

Testimony of Gail Heriot
Professor of Law, University of San Diego &
Member, U.S. Commission on Civil Rights
Before the House Subcommittee on Workforce Protections
March 24, 2015

Chairman Walberg, Ranking Member Wilson and distinguished Members of this Subcommittee, thank you for this opportunity to testify before you today on the proposed Certainty in Enforcement Act, currently embodied in H.R. 548. It is a bill I strongly support.¹

H.R. 548 is aimed largely at correcting a narrow problem created by the EEOC's April 25, 2012 guidance ("the *2012 Guidance*").² The *2012 Guidance* itself is a controversial document aimed at restricting an employer's discretion to make employment decisions (e.g. decisions to hire, fire or promote) based on an employee's³ criminal record.⁴ It purports to draw its authority from Title VII of the Civil Rights Act of 1964 (as amended), which prohibits discrimination in employment based on race, color, religion, sex or national origin. To get from discrimination on the basis of "race, color, religion, sex or national origin" to discrimination on the basis of criminal record, it employs disparate impact theory. Under this theory, intent to discriminate on the basis of race, color, religion, sex, or national

¹ I am testifying here today in my capacity as one member of the U.S. Commission on Civil Rights and not on behalf of the Commission as a whole. In its report on the general subject matter relating to my testimony, the Commission did not make recommendations and did not deal specifically with H.R. 548 since that bill was not yet in existence. See U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy* (December 2013).

² EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (April 25, 2012).

³ When I use the term "employee," I mean to include a job applicant.

⁴ H.R. 548 also covers employment decisions based on an employee's credit history. Because the U.S. Commission on Civil Rights has examined the criminal background issue but not the credit history issue, my testimony will be limited to the former. See U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy* (December 2013).

origin is irrelevant. It is enough that the employer's actions have a disparate impact on such protected group.

It is worth noting that in addition to the problem dealt with in H.R. 548, there are many other things wrong with the *2012 Guidance* and also with the EEOC's aggressive enforcement efforts surrounding it.⁵ But given the difficulties of passing major legislation reforming the EEOC, H.R. 548 must be regarded as a good start—one that should enjoy bipartisan support.

H.R. 548 seeks to solve a potential conflict between federal law (or at least the EEOC's conception of federal law) and state or local law. On the one hand, the *2012 Guidance* is aimed in very vague and general terms at limiting an employer's discretion to make employment decisions based on an employee's criminal record. Alas, after reading it, even experienced attorneys won't know how the EEOC wants employers to resolve particular cases. But on the other hand, state and local laws sometimes *require* employers to decline to hire or dismiss employees based on their criminal records.

The *2012 Guidance* forces employers into an impossible bind. Employers are told that maybe, but only maybe, federal law forbids what state or local law requires and that, if so, it is their duty to obey federal law and ignore state or local law. According to the guidance, it depends on the circumstances of each situation. The one thing that is clear is that *if* federal law demands the opposite of what state or local law demands, employers' allegiance must be to federal law. Employers are apparently expected to make their best guess as to whether federal law overrules state or local law in any particular case. In the end it will be utterly unclear to any conscientious employer exactly what, if anything, the EEOC is attempting to require them to do.

The EEOC is, of course, correct that under the U.S. Constitution's Supremacy Clause, federal law trumps state or local law. But the lack of clarity in the *2012 Guidance* makes the situation extremely unfair to employers. It doesn't have to be that way. But it is quite clear that the EEOC is not going to fix the problem. The job therefore falls to Congress.

Two kinds of errors are likely to occur. First, an employer may mistakenly conclude that the *2012 Guidance* does not forbid her to follow the state or local law, and she will therefore follow it. Because she is wrong about the guidance, the aggrieved employee and/or the EEOC itself may unleash their fury. Second, an employer may refrain from complying with a

⁵ For a more general critique of the EEOC's policy on criminal background check, see *infra* at 12-19.

state or local law in the mistaken belief that this is what the *2012 Guidance* requires. In this case, she will be in violation of valid state or local law and vulnerable to action by the state or local authorities.⁶

Note the following further complication: Even if the employer is correct about what the EEOC would want her to do under the circumstances of the particular case, (1) the EEOC's interpretation of Title VII may be wrong;⁷ and (2) there is real question whether the disparate impact liability

⁶ Another way in which the employer's error might come up is through a lawsuit for negligent hiring. See, e.g., *Stacy v. HRB Tax Group*, 516 Fed. Appx. 588 (6th Cir. 2013); *Underberg v. Southern Alarm, Inc.*, 643 S.E.2d 374 (Ga. App. 2007). Of course, if a decision to hire an ex-offender, made under pressure from the EEOC, results in an employee who commits a tort in the course of his employment, the employer will be liable under the common-law doctrine of respondeat superior. The fact that the employee is an ex-offender will never come up, although it may in fact be true that if the employer had followed state or local law and rejected the ex-offender's job application (or, where no state or local law exists, the employer had acted on her own initiative to reject the employee), the tort would never have occurred.

