The EEOC was wise to adopt a new Strategic Enforcement Plan for fiscal years 2017-2021, which allows the Commission to focus its own limited resources on the areas where

²³ U.S. Equal Employment Opportunity Comm'n, Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission (March 2006), http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

discrimination remains entrenched and far-too-common.²⁴

The Commission's victory in *EEOC v. Hill Country Farms, Inc.*²⁵ serves as a powerful reminder of the impact of the EEOC's focus on systemic and strategic enforcement. In that litigation, the EEOC represented 32 men with intellectual disabilities who were subjected, over the course of more than two decades, to harassment and discrimination, including verbal and physical abuse and sub-standard and otherwise deplorable living conditions.²⁶ As a result of the EEOC's advocacy, an Iowa jury awarded the men damages totaling \$240 million. In 2014, the EEOC reached a \$1.4 million settlement with JPMorgan Chase over allegations that the company maintained a sexually hostile work environment towards female mortgage bankers who worked at an Ohio location.²⁷ The settlement also requires JPMorgan to revise its data retention procedures in order to prevent future harassment.

More recently, in April 2016, the EEOC represented three applicants and a class of African-American and non-Hispanic applicants against Lawler Foods because the bakery failed to hire individuals on account of their race.²⁸ The EEOC reached an agreement requiring the bakery to pay over \$1 million.²⁹ In March 2016, EEOC settled another case resulting in Mavis Discount Tire, Inc. to pay \$2.1 million to 46 women because the company refused to hire women for field positions.³⁰ Shortly before that, the EEOC settled a case against Hillshire Brands Company (formerly known as the Sara Lee Corporation) requiring Hillshire to pay \$4 million to 74 former African-American employees who were subjected to a racially hostile work environment.³¹ The employees experienced racist graffiti on bathroom and locker walls and were called racial slurs, all while complaints were ignored by management.³²

We also applaud the EEOC's continued reliance on disparate impact liability as a tool through which to prove unlawful discrimination. The United States Supreme Court, in its landmark decision, *Griggs v. Duke Power Co.*, recognized that Title VII not only prohibits overt racial discrimination, but also "practices, procedures, or tests neutral on their face, and even neutral in

²⁴ In the U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017-2021, the Commission identified six substantive priorities, including: (i) eliminating barriers in recruitment and hiring; (ii) protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination; (iii) addressing selected emerging and developing issues; (iv) ensuring equal pay protections for all workers; (v) preserving access to the legal system; and (vi) preventing systematic harassment.

²⁵ *EEOC v. Hill Country Farms, Inc.*, 13-2796, 2014 WL 1813434 (8th Cir. May 8, 2014).

²⁶ Press Release, U.S. Equal Employment Opportunity Comm'n, Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>.

²⁷ Press Release, U.S. Equal Employment Opportunity Comm'n, JPMorgan Chase Will Pay \$1,450,000 to Resolve EEOC Class Sex Discrimination Lawsuit (Feb. 3, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/2-3-14.cfm>.

²⁸ Press Release, U.S. Equal Employment Opportunity Comm'n, Lawler Foods to Pay over \$1 Million to Settle EEOC Race and National Origin Discrimination Suit (April 26, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/4-26-16.cfm>.

²⁹ *Id.*

³⁰ Press Release, U.S. Equal Employment Opportunity Comm'n, Mavis Discount Tire to Pay \$2.1 Million to Settle EEOC Class Sex Discrimination Lawsuit (March 25, 2016), <https://www1.eeoc.gov/eeoc/newsroom/release/3-25-16.cfm>.

³¹ Press Release, U.S. Equal Employment Opportunity Comm'n, Hillshire Brands Company Pays \$4 Million to Settle Race Discrimination Suit (Dec. 22, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/12-22-15.cfm>.

