19-2308

United States Court of Appeals

FOR THE SECOND CIRCUIT

GEORGE MANDALA and CHARLES BARNETT,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

NTT DATA, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of New York

BRIEF OF AMICI CURIAE
YOUTH REPRESENT, NATIONAL EMPLOYMENT LAW PROJECT,
AND TWENTY-THREE OTHER PUBLIC INTEREST ORGANIZATIONS
IN SUPPORT OF
PLAINTIFFS'-APPELLANTS' PETITION FOR EN BANC AND PANEL REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), corporate Amici state that they are each tax-exempt non-profit corporations with no parent corporations and that no publicly held corporation owns ten percent or more of the stock of any Amici.

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IDENTITY & INTEREST OF AMICI CURIAE

Amici curiae are nonprofit organizations that advocate for racial equity and access to job opportunities for people with arrest and conviction records. Amici are twenty-five nonprofit organizations from throughout the country with decades of collective experience representing clients struggling to overcome the far-reaching collateral consequences of a criminal record resulting in lost employment opportunities and other barriers to re-entry. Eleven of Amici are based in the states of the Second Circuit. Amici's missions, in part, are to see that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, ("Title VII") is interpreted to ensure workers of color are able to vindicate their hard-won civil rights in court.

Amici submit this brief not to repeat arguments made by the parties, but to highlight the implications of the panel majority's opinion for Black working people in this Circuit. Absent rehearing, the panel majority's opinion would undermine Amici's longstanding policy goals, and those of close partners in community-based advocacy organizations across the Second Circuit.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), Amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

Youth Represent is a non-profit legal organization whose mission is to ensure that young people affected by the criminal system are afforded every opportunity to reclaim lives of dignity, self-fulfillment, and engagement in their communities. Through direct client representation, as well as state and federal litigation and policy advocacy, Youth Represent ensures that the lived experience and rights of those with criminal system involvement is both understood and protected.

The **National Employment Law Project** (NELP) is a non-profit legal research and advocacy organization with over 50 years of experience advocating for equal access to quality jobs for all U.S. working people. In important part, NELP works closely with allies throughout the Second Circuit and across the country to advance the employment rights of people with arrest and conviction records. A decision denying the Petition for En Banc and Panel Rehearing filed by Plaintiffs-Appellees will directly undermine NELP's mission by allowing a decision to stand that will block access to the courts by many workers of color facing race discrimination in hiring. Headquartered in New York, NELP has previously litigated and participated as amicus in numerous cases addressing the rights of workers with arrest and conviction records under Title VII.

Descriptions of the remaining individual Amici in this case are included in the motion Amici file along with this brief.

SUMMARY OF ARGUMENT

The heightened pleading standard to which the panel majority held Mr. Mandala and Mr. Barnett will create a significant barrier for countless other Black jobseekers seeking to enforce their civil rights. Unable to plead information in the sole possession of the employer prior to discovery, numerous otherwise-qualified workers who were denied jobs pursuant to an employer's blanket policy against hiring people with conviction records will find their attempts to litigate legitimate Title VII claims stymied. Pleading race disparities in the employer's specific applicant pool is not only near-impossible, but also unnecessary, given that national and state data demonstrates stark race disparities throughout the criminal legal system.

Following tireless advocacy by Black leaders and their allies, Title VII was enacted to help realize the moral imperative that all people deserve equal opportunity to work and prosper regardless of their race. As Black job applicants continue to face racism in hiring, they justly appeal to the courts to enforce hard-won Title VII rights. George Mandala and Charles Barnett, like all jobseekers with records,[2] deserve a chance to prove their claims.

[2] While this case was brought by two Black workers, the panel majority's opinion will also impact Latinx workers, who are over-represented in the criminal legal system. People of Latinx descent make up 16% of the general population but account for 19% of the U.S. incarcerated population. Leah Sakala *Breaking Down*

Amici's brief addresses two fundamental issues with the panel majority's opinion that warrant rehearing. First, the panel majority's opinion will allow employers in the Second Circuit to maintain discriminatory hiring policies that will disproportionately shut Black workers out of critical jobs. Second, the panel majority's opinion creates a heightened pleading standard that few plaintiffs will be able to meet and is inconsistent with longstanding precedent in this Circuit. This has profound consequences for disparate impact litigation in the Second Circuit.

