NO. 15-2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RONNIE JONES, ET AL.,

Plaintiffs-Appellants,

v.

THE CITY OF BOSTON, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EQUAL JUSTICE SOCIETY, JUSTICE AT WORK, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AND THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Fed. R. App. P., *amici curiae* herein state that they are not publicly held corporations nor do they have parent corporations that are publicly held.

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INTEREST OF *AMICI CURIAE*[1]

The *Amici*—National Employment Lawyers Association, the Equal Justice Society (EJS), Justice At Work, the American Civil Liberties Union of Massachusetts (ACLUM), and The Charles Hamilton Houston Institute for Race and Justice—submit this brief in support of Plaintiffs-Appellants' argument that the District Court erred in how it applied Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, when it granted summary judgment to the City of Boston.

Amici are committed to furthering the goals of the Civil Rights Act of 1964 and seek to provide employees with an effective recourse to address systemic denials of equal employment opportunities, specifically those that disparately impact minority employees.

When analyzing plaintiffs' disparate impact claims, the District Court should have considered the historical context and development of disparate impact under the Civil Rights Act of 1964, the 1972 amendments, and the Civil Rights Act of 1991. The efficacy of disparate impact theory is its ability to correct systemic denials of equal employment opportunity. The decision below fundamentally

[1] As required by Local Rule 29(c)(5), *amici curiae* state that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person—other than *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

departs from the intended purpose of disparate impact theory and its application to state and local municipalities under the law. *Amici* strongly believe that, if left uncorrected, the errors of the District Court below will severely weaken the role that Congress intended disparate impact analysis to play in eliminating discrimination in the workplace and, specifically, in state and local law enforcement.

The District Court's decision and the analysis employed to reach the decision will directly impact the lives and employment opportunities of the populations *amici* are dedicated to serving. While this Court's decision will impact the parties to this suit, it will also have a national impact because other courts will look to the decision as a way to achieve equal employment opportunity in law enforcement.

National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace.

The Equal Justice Society ("EJS") is a national legal organization focused on restoring constitutional safeguards against discrimination. EJS's goal is to help

achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, guaranteeing equal protection under the law to all citizens. EJS's legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience.

Justice At Work is a non-profit legal services organization founded in 2011 to support organizing efforts among non-union low-wage immigrant workers. Justice At Work provides strategic employment and labor legal support and is committed to the enduring principle that no worker shall be denied employment, or be wrongfully terminated, on the basis of race.

The American Civil Liberties Union of Massachusetts ("ACLUM") is a non-profit, non-partisan membership organization of over 25,000 members and supporters. Since 1920, ACLUM has worked to protect the civil rights and civil liberties established by state and federal constitutions and laws, including in numerous cases challenging drug testing of employees as well as cases challenging racial discrimination. ACLUM participated as *amicus* in this case when it was previously before this Court. *See Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014).

The Charles Hamilton Houston Institute for Race and Justice ("CHHIRJ") at Harvard Law School was founded in September 2005 by Charles Ogletree, Jr., Jesse Climenko Professor of Law at Harvard Law School. Houston helped to engineer the multi-year legal strategy that led to the unanimous decision by the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). CHHIRJ has been focused on, among other things, reforming criminal justice policies and redressing the influence of race on capital punishment. CHHIRJ seeks to address the profound historical and contemporary connections between race, discrimination and unequal access to opportunity.

ARGUMENT

The District Court's decision fundamentally departs from the fabric of Title VII. In the 1972 amendments to the Civil Rights Act of 1964, Congress emphasized the importance of removing discriminatory barriers to employment that existed in state and local governments and, particularly, discrimination in law enforcement. 92 P.L. 261, 86 Stat. 103.

The U.S. Supreme Court in *Griggs v. Duke Power Co.* recognized the theory of disparate (adverse) impact, relying in part on the 1966 U.S. Equal Employment Opportunity Commission ("EEOC") guidelines as a vital means to achieve equal employment opportunity under Title VII. *See Griggs v. Duke Power Co.*, 401 U.S.