³² *Id.*

terms of intent” that “operate to ‘freeze’ the status quo of prior discriminatory employment practices.”³³ Disparate impact is more important than ever, especially given that subtle and sophisticated types of discrimination are more commonplace today than instances of overt racial animus. The success of the Civil Rights Movement and the legislation it produced means that racial discrimination is no longer socially acceptable. This cultural change has helped reduce some racial discrimination. In other instances, however, discrimination has been driven underground, where it is vibrantly practiced but masked by code-words and pretexts. As the United States Court of Appeals for the Third Circuit has explained:

Anti-discrimination laws and lawsuits have ‘educated’ would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual’s race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial ‘smoking gun’ behind.³⁴

Disparate impact cases are often extremely challenging and can be very costly, especially given that they often involve analyzing large sets of data and require the retention of legal experts. But, if we are committed to ridding our nation’s workplaces of unlawful discrimination, these are precisely the types of cases the EEOC needs to be litigating.

The EEOC’s recent actions concerning the misuse of criminal background checks in employment highlight the ways in which the Commission is working to address and remedy discriminatory barriers that have disparate impacts on protected classes. In recent decades, the number of Americans who have some sort of criminal record has increased significantly. Incarceration rates in the United States have more than tripled since the 1980s.³⁵ As a result of this increase, the United States currently constitutes approximately five percent of the world’s population but holds 25 percent of the world’s prison population.³⁶ This rapid increase is largely attributable to the increased incarceration of non-violent drug offenders over the last three decades.

From 1975 to 2005 the United States’ incarceration rate increased by 342 percent.³⁷ Criminal justice policies that led to this incarceration rate surge continue to drive racial inequality and poverty. If not for mass incarceration, one study reports that the overall poverty rate would have dropped by 20 percent between 1980 and 2004.³⁸ One-in-three Americans are estimated to

³³ 401 U.S. at 430 (1971). Congress codified disparate impact liability under Title VII in the 1991 Civil Rights Act. See The Civil Rights Act of 1991, Pub. L. No. 102-166.

³⁴ *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

³⁵ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1998* (2002); Paige M. Harrison & Allen J. Beck, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2003* (2004).

³⁶ Marc Mauer, *Race to Incarcerate*, 15-14 (1999).

³⁷ Robert DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, SAGE JOURNALS Vol. 59, Issue 4 (2013) <http://journals.sagepub.com/doi/abs/10.1177/0011128708328864>.

³⁸ *Id.* at 20.

have a criminal record.³⁹ Although many have minor offenses, having a criminal record creates barriers to opportunity, such as employment, and is linked as a direct cause and consequence of poverty.⁴⁰ Unfortunately, data show that one year after their release, 60 percent of formerly incarcerated individuals remain unemployed.⁴¹ And, for those able to find employment, most have considerably diminished earnings.⁴² This has larger economic impacts as well, as excluding the formerly incarcerated and those with felony convictions results in a loss of about 1.7 to 1.9 million workers equivalent to about 0.9 to 1.0 percentage-point reduction in the employment rate, and the loss of between \$78 and \$87 billion in GDP.⁴³

The impact of the criminal justice system particularly resonates in communities of color. People of color are disproportionately represented in our prison system as they represent more than 60 percent of the prison population,⁴⁴ but makeup 37.9 percent⁴⁵ of the U.S. population. African Americans and Latinos in particular are overrepresented in the prison system. African Americans make up less than 13 percent⁴⁶ of the U.S. population but are 40 percent of the prison population.⁴⁷ Of the Black men born in 2001, one in three will be incarcerated, and one in six Latino men will go to prison.⁴⁸ The prevalence of arrest rates and criminal convictions are far higher among African Americans and Latinos than for whites: African Americans are 2.5 times more likely to be arrested than whites.⁴⁹ These racial disparities are not explained by disproportionate rates of criminal

³⁹ Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out*, CENTER FOR AMERICAN PROGRESS 1 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

⁴⁰ *Id.*

⁴¹ Rebecca Vallas et al., *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children*, CENTER FOR AMERICAN PROGRESS 4 (Dec. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

⁴² *Id.*

⁴³ Cherrie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment*, CENTER FOR ECONOMIC AND POLICY RESEARCH 1 (June 2016), <http://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

⁴⁴ Trends in U.S. Corrections, The Sentencing Project, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

⁴⁵ See U.S. Census, Quick Facts <https://www.census.gov/quickfacts/table/PST045216/00>.