Mass Incarceration in the 2010 Census, Prison Pol'y Initiative, (2014), https://www.prisonpolicy.org/reports/rates.html.

ARGUMENT

I. Blanket hiring bans against people with conviction records disproportionately harm Black workers and exacerbate existing inequities.

Nearly one in three U.S. adults, disproportionately Black people, have an arrest or conviction record.[3] In every state, Black people are incarcerated at over double the rate of white people—on average, at over five times the rate, and, in several states, at over ten times the rate.[4] These profound racial disparities[5] cannot be attributed to differences in rates of offending.[6] For example, studies show that white and Black populations use drugs at similar rates, yet Black people are arrested and incarcerated for drug offenses at much higher rates.[7]

Blanket hiring bans undermine the job prospects of people with records and the stability of their families and communities. Those bans also contravene laws across the Second Circuit that prohibit categorical bans on hiring people with criminal records.[8]

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[3] Anastasia Christman & Michelle Natividad Rodriguez, Nat'l Emp't Law Project, *Research Supports Fair Chance Policies* (2016), https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf.

[4] Ashley Nellis, The Sentencing Project, *The Color of Justice* 3 (2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[5] For additional statistical insights, please reference Professor Megan Kurlychek's amicus brief.

[6] Nellis, *supra*, at 9.

[7] *Id.* at 10.

[8] *See, e.g.*, N.Y. CORRECT. LAW § 753(a); CONN. GEN. STAT. § 46a-79; VT. STAT. ANN. tit. 21 § 495j.

Quality employment is critical to successfully rejoining one's community after contact with the criminal legal system. Studies show that employment is the most important influence on decreasing recidivism,[9] and that higher wages translate to lower recidivism.[10]

Given that nearly half of U.S. children have at least one parent with an arrest or conviction record,[11] families depend on the employment of people with records. Children of color are disproportionately impacted when parents with records cannot find employment: one in nine Black children have an incarcerated parent as compared with one in fifty-seven white children.[12] Employers that automatically reject people with records thus deprive many Black children of resources and the chance at economic mobility.[13]

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[9] Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind*, 28 JUST. Q. 382, 397–98 (2011) (finding nearly twice as many employed people with records avoided another incident as those without jobs).

[10] Christy Visher, et al., Urban Inst., *Employment After Prison* 8 (2008), https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF.

[11] Rebecca Vallas, et al., Ctr. for Am. Progress, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children* 1 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf.

[12] Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 4 (2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.

[13] Incarceration history more than doubles the likelihood that a man in the lowest quintile of earners will remain there twenty years later. Black children born into the lowest quintile are nearly twice as likely to remain there as white children. Richard

Allowing employers to automatically exclude people with records from employment exacerbates existing inequities. While Black organizers and their allies are leading efforts to reform the criminal legal system,[14] such changes take time, and millions of people with records need hiring free from race discrimination now. Black workers, already facing higher unemployment than white workers,[15] have been hardest hit by joblessness during the COVID-19 pandemic.[16] As these workers struggle to find new employment, they deserve a fair chance to be judged by their talents and not automatically screened out based on conviction history.

II. The panel majority's heightened pleading standard will further impede meritorious Title VII claims brought by Black workers with records.

The panel majority's opinion departs from Second Circuit disparate impact jurisprudence by establishing a heightened pleading standard that few plaintiffs will

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V. Reeves & Christopher Pulliam, Brookings, *No Room at the Top: The Stark Divide in Black and White Economic Mobility* (2019), https://www.brookings.edu/blog/up-front/2019/02/14/no-room-at-the-top-the-stark-divide-in-black-and-white-economic-mobility/.

[14] *See, e.g.*, M4BL, 2020 Policy Platform, https://m4bl.org/policy-platforms/ (last accessed Oct. 4, 2020).

[15] Valerie Wilson, Econ. Pol'y Inst., *Black Unemployment is At Least Twice as High as White Unemployment at the National Level and in 14 States and the District of Columbia* (2019), https://www.epi.org/publication/valerie-figures-state-unemployment-by-race/.

[16] *See, e.g.*, Caroline Modarressey-Tehrani, *Women of Color Hardest Hit by Pandemic Joblessness*, NBC NEWS, Aug. 1, 2020, https://www.nbcnews.com/news/us-news/women-color-hardest-hit-pandemic-joblessness-n1235585.

be able to satisfy. The panel majority held that general population statistics, like those relied on by Plaintiffs, are insufficient—plaintiffs must also plead specific information showing that broad race disparities are reflected in an employer's qualified applicant pool. Panel Majority at 17–21. However, before discovery, plaintiffs lack access to information necessary to determine who comprises the employer's applicant pool and describe its racial composition. The panel majority's newly created requirement will inhibit the enforcement of Title VII and allow hiring practices with a racially disparate impact to persist.