424, 433 (1971). Despite several court decisions retreating from the disparate impact theory of equal opportunity articulated in *Griggs*, Congress explicitly rebuffed these efforts in 1991 by codifying the disparate impact standard in Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166 § 3, 105 Stat. 1071 (1991). After the 1991 amendments to Title VII the burden shifting framework in place today is unquestionably clear. After a plaintiff establishes a *prima facie* violation "[a]n employer may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.'" *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (internal citations omitted). If an employer successfully proves that the practice in question is a business necessity, the third prong of this test is still available where "a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs." *Id.* (internal citations omitted); *See also* 42 U.S.C. § 2000e-2(k)(1)(A)(iii). As a result, disparate impact theory remains the most effective method for minority police officers to address systemic hurdles—past and present—to equal employment opportunities.

The type of drug testing employed here is one example of the type of systemic hurdle that Congress sought to eliminate. *Amici* readily concede that maintaining a drug-free police force is a legitimate, if not necessary, goal. *Amici* do

not dispute the goal, but rather, the means used to achieve this goal. Hair testing, the means chosen by the City to meet this goal, has a disparate racial impact. The City of Boston, nevertheless, chose to use hair testing even though it is not reliable. For example, the Civil Service Commission found that hair testing does not accurately distinguish between a positive test caused by ingestion and one caused by external exposure. The District Court summarized the Commission's findings: "The Commission identified scientific disagreement about the accuracy of the hair drug test, the lack of uniform national standards, and other factors, ultimately to conclude that hair test results do not 'meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee under just cause standards governing civil service employees under Massachusetts law.'" *Jones v. City of Boston*, 118 F. Supp. 3d 425, 434 (D. Mass. 2015) *(*citing *Boston Police Dept. v. Civil Service Commission*, Nos. 13-1250-A, 13-1256-F, at 6-7). The District Court further acknowledged that the Massachusetts Superior Court had similarly observed, "hair tests alone were not sufficiently reliable to outweigh a credible denial." *Id.* (citing *Boston Police Dept. v. Civil Service Commission*, Nos. 13-1250-A, 13-1256-F, at 25).[2]

[2] *Amici* recognize that this discussion was in light of the argument that the Civil Service Commission's finding on this point should be given preclusive effect. *Amici* do not address this holding, but the report does provide relevant evidence from which a factfinder should rely upon in making a factual determination that the use of hair testing did not meet the City's burden of showing business necessity. *See* discussion infra at Section I(B).

The heart of the District Court's error was prematurely acting as a finder of fact on materially disputed facts and ignoring, or rejecting on credibility grounds evidence from which it could be reasonably concluded that the City did not meet its burden of proving business necessity. The District Court compounded this error by concluding at summary judgment, that plaintiffs did not establish a lesser discriminatory alternative, rather than after a full development of the facts at trial. This error by the District Court is especially evident in its treatment of the intensively fact-driven expert testimony provided by the plaintiffs on the issue of lesser discriminatory alternatives. By applying a watered-down version of business necessity, and a heightened standard for plaintiffs to prove a lesser discriminatory alternative, the District Court's decision effectively precludes plaintiffs from ever establishing a disparate impact claim of discrimination.

This Court, in *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014), correctly applied the burden-shifting framework in its analysis and found that the plaintiffs identified that the hair drug test for Boston Police Department officers had a disparate impact on black officers under the first prong of the disparate impact framework. Now, this Court should continue to apply a legal standard that is consistent with *Griggs* when addressing the second and third prongs of the disparate impact framework. For the reasons discussed below, the District Court's decision should be vacated and remanded.

I. THE COURT SHOULD REMAND REQUIRING THE FACTFINDER TO SERVE ITS ROLE IN DETERMINING WHETHER THE CITY MET ITS BURDEN OF PROVING BUSINESS NECESSITY.

