IN THE SUPREME COURT OF IOWA
No. 12-0913

Linda Pippen, *et. al.*,
on behalf of themselves and all others similarly situated
Plaintiffs-Appellant

v.

State of Iowa, et al.
Defendants-Appellee

On Appeal from the Iowa District Court for Polk County
Judge Robert Blink
Case No. LACL1073

BRIEF *AMICI CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE IOWA/NEBRASKA NAACP STATE CONFERENCE, in support of Plaintiffs-Appellant

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INTEREST OF AMICI

The National Association for the Advancement of Colored People ("NAACP") is the country's largest and oldest civil rights organization. Founded in 1909, it is a non-profit corporation charted by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, and to eliminate racial hatred and racial discrimination. In fulfilling its mission, the NAACP has filed numerous amicus briefs on behalf of litigants in civil rights litigation in federal and state courts across the country.

The Iowa and Nebraska NAACP State Conference was founded in 1940 as the Iowa State Conference of Branches. Its mission statement is identical to the NAACP, but its focus is realizing that mission on a local level by helping and training citizens of Iowa and Nebraska.

INTRODUCTION & SUMMARY OF ARGUMENT

Iowa Courts apply a more exacting standard for evaluating claims of equal protection or civil rights violations than federal courts.[1] They have

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[1] Iowa's commitment to equality finds explicit support in two clauses of Iowa's constitution. Article I § 1 provides:

> All men and women are, by nature, free and equal, and have certain inalienable rights among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Similarly, Article I § 6 states:

long been bastions for the rights of minorities to participate freely and fully in society on the same terms as the majority.

The District Court ignored these fundamental principles in narrowly construing Plaintiffs' claims of disparate impact discrimination and in grudgingly assessing the evidence to support them. The District Court fundamentally misconstrued statistical evidence which, when properly considered, showed Plaintiffs established their prima facie case of disparate impact—not only at the bottom line (hiring) but also at the critical stage 2 of the State's hiring process (selection of those candidates who would be interviewed). The District Court's error occurred in part because of its erroneous reliance on a Supreme Court decision—*Wards Packing Co. v. Atonio*, 490 U.S. 642 (1989)—that was rejected by Congress through amendments to Title VII and, in part, because it misunderstood the type of comparison Plaintiffs' statistical evidence provided. In doing so, the Court effectively imposed an impossible standard for Plaintiffs to meet in any disparate impact case - a standard inconsistent with the robust enforcement

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> All laws of a general nature shall have a uniform operation; the general assembly shall not grant any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

of civil rights protections that have been a hallmark of Iowa's jurisprudence since before recognition of statehood. Furthermore, the State failed to put on any evidence of job relatedness and business necessity. Accordingly, this Court not only should reverse the District Court but should also instruct it to enter judgment for Plaintiffs.

ARGUMENT

I. PLAINTIFFS' PRIMA FACIE BURDEN IN A DISPARATE IMPACT CASE REQUIRES ONLY PROOF OF ADVERSE IMPACT; PLAINTIFFS NEED NOT PROVE PURPOSEFUL DISCRIMINATION OR IMPLICIT BIAS

The Pippen class action was brought as a disparate impact case under Title VII of the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 *et seq.* ("Title VII"), and the Iowa Civil Rights Act of 1965, as amended, Chapter 216, Code of Iowa (2009) ("ICRA"). Title VII makes unlawful not only employment practices that are purposefully discriminatory but also those that are discriminatory in effect, when the practice is not job related and a business necessity. That holding of the landmark *Griggs v. Duke Power Company* case of 1971 was reaffirmed in the 1991 Civil Rights Act ("the 1991 Amendments").

Notably, the 1991 Amendments included a specific finding in Section 2(2), that "the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), has weakened the scope and effectiveness of

Federal civil rights protections," Section 3(2) stated that a purpose of this Act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." The express Congressional repudiation of *Wards Cove* clearly was intended to let the Court know that it "got it all wrong" in its revisionist effort to dilute the protections afforded by the disparate impact theory of discrimination. In sum, the 1991 Amendments effectively reversed the decision in *Wards Cove* (which the District Court in the instant action relied on so extensively).

