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Susan Carle

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

APPEAL NO. 20-1691

BRUCE SMITH; PAUL JOSEPH; MARTIN JOSEPH; KIM GADDY;
BRIAN KEITH LATSON; LEIGHTON FACEY; MARWAN MOSS;
KENNETH SOUS; WILLIAM WOODLEY; LATEISHA ADAMS
Plaintiffs-Appellees,

JOHN M. JOHNSON; ROBERT TINKER
Plaintiffs,

v.

CITY OF BOSTON, MASSACHUSETTS
Defendant-Appellant

On Appeal from the United States District Court for the District of Massachusetts
Case No. 12-cv-10291-WGY
Honorable William G. Young

**BRIEF OF AMICUS CURIAE PROFESSOR SUSAN CARLE IN SUPPORT
OF THE PLAINTIFFS
ARGUING FOR AFFIRMANCE**

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(3), undersigned counsel for amicus curiae has concurrently filed a Motion for Leave to File the foregoing amicus brief.

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(4)(E), undersigned counsel for amicus curiae states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

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STATEMENT OF IDENTIFICATION AND INTEREST OF AMICUS CURIAE

This brief is being submitted by a law professor, Susan D. Carle, with more than 30 years of expertise in federal employment antidiscrimination law, and especially the history and purposes of disparate impact law. She submits this brief to share her expertise with this Court. She is currently Professor of Law and Vice Dean of American University Washington College of Law (organizational affiliation is offered for identification purposes only).

Dean Carle is a leading national expert on disparate impact law, having practiced, studied, and written for several decades about the history, purposes, and precedents under 42 U.S.C. §2000e-2(k)(1)(A), which codifies the standards for evaluating disparate impact claims in employment antidiscrimination cases filed under Title VII of the Civil Rights Act of 1964, as amended. She is a leading national expert on the long history of the civil rights movement from which the disparate impact doctrine arises. Her book on this topic, *Defining the Struggle: National Organizing for Racial Justice* (Oxford University Press, 2014), won the 2014 award of the Organization of American Historians for “the best book by a historian on the civil rights struggle from the beginnings of the nation to the present.” She is the author of more than 20 articles on civil rights law and the civil rights movement, a number of which have also won awards as detailed on her abridged CV submitted as an attachment to this brief.

Dean Carle has also had more than a decade of practice experience in a variety of settings. She argued cases in numerous federal courts of appeals and drafted briefs to the federal appellate courts and the U.S. Supreme Court while serving as an Appellate Attorney in the Civil Rights Division of the U.S. Department of Justice during the President George H.W. Bush Administration. She also worked for almost a decade at one of the nation's leading employment law firms, Bredhoff & Kaiser, in Washington D.C. After joining academia full time in 1997, she undertook extensive and balanced scholarship on the history, purposes and doctrines associated with Title VII. She has taught employment antidiscrimination law, employment law, labor law, and constitutional law for almost three decades as a law professor. Her abridged CV reflecting these activities is attached as an appendix. She has received no compensation from any source to fund preparation of this brief; rather, she has prepared this amicus brief in accordance with her commitment to pro bono professional service.

QUESTIONS PRESENTED

1. Whether the district court correctly applied the well settled standards of this Court, federal law, and the history and purposes of 42 U.S.C. §2000e-2(k)(1)(A) when it concluded, on the basis of its extensive and careful findings of fact, that the City of Boston’s 2008 exam for police lieutenants had a disparate impact and lacked the requisite validity under the Civil Rights Act of 1964, as amended?
2. Whether the judgment under review in this case, involving the validity of the 2008 promotion procedure for candidates for the position of police **lieutenant**, properly should differ from the outcome in this Court’s prior case, *Lopez v. City of Lawrence*, 823 F.3d 102 (1st Cir. 2016) (“*Lopez II*”), which examined the validity of the 2008 promotion procedure for candidates for the lower supervisory position of police **sergeant**?
3. Whether the district court properly entered judgment for plaintiffs without requiring plaintiffs to demonstrate an “alternative business practice” under 42 U.S.C. §2000e-2(k)(1)(A)(ii)?

SUMMARY OF ARGUMENT

This important case stands in a long line of cases that civil rights lawyers and the U.S. Department of Justice have filed over several generations with the goal of desegregating and creating equal employment opportunity—as well as appropriate diversity and community representativeness—in police and other emergency and public services departments in cities and municipalities across this country. Each of those cases has required a deep, careful, and fact-specific analysis of the promotion procedures for specific departments and specific positions within particular departments.