⁷ The *2012 Guidance* was not a bolt from the blue. There are earlier EEOC guidances and decisions on the topic of an employer's authority to act on an employee's criminal record (although the *2012 Guidance* goes further than previous guidances in several key ways, including its insistence that the need to comply with state or local laws in situations where the employer cannot otherwise demonstrate "business necessity" to the EEOC's satisfaction). See EEOC Policy Statement on the Use of Statistics Involving the Exclusion of Individuals with Criminal Records from Employment (Jul. 29, 1987); EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq. (February 4, 1987); Commission Decision No. 78-35, CCH EEOC Decisions, Para. 6720 (June 8, 1978). There is also some case law on the issue. See *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977). All were premised on the theory of disparate impact liability first endorsed by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *But see* Hugh Davis Graham, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 at 387 (1990) ("THE CIVIL RIGHTS ERA") ("Burger's interpretation [in *Griggs*] of the legislative intent of Congress in the Civil Rights Act would have been greeted with disbelief in 1964"); Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PENN L. REV. 1417 (2003) (arguing that the 88th Congress would have been astonished at *Griggs*). For a fuller discussion of this history and of why the *2012 Guidance* is bad policy, see Statement of Gail Heriot in U.S. Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy (December 2013).

theory used in Title VII is constitutional.⁸ Being right about what the EEOC wants will not prevent her from being in violation of valid state or local law if it turns about the EEOC has no statutory or constitutional authority for its position in drafting the guidance.⁹

H.R. 548 throws the hapless employer a lifeline. It clarifies federal law in one respect: It tells employers that they are free to comply with state or local laws without fear of being found in violation of Title VII on a disparate impact theory.¹⁰ Its operative paragraph states in full:

(o) Notwithstanding any other provision of this title, the consideration or use of credit¹¹ or criminal records or information, as mandated by Federal, State, or local law, by an employer, labor organization, employment agency, or joint labor management committee controlling apprenticeships or other training or retraining opportunities, shall be deemed to be job related and consistent with business necessity under subsection (k)(1)(A)(i) as a matter of law, and such use shall not be the basis of liability under any theory of disparate impact.

The 2012 Guidance Is Vague and Uncertain as to the Employer's Duty in Part Because of the Intricacies of Administrative Procedure Law and In Part Because the EEOC Apparently Likes It That Way.

⁸ In *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009)(Scalia, J. concurring), the question of the constitutionality of disparate impact liability was raised in a Supreme Court decision for the first time. Justice Scalia wrote: “[This decision] merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII ... consistent with the Constitution’s guarantee of equal protection?” For a concise discussion of the question, see Brief of Amicus Curiae Gail Heriot & Peter Kirsanow in *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 13-1371 (U.S. Sup. Ct. filed November 20, 2014). See also Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. L. REV. 1505 (2004); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

⁹ In addition, the employer may correctly perceive her legal duty, and the federal, state or local governments may incorrectly perceive that duty and attempt to enforce in the courts what they incorrectly perceive to be the law. This costs the employer too.

¹⁰ H.R. 548 also covers conflicts between the EEOC’s policy and other federal laws.

¹¹ See supra n.4.

Note that the *2012 Guidance* is just that—guidance. It is obviously not a federal statute; only Congress can enact statutes. It is not a rule. When Congress created the EEOC in 1964 as part of Title VII, it consciously denied the EEOC the authority to promulgate rules, and it remains the case that the EEOC has no authority to promulgate rules pursuant to Title VII. Even if the EEOC had been given that authority, it could not have issued the *2012 Guidance* as rule, since the Administrative Procedure Act permits rules to be promulgated only after a period of notice and comment on the draft rule.

A guidance can interpret a statute like Title VII and it can reveal something about the agency’s enforcement priorities. But it cannot impose duties on regulated persons (in this case mainly employers) that are not already required by the statute it is enforcing. Only a rule can do that (and then only in a very limited way).¹² Guidances issued as interpretations of very general statutes must ordinarily be general themselves, since it is difficult to be specific without pushing past the statute’s actual prohibition. When guidances transform the statute into a set of step-by-step instructions, they almost inevitably go beyond what the statute actually requires and hence are not really interpretations.

Guidances nevertheless can pack quite a punch. For one thing, they are very difficult to challenge in court.¹³ See, e.g., *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir 1974). The best and sometimes the only way to get the issues they raise before a court is to violate the guidance, get sued and then make the argument that the guidance is

¹² An agency with rule-making authority may promulgate rules that go somewhat beyond what the statute prohibits, provided the rule is a reasonable prophylactic intended to ensure that the statute itself is being complied with and not an simply effort to extend the statute beyond what Congress intended (and provided further that it complies with the Administrative Procedure Act’s notice and comment and other procedures). For example, suppose a statute that requires the owner of a tiger to “construct housing for such animal that will properly contain it.” The agency with rulemaking authority can promulgate a regulation requiring that they be kept in enclosures with walls of at least 8 feet, even though some tigers (such as very feeble ones) could be safely contained in enclosures with lower walls and hence for those owners the rule would be going somewhat beyond what the statute requires. Doing the same thing through a guidance, however, would be inappropriate. See *Hocor v. U.S. Dept. of Agriculture*, 82 F.3d 165 (7th Cir. 1996)(similar facts).

