No. 05-3857

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOUGLAS EL,

PLAINTIFF-APPELLANT

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

DEFENDANT-APPELLEE

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF *AMICUS CURIAE* THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PLAINTIFF-APPELLANT.

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* files the following statement of disclosure: The NAACP Legal Defense & Educational Fund, Inc. is a nonprofit 501(c)(3) corporation and is not a publically held company that issues stock.

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Interest of *Amicus*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") was incorporated in 1939 under the laws of New York State to provide legal assistance to black persons in securing their constitutional rights. For over six decades, LDF has appeared as counsel of record or *amicus curiae* in numerous cases involving race discrimination before the Supreme Court, the Courts of Appeals, and the federal District Courts. Since its passage 40 years ago, LDF has worked ceaselessly to enforce Title VII, litigating on behalf of individual plaintiffs and plaintiff classes against private and public employers to challenge discriminatory employment practices. Among the hundreds of Title VII cases LDF has litigated are *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), whose adverse impact holdings were ultimately codified in the Civil Rights Act of 1991. Given its expertise, LDF believes its perspective would be helpful to this Court in resolving the issues presented in this case.

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[1]All parties have consented to filing of this brief. Consent was provided by Plaintiff-Appellant's counsel, David Cohen, and Defendant-Appellee's counsel, Robert Jaurin, via telephonic conversations with *Amicus Curiae* counsel, Melanca Clark, on December 12th, 2005.

ARGUMENT

Introduction

The use of criminal record information in hiring policies is of critical importance to African Americans given the persistence of racial disparities at all stages of the criminal justice system, and the profound impact of collateral civil sanctions on the ability of former offenders to reintegrate and become productive members of society. These collateral civil sanctions can affect an individual's right to vote,[2] acquire housing,[3] receive public assistance[4] and student loans,[5] and as evidenced in this case, seek gainful employment.

In light of the close nexus between gainful employment and rehabilitation for individuals with prior criminal histories,[6] policy makers, courts, and the

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[2] Thirty-six states impose some form of restriction (ranging from time-limited ban to permanent disfranchisment) on the voting rights of individuals with a felony record. *See* SENTENCING PROJECT, *Felony Disenfranchisement Laws in the United States* (2005), *at* http://www.sentencingproject.org/pdfs/1046.pdf.

[3] *See, e.g.,* Corrinne Carey, *No Second Chance: People With Criminal Records Denied Access to Public Housing,* HUMAN RIGHTS WATCH (2004), *available at* http://hrw.org/reports/2004/usa1104/.

[4] *See* 21 U.S.C. 862a (2000) (authorizing imposition of lifetime ban on receipt of cash benefits or food stamps for individuals with drug convictions).

[5] *See* 20 U.S.C. 1091(r)(1) (2000) (codifying the 1998 amendment to the Higher Education Act of 1965 restricting federal financial aid and guaranteed loans for individuals with drug convictions).

[6] *See, e.g.,* Jeffrey K. Liker, *Wage and Status Effects for Employment on Affective Well-being among Exfelons*, 47 AMERICAN SOCIOLOGICAL REVIEW 264-283 (1982); ANN DRYDEN

Commonwealth of Pennsylvania itself have recognized that public policy favors avoiding "unwarranted stigmatization of and unreasonable restrictions upon former offenders through the imposition of employment barriers." *Sec'y of Revenue v. John's Vending Corp.*, 309 A.2d 358, 362 (Pa. 1972) ("This State in recent years has been unalterably committed to rehabilitation of those persons who have been convicted of criminal offenses. To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation."); *see also* President George W. Bush, State of the Union Address (Jan. 20, 2004), *at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html ("We know from experience that if [former prisoners] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison . . . . America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life."); *cf.* COUNCIL OF STATE GOVERNMENTS RE-ENTRY POLICY COUNCIL, *Report of the Re-Entry Policy Council, Charting the*

WITTE & HELEN TAUCHEN, WORK AND CRIME: AN EXPLORATION USING PANEL DATA (Nat'l Bureau of Econ. Research, Working Paper No. 4794, 1994); Robert D. Crutchfield & Susan. R. Pitchford, *Work and Crime: The Effects of Labor Stratification*, 76 SOCIAL FORCES 93-118 (1997).

Safe and Successful Return of Prisoners to the Community (2005), *available at* http://www.reentrypolicy.org/report/report-pdf.php ("Americans do not "recognize the extent to which policies set up a person released from prison for failure, with little hope of redemption").