Thus, what is at issue here, in the wake of renewed racial unrest and urgent calls for greater fairness in policing in the current period, is the legacy of America’s long yet still incomplete efforts to advance the most meritorious candidates into leadership positions within the nation’s police departments. Disparate impact analysis avoids the need for the finger pointing and blaming involved in accusations of invidious or “intentional” discrimination, as required under disparate treatment analysis. Disparate impact doctrine has long, sensible, historical roots in the pro-business approaches to equal employment opportunity of moderate Republican civil rights advocates in the 1940s. In its codification of that doctrine in 42 U.S.C. §2000e-2(k)(1)(A), Congress spoke clearly to the appropriateness of using disparate impact law as a tool to ensure fair opportunity for all in police departments.

The rules Congress set forth in 42 U.S.C. §2000e-2(k)(1)(A) require careful, fact-specific review of employers’ hiring and promotion practices to ensure the removal of “built in headwinds” to advancement on the basis of race—headwinds that continue to exist to this day due to a long national history of racial exclusion in employment. *Griggs v. Duke Power Co.*, 404 U.S. 424, 433 (1971). Indeed, as this Court recently held in affirming a different district court’s judgment in *Lopez v. City of Lawrence, Massachusetts*, No. 07–11693–GAO, 2010 WL 2429708 (D. Mass., June 11, 2010) (“*Lopez I*”), a district court’s factual findings as to the disparate impact and validity of a promotion practice challenged under 42 U.S.C. §2000e-2(k)(1)(A) should not be disturbed on review except in the case of “clear error,” *Lopez II*, 823 F.3d at 144, which the district court’s meticulous opinions below, in *Smith v. City of Boston*, 460 F. Supp. 3d 51 (D. Mass. 2020) (“*Smith III*”), *Smith v. City of Boston*, 267 F. Supp. 3d 325 (D. Mass 2017) (“*Smith II*”), and *Smith v. City of Boston*, 144 F. Supp. 3d 177 (D. Mass. 2015) (“*Smith I*”), most certainly do not evince. As the district court held, the City’s reliance on a knowledge test for rank ordering the 2008 candidates for promotions to police lieutenant constitutes an illegal practice under Title VII because the City failed to establish the validity of that exam *in the specific circumstance of promotions to lieutenant*. In contrast to the promotions to sergeant at issue in *Lopez II*, assessment for promotions to lieutenant

required assessment of skills and abilities in areas a knowledge test could not measure.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED THE WELL SETTLED STANDARDS OF THIS COURT, FEDERAL LAW, AND THE HISTORY AND PURPOSES OF 42 U.S.C. §2000e-2(k)(1)(A) WHEN IT CONCLUDED, ON THE BASIS OF ITS EXTENSIVE AND CAREFUL FINDINGS OF FACT, THAT THE 2008 LIEUTENANTS EXAM HAD A DISPARATE IMPACT AND LACKED THE REQUISITE VALIDITY UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED

A. The Birth of the Disparate Impact Concept in Pro-Business Employment Antidiscrimination Approaches between the 1940s and 1960s

The origins of the federal statutory provisions codified in 42 U.S.C. §2000e-2(k)(1)(A) stretch far back in history, to the largely forgotten work of pro-business civil rights advocates in the 1940s. In that period, disparate impact analysis had its genesis in the moderate, voluntarist approaches to racial progress in employment of the more conservative wing of the nascent civil rights movement. *See* Susan D. Carle, *A Social Movement History of Disparate Impact Analysis*, 63 Fla. L. Rev. 251, 275–82 (2011). As discussed at much greater length in the article just cited, long before passage of broad national employment antidiscrimination legislation, moderate, pro-business (*i.e.*, Republican) civil rights leaders, such as then-president of the National Urban League (NUL) Elmer Anderson Carter, sought to open fair employment opportunities to all regardless of race by focusing on identifying and

encouraging best business practices rather than accusing employers of invidious discrimination. *See id.* at 280, n. 174. Under the views of Carter and other civil rights advocates like him, the best strategy for opening employment opportunities to all regardless of race was to promote greater business efficiency, rationality, and effectiveness in hiring and promotion policies. They thus encouraged employers to examine traditional hiring and promotion practices and reform those that both posed hurdles to employment opportunities on the basis of race and were at the same time irrational, outmoded, or otherwise contrary to effective business practices. *Id.*

This remains the core, simple purpose of disparate impact law as codified in Title VII of the Civil Rights Act of 1964 as amended. As relevant here, a promotion practice fails to comport with federal antidiscrimination law when, first, those subject to it establish that it “causes a disparate impact on the basis of race, color, religion, sex, or national origin,” as plaintiffs have shown that use of the 2008 promotion exam for lieutenants does in this case; and, second, the employer “fails 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). Here, the district court has found for the plaintiffs under this second prong as well, a finding subject to reversal for clear error only. *Lopez II*, 823 F.3d at 144.