The District Court correctly noted that, in determining whether summary judgment is appropriate, "[a]ll facts in the record and all reasonable inferences must be drawn in favor of the nonmovant." *Jones*, 118 F. Supp. 3d at 431. Despite correctly articulating the standard, the District Court did not adopt it in application. It made findings of clearly disputed material facts in favor of the City of Boston. The District Court chose to weigh evidence, rather than applying summary judgment standard requiring the court to view the facts in the light most favorable to the plaintiff. It further erred by not waiting until this highly contested evidence was fully developed at trial. As the Supreme Court recently admonished, "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (U.S. 2014).

The District Court ignored clear disputes of material fact on both the accuracy and the reliability of the hair drug testing method utilized by the City of Boston. In contrast to the clear direction given by the Supreme Court in *Tolan*, the District Court "did not credit clearly contradictory evidence," *Id.* at 1867, and "neglected to adhere to the fundamental principle that at the summary judgment

stage, reasonable inferences should be drawn in favor of the nonmoving party." *Id.* at 1868. Furthermore, the District Court bewilderingly concluded that there is no dispute as to the efficacy of the urinalysis and hair-testing-plus alternative testing methods when compared to the method used by the City of Boston.

If trial courts are allowed to weigh the credibility of the facts in disparate impact cases at summary judgment, without viewing the facts in the light most favorable to the plaintiff, as the District Court did here, these matters will never be presented in a full trial where all the intensely factual determination can and should be made. If disparate impact cases such as these fail to reach trial, where the highly technical factual record can be fully developed, Congress's intent of eradicating inequality and disparate impact in the workplace through Title VII will continue to be threatened. The Court should seek to fulfill Congress's goal of eliminating discriminatory barriers and let these issues be decided at a full trial with factual and expert development.

A. The District Court Erred By Failing To Apply Business Necessity As Envisioned By *Griggs* and The Civil Rights Act Of 1991, And Instead Applying A Watered-Down Version of Business Convenience.

In *Griggs*, the Supreme Court established the burden-shifting framework of disparate impact cases. Specifically, the Court in *Griggs* determined that, once the plaintiff has established that a particular employment practice leads to a disparate

impact, the burden of persuasion shifts to the defendant employer to prove that the disputed practice is a "business necessity." *Griggs*, 401 U.S. at 432 ("More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."). In *Griggs* and subsequently in *Albemarle*, the Supreme Court agreed with the EEOC that "discriminatory tests are impermissible unless shown, by professionally accepted methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

The Court adhered to this burden-shifting framework for disparate impact cases for many years. *See, e. g.*, *Albemarle Paper Co.*, 422 U.S. at 425; *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The Court, however, began to erode the *Griggs* burden-shifting framework and eventually changed this analysis in *Wards Cove*. In *Wards Cove*, the Court ruled that an employer's only burden was producing a business justification for the disputed practice, but the ultimate burden of proof always rested with the plaintiff. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) ("In this phase, the employer carries the burden of producing evidence of a

business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff.").

Finding that disparate impact analysis had been impermissibly narrowed, Congress promptly enacted the Civil Rights Act of 1991 to overturn the *Wards Cove* decision and renew the promise of Title VII. Congress declared that "the decision of the Supreme Court in [*Wards Cove*], has weakened the scope and effectiveness of Federal civil rights protections; and legislation is necessary to provide additional protections against unlawful discrimination in employment." Pub. L. No. 102-166 § 2.

The 1991 Amendments to Title VII codified the burden-shifting framework created in *Griggs* and, directly relevant here, rejected *Wards Cove's* analysis that the employer only had to provide some employment justification for the challenged practice. Instead, Congress reinstated *Griggs's* business necessity standard and made it clear that it was the employer's burden to prove business necessity. In addition, Congress codified the third prong of the burden-shifting framework, legislating that only after the employer proves business necessity is the plaintiff required to make a demonstration that there is an alternative, less discriminatory means of achieving the same goal. *See* 42 USCS § 2000e-2.