¹³ Nevertheless, guidances, unlike rules, are not entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If a court disagrees with the interpretation of a statute laid down in a guidance, it is free to so rule. See *United States v. Meade Corp.*, 533 U.S. 218 (2001).

misinterprets the statute. Such a strategy is obviously high risk. It is not surprising that regulated persons tend to fall in line with guidances. Indeed, some commentators have expressed serious concern about the ability of federal agencies to wield excessive power through the use of guidances. See Robert Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992). The more vague a guidance is, the more effective it can be in constraining the behavior of regulated parties anxious to stay on the right side of the law. If an EEOC guidance is vague, timid employers will bend over backwards to be sure that they come nowhere near the wrong side of it. But if it is clear, employers can comfortably cozy up to the line, secure in the knowledge that they have not crossed it. No wonder so many federal agencies prefer to issue vague guidances rather than clear rules.

So what exactly does the *2012 Guidance* require employers to do? In the broadest terms, it purports to remind employers that: (1) African Americans and Hispanics have higher rates of arrest and incarceration than the population at large; and that therefore (2) under a theory of disparate impact liability, an employer can be held liable for making employment decisions based on an employee's previous conviction for a criminal offense unless the employer can demonstrate a "business necessity" for doing so. As mentioned above, intent to discriminate is irrelevant under this theory. It is enough that the employer's actions have a disparate impact on some protected group. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Of course, hardly anyone is foolish enough to advocate a complete ban on the consideration of the criminal record of employees. Convicted pedophiles should not be hired as children's camp counselors, just as convicted necrophiliacs should not be hired by the morgue. Much of the *2012 Guidance* must therefore be devoted to discussing what constitutes "business necessity"—i.e. the circumstances under which an employer may fire, fail to promote or decline to hire an employee on account of his previous convictions.

In part, the *2012 Guidance's* vagueness and uncertainty is because the meaning of the term "business necessity" is vague and uncertain.¹⁴ Some

¹⁴ One thing everyone seems to agree on is that the Civil Rights Act of 1991, which uses the term, and the case law that preceded it are ambiguous as to the meaning of "business necessity" in the context of disparate impact liability. Oklahoma City University law professor Andrew Spiropoulos describes the problem this way:

[T]he [Supreme] Court articulated two very different versions of the business necessity defense: a strict one that would be very difficult for employers to meet and a lenient one that would give employers more discretion. ... [T]hose who contend that the Act establishes a strict

have argued that to establish “business necessity” an employer must be able to establish that the continued operation of its business is at stake. Others—much more plausibly—advocate various less stringent standards.¹⁵

But even if the meaning of “business necessity” were clear, its application to actual cases would not be. The *2012 Guidance* states that it “does not necessarily require individualized assessment in all circumstances ...” But it fails to give any safe alternative and instead states that “the use of a screen that does not include individualized assessment is more likely to violate Title VII ... [and] the use of individualized assessments can help employers avoid Title VII liability....” One can be confident that employers will read this as requiring individualized assessments at least for members of the groups for whose benefit the policy is intended (African Americans and Hispanics). They would be fools not to.

What exactly does an “individualized assessment” require? Again the guidance is far from clear. At the very minimum it appears to require an employer have a policy that takes into account (1) the nature and gravity of the employee’s offense or offenses; (2) the time that has passed since the conviction and/or completion of sentence; and (3) the nature of the job the employer seeks to fill.¹⁶ But it also appears to require a case-by-case opportunity for job applicants to make their case based on their unique circumstances. The *2012 Guidance* contemplates that employers will

business necessity defense and those who argue that the Act enacted the more lenient business necessity defense both have plausible arguments for their interpretations founded in two different lines of Supreme Court precedent. ... [N]either side can conclusively show that their interpretation was embodied in the Act.

Andrew Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1478, 1483-85 (1995). As Professor Spiropoulos describes, this ambiguity was built into the Act by Congress. *Id.* Put simply, Congress punted. It left the issue to be decided in future litigation.

¹⁵ See, e.g., Susan Grover, *The Business Necessity Defense in Disparate Impact Employment Discrimination Cases*, 30 GA. L. REV. 387, 429 (1996) (“That defense [the business necessity defense] should require an employer to prove that its discriminatory practice is crucial to its continued viability”). Professor Grover clarifies her use of the term “continued viability” by stating that it means that “relinquishing the discriminatory practice will compel the employer to cut back on its business, resulting in employee layoffs.” *Id.* at n. 5.