In short, the important, albeit sometimes overlooked, historical insight underlying disparate impact law is that it encourages merit-based promotion and best

business practices in a way that advances racial justice without requiring that anyone be accused of invidious racism *or* that less meritorious candidates be advanced over more meritorious ones. The goal of disparate impact analysis has always been to identify and implement best business practices so that employers select meritorious persons for jobs regardless of race, thus eliminating the many vestiges of institutional racism that still operate to hold back persons of color in employment markets for no “good” or business-justified reason. To put it another way, as scholars of disparate impact have long pointed out, disparate impact analysis prohibits the use business practices that pose obstacles on the basis of race (or other protected characteristics as defined in federal employment antidiscrimination statutes) where more meritorious employment decisions can be made through the use of more effective practices.¹

As the pro-business civil rights advocates who first pioneered this concept recognized, a great advantage of disparate impact law is that it eliminates the need

¹ See, e.g., Lani Guinier & Susan Sturm, Op-Ed., *Trial by Firefighters*, N.Y. Times (July 10, 2009) www.nytimes.com/2009/07/11/opinion/11guinier.html (observing that pen-and-paper tests are not good predictors of later performance in emergency services jobs); Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 Or. L. Rev. 253, 258 (2003) (observing that “disparate impact . . . foster[s] the creation and implementation of personnel practice which will insure that business accurately evaluates its applicants and employees”); cf. Martha Minnow, *Making All the Difference: Inclusion, Exclusion, and American Law* 7–9 (1990) (noting that policies of inclusion have many collateral policy benefits).

for finger-pointing, blaming, and accusations of invidious or “intentional” racism. This continues to be an important aspect of disparate impact law in sensitive contexts such those arising from exclusive reliance of pen-and-paper “knowledge” exams to establish rank ordering for higher-level public service leadership positions. It is well known that exclusive reliance on pen-and-paper tests will tend to produce disparate impact on the basis of race, for complex reasons including the legacy of institutional and structural racism; continuing, stark race-based disparities in educational opportunities;² and the psychological effects of stereotype threat and related phenomena, which pose barriers to successful performance for outsider candidates in high-stakes written testing, as documented in a voluminous literature pioneered by Claude Steele and other expert psychologists.³

Given what this expert literature shows, the question arises as to why some police and other public service departments continued for so long to place virtually exclusive reliance on high-stakes pen-and-paper testing in order to rank order

² The U.S. Department of Education collects these statistics at its Civil Rights Data Collection website, <https://www2.ed.gov/about/offices/list/ocr/data.html>.

³ See, e.g., S. Liu et al., *Effectiveness of Stereotype Threat Interventions: A Meta-Analytic Review*, J. Applied Psych. (advance online publication) <https://doi.org/10.1037/apl0000770>; American Psychological Association, *Stereotype Threat Widens Achievement Gap*, (July 15, 2006) <https://www.apa.org/research/action/stereotype>; Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. Personality & Soc. Psych. 797 (1995), <https://doi.org/10.1037/0022-3514.69.5.797>.

candidates for leadership positions that require essential skills and abilities other than paper-based knowledge. Again the reasons are complex. Some states require such testing under state laws, *see, e.g., Smith I*, 144 F. Supp. 3d at 183 (noting that such civil service laws operated in this history of this case). Civil service employee organizations, whose traditional members were well served by these selection devices, also put their weight behind them. Many unionized public service departments operate under union contracts that require pen-and-paper selection practices. Current doctrine holds that knowledge of the disparate impact of employment practices does not equate to intent to cause disparate treatment in adopting and retaining these practices. *But see* Mark S. Brodin, *Discriminatory Job Knowledge Tests, Police Promotions, and What Title VII Can Learn from Tort Law*, 59 B.C. L. Rev. 2319, 2363–71 (2018) (arguing that courts should find intentional discrimination where diverse impact is foreseeable). Nevertheless, it cannot be gainsaid that exclusive or near-exclusive reliance on pen-and-paper tests for promotions to non-deskwork leadership positions guarantees that the employment advantages traditionally enjoyed by this country’s historical racial majority, as well as continued exclusion of racial minorities, will continue in the absence of vigorous enforcement of disparate impact law. Under these conditions, it is helpful, to say the least, that Congress codified in 42 U.S.C. §2000e-2(k)(1)(A) a test for eradicating irrational promotion practices for public service leadership positions

without the need to resort to accusations of past or present “invidious” race-based conduct.