⁴⁶ *Id.*

⁴⁷ Peter Wagner and Bernadette Rabuy, *Mass Incarceration*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

⁴⁸ Trends in U.S. Corrections, The Sentencing Project, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

⁴⁹ Recent statistics from the FBI show that African Americans accounted for more than 3 million arrests in 2009 (28.3 percent of total arrests), even though they represented just 12.9 percent of the general population; whites, who formed 75.6 percent of the general population, accounted for fewer than 7.4 million arrests (69.1 percent of total arrests). Crime in the United States, 2009 U.S. Department of Justice — Federal Bureau of Investigation (Sept. 2010) tbl. 43, <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>. Among persons arrested on felony charges in 2006, 29 percent were white, while 45 percent were black and 24 percent were Latino. Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, app. tbl. 2 (2010). Similar disparities are seen in conviction rates as well. One recent estimate found that nearly one-fourth of the black adult male population (23.3 percent) has at least one felony conviction but is not currently under any form of criminal justice supervision, while that figure is only 9.2 percent for the adult male population as a whole. Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy and the Civic Reintegration of Criminal Offenders*, 605 *Annals Am. Acad. Pol. & Soc. Sci.* 281, 288 & tbl. 2 (2006); see also Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, 3 (2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (finding African Americans incarcerated 5.6 times rate of whites, Hispanics incarcerated at 1.8 times rate of whites).

activity—one study found that in 2005, African Americans represented 14 percent of current drug users, yet they constituted 33.9 percent of persons arrested for drug offenses.⁵⁰ Rather, they demonstrate the roles that racial profiling and discriminatory criminal justice policies have played and continue to play in our criminal justice system.⁵¹

This has important civil rights and racial justice implications. A 2004 study by Professor Devah Pager found that white job applicants with a criminal record were called back for interviews more often than equally-qualified black applicants who did not have a criminal record, attributing this to the effect of employers' consideration of both race and criminal background.⁵² According to Professor Pager, the criminal justice system plays a central role in “sorting and stratifying labor market opportunities” for those with criminal records.⁵³ Employment policies and practices that apply a blanket exclusion of those with criminal records can lead directly to the disproportionate exclusion of African Americans and Latinos from the workforce with the attendant impact on their economic security and opportunity.

In response to this growing trend, the EEOC, in a bipartisan manner, issued enforcement guidance, entitled *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.*⁵⁴ The Commission met publicly to discuss this subject in 2008 and July 2011 and those meetings, the testimony and over 300 written comments helped inform the Commission's consideration of revisions to existing EEOC guidance, issued originally in 1987 and 1990. The updated guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment. I would like to emphasize a few points about the guidance.

First, neither Title VII nor the guidance prohibits employers from considering criminal history when they make employment decisions. Second, the guidance describes how employers considering criminal history in a targeted, fact-based way can avoid Title VII liability consistent with existing law. It is also consistent with how many employers already assess criminal history. Lastly, it reiterates that the fact of an arrest, standing alone, does not establish that criminal conduct occurred and an employer should not rely on arrest alone to make employment decisions. This is done because an arrest is an accusation and does carry the same weight as a conviction; also, arrest records can be unreliable and inaccurate. What is important is that people have an opportunity to apply and be considered for jobs for which they are qualified and for which their criminal records

⁵⁰ Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, Am. Bar Ass'n (2010). A recent report by the American Civil Liberties Union (“ACLU”) found that “Black people are 3.7 times more likely to be arrested for marijuana possession than white people despite comparable usage rates.” Press Release, ACLU, *New ACLU Report Finds Overwhelming Racial Bias in Marijuana Arrests* (June 4, 2013), <https://www.aclu.org/criminal-law-reform/new-aclu-report-finds-overwhelming-racial-bias-marijuana-arrests>.

⁵¹ See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *Invisible Punishment* 53 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing war on drugs).

⁵² Devah Pager, *The Mark of a Criminal Record*, 108 AM. JOURNAL OF SOCIOLOGY 937, 957-60 (2003), <http://www.irp.wisc.edu/publications/focus/pdfs/foc232i.pdf>.

⁵³ *Id.* at 46.

⁵⁴ U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. (April 25, 2012).

are not relevant or predictive. Permanently excluding people from the workforce because of contact with the criminal justice system is inconsistent with Title VII.