¹⁶ This part of an individualized assessment can trace its pedigree back to *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977).

provide “notice that [the job applicant] has been screened out because of a criminal conviction, an opportunity to ... demonstrate that [the employer’s policy] should not be applied due to his particular circumstances; and ... whether the additional information ... warrants an exception ... show[ing] that the policy as applied is not job related and consistent with business necessity.” *2012 Guidance* at 15.

Put differently, the *2012 Guidance* requires that employers telegraph to job applicants that they have been screened out on account of their criminal records. It thus exponentially increases the odds of a lawsuit. The vague discussion of business necessity and individualized assessment in the guidance means that reasonable minds will disagree as to whether the employer has sufficient reason to reject a job applicant on account of his criminal record. The employer knows that ultimately it is not her judgment that matters; rather, it is initially the disappointed job applicant’s judgment, since he may file a complaint.¹⁷ It then becomes the EEOC’s judgment and later the court’s. All have the power to impose huge costs on the employer.

This leaves an employer in an extremely awkward position. She may have her own view of whether “business necessity” justifies a decision not to hire a job applicant with a criminal record in a particular case. But she has no way of knowing whether the EEOC or the courts will agree with her (and she can be pretty confident that the rejected job applicant will seldom agree or else the applicant wouldn’t have applied for the job in the first place). One of the last things an employer wants is to get caught up in an EEOC investigation or in litigation, either of which could be costly. All employers therefore have a strong incentive to err on the side of not conducting criminal background checks at all or of not acting on them when they bring felony convictions to light.

All of this is arguably bad enough by itself (since the sad truth is that those who have committed crimes in the past are more likely to do so in the future than those who have never committed crimes). But when employers are instructed that they must ignore state and local laws that require them to reject job applicants with certain types of criminal convictions, the problems multiply. Yet that is exactly what the *2012 Guidance* does when it claims to trump any state or local laws of this type.

Employers are thus placed between a rock and hard place. The *2012 Guidance* itself is extremely vague about when an employer’s desire to avoid having an employee with a criminal record rises to the level of “business necessity.” The employer is thus faced with a choice between *possibly*

¹⁷ The fact that ex-offenders are sometimes *unreasonable* should not be lost sight of.

violating federal law or *certainly* violating state or local law. Woe to the employer who chooses incorrectly.

In this respect, it is worth pointing out that the EEOC does not have a particularly good track record in enforcing its policy on criminal convictions. Twice U.S. Courts of Appeals have slapped the agency down decisively. See *EEOC v. Peplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013), *aff'g* 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. 2011); *EEOC v. Freeman*, __ F.3d __ (4th Cir. February 20, 2015), *aff'g* 2013 U.S. Dist. LEXIS 112368 (D. Md. 2013).

In *Peplemark*, the EEOC wrongly accused the employer of having a more stringent policy on criminal convictions than it in fact had. The trial court ordered EEOC to pay Peplemark \$751,942.48 in attorneys' fees, expert witness fees and costs, and the Sixth Circuit affirmed. In *Freeman*, the trial court excluded an expert's report on the disparate impact of Freeman's criminal convictions policy on the ground that the expert's report was rife with error. On that basis, it granted summary judgment to Freeman. The Fourth Circuit affirmed, citing "an alarming number of errors and analytical fallacies" in the expert's report. A concurring opinion by Judge Agee catalogs "a pattern of suspect work" in EEOC cases by the same expert, who the EEOC had nevertheless continued to use.

It is fair to characterize all these opinions, both at the trial and appellate levels, as scathing. But rather than elaborate on them in my testimony, I urge the members of this subcommittee and staff members to read the opinions for yourselves.¹⁸ I am confident that you will agree that are not your ordinary, everyday criticisms of a federal agency.

These fully-litigated cases may be just the tip of the iceberg. The EEOC's pattern of enforcement on this issue has been marked by something akin to religious fervor. It has targeted employers whose line of work is sensitive enough that the need for clean criminal records should be viewed as an obvious business necessity.¹⁹ For example, at the briefing on the *2012 Guidance* held on December 7, 2012,²⁰ the Commission heard testimony from Julie Payne, Chief Legal Office of G4S's American Region and General

¹⁸ Electronic versions of these opinions are attached to the electronic version of this testimony as Exhibits A, B, C, and D.

¹⁹ The fact that Title VII makes EEOC investigations and mediations confidential adds to the degree to which EEOC policymaking has tended to escape both public scrutiny and government oversight. 42 U.S.C. § 2000e-5(b).

²⁰ The transcript of this briefing is available on the web site of the U.S. Commission on Civil Rights.

Counsel to G4S Secure Solutions (USA) Inc. Ms. Payne detailed the long investigation that G4S was undergoing. Note that G4S is a company that furnishes security guards to other businesses. This is a strange case for the EEOC to be pushing given the obvious need for trustworthy security guards.

The EEOC's own judgment about when employers ought to be able to make employment decisions on the basis of an employee's criminal record is poor. Under the circumstances, it is expecting a lot of employers to guess correctly about what the EEOC wants from them and/or what federal law actually requires. This makes the need for the Certainty in Enforcement Act all the greater.