The questions defined in 42 U.S.C. §2000e-2(k)(1)(A) instead are cleaner, more logical and more precise— namely, is an employer using a promotion practice that harms members of an outsider group protected under the Civil Rights Act due to this nation’s tragic history of race discrimination, and, if so, does that practice predict performance on the job with sufficient validity? If the answer to the latter question is no, then the employer should not use the practice because it is, at bottom, contrary to best business practices from *anyone’s* perspective in blocking highly worthy candidates from promotion on racial, as well as potentially other, grounds. The employer is best off and thus should use a better—*i.e.*, more rational or effective—practice, which all the while also serves to advance the nation’s still elusive civil rights goals of creating a fair playing field for all and greater representativeness of served communities in the work forces of public service departments.

B. Disparate Impact in the Early Years of Title VII Enforcement

The historical understanding of disparate impact law discussed above carried forward into the early years of enforcement of Title VII the Civil Rights Act of 1964. In these early years, the newly created Equal Employment Opportunity Commission (EEOC) lacked strong enforcement powers. (Congress would grant these powers to

the EEOC in the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; *see* Carle, *supra*, at 296). After passage of the 1964 Act, the EEOC focused on the large employment sectors where its research showed it might get the biggest bang for the buck in terms of improving employment opportunities for persons of color. The EEOC thus decided to focus its efforts on certain large Southern industries, specifically textile manufacturers and power plants, for voluntary compliance campaigns. *Id.* at 290–92. Prior to passage of the 1964 Act, these employers had explicitly discriminatory policies; the EEOC worked to train willing managers and executives in these companies to identify barriers to employment opportunity and voluntarily implement more effective and less discriminatory hiring and promotion practices.

Many employers engaged in this work willingly, but some were recalcitrant. Through an informal reciprocal arrangement, the EEOC passed on the cases of recalcitrant employers to the NAACP Legal Defense Fund for litigation. *Id.* at 289–91. *Griggs v. Duke Power Company* arose from one such case; the NAACP filed a lawsuit against this company under a disparate impact theory in 1966, after the company refused to work voluntarily with the EEOC to replace its questionable employment practices with ones that both reflected better business practices and would greatly improve hiring and advancement opportunities on the basis of race. *Id.* at 292.

Griggs, of course, became the landmark U.S. Supreme Court case on disparate impact analysis, and today is so well known that does not require extensive treatment in this brief. However, there are aspects of that case that bear brief note. First, as in many disparate impact cases, on its facts *Griggs* falls somewhere in between a disparate impact and an implicit disparate treatment case. There was, it bears remembering, strong circumstantial evidence of invidious intent in that case: the Duke Power Company had excluded Black persons from employment in all but the most undesirable work in its power plants right up until the date the Civil Rights of 1964 took effect. *Id.* at 292. It was not until the eve of that date that the company adopted a new policy requiring employees in the more desirable unskilled jobs in its plants to pass IQ tests—even though such tests had never been required when only persons of Caucasian decent were allowed to hold these positions. In other words, *Griggs* might have been won under a disparate treatment/invidious intent theory; its facially “neutral” intelligence tests may well have served as pretext for continued intentional discrimination.

The disparate impact approach, however, was cleaner and more precisely directed at the real problem—namely, eliminating the employment practices that blocked meritorious candidates of color from employment opportunities. As the Court in *Griggs* recognized, disparate impact analysis provided a way of identifying and eradicating less than rational employment practices that created “built in

headwinds,” 404 U.S. at 433, to the employment prospects of traditionally under-represented minorities— all without accusing employers that used such practices of “bad” intent. Disparate impact law simply stops the use of unnecessary and less than optimal business practices where more effective ones would better benefit *all* meritorious job candidates.