The EEOC's guidance was designed to consolidate, clarify, and update prior guidelines the Commission had promulgated on the topic, guidelines—initially issued in 1987 when now-Supreme Court Justice Clarence Thomas was serving as Chair—that had become outdated and did not reflect recent factual and legal developments.⁵⁵ It is important to note that the EEOC's guidance does not prevent or discourage the use of criminal background checks. Instead, it clearly sets forth how employers' use of criminal history information can, in some instances, violate Title VII. The EEOC, relying on social science research showing that African-American job applicants without criminal records are less likely than white applicants with criminal records to get called back for interviews or receive offers of employment,⁵⁶ discusses how employers can violate Title VII's disparate treatment provision if they treat similarly situated individuals with criminal histories differently because of their race. The guidance goes on to explain that even criminal records policies that are facially race-neutral can result in disparate impact liability if they disproportionately impact racial minorities (or other protected groups) and are neither job related nor consistent with business necessity. In order to avoid violating Title VII, the guidance recommends employers, when developing criminal records policies, consider three sensible factors: (i) the nature and gravity of the prior criminal conduct, (ii) the time that has elapsed since the prior criminal conduct, and (iii) the nature of the job held or sought.⁵⁷ The EEOC's guidance makes clear that consideration of these factors is important for ensuring that exclusions based on criminal records are not overly broad, but are related to the positions at issue and necessary from a business perspective. Indeed, LDF, the National Employment Law Project and the Leadership Conference on Civil and Human Rights filed an amicus brief in *Guerrero v. California Department of Corrections and Rehabilitation*, a case before the Ninth Circuit Court of Appeals, arguing that the court should rely on the EEOC guidance in determining whether particular employers' criminal background check policies unfairly exclude applicants of color.⁵⁸

The EEOC's work on the guidance is not only commendable, it is also consistent with the growing national and bipartisan consensus that we need to rethink our criminal reentry systems

⁵⁵ See Equal Employment Opportunity Comm'n, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964* (Feb. 4, 1987); Equal Employment Opportunity Comm'n, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987); Equal Employment Opportunity Comm'n, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Sept. 7, 1990).

⁵⁶ One study, demonstrated that White job applications with a criminal record who had the same qualifications as African-American applicants without criminal record were three times more likely to be invited for interviews than the African-American applicants. Devah Pager, *The Mark of a Criminal Record*, 108 *Am. Journal of Sociology* 937, 957-60 (2003). The results of that study, which provides powerful evidence that some employers may be discriminated against African-American applicants, and especially those with criminal records, has been replicated in other research. See, e.g., Devah Pager, Bart Bonikowski, & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 *Am. Sociological Rev.* 777, 785 (2009).

⁵⁷ These factors, also known as the "Green factors," are based on a 1975 decision by the United States Court of Appeals for the Eighth Circuit. See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). In that decision, the court concluded that an employer's policy that disqualified applicants for employment for any criminal conviction other than a minor traffic offense violated Title VII's disparate impact protections.

⁵⁸ Brief for Victor Guerrero as Amicui Curiae Supporting the Plaintiff, *Guerrero v. Cal. Dep't of Corrections and Rehabilitation, et al.*, http://www.naacpldf.org/files/case_issue/Guerrero%20LDF%20Amicus%20Brief.pdf.

to ensure that millions of Americans who have a criminal record, but who have paid their debt to society and are qualified for work, are not unjustly denied the opportunity to reintegrate back into society by the misuse of criminal background checks. To allow the presence of an arrest or conviction record to bar an individual from meaningful employment forever, would deny to millions that most powerful and important American opportunity—a second chance.