B. The Hair Drug Tests Are Not Consistent With Business Necessity.

This Court previously determined that the plaintiffs met their initial burden of establishing a prima facie disparate impact claim. *Jones v. City of Boston*, 752 F.3d at 53. Once the plaintiffs establish a prima facie case of disparate impact, the burden shifts to the defendants to demonstrate that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Griggs*, 401 U.S. at 431, 436. The 1991 Amendments make it clear that this remains the standard. To show business necessity, the defendant must first demonstrate that the practice attempts to "measure a characteristic that constitutes an 'important element of work behavior.'" *Albemarle Paper Co.*, 422 U.S. at 431; *see also* 29 CFR 1607.4. Second, the defendant must show "by professionally acceptable methods" that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." 29 C.F.R. § 1607.4(c). Here, the plaintiffs do not dispute that being drug free is an "important element of work behavior and job performance" and neither do the *Amici*. Petitioner-Appellant Brief at 8, *Jones v. City of Boston*, No. 15-2015 (1st Cir. Mar. 4, 2016). However, because the plaintiffs provide evidence that the outcomes of the hair drug tests are not "predictive of or significantly correlated with important elements of work behavior," the District

Court erred by acting as the fact finder on this contested issue, and then compounded that error by ultimately concluding that the hair drug program is consistent with business necessity. *Jones*, 118 F. Supp. 3d at 435-437. (The District Court in fact observed that hair testing is not used in federal government workplace testing programs, that the Society of Forensic Toxicologists has stated that "results of hair analysis alone do not constitute sufficient evidence of drug use for application in the workplace," and that plaintiffs' experts question whether the tests could accurately identify ingested cocaine *Id.*).

The District Court found that "the plaintiffs have failed to present evidence from which a reasonable factfinder could determine that the hair drug test is not predictive of or significantly correlated with drug use." *Jones*, 118 F. Supp. 3d at 439. However, the plaintiffs presented abundant evidence that hair drug testing is unreliable and fails to differentiate external contamination from intentional ingestion, and, therefore, such tests do not meet the "significantly correlated" standard. *Id.*

The District Court also stated that a person whose hair tests positive for cocaine is more likely to be a drug user than those who test negative, regardless of the source of cocaine. *Id*. While this may or may not be true, this issue presents a factual determination for a full trial, which, even if true, does not establish "business necessity." This analysis omitted the District Court's own contention that

"there is a greater likelihood that Boston Police Department officers would encounter cocaine in their daily work than people with most other occupations." *Id.* at 436. Further, this conclusion also disregarded those who test positive solely because of environmental contamination, and assigned these officers the same culpability as those who intentionally ingest cocaine. The District Court even found that "the record [did] support a dispute of fact on these points," but failed to weigh the evidence in the light most favorable to the plaintiff when it stated that the experts failed to apply their findings to real world situations. *Jones*, 118 F. Supp. 3d at 440. However, it is up to the factfinder based upon a full factual record including expert testimony to weigh all of the evidence that has been presented once it is determined that there is a dispute of material facts.

The plaintiffs' experts recognized that some of the external contamination can be eliminated by decontamination procedures adopted by Psychemedics, but also recognized that contamination from cocaine can result when the cocaine binds to melanin in one's hair, noting that those with darker hair have more melanin. *Id.* at 437-438. Further, Dr. Kidwell, one of the plaintiff's experts, pointed out that the external contamination attaches itself to hair that has been cosmetically treated, which is more likely to be the case for African Americans. *Id.* at 438. The District Court erroneously found that these expert conclusions were not significant enough to indicate that the test was inadequate, and placed the burden on the plaintiffs to

disprove business necessity. *Id.* at 446. Also, the judge did not apply the summary judgment standard and improperly made a finding of fact when he determined that the expert's evidence was hypothetical and did not have a "significant enough effect to defeat the [City of Boston's] evidence that the hair drug testing is generally reliable and is predictive of and significantly correlated with important elements of work behavior." *Id*. at 440. Here, the District Court's language evinces error where it concludes that hair testing "generally is reliable and is predictive" of actual drug use. Being generally reliable or predictive is not proving "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. Being "reliable and predictive of work behavior" is an intensive factual determination requiring extensive development of expert testimony that must be properly left for trial.