In *Griggs*, in a unanimous opinion authored by Chief Justice Burger, the Court held that an employer's good faith requirements of a high school diploma and success on the Wonderlic test were unlawful because they had an adverse impact on African American candidates and the employer failed to prove that either the diploma or test were related to successful performance of the jobs in question. The Court explained Congress's rationale for this disparate impact theory of discrimination:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices,

> procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.
>
> * * * What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of a racial or other impermissible classification.
>
> * * * The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice, which operates to exclude Negroes, cannot be shown to be related to job performance, the practice is prohibited.

Id. at 431.

The initial disparate impact cases decided by the Supreme Court involved standardized employment tests or criteria, so-called objective measures—written aptitude tests, height-weight requirements, high school diploma, etc.—but the Court held in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), that the disparate impact theory of discrimination applied fully to subjective decision making as well. The Court was

> "persuaded that our decisions in Griggs and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection devices. . . . We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."

Watson, at 989-90.

In a comment especially relevant to the instant case, the *Watson* Court stated, "if an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." Id. at 990-91.The logical reasoning for this conclusion is based on the fact that the disparate impact theory of discrimination is intended to protect against the present effects of past discrimination and against "the problem of subconscious stereotypes and prejudices . . . ." *Watson v. Fort Worth Bank & Trust*, at 990.

The amici believe the social science evidence regarding implicit bias research is very convincing. Indeed, the NAACP has relied upon it in at least one other context in urging state courts to reverse rulings. However, the NAACP is far from alone in their efforts in this regard. The National Center for State Courts (www.ncsc.org) has similarly relied upon social science in preparing training materials, and at least three courts, including Iowa's northern neighbor Minnesota, have also relied on this social science in training judges and court personnel. *See, e.g.,* Addressing Implicit Bias in the Courts (summarizing the research paper Helping Courts Address Implicit Bias: Resources for Education - a research project involving the judicial

systems of California, Minnesota and North Dakota's courts) (available at http://www.ncsconline.org/D_Research/ref/implicit.html). Federal Judge Mark Bennett of the Northern District of Iowa routinely discusses implicit bias with prospective jurors during jury selection, asks each potential juror to take a pledge against bias, and gives a specific instruction on implicit biases before opening statements. Kang, Bennett et al*, Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1181-82 (2012) (available at http://www.uclalawreview.org/?p=3576k.). See also Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L.& POLICY REV. 149 (2010).

Importantly, amici note that Plaintiffs need not prove either purposeful discrimination or implicit bias in the State's hiring process to prevail on the disparate impact theory of discrimination. Proof that an employment practice has a statistically significant adverse impact on qualified African American applicants (or that such an adverse impact is caused by the selection process as a whole when the elements of the process are incapable of separation for analysis) is sufficient to make out Plaintiffs' prima facie case of discrimination, subject to proof by the employer of its affirmative defense of job relatedness and business necessity. 42 U.S.C.

2000e-2(k)(1)(A)(i), (B)(i). The convincing evidence as to the prevalence, and invidiousness, of implicit bias, however, argues convincingly for a generous construction of disparate impact law, not the grudging approach of the District Court.

II. THE COURT ERRED IN CONCLUDING PLAINTIFFS FAILED TO SATISFY THEIR *PRIMA FACE* CASE

In erroneously determining Plaintiffs failed to satisfy their *prima facie* case, the District Court embraced several findings of the State's expert, Dr. Miller, that are highly questionable, including at least two of which constitute clear reversible error. However, Plaintiffs provided sufficient evidence to shift the burden of proof to the State. Plaintiffs' evidence included an independent report--*generated at the State's request*— that showed great disparity in hiring and promotion.

A. The Court Misunderstood Miller's Testimony, Which Proved Adverse Impact Against Certain Agencies.

Dr. Miller attempts a statistical sleight of hand, seeking to mask his finding that "[f]or one-third of the departments, the probability of an African-American receiving an interview was [statistically significantly] lower than whites" by asserting that "[i]n the other two-thirds of departments, the probability of interview was not statistically adverse to African-Americans, and in several departments the probability was higher

for African-Americans than whites." Op. at 35 (No.7). Dr. Miller's conclusion fails to explain that the one-third of the departments that had a statistically significant adverse impact on African American applicants do the vast majority of the State's hiring. This is reinforced with the findings in the CPS report.