The EEOC has also been active enforcing the law in this area. For example, in 2013, the EEOC sued BMW for violating Title VII of the Civil Rights Act for enforcing a criminal background policy that disproportionality screened out African Americans from jobs.⁵⁹ BMW contracted with a company that managed its local operation who had employed these workers for several years.⁶⁰ When a new contractor started, BMW ordered that contractor to use BMW's policy, subjecting these employees to a background check that automatically excluded those with criminal backgrounds without assessing the nature and severity of the crime, the age of the conviction, or the claimants' long work history at the company.⁶¹ BMW settled this suit, paying \$1.6 million and offering employment opportunities to the discharged workers in the suit and up to 90 African-American applicants who BMW's contractor refused to hire based on BMW's previous conviction records policy.⁶²

The EEOC also sued Dollar General in 2013 alleging Dollar General violated Title VII by having a criminal history background policy that barred anyone with a conviction from working at the retailer, resulting in a disparate impact against Black individuals.⁶³ In the suit, EEOC alleges that an applicant's offer was rescinded after it was discovered that she had a six-year-old drug possession conviction, even though she had been a cashier at another store for four years.⁶⁴ Another applicant was rejected because of a conviction that appeared on her record in error. When she notified Dollar General that the conviction record was a mistake, the retailer nevertheless refused to hire the applicant.⁶⁵ The lawsuit is pending.

We are seeing the fruits of the EEOC's leadership in this area across the country. Several companies and jurisdictions have adopted so-called "ban-the-box" policies, delaying the consideration of criminal records until later in the employment process, a policy recommended by the EEOC guidance. Nationwide over 150 cities and counties have adopted ban the box. Twenty-five states have adopted ban the box policies and 9 states have removed the conviction history question on job applications for private employers.⁶⁶ As part of the President's Obama's Fair Chance Business Pledge, over 100 companies, businesses, and employers indicated that they are "committed to providing individuals with criminal records . . . a fair chance to participate in the

⁵⁹ Press Release, U.S. Equal Employment Opportunity Comm'n, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), <https://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Michelle Natividad Rodriguez and Beth Avery, *Ban the Box* (Feb. 1, 2017), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

American economy” including Facebook, Google, Koch Industries, the Coca-Cola Company, Pepsi Co., and Xerox.⁶⁷

Additionally, according to a 2015 survey of over 500 employers by EmployeeScreenIQ, fewer employers are asking candidates about their criminal history on job applications, decreasing from 66 percent last year, to 53 percent this year.⁶⁸ Companies using individualized assessments for candidates who have conviction records, also recommended by the EEOC guidance, increased this year to 72 percent from 64 percent.⁶⁹

There is also evidence that these policies have been successful. One study that analyzed the experiences of finding employment for 740 formerly incarcerated people found that 8 months after release, 80 percent of employed respondents stated that their employers knew about their criminal record.⁷⁰ This is consistent with the results of focus groups conducted by the U.S. Department of Labor’s Center for Faith-Based and Community Initiatives in 2002, in which employers of people with criminal records said: “One of the [people with records] we hired is now a store manager, and another is an assistant manager. Each has excellent management skills and both are great mentors to other [people with records] we’ve hired”; and, “There are many misconceptions out there about [people with records]. We try to look beyond that label and consider each person on his or her merits—on a case-by-case basis.”⁷¹ These policies have also yielded benefits to our economy and society. A 2011 study evaluating the economic benefits of employing formerly incarcerated people in Philadelphia found that putting 100 formerly incarcerated persons back to work would increase their lifetime earnings by \$ 55 million, increase annual sales tax revenue by \$19,100 and contribute \$770,000 in sales tax revenues over their lifetime.⁷² Additionally, the same study estimated that a reduction in recidivism for 100 individuals can result in savings over \$2 million annually.⁷³

We know that employment can help public safety, and the overall prosperity of communities. Employment promotes public safety and quality of life in neighborhoods. Obtaining reliable employment is critical for formerly incarcerated individuals success and not re-offending.⁷⁴ Other research also points to earning higher wages decreasing the likelihood of recidivism.⁷⁵ A three-year study examining the rate of recidivism of formerly incarcerated

⁶⁷ Press Release, White House Launched the Fair Chance Business Pledge, April 11, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

⁶⁸ EmployeeScreenIQ, *Employment Screening 2015: Background Screening Trends & Practices* (2015), http://content.employeescreen.com/hubfs/ESIQ_2015_survey_final2.pdf?t=1446555272215.

⁶⁹ *Id.*

⁷⁰ Christy Visher, Sara Debus, and Jennifer Yahner, *Employment after Prison: A Longitudinal Study of Releases in Three States*, URBAN INSTITUTE (2008), www.urban.org/UploadedPDF/411778_employment_after_prison.pdf.