There is no dispute that accurate and reliable drug testing for police officers could be "a reasonable measure of job performance," *Griggs*, 401 U.S. at 436, and "bear a demonstrable relationship to successful performance of the jobs for which it [is] used." *Id.* at 431. However, the experts' studies show that the specific use of hair drug tests alone are not a business necessity and hair drug tests have a greater disparate impact on African Americans than the alternatives suggested below. *See Massachusetts Civil Service Commission ("the Commission"): In re Boston Police Department Drug Testing Appeals, Nos. D-01-1409 et al.* Because of the

likelihood that the disparate amount of negative test results among African Americans are due to their environmental exposure to drugs, and not direct ingestion, the hair drug testing program cannot be said to be significantly correlated with the desired characteristics for police department employment, and therefore, cannot satisfy the second part of the business necessity standard that is reinforced in *Albemarle Paper Co.* and set forth in the EEOC Guidelines. *See* 29 CFR § 1607.4.

A reasonable factfinder could conclude from the plaintiff's evidence that the hair drug test practice is not a business necessity. The Court should insist that this highly factual determination be done at trial based upon a complete record to ensure that discriminatory barriers to employment are properly screened in the police force as Congress intended.

C. *Texas Department Of Housing And Community Affairs* Did Not Alter The Express Language Of Title VII.

The City of Boston has recently argued that Title VII's well-established burden-shifting framework has been altered by last year's United States Supreme Court decision in the fair housing context. *See Smith v. City of Boston*, No. 12-10291 WGY 2015 W.L. 7194554, N.43 (D. Mass, Nov. 11, 2015). This misinterpretation of *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (U.S. 2015), and the First Circuit's

analysis of this case in *Abril-Rivera v. Johnson*, 806 F.3d 599 (1st Cir. 2015), could lead one to mistakenly conclude that the second and third prongs of the *Griggs* test have been reversed. The Court in *Abril-Rivera*, interpreting *Inclusive Communities*' possible relevance to the employment context, stated that in Title VII disparate impact cases, "before rejecting a business justification . . . a court must determine that a plaintiff has shown that there is 'an available alternate . . . practice that has less disparate impact and serves the [entity's] legitimate needs." *Abril-Rivera*, 806 F.3d at 606-07 (quoting *Inclusive Communities Proj., Inc.*, 135 S.Ct. at 2518). However, *Inclusive Communities* did not alter the burden of proof in Title VII cases. If *Abril-Rivera* were read to alter the statutorily provided order of proof, as the City has in other cases urged, this would contravene the explicit language of Title VII. *See* 42 U.S.C. § 2000e-2(k)(1)(a).

One of Congress's primary goals in amending Title VII in 1991 was to specify both who bears the burden of proof, and the order of proof in disparate impact cases. Congress could not have been more specific. Title VII's subsection regarding the burdens of proof in disparate impact reads as follows:

> (k) Burden of proof in disparate impact cases.
> (1)(A) An unlawful employment practice based on disparate impact is established under this title only if--

> (i) a complaining party demonstrates[3] that a respondent uses 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; or
> **(ii)** the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(a).

Nothing in the text of *Inclusive Communities* indicates that the Supreme Court intended to re-write Title VII disparate impact as it stands after the Civil Rights Act of 1991. This point is emphasized by the fact that *Inclusive Communities Project, Inc.*, 135 S.Ct. at 2518 cites *Ricci v. DeStefano*, 557 U.S. 557, 558 (2009), which directly contradicts the claim that the prongs have shifted. Specifically, the cited portion of *Ricci* states that:

> An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.

Ricci, 557 U.S. at 578 (internal citations omitted).

[3] In the 1991 Amendments to Title VII of the Civil Rights Act of 1964 "the term 'demonstrates' means meets the burdens of production and persuasion." 42 USCS § 2000(m). Congress used the word "demonstrates" when referring to the burdens under prong one and two, but when referring to lesser discriminatory alternatives, used the language "demonstration." For the purposes of this brief we assume "demonstration" takes on the same meaning as "demonstrates."