The issue of rehabilitation of former offenders has gained national attention due to the historically unprecedented number of Americans who have had contact with the criminal justice system. Incarceration rates have more than tripled since the 1980s. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1998 (2002); PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2003 (2004). As a result of this increase, the United States currently constitutes approximately five percent of the world's population but holds 25% of the world's prison population. MARC MAUER, RACE TO INCARCERATE 15-41 (1999). A disproportionate number of the two million people in American jails and prisons are racial minorities. African Americans are not only more likely to be arrested than whites, but are also more likely to be charged once arrested, and are more likely to be convicted and incarcerated when charged.

Id. at 118-141.[7] Nationwide, African Americans account for 12% of the population, 27% of all arrests, and 44% of those convicted of felonies. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES (2003). All told, at least 12 million Americans possess a felony record, approximately eight percent of the working-age population. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 938 (2003). For African-American men who have a 33% likelihood of incarceration during their lifetime, this figure is undoubtedly higher. THOMAS B. BONZCAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION 1974-2001 (2003).

In the face of these disparities it is evident that almost any employment policy excluding individuals with criminal records is likely, as has been shown in this case, to have a disparate impact on African Americans. Title VII's requirement that job exclusions based on possession of a criminal record be job-related and consistent with business necessity ensures that employers do not maintain such policies to advance or perpetuate illegal racial discrimination.

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[7] *See also* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 754 (1993) (discussing racial disparities in the criminal justice system and noting that high rates of arrest of African Americans for drug-related offenses are unlikely to be indicative of higher rates of drug offending as compared to the general population).

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In this case, because the district court did not properly apply the business justification standard, its ruling granting summary judgment in favor of SEPTA should be reversed.

I. TITLE VII PROHIBITS THE RACIALLY DISCRIMINATORY USE OF CRIMINAL HISTORY INFORMATION.

Despite clear evidence of the disparate impact that SEPTA's employment policy has on African Americans, and SEPTA's ability to consider, on an individualized basis, the criminal histories of its paratransit drivers, SEPTA insists on imposing an unduly restrictive hiring policy excluding applicants with any felony conviction or enumerated misdemeanor conviction within the prior seven years, and any felony or misdemeanor conviction (irrespective of the time of the offense) involving a crime of moral turpitude or violence against any person.[8] Title VII prohibits such a course unless the policy in use by the employer is both

[8] Plaintiff asserts that the employment policy to which he was subject imposed a *per se* bar on the hiring of any individuals with any type of criminal conviction for the paratransit driver position. *See* Plaintiff's Appellate Br. at 14-21. The District Court, however, assumed, without acknowledging the conflicting evidence in the record, that SEPTA applied a policy excluding all individuals with any history of a felony or misdemeanor for a crime of violence or moral turpitude, and individuals having any felony or specified misdemeanor conviction occurring in the prior seven years. *See* July 12, 2005 Memorandum and Order (A18) [hereinafter "Order"]. (All references to the Appellate Record are in the form of "(A_)", referring to the designated pages of the Appellate Appendix filed by Plaintiff-Appellant.) While a dispute between the parties as to what employment policy applied appears to raise a triable issue of material fact warranting reversal of the district court's decision, *amicus* believes that the District Court's grant of summary judgment was in error even if SEPTA is found to have utilized the SEPTA employment policy formulation described by the District Court. The arguments in this brief are thus addressed to the District Court's formulation of SEPTA's employment policy.

job-related and consistent with business necessity. The rationale behind Title VII's business necessity requirement is clear, both in the legislative history and the subsequent case law interpreting the ambit of the statute's protection: to eliminate invidious racial and other illegal discrimination in employment decisions.

While it is well established that a plaintiff need not show a subjective discriminatory motive on the part of an employer to prevail in a Title VII case, such motives are not divorced from a Title VII inquiry, even where an employment policy's disparate impact is at issue. Requiring an employer to prove that its employment policy is both job-related and consistent with business necessity ensures that employment decisions have not been made on the basis of racial prejudice and stereotypes, either conscious or subconscious. As the 11th Circuit has noted, in the face of evidence of disparate impact of its policy, if an employer cannot demonstrate that the challenged practice is job- related "what explanation can there be for the employer's continued use of the discriminatory practice other than that some invidious purpose is probably at work?" *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1321-22 (11th Cir. 1999), *reh'g en banc denied*, 212 F.3d 602 (2000).