A Congressionally-Enacted Statute that Explicitly Defers to State and Local Law Would Limit the Reach of the 2012 Guidance in Situations in Which a Democratically-Elected Body Has Determined that Criminal Background Checks Ought to be Mandatory.

State laws requiring employers to reject job applicants with criminal records tend to be very sensible. Deferring to the judgment of democratically-elected state legislatures and other state and local law-making bodies is itself entirely sensible.

For example, in the Commonwealth of Virginia, nursing homes are forbidden to hire anyone with certain specified criminal convictions. Among the specified crimes are murder, manslaughter, abduction, robbery, aggressive use of a machine gun, and abuse and neglect of incapacitated adults. See Va. Code Ann. § 32.1-126.01. Licensed homecare organizations are similarly limited in whom they can hire. See Va. Code Ann. § 32.1-162.9:1.

State legislators in Virginia have obviously decided that case-by-case analyses are less appropriate than hard-and-fast rules in those industries. It is unlikely that this is because they cannot imagine a case in which a rational nursing home or licensed homecare organization might want to hire an ex-offender. There are hundreds of thousands of ex-offenders in Virginia. Each one has a different story and no doubt some would do well working for a nursing home or licensed homecare organization. But the legislature made the judgment that more mistakes will be made if employers are told to exercise their discretion than if they are told they must refrain from hiring those with specified convictions. I know of no evidence suggesting that the legislature's judgment was in any way unsound. The *2012 Guidance* will only serve to confuse Virginia employers covered by these laws as to where their legal duty lies.

Texas similarly prohibits certain facilities that serve the elderly, the disabled and the terminally ill from hiring anyone with certain specified criminal convictions. The crimes on the list include criminal homicide, aiding suicide, Medicaid fraud, and improper relationship between educator and student. Tex. Health & Safety Code § 250.004. Again, I know of no evidence that the legislature’s judgment was in any way unsound. The same goes for similar requirements in Illinois, Mississippi and New Hampshire. See 225 ILCS § 46/25 (prohibiting employers from hiring certain types of healthcare workers if they have certain kinds of criminal convictions); Miss. Code. Ann. § 43-11-13 (requiring healthcare employers and long-term care facilities to refrain from hiring individuals with convictions for certain crimes); N.H. Code, title XII, § 170-E:7 (requiring child daycare providers to do criminal background checks and to take “corrective action to remove the individual” if an employee is found to have past criminal convictions involving harm to children).

Freeing employers from the bind created by the *2012 Guidance* is the very least Congress can do to help these employers. When employers are caught in such a bind, they are apt to hesitate to hire at all. That is obviously not in anyone’s interest.

But there are a couple of concerns that deserve mention at this juncture. First, the Mississippi statute mentioned above has a procedure for waivers. The proposed Certainty in Enforcement Act needs to make clear whether employers are required to seek such a waiver before its protections kick in. I would recommend that it not be required, since in most cases it will be obvious that it will not be granted and thus a waste of time. If the proposed Certainty in Enforcement Act is to achieve its goal of certainty, then it needs to be mindful of situations like those that are apt to arise in Mississippi. Note that a Mississippi employer could still seek a waiver if she so desired.

Second, there are state laws that may raise problems with the Certainty in Enforcement Act as currently proposed, because they require criminal background checks, but do not explicitly require employers to reject job applicants if a felony conviction is uncovered. For example, Texas law requires “in-home service” and “residential delivery” companies to conduct background checks, but it does not require the employer to make specific up-or-down decisions about job applicants based on the results. Instead, it creates a rebuttable presumption against any claim of negligent hiring if the job applicant had a clean record for a specified period of time. Tex. Civ. Pract. & Remedies Code § 145.

Even though no explicit action is mandated by the Texas statute, it is clear that the Texas legislature viewed “in-home service” and “residential delivery” companies to be a special case where extra vigilance is necessary. But it also thought that under the circumstances the employer’s judgment—provided that it is informed—would be superior to legislation flatly prohibiting employers from hiring job applicants with particular criminal convictions. Again, I would recommend deference. If the area was viewed as important enough for the state legislature to require criminal background checks, Congress should allow employers to exercise their discretion, free from the fear of liability for violation of Title VII as interpreted by the *2012 Guidance*. As the Texas legislature’s action makes clear, a lot rides on the trustworthiness of employees of in-home service and residential delivery companies. Everyone has an interest in ensuring that employers are erring on the side of safety and not on the side of pleasing the EEOC.

Congress Should Consider Going Beyond H.R. 548.