Dr. Miller's report identified eight agencies with statistically significant adverse results at stage 2 of the hiring process: the Department of Agriculture, the Department of Civil Rights, the Department of Natural Resources, the Department of Public Defense (HLSEM), the Department of Public Health, the Department of Transportation, the Department of Veterans Home, and the Department of Human Services. According to DAS's own report (Just the Facts, Pl. Ex. 264), these agencies combined to employ approximately 58% of the State's workforce in FY 2008:[2]

Unit / Agency	No. of Employees	% of

[2] See Table VI, Step 2 Applications with Race Indicator by Department. The above Chart only includes departments where the disparate impact was at least 2 standard deviations. However, Workforce Development (with 805 employees) could well be included as it had a negative 1.94 standard deviation, a less than 5% probability. Were Workforce Development employees included among the departments with significant disparate impact, the percentage of affected State employment rises to 61.8%.

		Workforce
EXECUTIVE BRANCH	20,552	100%
Department of Agriculture	392	
Department of Civil Rights	26	
Department of Natural Resources	974	
Dep't of Public Defense (HLSEM)	362	
Department of Public Health	432	
Department of Transportation	3,063	
Department of Veterans Home	860	
Department of Human Services.	5,781	
TOTAL:	11,890	57.85%

B. CPS Demonstrated State-Wide Adverse Impact In The Selection To Interview Stage of the State's Hiring Process.

The CPS Report found that in FY 2004-2006, of those applicants who met the minimum job qualifications and were referred, the percentage of African Americans who were afforded an interview (11.39%) was only half

(.563%) the percentage of whites (20.24%) who were interviewed, a showing dramatically below the EEOC Rule of 4/5 threshold for disparate impact.[3] The implication of Dr. Miller's conclusion that the disparate impact experienced by African American candidates in one-third of all State departments is "washed out" by the statistically insignificant disparate impact in the other two-thirds is *false*. Discrimination in nearly 60% of hires is not offset by lack of discrimination in the other 40% - as CPS confirmed. The aggregated results demonstrate that African Americans seeking employment with the State of Iowa face strong, built-in headwinds.

Furthermore, the Supreme Court has made clear that Dr. Miller's entire premise is faulty since Title VII protects each individual from employment discrimination. In disparate treatment cases, an employer violates the law when it intentionally fails to hire a person of color because of his race, even though the employer's overall hiring record was one of nondiscrimination and this act of discrimination was aberrational. *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). This principle was extended to disparate impact cases in *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal*, the Court held that the fact that the percentage of African

[3]CPS report, p. 33. The CPS Report has much more credibility than the State's expert witnesses because it was not prepared in preparation for trial, but rather at the instruction of Governor Tom Vilsack.

Americans who were promoted showed no adverse impact (indeed, it showed African Americans were promoted at a higher rate than whites) did not immunize the employer from Title VII disparate impact liability to those African Americans who were disproportionately rejected based on a test that had an adverse impact on African Americans.[4] Thus, the fact that (according to Dr. Miller) impact may not have been shown at the third stage (interview to hire) does not immunize the State from liability for those African Americans who clearly were excluded from the State's hiring process at the second stage (selection for interview), particularly in those agencies where *all available evidence* suggests they were unlawfully excluded from the opportunity to interview.

The *Pippen* Plaintiffs have not only proven statistically significant disparate impact on African American candidates at the "getting to the interview" stage but also—and unlike in *Teal*—a similar adverse disparate

[4] In *Teal*, African Americans experienced disparate impact on the written promotion test, as their pass rate of 54.2% was significantly less than the 79.5% pass rate of whites; the African American rate was 68% of the white pass rate (.542/.795=.68), well below the Rule of 4/5s threshold for disparate impact. However, despite the adverse impact of the test, 23% of African American applicants were promoted (11/48=.229) compared to only 13.5% of white applicants (35/259=.135). *Teal* held that the fact there was no adverse impact at the bottom line did not immunize the employer from liability to the African Americans who were rejected based on the promotion test.

impact on African Americans in State Government's ultimate hiring decisions. Unlike in *Teal*, where the employer sought to "correct" the adverse impact of its test by promoting those African Americans who passed the test at a rate much higher than the rate for whites who passed the test, the discriminatory impact of the subjective decisions as to who got an interview carried through to the final hiring decision.

The CPS Report found substantial adverse impact in the ultimate selection for hire: "While African Americans constituted 6 percent of the total qualified pool, they represented no more than 2.8 percent of the total hires for the years FY 2004-06." *Id*. at 30. CPS also found substantial adverse impact in stage 2 component of the hiring process—the departments' decision making as to which of the qualified candidates would be interviewed. For FY 2004-2006, only 11.39% of qualified African Americans received interviews compared to 20.24% of qualified whites—a African American/white ratio of 56.29% (11.39/20.24=.5629), well below the Rule of 4/5-threshold.