In our nation's history, criminal history information has been used as a means to discriminate against African Americans. For example, state legislatures

in both the north and south tailored their felon disfranchisment laws to require the loss of voting rights only for those offenses committed mostly by African Americans, in order to disfranchise the African-American electorate. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court found that a disfranchisment clause under the Alabama constitution excluding from voting all individuals with misdemeanors involving crimes of moral turpitude, had been adopted by the Alabama legislature for racially invidious purposes, in spite of its racially neutral language. Citing evidence that the crimes enumerated in the statute were ones thought to be more commonly committed by African Americans, the court invalidated the clause, as such evidence revealed that the clause's enactment was "motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233.

More recently, studies have shown the persistence of illegal employment discrimination against African Americans and the connection between such invidious discrimination and the use of criminal records in hiring decisions. A study performed in Madison, Wisconsin and then replicated in New York City tested the effect of race and criminal history on the number of "call-backs" received for entry-level employment positions by sending black and white testers with matched qualifications to job interviews. Devah Pager, *The Mark of a*

Criminal Record, 108 AM. J. SOC. 937 (2003); Paul von Zielbauer, *Study Shows More Job Offers for Ex-Convicts Who are White*, NY TIMES, July 17, 2005, at B1 (describing New York study). The study found not only that whites were three times more likely to get a call-back than similarly credentialed African Americans, but also that whites with criminal records were still more likely to receive a call-back than African-American applicants without criminal records. Indeed, race compounded the effect of having a record: white men with a criminal record were half as likely to receive call-backs as white men without a criminal record, black men with a criminal record were only a third as likely to receive a call back as black men without a criminal record. The negative impact of having a criminal record on black applicants, therefore, was greater than it was for whites. One plausible explanation for this phenomenon is that the presence of a criminal record allows employers to justify decision-making on the basis of stereotypes and prejudice already held against African-American applicants.

Although some progress has been made, it is clear that the problem of employment discrimination that Title VII was enacted to address has not been eradicated. The fact that such discrimination may rear its head under the guise of an employment policy targeted at individuals with criminal records is not reason to eschew application of Title VII's clear standards.

II. THE PROPER APPLICATION OF TITLE VII'S BUSINESS NECESSITY REQUIREMENT ENSURES THAT EMPLOYERS DO NOT MAKE HIRING DECISIONS ON THE BASIS OF PREJUDICE, STEREOTYPES AND INVIDIOUS DISCRIMINATION.

Title VII was enacted, in large part, to prevent employment decisions based on racial prejudice and stereotypes, and to require instead that an employer focus on individuals' qualifications and abilities to perform the job in question. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 243-44 (1989). Under this framework, when considering an applicant's criminal history in determining job suitability, an employer should only consider the extent that the individual's particular conviction relates to the specific responsibilities of the job applied for. Without this requirement an employer would be free to rely on stereotypes to justify its policy of excluding applicants with a criminal history, irrespective of the disproportionate burden such a policy imposed on African Americans, and without regard to whether the policy actually resulted in a safer work environment.[9]

Accordingly, rather than rely on overly broad generalizations about ex-offenders as a class, Title VII requires that SEPTA present empirically validated

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[9] The elderly and disabled, reacting to the highly charged rhetoric surrounding the prevalence of crime, might feel safer with the policy SEPTA has in place, but there is no evidence that they will actually be safer. In any event, customers' preferences do not provide a business justification for a discriminatory policy. *See, e.g., Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981).

proof that there is a connection between a specific conviction and current behavior to support a business justification defense of its discriminatory hiring policy. *See Green v. Mo. Pac. R.R. Co.,* 523 F.2d 1290, 1298 (8th Cir. 1975) (employment policy excluding individuals with criminal records found to violate Title VII where employer "had not empirically validated its policy with respect to conviction records"). Heightened scrutiny of the proof offered by defendant in support of a business justification is warranted where the employer has developed data supporting its business justification in response to a law suit. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 433 n.32 (1975) (courts should "examine with great care" studies validating discriminatory employment practices when prepared in anticipation of litigation).

In this case the district court failed to hold SEPTA to Title VII's rigorous standards. The court allowed SEPTA to defend its policy on the basis of its assertion that "former prisoners are much more likely to engage in criminal conduct (subsequent to release) than the 'typical' adult in the general population," Order (A19) (citing report of Dr. Griffen), and the introduction of evidence showing recidivism rates for federal and state prisoners over a three year period. If SEPTA's reliance on such generalized recidivism statistics as a proxy for plaintiff's propensity to commit a crime is sufficient to support business necessity,

any employment policy which excludes individuals with criminal records, no matter how broad, would similarly be justified. Blanket exclusions, however, are clearly violative of Title VII. *See Gregory v. Litton Systems, Inc.,* 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972); *Green*, 523 F.2d at 1296; *cf. Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974) (finding that blanket ban excluding individuals with felony convictions from civil service positions violated the Equal Protection and Due Process Clauses of the United States Constitution).