H.R. 548 is certainly commendable, but it solves only a small problem among the many problems created by the EEOC policy on criminal convictions. A Congressional enactment exempting employers from Title VII disparate impact liability altogether when they make employment decisions based on an employee’s criminal record would be even better. This would leave the matter up to employer discretion supplemented by state and local law and by federal liability for disparate *treatment* (i.e. actual discrimination as opposed to mere disparate impact).²¹

This is not to say that Congress should not be concerned about the integrating ex-offenders into the workforce. It should be very concerned. Indeed, we all must be. But there are good ways and bad ways to do this, and the EEOC is employing a very bad way. Among other things, the need to integrate ex-offenders into the workforce and into mainstream society in general would exist even the absence of the race and national origin issue. Yet under the EEOC’s approach, it is African American and Hispanic males who have the standing to sue. But what about the Japanese-American female ex-offender? Statistically, Japanese-American females commit far less than their “fair share” of crimes and hence are less likely to have criminal records. But for the Japanese-American female who happen to be an ex-offender and is having a difficult time getting a job, this is cold comfort.

²¹ Under this approach an employer who rejects African Americans with criminal records, but not whites with criminal records would still be liable under federal law.

For contrast, consider the Work Opportunity Tax Credit Program. See Small Business Job Protection Act, Pub. Law 104-188 (1996).²² Under that program, employers who choose to hire a qualified ex-offender get a small tax credit. No one is forced or threatened with litigation to participate. Those businesses that perceive themselves as benefiting from the arrangement will be the ones that take advantage of it. Eligibility and other ground rules are clearly defined, so no one need be confused about what the law permits. The tax credit applies—as it should—to ex-offenders of all races and both sexes.

Employers have many things to worry about when they hire. All employers are vulnerable. If they make a wrong choice, they can wind up with someone who is undependable, difficult to work with or incompetent. A bad employee can steal from the employer, harass fellow employees, drive away the customers, and cause devastating harm.²³ Employers can end up legally responsible for the actions of their employees under doctrines of negligent hire or supervision, respondeat superior and actual or apparent authority. The need to fire an employee often brings lawsuits and thus must be avoided where possible. No wonder employers are sometimes hesitant to hire. Policymakers need to avoid making them more hesitant.

But that doesn't mean that no employer will find hiring ex-offenders an attractive option. Jobs vary immensely. Some provide the employee with very little opportunity for wrongdoing; others can be made that way by adding a little extra supervision. Individuals with criminal records vary immensely too. There are some whose integrity is not open to serious doubt; there are others who will likely do well when working with colleagues who are aware of their weaknesses and sensitive to the need to avoid creating problems. A modest tax credit can be a useful tool to persuade an employer who is considering hiring an ex-offender but has not yet taken the plunge. In the long run, if administered properly, this program can reduce crime and save the taxpayer money.²⁴

²² The Work Opportunity Tax Credit Program was originally set to expire on September 30, 1997. 110 Stat. 1772. It has been revised and extended on several occasions since, most recently the Tax Increase Prevention Act of 2014, P.L. 113-295 (2014).

²³ See *Employee Kills 8, Himself in Connecticut Shooting Rampage*, L.A. TIMES (August 4, 2010).

²⁴ I do not mean to suggest that the tax code is an instrument to which Congress should routinely resort to achieve goals that are unrelated to revenue raising. It should be used sparingly for that purpose.

The Work Opportunity Tax Credit Program allows the employers who are in the best position to offer employment to ex-offenders (or to a particular ex-offender) to self-select. Some employers may find that they are in a good position to hire a large number of ex-offenders; others may prefer to hire none. The latter group won't have to worry about their ability to prove to the satisfaction of any government bureaucrat that they had good reason for their decision; instead, they simply won't be able to enjoy the tax credit that employers who make the opposite decision will enjoy. The important thing is that the decision will be made by individuals who are intimately familiar with the actual job and job applicant at issue and have an incentive to make the right decision instead of by far away bureaucrats and judges, who have no such familiarity with the situation. The decision is not subject to second guessing.

The EEOC's policy has none of the virtues of the Work Opportunity Tax Credit Program. The *2012 Guidance* ham-fistedly discourages all employers from even checking into the criminal backgrounds of its job applicants and especially from acting on the information they obtain if they do. Each employer knows that it is not her own best judgment that will be decisive, but rather the judgment of the disappointed job applicant who can choose to sue her, of the EEOC which can subject her to long investigations and litigation and ultimately of the courts.

This is disturbing in view of the original purpose of Title VII, which was hardly intended to assert federal control over every aspect of the workplace. Its carefully limited purpose was to prohibit employment discrimination based on race, color, religion, sex and national origin; criminal background checks are, of course, not mentioned at all.²⁵ As Representative William M. McCulloch, et al. put it:

²⁵ Section 703. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive ... any individual of employment opportunities or adversely affect his status as an employee, *because of such individual's race, color, religion, sex, or national origin*.

42 U.S.C. sec. 2000e-2 (emphasis added).

“[M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.”²⁶

See also Case & Clark Memorandum, 110 Cong. Rec. 7247 (Title VII “expressly protects the employer’s right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.”).²⁷

At the time, Ranking Member McCulloch’s point was likely seen as obvious, but important. Free enterprise has always been the engine that drives the nation’s prosperity. For that and other reasons, the best way for the federal government to promote the general welfare, including the welfare of women and minorities, has usually been to allow peaceable and honest

²⁶ Statement of William M. McCulloch, et al., H.R. Rep. No. 914, 88th Cong., 2d Sess. (1964). McCulloch was the ranking member of the House Judiciary Committee and was considered by many to have been indispensable in drafting and securing the passage of the Act.