Dr. Miller's finding 5 states: "The probability of an African-American afforded an interview and being hired was no different than that of whites, where the same applicant, regardless of race, was afforded more than one interview." P. 35 (No. 5). This statement is very misleading, as the

damage has already been done. An applicant can't get hired if she doesn't get an interview. The fact that African Americans who were afforded interviews did not experience disparate impact at the subsequent hiring stage does not refute the significant disparate impact to the disproportionate number of African Americans who were denied an interview. The systemic discrimination occurred in the subjective, standardless decisions made by the departments in determining whom they would interview; and the adverse impact there was perpetuated at the hiring stage

C. The Court Mischaracterized Plaintiffs' Evidence As "Bottom Line" Statistics Like The Statistical Evidence Rejected In *Wards Cove.*

The AMICI fears that the trial court was erroneously influenced by the *Wards Cove* decision, from which it quoted extensively: "'[A] Title VII plaintiff does not make out a case of disparate impact simply by showing, 'at the bottom line,' there is a racial imbalance in the workforce.'" Op. at 15. Although the District Court referenced *Wards Cove*'s description of bottom-line disparities in its characterization of Plaintiffs' statistical evidence as "bottom-line" racial disparities at 47 and 53, the court did so without regard to the facts (1) that the decision in *Wards Cove* has been superseded by statute and (2) the evidence presented by Plaintiffs was quite clearly not

the same type of statistical evidence that the Supreme Court deemed insufficient in *Wards Cove*.

In reversing the Ninth Circuit, what the Supreme Court objected to in *Wards Cove* was the comparison of the racial compositions of one set of jobs to another *within an employer's workforce* without any reference to the qualified labor pool for *either* category of job, *Wards Cove*, 490 U.S. at 650-51. The Court explained that "the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed" because, among other things, "with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected 'the pool of qualified job applicants' or the 'qualified population in the labor force.'" *Wards Cove*, 490 U.S. at 651 (seemingly quoting *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), without citation).

This same type of "internal only" comparison doomed the plaintiffs evidence in *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011). There, the Eighth Circuit noted, "plaintiffs' statistical evidence assumed that all applicants were qualified for promotion to each position" and only included an internal workforce comparison. *Id.* at 819 (discussing the inadequacy of

plaintiffs' attempt to prove "disparate impact in supervisor hiring based on a comparison between the racial composition of Nucor supervisors, as a group, and the racial composition of all employees categorized as craft workers or operatives" and stating that such "a bare assertion of racial imbalances in the workforce is not enough to establish a Title VII disparate impact claim").

Plaintiffs' statistical evidence under the present facts did not compare the percentage of African Americans in professional jobs to African Americans technical jobs while employed at the State. Nor did they offer a comparison of African Americans in non-management jobs to African Americans in management jobs (other than to show the vast majority of managers making hiring and promotion decisions were white).

Rather, consistent with Title VII, Iowa law, *Nucor*, and the EEOC's Uniform Employee Selection Guidelines, Plaintiffs compared selection rates between white and African American applicants - those selected for merit positions (the at-issue jobs) as compared to those who the State itself determined were minimally qualified to work in the job classification. Those analyses showed statistically significant disparities in selection rates by race. *See also Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 518-19 (Iowa 1990) (proper comparison after *Wards Cove*

is between composition of the protected class in the composition of at issue jobs and the population in the relevant labor market); *see also Watson*, 487 U.S. at 997 (citing *Hazelwood* as requiring a comparison between the employer's teaching staff and the qualified school teacher pool in the relevant labor market); 29 C.F.R. § 1607.4 (focusing inquiry on comparison of selection rates of one group of applicants compared to another).

As Dr. Killingsworth explained, his results (like CPS's) show clear violations of the EEOC's 80% or "four-fifths rule" and statistically significant differences at each step of the hiring process. (Pl. Ex. 428B) Transcript 1397-1410. Under the EEOC's 80% rule, Dr. Killingsworth's step-by-step analysis clearly establishes the existence of an adverse impact, which Defendants failed to rebut. Dr. Killingsworth's subsequent regression analysis of Steps 2 and 3 (Pl. Ex. 431D) confirmed adverse impact at Steps 2 and 3, as did Dr. Miller's analysis of Steps 1 and 2. Transcript 3031-32, 3059-65 (conceding African Americans' applications statistically significantly less likely to be referred to the various departments and conceding statistically significant adverse results for African American applicants in selection for interview).