The court in *Inclusive Communities* noted, "To be sure, the Title VII framework may not transfer exactly to the fair housing context." *Inclusive Communities*, 135 S.Ct. at 2523. It is also reasonable to conclude that, even if the burden-shifting framework has been changed in the fair housing context, this framework "may not transfer exactly" to Title VII. *Id.* This is supported by the fact that Congress has meticulously codified the burden-shifting framework in the statute.

Finally, altering the order of the second and third prong flies in the face of reason. If an employment practice has no business necessity justifying the practice, then why should a lack of an alternative means prevent a court from finding a violation of Title VII? This, in addition to the extensive legislative history and jurisprudence surrounding Title VII, indicates that nothing in *Inclusive Communities* should be seen as altering the nature of disparate impact analysis outside the context of the Fair Housing Act.

II. THERE ARE ALSO CONTESTED ISSUES OF FACT REGARDING WHETHER THE PLAINTIFFS PROVIDED A LESS DISCRIMINATORY ALTERNATIVE.

Even if it is determined that hair drug tests are job related and consistent with business necessity, a reasonable factfinder would be able to weigh the evidence and determine that "alternative employment practices exist." 42 U.S.C. § 2000e-2(k)(1)(A)(ii). After an employer makes the showing of business necessity

required by the *Griggs* test, the burden shifts to the plaintiff to make a demonstration that there is an "'alternative employment practice . . . without a similarly undesirable racial effect," which "also serve[s] the employer's legitimate interest" to succeed in their claim. *Albemarle Paper Co.*, 422 U.S. at 425; *see also*, 42 U.S.C. § 2000e-2(k)(1)(A)(ii). The District Court erred when it found that the plaintiffs did not demonstrate a less discriminatory alternative. This was a determination that should have been made at trial and not on summary judgment.

The proper analysis is not whether the alternative has *eliminated* disparate impact, but only whether the alternative is *less* discriminatory. *Albemarle Paper Co.*, 422 U.S. at 425. As discussed, in determining whether the plaintiffs demonstrated there were lesser discriminatory alternatives, the District Court failed to view the evidence in the light most favorable to plaintiffs to determine whether there was a genuine issue for trial. Instead, the judge mistakenly departed from the summary judgment standard and chose to weigh the limited evidence presented before it rather than having these issues developed fully at trial.

The plaintiffs in Petitioner-Appellant Brief at 54-59 have discussed in detail the facts from which a reasonable juror could conclude that plaintiffs had demonstrated a lesser discriminatory alternative, and *Amici* will not repeat those points. Instead, *Amici* highlight just two examples of this error. These examples are not being presented to demonstrate their merit but to illustrate that the District

Court judge should not have determined these alternatives were meritless without a fully developed record.

The plaintiffs introduced two procedures that were less discriminatory alternatives to hair drug tests: 1) urinalysis and 2) a hybrid test where hair drug testing and urinalysis are utilized. The plaintiffs' experts, as well as the City of Boston's experts, all recognize that urinalysis is predictive of important elements of work behavior. Petitioner-Appellant Brief at 57. (noting that it "is undisputed that urinalysis has a longer history of use and validation than the hair drug test"). Because of its predictability and lack of racial bias, the police department could have continued to use urinalysis to detect drug use among prospective and current employees without disparately impacting black police officers.

In his analysis of the urinalysis alternative, the judge disagreed with substituting urinalysis as a sufficient alternative and stated "there is undisputed evidence in the record . . . that hair testing and urinalysis are not equally valid alternatives, particularly when the benefits and burdens of urinalysis are considered." *Jones,* 118 F. Supp. 3d at 442 (citing *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality)) ("Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."). First, there is no meaningful discussion of

what "undisputed evidence" would compel a factfinder to find that urinalysis was not a lesser discriminatory alternative. This is particularly troubling in light of the fact that the City of Boston used urinalysis in the past, and that the experts for both the City of Boston and for the plaintiffs agreed that there is less racial impact in urinalysis testing. *Jones*, 118 F. Supp. 3d at 441. Not only did the District Court weigh evidence in its summary judgment analysis, but it erroneously relied on *Watson's* plurality analyzing *Griggs*, instead of relying on the *Griggs* opinion and the standard set forth within. *Id.* at 442.