Thus, in *Griggs* disparate impact analysis was fully born, at the most visible national level,⁴ in the civil rights jurisprudence of the U.S. Supreme Court. Some decades of experience in the federal courts ensued in the development of doctrinal tests and burdens of proof to further flesh out the disparate impact concept. The tests codified in 42 U.S.C. §2000e-2(k)(1)(A) arise from these precedents through a complex doctrinal history (the details of which need not concern us here). After the U.S. Supreme Court took what Congress viewed as a misstep in its statutory interpretation of the allocation of burdens of proof in disparate impact cases in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 658–59 (1989), Congress codified its preferred definitions, tests, and burden of proof allocations for disparate impact analysis in the Civil Rights Act Amendments of 1991. Today, the basic legal rules to be applied are fairly clear and statutorily stable. The issues presented in this and other still-extant police promotion cases do not involve questions of law but instead

⁴ By this time there were many other disparate impact cases in the federal courts as well, as discussed in Carle, *supra*, at 279–82 & 292–94; *Griggs* was the one the Court first took for review.

call for careful factual analysis of the success of the steps police departments have taken to eliminate or mitigate disparate impact in promoting officers into their higher leadership ranks, using procedures that validly measure the essential skills and abilities needed for such leadership positions. Those issues are determined through complex fact-based analysis conducted by experts in the field of job validation studies.

**C. The Special Importance of Disparate Impact Analysis in
Desegregating Police Departments at All Levels Including
Leadership Ranks**

A key sub-branch of disparate impact law's history concerns its application to police departments specifically. State and municipal employers were not covered under Title VII until the 1972 Amendments. *See* The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Once those became law, the U.S. Department of Justice quickly began litigating both disparate treatment and disparate impact cases against police and other emergency services departments across the country, for a number of reasons. As one of the chief architects of this U.S. Department of Justice disparate impact litigation program recounted, in 1972, "one could have thrown a dart at a map of the United States and probably have been able to justify an investigation of the nearest large city because of its lack of uniformed minority or female officers." Richard S. Ugelow, *I-O Psychology and the Department of Justice, in* Employment Discrimination Litigation: Behavioral,

Quantitative, and Legal Perspectives 463, 467–68 (Frank J. Landy, ed., 2005). The Justice Department had several other reasons for targeting police and firefighting departments as the focus of its enforcement efforts as well. First, its demographic studies confirmed the above-noted stark absence of appreciable numbers of persons of color in these coveted jobs. Moreover, police and other protective civil service work was “highly visible to the community,” as well as “prestigious and well paid, and offered significant opportunities for advancement.” *Id.* at 467. In addition, the legislative history of the 1972 Amendments clearly reflected Congress’s specific concern that “[b]arriers to equal employment are greater in police and fire departments than in any other area of State and local Government.” *Id.*, (quoting The U.S. Commission on Civil Rights 1968, “For All the People, by All the People: Report on Equal Opportunity in State and Local Government Employment,” Finding No. 5 (1969)). Finally, the famous Kerner Commission report, published in 1968 in the wake of high national levels of civil unrest in response to police violence and other acts of racial injustice, had specifically emphasized the need for city police departments to better reflect the demographics of the communities they served. Ugelow, *supra*, at 467.

Recognizing all of these problems, the U.S. Department of Justice, along with civil rights organizations and lawyers, began to litigate police disparate impact cases in the mid-1970s, sometimes through negotiated settlements and sometimes through

hard-fought litigation. *Id.* at 474. These efforts first focused on integrating the ranks of entry-level police officers; today, the last stage of this important initiative involves pursuing fairness in opportunities for police officers of color to move into the ranks of higher leadership in police forces, the matter at issue in this case.

II. THE JUDGMENT UNDER REVIEW IN THIS CASE, INVOLVING THE VALIDITY OF THE PROMOTION PROCEDURE FOR CANDIDATES FOR THE POSITION OF POLICE LIEUTENANT, PROPERLY SHOULD DIFFER FROM THE OUTCOME IN THIS COURT’S PRIOR CASE, *LOPEZ II*, WHICH EXAMINED THE VALIDITY OF THE PROMOTION PROCEDURE FOR CANDIDATES FOR THE LOWER SUPERVISORY POSITION OF POLICE SERGEANT.

Despite the City’s attempts to suggest the contrary, it is no surprise that the judgment now under review requires a different result than did the 2008 exam for promotions to police sergeant, which this Court upheld as just barely valid in *Lopez II*, 823 F.3d at 144. In *Lopez II*, this Court properly applied the clear error standard in reviewing the factual findings of the district court in *Lopez I*, 2014 U.S. Dist. LEXIS 124139, at *60–61, that the City had “minimally” met its burden of showing that its 2008 promotion exam for the position of sergeant passed the standard for establishing validity. In other words, this Court, over a strong dissent by Judge Torruella, 832 F.3d at 121, found that the 2008 exam, when used for promotions to the lower leadership position of sergeant, met the standard for validity “albeit,” as this Court noted in agreeing with the district court, “not by much.” 823 F.3d at 114.