Even Dr. Miller's analysis of Step 2 that controlled for numerous variables, including "department applied to," found statistically significant

results in interview selection rates that were adverse to African Americans. Dr. Miller testified that the probability of those results was as close to zero as Dr. Finegold's computer could compute. Transcript 3059-65. This means the likelihood of seeing racial differences in selection rates this large is effectively zero. Thus, even accounting for differences in departments by controlling for department applied to, Dr. Miller found statistically significant adverse results for African Americans.

These results are aggregated statistical analyses that are the outcomes of the hiring process (or particular stages of it). As explained below, Plaintiffs conducted those analyses because those were the only analyses possible based on the State's record-keeping.

III. THE STATE'S FAILURE TO MAINTAIN RECORDS PERMITS PLAINTIFFS TO RELY ON STATISTICAL ANALYSES SHOWING ADVERSE IMPACT IN THE DECISIONMAKING PROCESS AS A WHOLE.

The Civil Rights Act of 1991 reaffirmed the *Griggs* holding that a showing of adverse impact comprises a prima facie case of disparate impact discrimination, shifting the burden of persuasion to the employer to prove its employment practice is job-related and a business necessity. Section 105 provides in pertinent part:

> An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party

> demonstrates that a respondent used a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

Section 104 of the Act defined the term "demonstrates": "The term 'demonstrates' means meets the burden of production and persuasion."

The State did not even attempt to prove an affirmative defense. It made no effort to demonstrate that selection devices relying on subjective decision-making used by departments to select candidates for interview were job related and a business necessity. Instead, it rested its entire defense in asserting that Plaintiffs had failed to satisfy the 1991 Civil Rights Act requirements that the "complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact" or to demonstrate "that the elements of a respondent's decision-making process are not capable of separation for analysis which allows the decision-making process to be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (hereinafter "not capable of separation for analysis exception").

It is undisputed that Plaintiffs proved there was substantial adverse impact on African Americans at stage 2 of the State's hiring process (the "getting to the interview" stage) and in the overall decision-making process. It is furthermore undisputed that DAS delegated total discretion to the

various departments in making the subjective determination as to *how to determine* which of the referred applicants would be interviewed and as to which candidates would be selected to be interviewed. The actual methods by which the various departments made this critical decision varied widely.

CPS asked each department to respond to its inquiry as to "how you determine who will be interviewed from the certification list." CPS summarized the departmental responses in its Report, and the CPS summaries confirm that standardless, decision making procedures were the norm. CPS Report, at 98-102. Unsatisfied with CPS's answers, DAS's own virtually identical inquiries confirmed that the hiring manager decided what screening devices would be used. Ultimately, there was no evidence presented that would indicate that anyone ever validated screening devices in order to determine if they accurately selected the most meritorious candidate. This hardly constitutes a system based on scientific principles, as law dictates the merit system should operate. Plaintiffs' counsel and their experts made extensive efforts to identify and isolate the specific procedures and criteria that were utilized by the State's decision makers. They found a total failure on the part of the various departments to retain data that would enable determination of impact as to the particular procedures or criteria used.

As the authors of a leading casebook explain:

> Contrary to *Wards Cove*, new §703(k)(1(B) provides that 'bottom line' statistics can sometimes be used to prove disparate impact discrimination . . . . As a practical matter, all of the data concerning the selection process will be maintained by the employer, and whether all that data is turned over in discovery will be the first question. An employer who resists discovery may well provide the plaintiff with 'incapable of being separated for analysis' on a silver platter. *This also should be true if the employer simply doesn't preserve the data.*

Zimmer, Sullivan, and White, CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION 244 (7th Ed. 2008) (emphasis added).