The second alternative presented, the hybrid method, would allow the continuation of the hair drug test, but also require confirmation of cocaine ingestion through urinalysis. The Massachusetts Civil Service Commission stated that hair testing alone is not enough to terminate an employee. The hybrid method would allow confirmation of drug use before a police officer would either be terminated or face punitive measures. The District Court continued to inappropriately weigh the evidence without viewing the facts in the light most favorable to the plaintiff when evaluating the hybrid method alternative. The District Court explained, "Dr. Kidwell's only assessment of the equal validity of his proposal is a statement that '[t]he cost of such a policy could be even less than the current hair testing program, and yet provide even a better deterrent to drug use." *Id*. at 445. This speculative and unsupported endorsement of a hybrid

program of uncertain dimensions does not provide the 'extensive data' from which a reasonable factfinder could conclude that this is an equally valid alternative." *Id.* By stating that the plaintiffs did not provide enough "extensive data" for a factfinder to find the hybrid method to be an equally valid alternative, the District Court suggested that his ruling and analysis required the same type of data that a trier of fact would require to find the truth of the matter. At summary judgment, the court should not weigh whether there is extensive evidence, but rather whether there is sufficient evidence from which a factfinder could conclude that the plaintiffs carried their burden. The court's role is to determine if there is a genuine issue that is sufficient to go to trial. It is clear that this step was missed in the District Court's analysis.

The plaintiff prevails if the employer has refused to adopt a less discriminatory alternative employment practice. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii). Because the plaintiffs here have demonstrated that the City of Boston did not adopt the less discriminatory employment practices which would achieve the employer's same legitimate interest, a reasonable factfinder should ultimately determine if the plaintiffs' evidence is sufficient after the record is fully developed at trial. Although the District Court found that the plaintiffs did not present any "compelling evidence" that the City of Boston refused to implement alternative employment practices, this is up to the factfinder to establish at trial.

See Jones, 118 F. Supp. 3d at 446. The plaintiff does not need to provide "compelling evidence," *Id.*, at summary judgment, but only evidence from which a reasonable factfinder could conclude that the employer has a suitable alternative to meet its needs and has failed to make use of that less discriminatory method of achieving its business necessity.

III. TO ACHIEVE WHAT CONGRESS INTENDED, DISPARATE IMPACT CLAIMS SHOULD BE ANALYZED CONSISTENT WITH THE GOALS OF TITLE VII AND IN A MANNER THAT RECOGNIZES THE VITAL ROLE TITLE VII PLAYS IN ATTEMPTING TO ACHIEVE EQUAL EMPLOYMENT OPPORTUNITIES.

Following the assassination of Dr. Martin Luther King, Jr., Senator Brooke warned Congress of the need to prevent America's impending drift toward a racially segregated—separate and unequal—society. 114 Cong. Rec. S4173-77, at 4174 (Apr. 17, 1968) (statement of Sen. Brooke). Attempting to address that reality, he introduced a bill that would remove Title VII's state and local government exemption.[4] *Id.*

[4] The "state and local government exemption" refers to the absence of Title VII application and enforcement in state and local government employment prior to the amendments to the Civil Rights Act that Congress adopted in 1972. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 701 (July 2, 1964) (defining "employers").

The importance of removing the state and local government exemption to more effectively implement Title VII's goals was echoed throughout Congress.[5] Indeed, Congress recognized that the obstacles presented by the state and local government exemption were "particularly acute in those governmental activities which are most visible to minority communities (notably education, **law enforcement**, and the administration of justice) with the result that the credibility of the government's claim to exist 'for all the people . . . by all the people' is called into serious question." S. Rep. No. 91-1137, at 7 (1970) (statement of Sen. Williams) (emphasis added).