The panel majority's opinion will require plaintiffs to plead information not available to them before discovery. Specifically, plaintiffs will be unable to examine the characteristics of the employer's qualified applicant pool without access to detailed information about the employer's minimum hiring criteria. Plaintiffs will need answers to such questions as "what other positions [the employer] offers, what the qualifications for those positions might be, or even whether [the employer] applies the same alleged hiring policy to them." Dissent at 17 n.8. But that information is unavailable to plaintiffs at the pleading stage because it is "particularly within [the employer's] knowledge and control." *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (Sotomayor, J.) (finding a Fair Housing Act discrimination claim sufficiently pleaded despite not containing "specific facts," citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

If allowed to stand, the panel majority's opinion will make it much harder for people with records to defend their statutorily guaranteed civil rights. For example, Nancy[17]—a Black Latina client represented by Amicus Youth Represent—was enrolled in a workforce development program that placed her in a competitive software engineering internship. Nancy excelled over the course of her six-month internship, so her manager encouraged her to apply for a full-time position. She was ultimately offered a job paying $60,000 a year—a life-changing salary for her and her family. Even though the company did not check Nancy's conviction record before her internship, it required a background check before hiring her. The resulting conviction history report revealed a years-old conviction for a theft offense unrelated to the position. Despite her extremely successful internship experience, and in the face of significant evidence of rehabilitation provided by Nancy, the company revoked her offer.

The panel majority's opinion would prevent Nancy from bringing a Title VII challenge to the company's policy of denying jobs to people with conviction records. While Nancy appeared to satisfy the company's qualifications—with the exception of her conviction—she is not privy to the minimum educational or technical qualifications for the position. Under the panel majority's standard, without that information, Nancy's claim would not survive a motion to dismiss. Nancy is not

[17] The client's name has been changed to protect her identity.

alone. The consequences of this heightened standard are far-reaching and could result in illegal policies going unchallenged because individuals like Nancy will likely be unable to plead allegations showing that the employer's policy resulted in the exclusion of a disproportionate number of Black applicants from the hiring pool.

The panel majority's heightened pleading standard will render it much harder for Black workers with records to fully enforce their hard-won civil rights under Title VII, contravening Congress's intent that the Federal Rules of Civil Procedure eliminate procedural barriers to justice.[18] Rule 8 requires merely a "short and plain statement of the claim showing that the pleader is entitled to relief."[19] While a complaint must satisfy the *Twombly*/*Iqbal* plausibility standard, the U.S. Supreme Court has continued to emphasize that "heightened fact pleading of specifics" is not required—"only enough facts to state a claim to relief that is plausible on its face." *See Twombly*, 550 U.S. at 570 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002)); *Hu v. City of New York*, 927 F.3d 81, 97 (2d Cir. 2019). The panel majority's opinion requiring pleading of information unavailable prior to discovery

[18] Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal, 60 DUKE L. J. 1, 3–4 (2010) ("[T]he Federal Rules reshaped civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits based on a full disclosure of relevant information."); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 515 (2017) ("Congress focused on workers and their ability to litigate in deliberating over the Rules—a fact that should bear upon how the background purposes of the Rules are understood.").

[19] FED. R. CIV. P. 8(a)(2).

effectively requires "heightened fact pleading of specifics" that will prevent litigants with records from bringing plausible disparate impact claims, contrary to Rule 8 and Supreme Court precedent.

CONCLUSION

The panel majority's opinion denies Plaintiffs the opportunity to vindicate their civil rights because Plaintiffs cannot plead specific facts that are wholly under Defendant's control. In doing so, the panel majority's opinion imperils Title VII's promise, erecting an obstacle that will prevent many workers with records from pursuing hiring discrimination claims in the Second Circuit.

For the reasons above, Amici respectfully urge this Court to grant the petition for rehearing en banc or reargument.

Respectfully submitted,

Dated: October 13, 2020
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(b)(4) because it contains 2,300 words, excluding the items exempted under Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: October 13, 2020
New York, New York

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