Although the District Court acknowledged the case law that holds the "not capable of separation for analysis exception" applies when the employer fails to maintain records, the court did not give it serious consideration. Instead, the District Court concluded the decision-making process was capable of separation for analysis because Dr. Killingsworth, Dr. Miller, Dr. Greenwald, Dr. Kaiser, and CPS were "capable of separating data for the referral stage, the interview stage, and the hiring stage for African-Americans as compared to whites over a period of years." (Op. at 43-44.) Yet the District Court did not acknowledge that Plaintiffs had demonstrated with undisputed evidence the substantial disparate impact on African Americans that occurred at the "getting to the interview" stage. Instead, the District Court went on to conclude that the "objective and

subjective components" of the "State's system" "are not so confused so as to prevent Plaintiffs from honing in on one particular employment practice and constructing their case upon it." The trial court gave the "second resume screen" and the "spelling and grammar screening" as examples of particular employment practices that should have been evaluated for impact by Plaintiffs. Op. at 45 n.26.

What is clear is that none of the State departments maintained sufficient records as to the myriad of subjective procedures and/or criteria they utilized, or the scoring of individuals based on such criteria. The record indicates that the various State departments neither preserved the data nor scored the criteria/factors that were determinative, and these recordkeeping failures precluded disparate impact analysis of the decision-making factors that disproportionately denied interviews to qualified African American candidates. What the trial court wanted in the way of more specifics could not be provided due to the State's longstanding failure to maintain the employment records required by law.

Rather than faulting the State for its wholesale failure to comply with not only the EEOC's recordkeeping requirements but also those required by Iowa law, the District Court concluded the Plaintiffs failed to meet their burden of identifying a particular employment practice. It did so without

discussing (1) whether Plaintiffs' identification of the adverse impact at the "getting to the interview" stage satisfied their burden, and (2) if it did not, whether the State's recordkeeping failures precluded Plaintiffs from identifying the impact of even more specific criteria (such as the second resume screen and spelling and grammar screening).

In short, by erroneously describing the records that existed, the District Court essentially heightened Plaintiffs' burden of proof to a standard to which they should not have been held, and which they could not reasonably have met under the circumstances. Plaintiffs only received some hiring files, not even all files for a particular agency. The limited data and records that were available did not permit Plaintiffs—contrary to the District Court's suggestion—to focus their inquiry on a different or more specific practice, despite their desire to determine the headwinds they faced.

The State's failures to maintain records are particularly important to the amici.[5] The organization's mission is to eliminate discrimination for the benefit of all citizens; and where nondiscriminatory, legitimate barriers to their members being hired exist, they want to know and understand them in

[5]The District Court ignored the longstanding equitable notion that a party's failure to maintain records consistent with legal obligations should result in an inference that the records would have favored the party's opponent.

order to help their members overcome them.[6] If African Americans are not receiving State positions because they actually *do* hold fewer necessary degrees or have less relevant work experience or skill sets, the amici want to know so they can inform their members what to do better. If, on the other hand, they are incorrectly being *perceived* as having inferior education, work experience or skill sets, the amici want to know that so they can help their members overcome those *misperceptions* and work with employers like the State to find ways to avoid them.

Ultimately, however, only employers can retain and store information about the bases for their decisions. Only employers can record what skills mattered to the job and why one candidate was evaluated as having more of those skills as compared to others. Here, despite a bounty of legal obligations to do so, the State failed to maintain those records.

Governor Chet Culver implicitly acknowledged the State's failure of record keeping and the need for records to assess practices for adverse impact when he issued Executive Order No. 4 in 2007:

> DAS, in consultation with the Iowa Civil Rights Commission and Department of Human Rights, shall annually monitor the application

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[6] The State's failures are also important to the NAACP because its members want to ensure that positions with the State go to the most qualified candidates and that the State's resources are used as efficiently as possible.

> of the screening methods used by state agencies, assess their impact on employee groups in the selection process and counsel department with regard to selection processes that pose barriers to any applicant group. Where systems and methods to gather such selection data are inadequate, efforts to improve them shall be made.

Executive Order No. 4 mirrored the already existing obligations of DAS and agencies to maintain records and to assess impact. *See, e.g.,* Iowa Code § 19B.3(1)(d) (requiring DAS to "[m]onitor accomplishments with respect to affirmative action remedies"); Iowa Code § 19B.3(1)(c) (requiring DAS to "[g]ather data necessary to maintain an ongoing assessment of affirmative action efforts in state agencies"); Iowa Admin. Code § 11—68.2(3) (requiring agencies, where not otherwise centrally available, to keep records which at a minimum allow for the tracking of the composition of applicant group, monitoring groups through the hiring process, and the assessment of impact of personnel actions on various groups).