Using recidivism rates of an undifferentiated group of individuals with criminal records to support a conclusion that all are equally likely to commit another crime assumes an ability to predict behavior that even defendant's experts disavow.[10] By permitting SEPTA to rely on such statistics the district court disregarded the significance of highly individual factors which clearly bear on an individual's propensity to recidivate, such as evidence of rehabilitation, as well as the nature of the crime and the time passed since the commission of the offense, factors required to be considered under the EEOC's policy guidance.[11]

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[10] *See* Sosbey Report (A19); Blumstein Report (A953).

[11] *See* EEOC, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964,* II EEOC Compliance Manual § 604 (Feb. 4, 1987); *see also* Christopher Uggen, *Work as a Turning Point in the Life Course of criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AMERICAN SOCIOLOGICAL REVIEW, 529-546 (2000); Miles D. Harer, *Recidivism among Federal Prisoners released in 1987*, 46 JOURNAL OF CORRECTIONAL EDUCATION, 98-127 (1995); Thomas Meisenhelder, An Exploratory Study of

In fact, the Bureau Of Justice report upon which SEPTA's experts rely, shows that even for the very limited time period it covers, the proximity in time to the commission of an initial offense has a great impact on the incidence of recidivism. For example, the first year of release accounted for nearly two thirds of all recidivism reported for the three years covered in the Bureau Of Justice report.[12] While *overall* recidivism rates of a group of former offenders can only rise as each year passes, the probability that an *individual* offender will re-offend for each year remaining crime-free decreases. SEPTA's experts concede this important point which has been substantiated by a number of publically available studies.[13]

Not only did the Court permit SEPTA to support its business justification defense on the basis of overly broad and generalized recidivism statistics, but it similarly accepted SEPTA's contention that specialized transportation services serving people with disabilities and senior citizens are inherently high-risk

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Exiting From Criminal Careers, 15 CRIMINOLOGY 319 (1977).

[12](A933) (U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994).

[13]*See* Blumstein Report (A953) n.13 ("The largest volume of recidivism occurs in the first year out and the rate decreases in subsequent years."); Sosbey Report (A922); MICHAEL EZELL & LAWRENCE COHEN, DESISTING FROM CRIME (2005); *see also* JOHN LAUB & ROBERT SAMPSON, SHARED BEGINNINGS, DIVERGENT LIVES (2003).

environments for victimization without inquiry into whether the evidence SEPTA relied on supported the particular exclusionary policy it had in place. SEPTA's expert's purported proof on this point is supported largely by studies describing the rate of sex crimes against disabled children and adults.[14] While such evidence might provide a business justification for an employment policy that excluded convicted sex-offenders, it cannot justify an employment exclusion broader than this narrow class of offenders. SEPTA can no more rely on this data then it could rely on evidence of the effects of smoking crack/cocaine on job performance to justify the business necessity of a hiring policy which excluded all individuals who indulged in any form of smoking (including cigarette and cigar smoking), if such a policy disproportionately impacted a class protected under Title VII. Such tenuous evidence simply does not suffice in meeting SEPTA's burden of showing that its employment policy is both job-related and consistent with business necessity. *See Banks v. City of Albany*, 953 F. Supp. 28, 36 (N.D.N.Y. 1997) (employers must present "convincing expert testimony" that a challenged practice is required to establish a business necessity defense).

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[14] *See, e.g.,* Sosbey Report (A912) (analyzing study conducted in 1991 and updated in 1994 reviewing incidents of sex crimes committed against disabled children and adults to determine the prevalence of crime against vulnerable populations perpetrated by transportation providers); *id.* at (A917) ("Among *sex crimes* committed against passengers by drivers, cases that involve vulnerable victims (most frequently children and people with disabilities) were prominent.") (emphasis added).

In the instant case the district court found SEPTA's employment policy justified by business necessity on the mere showing that criminal background checks bear *some* relationship to public safety. Order (A19-20). The law requires that an employment practice not only foster safety and efficiency, but must be *essential* to that goal. *Green*, 523 F.2d at1298. In other words, an employer must show that the employment policy it has implemented is a valid measure of the *minimum* qualifications necessary to achieve its legitimate goals. *Lanning v. SEPTA*, 181 F.3d 478 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131 (2000), *on appeal after remand*, 308 F.3d 286 (3d Cir. 2002) (rejecting business justification defense where SEPTA failed to present evidence that the policy in question measured the minimal qualifications necessary to perform the job of paratransit police officer, and relied instead on evidence merely showing policy had some relationship to public safety).[15] Because it failed to require SEPTA to show that the particular exclusions at issue in the policy were necessary to achieve SEPTA's legitimate interest in passenger safety, the district court's ruling should be reversed.