⁷¹ U.S. Dep’t of Labor, Center for Faith-Based and Community Initiatives, *Ready 4 Work*, https://www.doleta.gov/PRI/PDF/R4W_Business_Perspectives_Ex_offender_reentry.pdf.

⁷² Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia, ECONOMY LEAGUE OF GREATER PHILADELPHIA, 2011. <http://economyleague.org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf>.

⁷³ *Id.*

⁷⁴ Christy A. Visher et al., *Ex-Offender Employment Programs and Recidivism: A Meta-Analysis*, JOURNAL OF EXPERIMENTAL CRIMINOLOGY 1 (2005): 295–316, https://www.researchgate.net/publication/226757982_Ex-offender_Employment_Programs_and_Recidivism_A_Meta-Analysis.

⁷⁵ *Id.* at 295.

individuals who participated in a program aimed at assisting individuals in finding and keeping gainful employment, found that, among the people who participated in the program and obtained employment, only 18 percent recidivated or less than one in five.⁷⁶ And, even being employed for 30 days reduced the rate of recidivism by over 60 percent.⁷⁷ In testimonies collected by the National Employment Law Project, many employers spoke about how employees with records have been found to be more productive, less likely to leave, and be promoted faster.⁷⁸ Additionally, in the case of the U.S. military, it was found that enlistees with felonies were not more likely to be discharged for negative reasons, and they were even promoted at a higher rate than those with no criminal records.⁷⁹

At LDF, ensuring that those with criminal records are not arbitrarily barred from employment opportunities is a key focus of our employment discrimination work. We continue to have active policy and employment discrimination litigation dockets, including ongoing litigation against the Washington Metropolitan Area Transit Authority challenging its use of an overly broad and unnecessarily punitive criminal background screening policy.⁸⁰ And we regard the EEOC's leadership in this area, including its membership on the Federal Interagency Reentry Council, as just one example of how the Commission continues to carefully and thoughtfully recalibrate its regulatory and enforcement agenda to respond to trends and shifts in employment discrimination.

The eve of the 53rd anniversary of the Civil Rights Act of 1964 provides a timely opportunity to pause and consider the regulatory and enforcement priorities of the EEOC. Undoubtedly, the EEOC should be applauded for the tremendous role it has played in helping to ensure that American workers are not being denied equal opportunity based on race, national origin, sex, age, religion, disability, or any other protected category. But, the EEOC's work is far from over. The Commission must continue its work of developing new and innovative ways to combat unlawful discrimination. As Naomi Earp, who served as Chair of the EEOC under President George W. Bush once remarked: "New times demand new strategies to stay ahead of the curve. These old evils are still around in new forms and [the Commission] intend[s] to act vigorously to eradicate them."⁸¹ Accordingly, we should also take this opportunity to ensure that the EEOC has the resources it needs to continue its critically important work, including systemic enforcement, to make sure that no one in this country is denied equal opportunity and fair treatment in the workplace.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

⁷⁶ Safer Foundation, *Three-Year Recidivism Study 2008* (2008), <http://saferfoundation.org/files/documents/Safer%20Recidivism%20Study%202008%20Summary.pdf>.

⁷⁷ *Id.*

⁷⁸ See National Employment Law Project, The Business Case <http://www.nelp.org/content/uploads/Business-Case-Fair-Chance-Employment.pdf>; and National Employment Law Project, Research Supports Fair-Chance Policies, <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>.

⁷⁹ Jordan Yadoo, *Ex-cons May Outperform You in the Workplace*, BLOOMBERG MARKETS (May 5, 2016), <https://www.bloomberg.com/news/articles/2016-05-05/ex-cons-may-outperform-you-in-the-workplace>.

⁸⁰ See LDF Challenges WMATA's Use of Overly Broad and Punitive Criminal Background Screening Policy. July 30, 2014, <http://www.naacpldf.org/update/ldf-challenges-wmatas-use-overly-broad-and-punitive-criminal-background-screening-policy>.

⁸¹ Press Release, U.S. Equal Employment Opportunity Comm'n, *Naomi C. Earp Takes Office as EEOC Chair* (Sept. 6, 2006), <http://eoc.gov/eoc/newsroom/release/9-6-06.cfm>.