Despite Executive Order 4, DAS and agencies still failed to maintain records, validate selection devices, and assess impact. Why the District Court gave the State the benefit of the doubt under these circumstances is unclear. What is clear is that the District Court erroneously concluded records existed and were made available to Plaintiffs, when in reality they did not exist and/or were not provided to Plaintiffs. In declining to find that the patent inadequacies of the State's recordkeeping rendered the

employment process incapable of separation for analysis, the trial court's ruling blinks the reality that the disparate impact theory of discrimination can be rendered a paper tiger, a nullity, if employers can avoid liability by failing to maintain the employment records required by the EEOC and Iowa law.

The Eighth Circuit opinion upon which the trial court relied, *Bennett v. Nucor Corp*., 656 F.3d 802, 817-18 (8th Cir. 2011), Op. at 12, is distinguishable. The Eighth Circuit found that the company's various departments used a variety of measures to evaluate candidates for promotion, and upheld the district court's entry of summary judgment because plaintiffs failed to identify the measures that had an adverse impact. However, there is no indication in either the Eighth Circuit opinion, or the District Court opinion, that plaintiffs raised any issue that Nucor Corporation's recordkeeping precluded them from identifying the specific measures that caused impact. Amici suggest that the Eighth Circuit applied a very grudging analysis to the disparate impact claim, one that is inconsistent with the Supreme Court's construction of Title VII law that encourages employers to be pro-active in implementation of programs and policies that will prevent discrimination in the workplace.

In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the Court modified agency principles so that employers who make good-faith efforts to prevent discrimination in the workplace can avoid punitive damages liability. Likewise, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), modified agency principles so that employers who exercise "reasonable care to prevent and correct promptly any sexually harassing behavior" may be able to avoid vicarious liability when no tangible employment action was taken. In both *Kolstad* and *Ellerth*, the Court molded Title VII law to further the goal of encouraging employers to be pro-active in preventing discrimination and securing compliance with antidiscrimination law.

The District Court's decision in the instant case does just the opposite. It provides a disincentive to employers to maintain the records necessary to evaluate their employment processes for disparate impact. Absent records, there can be no assessment of adverse impact. Nor can managers be held accountable for the decisions they make. The lesson many employers and managers will reasonably draw from the District Court's ruling is that they "can get by" with poor recordkeeping—and poor recordkeeping will effectively immunize them from disparate impact claims or accountability. Accordingly, the District Court's ruling, if allowed to stand, will have the

direct effect of undermining not only the purpose of the State's merit system, the Civil Rights Act and Title VII, but the longstanding jurisprudence and principles this Court has applied in advancing the cause of equality.

IV. THE IOWA SUPREME COURT SHOULD LEAD ONCE AGAIN.

From its inception in 1839 the Iowa Supreme Court has a long tradition of national leadership on civil rights and civil liberties issues, in construing the Natural Rights/Equality clauses of the Iowa Constitution and in construing Iowa statutes. This Court, and Iowans everywhere, should be rightfully proud of the nineteenth century racial justice Civil Rights Trilogy of *Ralph-Clark-Coger*[7] and the path breaking gender equality precedent of Arabella Babb Mansfield. At the beginning of the twenty-first century this Court again embraced its independent model of constitutional interpretation in *State v. Cline*, 617 N.W. 277 (2000):

> [A]lthough this court cannot interpret the Iowa Constitution to provide *less* protection than that provided by the United States Constitution, the court is free to interpret our constitution as providing *greater* protection for our citizens' constitutional rights. * * * [O]ur court would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law.

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[7] In re Ralph, Morris 1 (Iowa 1839); Clark v. Bd. Of School Directors, 24 Iowa 266 (1868); Coger v. North West Union Packet Co., 679 N.W.2d 659 (1873).

Id. at 284-285 (italics in original).[8]

The instant case does not require this Court to construe the Natural Rights/Equality provisions of the Iowa Constitution, but the progressive sweep of those equality principles most certainly supports a generous construction of the federal and Iowa civil rights statutes that govern this case and the equitable relief they authorize. For example, *Coger v. North West Union Packet*, which this Court decided on the equality protections of the Iowa Constitution, also construed the 1866 federal civil rights statute (current 42 U.S.C. § 1981) and the Fourteenth Amendment broadly. This Court's generous construction of §1981 in *Coger* was eventually adopted by the United States Supreme Court, but not until *Brown v. Board of Education*, 347 U.S. 483 (1954), breathed new life into the Reconstruction Era civil rights statutes more than eighty years later.