Given the test's minimal validity when used for the first-rung leadership position of sergeant, it makes all the sense in the world that the identical exam is *not* valid as used in the different context of promotions to the higher-level leadership position of police lieutenant. Thus, in the case under review, the district court, correctly applying all the legal principles and standards this Court reiterated in *Lopez II*, properly found that, in the context of *lieutenant* promotions, the City failed to meet its burden of establishing that the 2008 exam was valid under 42 U.S.C. §2000e-2(k)(1)(A)(i).

As the district court below found, the positions of sergeant versus lieutenant in the Boston police department are different. *See Smith I*, 144 F. Supp. 3d at 185. The position of sergeant requires knowing and applying police rules in supervising front line police officers. The position of lieutenant, on the other hand, involves more complex managerial skills, including being “in charge of station houses,” responsible for “the proper arrest of suspects and for the safety of prisoners,” as well as “talking with citizens at community meetings,” and “taking control of scenes of major incidents”; thus, the court found, the “job requires good management skills, including the ability to motivate employees, and to communicate information between ranks.” *Id.* Moreover, the court found, when the Boston police department undertook in 2006 and thereafter to engage more proactively in community policing, which involved police officers becoming more closely involved in the diverse

communities they serve, the skills required for its police lieutenants “further evolved.” *Id.* The City had indeed previously acknowledged that important skills could not be evaluated by a written test, including the “ability to establish rapport with persons from different ethnic, cultural, and/or economic backgrounds.” *Id.* at 187 (internal quotations omitted).

Not only the district court in this case, but finders of fact in other contexts have found that the skills needed for police lieutenant versus sergeant work are different. To take one example, the federal Wage and Hour Division of the U.S. Department of Labor found that sergeants in an unnamed county sheriff’s department were not exempt employees under the overtime provisions of Section 3(e)(2)(c) of the Fair Labor Standards Act because their work related “more to the ongoing day-to-day ‘production’ operations of the Department;” in contrast, the Division determined, the lieutenant positions at issue in that case were exempt from overtime because those positions required the consistent exercise of independent judgment and discretion. U.S. Dep’t of Labor, Wage and Hour Div., Administrative Letter Ruling (May 19, 1988) published in *Public Employer’s Guide to FLSA Emp. Class. Appendix IV, March 2104 Supplement*.⁵

⁵ This document is available at <https://1.next.westlaw.com/Document/Iff53748631c211df9b8c850332338889/View/FullText.html?navigationPath=%2FFoldering%2Fv3%2Fscarle%3D40osk1%2Fhistory%2Fitems%2FdocumentNavigation%2Ff69026a7-dee3-4eff-9680-aae339caa8eb%2Fi86gXiLztwPxOHjNUWOkps%60aX7kppiyJ6QWrSArkhMkS>

Here, somewhat analogously, the district court found as a matter of fact that the City’s police lieutenants do different work than sergeants—work that cannot be validly tested using a pen-and-paper exam to determine rank orderings for promotions to lieutenant. As the district court found, lieutenants’ work is not limited primarily to the fairly routine application of rules and policies, something that can be measured through knowledge tests of department rules and policies—which, indisputably, are all that the 2008 exam tests, *see Smith II*, 267 F. Supp. 3d at 330 (noting that the 2008 exam solely tested “knowledge” areas). The job of lieutenant focuses on the use of higher skills than those required at the sergeant level. Indeed, that is precisely why there are lieutenant as well as sergeant positions in the police force; lieutenants exercise a higher level of leadership skills than sergeants do. Thus, as the district court correctly found on the facts in this case, a valid test for the promotions of lieutenants should include skills assessment other than paper-based knowledge. *Id.*

To be sure, everyone who has reached the level of sergeant has already successfully passed the written exam that tests knowledge of police procedures,

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eb4e2db9a08ebbd4e20ca1a49479493a390266733db72d122086862609e&originati
onContext=MyResearchHistoryAll&transitionType=MyResearchHistoryItem&con
textData=%28oc.Search%29&VR=3.0&RS=cblt1.0

laws, and other information. And, certainly, candidates for promotion to police lieutenant positions could be required to take a knowledge exam as some part of qualifying for promotion. The problem here, as the district court found, is that the pen-and-paper test determined 100% of the rank ordering of the 2008 candidates for promotion. *Id.* at 330 (noting its finding of fact that the 20% component assigned to experience and education ended up having “virtually no impact on the final exam scores”) (internal citations omitted).