[15]In light of this standard, SEPTA's expert Dr. Sosbey's reference to the observation of forensic psychologist, Vern Quinsey, seems poorly chosen. *See* Sosbey report (A920) ("If you can hire enough people without criminal records, don't hire any who have one.").

III. INDIVIDUALIZED CONSIDERATION OF APPLICANTS' CRIMINAL HISTORY INFORMATION IS A FEASIBLE EMPLOYMENT POLICY FOR SEPTA AND ITS AGENTS.

An employment policy requiring individualized consideration of the age, nature and job-relatedness of each applicant's criminal conviction would be consistent with Title VII's emphasis on individualized rather than group-based considerations as a basis for decision making. Moreover, the district court has found that the paratransit contractors "clearly have the capability to . . . perform a case-by-case analysis of each prospective employee. . . ." Order (A23). *Cf. Albemarle Paper Co.*, 422 U.S. at 436 (business justification may be pretext for discrimination where the employer has an equally effective manner at its disposal for achieving its goals which comply with Title VII). Accordingly, such a policy would be an appropriate substitute for that currently used by SEPTA, even if it has no less of a disparate impact on minority applicants.[16] It is, however, probable that the "individualized screening" approach would result in a lessened adverse impact than that experienced under the blanket exclusions.

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[16] *See Lanning*, 181 F.3d at 490 n.15 (If an employer cannot demonstrate that its discriminatory employment policy measures the minimum qualifications necessary for the job in question, the employer may "develop either a non-discriminatory practice which furthers its goals, *or an equally discriminatory practice that can meet this standard*") (emphasis added).

No less significantly, such individualized consideration would likely insulate SEPTA from negligent hiring lawsuits which, under Pennsylvania law, turn on whether an employer knew or should have known that an employee posed an unreasonable risk to others. *Dincher v. Great Atlantic & Pacific Tea Co.*, 51 A.2d 710, 714 n.3 (Pa.1947).[17] Under a negligence standard, careful individualized consideration of every applicant's criminal history would serve as proof that every reasonable precaution was taken by SEPTA and/or its agents to ensure that any particular paratransit employee was suited for his or her position. In other words, SEPTA need not proceed as if a strict liability standard were in place. *See, e.g., Ford v. Gildin,* 613 N.Y.S.2d 139 (1994) (employer not liable for negligent hiring of an employee with a manslaughter conviction who molested a child because "it was not foreseeable ... that a person who had committed manslaughter.. would molest a child [27] years later."); *cf.* FLA. STAT. ANN. § 768.096 (employer not liable for torts committed by agents where employer can show criminal history obtained and evaluated for information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed).

[17]Moreover, SEPTA, as a Commonwealth agency, in certain instances can seek sovereign immunity protection from liability under Section 2310 of Title 1 of the Pennsylvania Judicial Code. *See* 1 PA. CONST. STAT. § 2310; 42 PA. CONST. STAT. § 8521.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that this Court reverse the district court's grant of Summary Judgment.

Dated: *14*, December 2005

Respectfully submitted,

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CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Norman J. Chachkin, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Word Count

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4118 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also 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 WordPerfect 9.0 in 14 point, Times New Roman font.

3. Certification of Service

I hereby certify that I e-mailed an electronic copy of the foregoing Brief of *Amicus Curiae* The NAACP Legal Defense & Educational Fund, Inc. in Support of Plaintiff-Appellant, in a single .PDF file, to the Office of the Clerk, United States Court of Appeals for the Third Circuit at the following e-mail address: <electronic briefs@ca3.uscourts.gov>.

I hereby certify that ten copies of the foregoing Brief have been deposited in the United States mail, postage prepaid and properly addressed to the Office of the Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

I hereby certify that two copies of the foregoing Brief have been deposited in the United States mail, postage prepaid and properly addressed, to counsel for all other parties in this suit, as follows:

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4. Certification of Identical Compliance of Briefs

I hereby certify that the electronic and hard copies of foregoing Brief in the instant matter contain identical text.

5. Certification of Virus Check

I hereby certify that a virus check of the electronic .PDF version of the foregoing Brief was performed using Symantic AntiVirus, and the .PDF file was found to be virus free.

Dated: *14*, December 2005

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