The 1991 Amendments reaffirmed the disparate impact theory of discrimination of *Griggs v. Duke Power* and its full equality goal, and for the first time authorized courts to award compensatory and punitive damages,

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[8] Cases that provide greater Criminal Procedure safeguards-protections include *State v. Fleming*, 790 N.W.2d 560 (2010), *State v. Ochoa*, 792 N.W. 260 (2010), and *State v. Pals* , 805 N.W.2d 767 (2011). Cases that provide greater equality protections include *Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (2004) and *Varnum v. Brien*, 763 N.W.2d 862 (2009).

but only in cases of intentional discrimination. Equitable relief, including hiring, reinstatement, seniority credit, back pay, and attorney's fees would continue to be available in all cases, including disparate impact cases. This Congressional compromise on remedies in disparate impact cases reflected a balanced approach that contemplated full renewal of the generous liability standard that prevailed under *Griggs v. Duke Power*. Plaintiffs respectfully submit that the District Court's reasoning does not reflect the full sweep of the reforms intended by the 1991 Amendments.[9] There is no United States Supreme Court precedent that is dispositive of the issues in the instant case, and Plaintiffs urge this Court to construe disparate impact law under Title VII and the Iowa Civil Rights Act broadly so as to provide full equality protections. Such a construction of disparate impact law would be in keeping with the great tradition of this Court's equality jurisprudence and the 1991 Amendments.

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[9] Should Congress or the Iowa Legislature disagree with some aspect of its construction of a statute, either legislative body can readily "correct" the Court's construction by mere enactment of a statute.

V. BECAUSE THE STATE FAILED TO OFFER EVIDENCE OF AVAILABLE AFFIRMATIVE DEFENSES, PLAINTIFFS PREVAIL.

The extensive factual record affords this Court alternative factual bases and legal grounds upon which to reverse the trial court ruling, and to enter judgment for all or a large portion of Plaintiffs' class. First, the Plaintiffs have proven that the State's employment decision making process was not capable of separation for analysis due to the State's grossly deficient record keeping and that there was substantial disparate impact on African Americans in hiring at the bottom line. This showing established a prima facie case of disparate impact on the Plaintiffs class with regard to all State departments, subject to the State's opportunity to establish an affirmative defense based on a showing that the employment practices utilized were job related to the positions in question and consistent with business necessity. The State made no effort to establish the affirmative defense, and this Court should reverse the trial court and direct that judgment be entered for the Plaintiffs' class on the entirety of their class claim.

Second, even if this Court concludes that the State's recordkeeping was not so deficient as to have rendered its selection process incapable of separation for analysis, by having proven that stage 2 of the State's hiring process had a disparate impact on African American candidates and that the

subjective decision making at this stage regarding which qualified candidates referred by DAS would be afforded interviews constituted a particular employment practice, the Plaintiff's nonetheless clearly established a prima facie case of disparate impact on the Plaintiff's class—at the very least with regard to the Department of Agriculture, the Department of Civil Rights, the Department of Natural Resources, the Department of Public Defense (HLSEM), the Department of Public Health, the Department of Transportation, the Department of Veterans Home, and the Department of Human Services.

Despite having had the opportunity to do so, the State made no effort to establish an affirmative defense based on a showing that the employment practice utilized was job related to the positions in question and consistent with business necessity.

Given the State's failure to establish an affirmative defense to Plaintiff's prima facie case, this Court should reverse the trial court in part and direct that judgment be entered for members of Plaintiffs' class that qualified for referral (at least for the aforementioned agencies). Thus, the District Court should be directed to enter judgment and conduct evidentiary hearings necessary for the determination of class wide injunctive relief and any individualized relief for members of Plaintiffs' class.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the District Court's determination and remand for proceedings as outlined above.

Dated: November 30, 2012

Respectfully Submitted,

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CERTIFICATE OF FILING

I hereby certify that on the 30th day of November, eighteen (18) copies of the attached Brief *Amicus Curiae* were hand delivered to the Iowa Supreme Court, 1111 E. Court Avenue, Des Moines, Iowa, 50319.

Signature:

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true copies of the foregoing Brief *Amicus Curiae* were served on each of the parties of record by enclosing the same in an envelope addressed to each such party listed below at his address as disclosed by the pleadings of record with postage fully paid and by depositing said envelope in a U.S. Post Office depository in Des Moines, Iowa on November 30, 2012.

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