²⁷ Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), the bill’s co-managers on the Senate floor, repeatedly assured their colleagues that Title VII would not interfere with employer discretion to set job qualifications—so long as race, color, religion, sex and national origin were not among them in their famous interpretative memorandum:

“There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.”

Case & Clark Memorandum, 110 Cong. Rec. 7213.

Note that Case and Clark used the term “bona fide qualification tests,” meaning qualification tests adopted in good faith, and not “necessary” or “scientifically valid” qualification tests. To Case and Clark the issue was whether the employer chose a particular job qualification *because* he believed that it would bring him better employees or *because* he believed it would help him exclude applicants based on their race, color, religion, sex or national origin.

individuals the freedom to run their own business affairs. When exceptions become necessary (as they did in 1964), they were understood by most as precisely that—exceptions. They were not intended to swallow the rule.

While few grasped it at the time, all of this began to change when the Supreme Court interpreted Title VII to ban not just actual discriminatory treatment, but also actions that have a disparate impact on a protected group in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). A significant problem with disparate impact theory is that *all* job qualifications have a disparate impact. It is no exaggeration to state that there is always some protected group that will do comparatively poorly with any particular job qualification. As a group, men are stronger than women, while women are generally more capable of fine handiwork. Chinese Americans and Korean Americans score higher on standardized math tests and other measures of mathematical ability than most other ethnic groups. Subcontinent Indian Americans are disproportionately more likely to have experience in motel management than Norwegian Americans, who more likely have experience growing durum wheat. African Americans are over-represented in many professional athletics as well as in many areas of the entertainment industry. Unitarians are more likely to have college degrees than Baptists. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)(recognizing that disparate impact liability applies to subjective as well as objective job qualifications).²⁸

The result is that the labor market is anything but free and flexible. All decisions are subject to second-guessing by the EEOC or by the courts. This is a profound change in the American workplace—and indeed in American culture. Note that disparate impact liability applies to promotions and terminations too. See *George v. Farmers Electric Cooperative, Inc.*, 715 F.2d 175 (5th Cir. 1983); *Wilmore v. Wilmington*, 699 F.2d 667 (3d Cir. 1983).²⁹

²⁸ Some of the disparities are surprising. Cambodian Americans are disproportionately likely to own or work for doughnut shops and hence are more likely to have experience in that industry when it is called for by an employer. See Seth Mydans, *Long Beach Journal: From Cambodia to Doughnut Shops*, N.Y. TIMES, May 26, 1995. The reasons behind other disparities may be more obvious: Non-Muslims are more likely than Muslims to have an interest in wine and hence develop qualifications necessary to get a job in the winemaking industry, because Muslims tend to be non-drinkers.

²⁹ Supporters of disparate impact liability sometimes argue that disparate impact's ubiquity is not a problem, because the EEOC has agreed to abide by a "four-fifths rule." Under the Uniform Guidelines on Employee Selection Procedures, if a particular job qualification leads to a "selection rate for any race, sex, or ethnic group" that is "greater than four-fifths" of the "rate for the group with the highest rate" it will not be regarded by federal enforcement agencies as evidence of adverse

Some might argue that this is water under the bridge.³⁰ But even if they are right, there is no reason that Congress cannot exempt the most sensitive areas from the disparate impact policy. I can think of no better candidate from exemption than an employer's policy and practices on hiring and retaining employees with criminal convictions. It is not just that it is abusive to use coercive "sticks" to force an employer to hire or retain an employee whose criminal record causes her to feel uncomfortable when non-coercive "carrots" like the Work Opportunity Tax Credit Program are much more useful in matching the right ex-offender to the right job. It is also that the policies embodied in the *2012 Guidance* may be counterproductive for the EEOC's professed purpose of improving job opportunities for African Americans and Hispanics.

In Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451 (2006) ("*Perceived Criminality*"), the authors discussed the double effect of using criminal background checks. As they explain, it must be kept in mind that African-American and Hispanic men are not simply more likely to have a criminal record, they also are likely to be perceived that way. Consequently, if the *2012 Guidance* discourages some employers from checking the criminal background of job applicants out of fear of liability, some will almost certainly shy away from hiring African-American or Hispanic males in the (not necessarily unfounded) belief that members of these groups are somewhat more likely to have criminal records than white or Asian American female applicants. Put differently, the EEOC's

impact." This is cold comfort. First of all, particularly when the population is broken into multiple ethnic groups, selection rates of less than four-fifths relative to the ethnic group with the highest rate are the rule and not the exception.