The district court’s factual findings are well within the mainstream of judgments in favor of plaintiffs that courts of appeals have affirmed on review in police department cases involving promotions to lieutenant. *See, e.g., Isabel v. City of Memphis*, 404 F.3d 404, 414–15 (6th Cir. 2005) (finding that the city of Memphis’s written test for promotion of police sergeants to lieutenants unlawfully discriminated against minority candidates by measuring job knowledge only); *cf.* Press Release, U.S. Dep’t of Just., Justice Department Settles Allegations of Employment Discrimination in Promotion of Police Sergeants in New Jersey (Aug. 1, 2011) (announcing that the Justice Department and State of New Jersey had negotiated a consent decree which, if approved by the court, would provide relief to candidates for police promotions to lieutenant who were subject to an unlawful written promotion exam procedure). Indeed, the Boston Police Department appears to have remained one of the only cities in the country that still relied exclusively on

pen-and-paper assessment for lieutenant promotions in 2008. *See* Brodin, *supra*, at 2337 & n. 90; 2356 & n.198.

In short, it is no wonder that a procedure that produced a rank ordering for lieutenant promotions that was completely determined by a knowledge exam alone, even if “minimally” valid for promotions to sergeant, *Lopez II*, 823 F.3d at 102, would fail on the facts to pass muster as valid for the next level of police leadership promotions from sergeant to lieutenant, just as the district court found below.

III. THE DISTRICT COURT CORRECTLY ENTERED JUDGMENT FOR PLAINTIFFS WITHOUT REQUIRING THEM TO DEMONSTRATE AN ALTERNATIVE BUSINESS PRACTICE

The City makes much of the fact that the district court entered judgment for the plaintiffs without proceeding to conduct an “alternative employment practice” analysis under 42 U.S.C. §2000e(k)(1)(A)(ii) (hereinafter “(A)(ii)”). This argument misunderstands how (A)(ii) works. That provision offers an *alternative* way for plaintiffs to make out a disparate impact claim—namely, by showing an “alternative employment practice” that the respondent has refused to adopt. The provision comes into play only if the finder of fact concludes that the plaintiffs have lost under 2000(k)(1)(A)(i) (hereinafter “(A)(i)”). In other words, Section (A)(ii) gives plaintiffs a second bite of the apple, so to speak, but only when the plaintiffs have lost under (A)(i).

The fact that Congress in 1991 codified the specific test and defenses for disparate impact claims in detail in the statutory language of the Act leaves the City no room to argue for a different doctrinal approach at this time. Whereas a number of approaches were once arguable before Congress specifically codified its intent in the 1991 amendments, today Congress has spoken clearly and definitively. Congress has explained how it wants the courts to apply the (A)(ii) alternative employment practice step of the analysis and this Court should follow that language. That language specifically states that plaintiffs win either if they establish disparate impact and respondent fails to demonstrate that the practice is job related and consistent with business necessity, (A)(i), which is what the district court found, “*or*” if plaintiffs demonstrate an alternative employment practice under (A)(ii). Here the district court’s findings of fact establish the outcome under (A)(i); thus it did not proceed to (A)(ii).

Logic can further help demonstrate this point. As I sometimes explain to my students, a helpful way to think about the relationship between (A)(i) and (A)(ii) is to view (A)(ii) as a double check on the results obtained through an analysis conducted under (A)(i). Logically, if an alternative business practice exists that a respondent could use but refuses to adopt, then it follows that the employment practice under scrutiny is not in fact “consistent with business necessity” as required under (A)(i), in the sense that the practice is not “necessary” because another, better

practice could be used instead. Here, the district court found that the practice under challenge—*i.e.*, the 2008 exam for promoting lieutenants—was not sufficiently valid and the City had failed its burden of demonstrating that this practice was “job related and consistent with business necessity” under (A)(i), and thus, logically, that the plaintiffs prevailed. Indeed, this Court indirectly recognized this relationship between (A)(i) and (A)(ii) in *Lopez II* when it noted that “if the alternative test with less adverse impact has equal or greater validity, it makes no difference how valid the employer’s actual test is; the employee wins.” *Lopez II*, 823 F.3d at 119 (citation omitted).

Finally, it bears noting, at this point the City has already established different promotion procedures so an inquiry into the existence of alternative business practices is no longer relevant.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the district court below.