Congress knew that employment practices used by state and local police departments had a disparate impact on minority applicants.[6] In response, Congress amended Title VII through the Civil Rights Act of 1972, and explicitly defined "persons" to include "governments, governmental agencies, [and] political

[5] *See, e.g.*, 118 Cong. Rec. S3460-64 (Mar. 6, 1972) (statement of Sen. Williams); S. Rep. No. 92-415, at 10 (1971) (statement of Sen. Williams); *Hearings on the EEOA of 1971*, Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92d Cong. 454 (1971) (statement of Edward Taylor Anderson, Legislative Associate, Common Cause); H.R. Rep. No. 92-238, at 21-22 (1971) (statement of Rep. Hawkins); H.R. Rep. 91-1434, at 17 (1970) (statement of Rep. Perkins); S. Rep. No. 91-1137 (1970) (statement of Sen. Williams); 116 Cong. Rec. E7656-64, at 1301 (daily ed. Aug. 14, 1970) (statement of Rep. Mikva); 115 Cong. Rec. S6239-41, at 1788 (June 12, 1969) (statement of Sen. Brooke); 114 Cong. Rec. H2899-00, 2080-81 (daily ed. Apr. 22, 1968) (statement of Rep. Ottinger); *see also Conn. v. Teal*, 457 U.S. 440, 449 (1982).

[6] The Report noted that disparate impact in police departments relentlessly continued beyond the recruitment process. Sen. Rep. No. 91-1137, at 83 ("Reports of discriminatory treatment in work assignments, promotions, and personal interaction were more frequent in the police and fire departments than in any other area of government studied by the Commission.").

subdivisions." 42 U.S.C. §2000e(a). By bringing state and local governments under the purview of the Act, Congress attacked discriminatory employment practices where they were traditionally most pervasive. H.R. Rep. No. 81-1434, at 9 (Aug. 21, 1970) (statement by Rep. Perkins); 116 Cong. Rec. E7656-64, at 1301 (daily ed. Aug. 14, 1970) (statement of Rep. Mikva).

When Congress passed the 1972 amendments, it recognized that state and local law enforcement officers hold a unique position in the public eye. S. Rep. No. 91-1137, at 7 (1970) (statement of Sen. Williams). Having equitable opportunities for minorities in police departments tasked with protecting and serving communities fulfills the promise of government "by all the people, for all the people." *Id.* at 7 (statement of Sen. Williams). While our country has come a long way in racial equality since 1972, the racially charged events of the past years have brought back to the forefront a discussion about diversity in police forces. With this in mind, it is especially important that the courts apply a vigorous disparate impact analysis when analyzing the hair drug testing used by the City of Boston.

Legislative history demonstrates that Congress intended Title VII to apply to state and local government employers, particularly police departments, in order to remedy the problematic discrimination that persisted during the 1960s and 1970s and still reverberates today. On this point, there should be no debate. The historical

context illustrates the evils that Title VII was intended to address and must inform the court's application of disparate impact analysis.

CONCLUSION

The District Court erred in applying the *Griggs* standard by denying the parties the opportunity to fully develop their case with expert and factual testimony before making findings on disputes of material fact. When seeking to apply the *Griggs* standard in a summary judgment proceeding, the trial court must remember its role as finder of a genuine issue, reserving its role as finder of fact until after the record has been completely established and all parties have presented the entirety of their case. Failing to do so will effectively eliminate disparate impact as a viable means of attacking systemic discrimination in the workplace at the risk of perpetuating the continued use of employment practices that have a disparate impact but are not a business necessity.

For all the reasons discussed above, the decision below should be vacated and remanded.

Respectfully submitted this 11 day of March, 2016.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains[6,425] words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed R. App P. 32(a)(5) and the type of style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally space typeface using [*Microsoft Word 2010*] in [*14pt times new Roman*].

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of March, 2016, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court and served on counsel using the CM/ECF system.

I further certify on the 11th day of March, 2016, I caused the required copies of the Brief of *Amici Curiae* to be filed with the Clerk of the Court, via United Parcel Service Next Day Delivery, and served upon counsel for the Appellants and Appellees, at the addresses below.

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