Consider, for example, the horse racing industry. Of the five top-grossing North American jockeys of 2012, all are Hispanic males. Height and weight restrictions make it less likely that an African- or Irish-American male will qualify. Furthermore, this supposed limitation on disparate impact is not binding on private litigants (and does not even guarantee which approach federal agencies will take).

Moreover, while the "four-fifths" rule purports to be practical, it is useless in practice. Prior to adopting a particular job qualification, employers usually have no way of knowing what the selection rates will be. All they can be sure of is that the results won't be equal across the board, since nothing ever is.

³⁰ The Civil Rights Act of 1991 acknowledged, but did not expressly embrace disparate impact liability. 42 U.S.C. § 2000e-2(k).

attempt to prevent the “disparate impact effect” creates an incentive for a “real discrimination effect.”

Of course, prohibiting real discrimination is exactly what Title VII was supposed to do. Congress was well aware that some discrimination—call it “statistical discrimination”—is rooted in stereotypes that may or may not have some basis in fact. For example, women really are on average less physically able to lift heavy weights than men. But if an employer wanted an employee who was able to lift heavy weights, Congress took the position that the employer should look for evidence of those characteristics and not depend on stereotypes. But the success of that approach depends upon the ability of employers to seek evidence of the actual desired traits. If the employer is looking for trustworthy employees who will not commit crimes, they need some source of information. The applicant’s criminal record (or lack of a criminal record) is often the best method for separating the cases that are most likely to be a problem from those that are not. It is a window into the content of their character, and while it is an imperfect window, there is no such thing as a perfect window. If employers are prohibited from using it, they may be tempted, consciously or unconsciously, to use race as a proxy for criminal record. This will be hard to detect.

Other employers may make adjustments to their hiring policies that are not in any way motivated by race, but which ultimately decrease the likelihood that African-American and Hispanic job applicants will be hired. Suppose, for example, an employer regularly hires young high school drop-outs as packers for his moving van business. Given the business location’s demographics, this yields a labor pool that is disproportionately African American and Hispanic, but not overwhelmingly so. Until his lawyer instructed him that the requirement of “individualized assessments” made excluding applicants with criminal records too risky, he had been doing criminal background checks on all job applicants and declining to hire most of those with a record. But after he stopped conducting those checks, he hired a young, white 19-year-old who ended up stealing from the customers. Another recent hire turned out to have a drug problem. The employer does not know it, but criminal background checks would have identified these employees as risky. All the employer knows is that he is not satisfied with his recent hires, so he decides to convert the full-time jobs that come open into part-time jobs and to advertise in the campus newspaper at a nearby highly competitive liberal arts college. He figures (rightly or wrongly) that the students there will likely be more trustworthy than the pool he had been hiring from. Given the school’s demographics, this yields an overall labor pool that has proportionately fewer minorities. The EEOC guidance would have accomplished precisely the opposite its intentions.

From a policy standpoint, the obvious question is which effect dominates—the disparate impact or the disparate treatment effect. The

answer to that question is clear: Nobody knows.³¹ But that is just the problem: The EEOC policy is pushing employers to hire and retain employees with criminal convictions when doing so is against the employers' better judgment. One would think at the very least the EEOC would have strong evidence that this accomplishes the task that it views itself as carrying out—improving the employment prospects of African American and Hispanic men.

In conclusion, I urge that H.R. 548—the proposed Certainty in Enforcement Act be passed into law. But I also urge that Congress consider more far-reaching legislation that would exempt employment decisions based on an employee's criminal conviction record from disparate impact liability. By all means, the federal government has a role to play in helping ex-offenders re-enter the workforce. But attempting to accomplish this through Title VII disparate impact liability is the wrong way to do it.

³¹ The evidence adduced in *Perceived Criminality* suggests that it may be the disparate treatment effect that dominates. That article examined the answers to interview questions provided by slightly over 3000 employers that hired workers without college degrees in four cities during the early 1990s. Approximately half of those employers either always or sometimes conduct criminal background checks on job applicants. Further data collected in 2001 in Los Angeles showed this number had climbed from 48.2% to 62.3% for that city specifically.

The article found that employers who conduct background checks were more likely to have recently hired an African-American applicant than employers who do not. Among those employers who were unwilling to hire ex-offenders, the employers who checked were 10.7% more likely to have recently hired an African American. This finding was highly significant. It is always difficult to distinguish cause from effect. In conducting studies of this kind, one could argue that the reason that employers who undertake background checks are more likely to hire African Americans is that they face labor pools that are heavily African American and are biased against African Americans.

Research has been undertaken attempting to confirm or refute the hypothesis that easy availability of criminal background information benefits black males as a group overall by comparing the black-to-white wage ratio in states that make criminal records broadly available to that in states that do not. Shawn D. Bushway, *Labor Market Effects of Permitting Access to Criminal History Records*, 20 J. CONTEMP. CRIM. JUSTICE 276 (2004). Bushway's data did indeed show that states that make criminal records broadly available have higher black-to-white wage ratios, but those data were too skimpy for this difference to be statistically significant. Bushway has called for more research. *Id.* at 288-89.