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UNITED STATES COURT OF APPEALS For the First Circuit

Appeal No. 20-1691

CERTIFICATE OF COMPLIANCE

1. Pursuant to FRAP 32(a)(7)(B)(i), the Brief of Amicus Curiae contains no more than 5,484 words, as counted by the word processing system used to prepare the Brief.

2. 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 has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

/s/ David Hadas

Dated: April 1, 2021

UNITED STATES COURT OF APPEALS For the First Circuit

Appeal No. 20-1691

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this brief was electronically with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All counsel for petitioner and respondents in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system.

/s/ David Hadas

Dated: April 1, 2021

APPENDIX

**CV ABRIDGED -- EMPLOYMENT ANTIDISCRIMINATION LAW -- FOR
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EDUCATION

Yale Law School, J.D., 1988
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Sociology and anthropology, *magna cum laude*

ACADEMIC EMPLOYMENT

[Washington & Lee Law School, Lexington VA
Visiting Professor of Law, Aug. 2021-May 2022 (prospective)]

American University Washington College of Law, Washington, DC
Professor of Law, September 2003-present
Vice Dean, July 2018- present
Associate Dean for Scholarship, September 2005-September 2008
Associate Professor, 2000-2003; Assistant Professor, 1997-2000

Courses Taught: Constitutional Law; Employment Discrimination; Labor and
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Holocaust (co-taught); Torts (2000-2012); various seminars

Harvard Law School, Cambridge, MA.
Visiting Professor of Law, January-June 2006

Georgetown University Law Center, Washington, DC
W.M. Keck Teaching Fellow in Legal Ethics, August 1995-February 1997

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SCHOLARLY AWARDS AND GRANTS

Organization of American Historians, 2014 Liberty Legacy Foundation Award for *Defining the Struggle: National Organizing for Racial Justice, 1880-1915* (Oxford University Press, 2013), awarded “to the author of the best book by a historian on the civil rights struggle from the beginnings of the nation to the present.”

American University 2015 Award for Outstanding Scholarship, Research, Creative Activity, and Other Professional Contributions

Washington College of Law 2015 Pauline Ruyle Moore Scholar Award for *Defining the Struggle: National Organizing for Racial Justice, 1880-1915*

Ruth Landes Memorial Foundation Grant Award for *Defining the Struggle: National Racial Justice Organizing, 1880-1915*. Salary, travel and research assistance grant for book completion.

Best Scholarly Paper Award, American Association of Law Schools, 2001, for “Race, Class, and Legal Ethics in the Early NAACP, 1910-1920”

Jean and Edgar Cahn Article Award, National Equal Justice Library, 2004, for “From *Buchanan to Button*: Legal Ethics and the Early NAACP (Part II),” awarded “for distinguished scholarship on the subject of equal access to justice.”

Elizabeth Payne Cubberly Scholar Award, American University Washington College of Law, 2006, for “Theorizing Agency.”

TEACHING AWARDS

Public Interest/Public Service Scholars Third Annual Faculty Award, 2009. Student-awarded honor given to a faculty member for outstanding support of public interest at the law school.

American Association of Law Schools, Teacher of the Year Award, 2004, recipient from American University, Washington College of Law.

PUBLICATIONS (SELECTED)

BOOKS

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Invited Guest Blogger, Campaign for the American Reader (Dec. 2013)

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“What the Entry Pattern for African American Women into Law Reveals about the U.S. Legal Profession”

“Looking at the Law/Non-Law Divide through the Lenses of Gender and Race in Turn-of-the-Twentieth-Century U.S. Women’s Reform Activism 1880-1920” (paper commissioned for Organization of American Historians’ Annual Meeting)

“Using a Comparative Lens to Evaluate Turn-of-the-Century Legislative Approaches to Worker Dignitary Rights: The Spread of Gendered Workplace Seating Laws in England, Europe, the U.S. and Latin America.”

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LEGAL EMPLOYMENT

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U.S. Department of Justice, Civil Rights Division, Washington, DC. Appellate Attorney. Drafted briefs and argued before federal courts of appeals in civil rights cases in criminal, employment, housing, and voting rights areas. Wrote drafts of United States briefs in *Johnson Controls v. UAW*, 499 U.S. 187 (1991) (application of Title VII to employers’ fetal protection policies) and *Chisom v. Roemer*, 501 U.S. 380 (1991) (coverage of state judges under Voting Rights Act). (1989 - 1991)