No. 16-4372

In the

UNITED STATES COURT OF APPEALS

for the

EIGHTH CIRCUIT

CARA WILLIAMS, *ET AL.*,
Plaintiffs-Appellants,

vs.

WELLS FARGO BANK, N.A.,
Defendant-Appellee.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA
CASE NO. 4:15-CV-000038 CRW-SBJ
HON. CHARLES R. WOLLE, UNITED STATES DISTRICT JUDGE

BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFFS-APPELLANTS & REVERSAL ON APPEAL

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Civil Procedure 26.1 and 30(c)(1), the National Employment Law Project states that it is a tax-exempt non-profit corporation with no parent corporation and no publicly held corporation that owns ten percent or more of its stock.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

Amicus writes not to repeat arguments made by the parties, but to shed light on the significant barriers to employment faced by people with arrest and conviction records, particularly those of color, and to urge the Court to interpret Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and Section 19 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829 ("Section 19"), in light of that important real-world context. Amicus curiae submits this brief pursuant to Federal Rule of Appellate Procedure 29.[1]

The National Employment Law Project ("NELP") is a non-profit legal research and advocacy organization with 45 years of experience advancing the rights of low-wage workers and those struggling to access the labor market. NELP seeks to ensure that vulnerable workers across the nation receive the full protection of employment laws. Specializing in the employment rights of people with arrest and conviction records, NELP has helped to lead the national movement to restore fairness to employment background checks. NELP works with allies in Eighth Circuit states and across the country to promote enforcement of federal, state, and local antidiscrimination laws and ensure that barriers to employment are

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus states that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

minimized for workers with records. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers with arrest and conviction records.

INTRODUCTION & SUMMARY OF ARGUMENT

People with arrest and conviction records form a shockingly large portion of the U.S. population, among whom people of color are disproportionately represented because of race disparities in the U.S. criminal justice system. Various legal restrictions and employer preferences create, to say the least, an uphill battle for people with records in search of employment. The hiring barriers they face frequently deny them a means to support their families and communities. Their resulting lack of employment weakens the economy and unnecessarily drives up the rate of recidivism. Moreover, employers needlessly screen out a hard-working portion of their talent pools. For all of these reasons, public policy does not support imposing extensive collateral consequences on workers with records. Nor does it support expansive judicial interpretations of existing legal restrictions, such as Section 19 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829 ("Section 19"). Rather, the actions of Defendant-Appellee Wells Fargo and other facts of this case must not be read in isolation from these public policy considerations. Wells Fargo summarily terminated employees, and rescinded offers to applicants, with waivable Section 19 offenses on their records—resulting in a disparate impact on workers of color. Despite asserting that the statute mandates such terminations, Wells Fargo has previously complied with Section 19 in less severe ways, such as by informing other workers of the waiver process or even sponsoring their waiver applications.

The Court ought remain mindful of the real-world implications for struggling families and communities of color as it performs a careful and thorough analysis for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII").

ARGUMENT

1. An immense segment of the population—disproportionately people of color—have arrest or conviction records that can hinder their employment.

A staggering number of people in the United States have records in the criminal justice system. Over 70 million people—or nearly one in three U.S. adults—have an arrest or conviction record that can be revealed through a background check. Anastasia Christman & Michelle Natividad Rodriguez, Nat'l Emp't Law Project, *Research Supports Fair Chance Policies* 1 & n.1 (Aug. 1, 2016), http://bit.ly/1sk48Nn (citing U.S. Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012* 2 (Jan. 2014), http://bit.ly/2m1uC4U); *see also* Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall St. J., Aug. 8, 2014, http://on.wsj.com/2lV1viR (reporting that the names of over 77 million individuals appear in the FBI master criminal database). Over 2.3 million people are incarcerated in the United States, Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, Prison Policy Initiative (Mar. 14, 2016),

http://bit.ly/2g59nxw, with over 636,000 people released each year, E. Ann Carson, U.S. Bureau of Justice Statistics, *Prisoners in 2014*, at 9-10 (Sept. 2015), http://bit.ly/2lmU3jn.

As these massive numbers make plain, the population with records does not represent some stereotype of hardened "criminals," but rather a huge portion of our family and community members. In fact, nearly half of all U.S. children have at least one parent with a record. Rebecca Vallas, et al., Ctr. for Am. Progress, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children* 1 (Dec. 2015), http://ampr.gs/2iT7VwO.

Perhaps even more startling than the sheer size of the population marked by the criminal justice system is the race disparity among those individuals. Nationally, African Americans make up twice the percentage of arrests as their share of the population. *Compare* Fed. Bureau of Investigation, *Crime in the United States, 2015: Overview Table 43* (2016), http://bit.ly/2m0yMf5 (noting 26.6% of 2015 arrests were of black or African American people), *with* U.S. Census Bureau, *Quickfacts: United States*, http://bit.ly/2m1NMFZ (indicating that 13.3% of the U.S. population was black or African American in 2015). Black men are especially impacted, with nearly 50% arrested by age 23 versus approximately 30% for the general population. Robert Brame, et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 Crime & Delinquency 471,

471-86 (2014). As of 2003, approximately one in seventeen white men were expected to spend time in prison during their lifetimes—a number dwarfed by the rates for black and Hispanic men, which were calculated at one in three and one in six, respectively. Thomas P. Bonczar, Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1 (Aug. 2003), http://bit.ly/2myRKdU.

2. Barriers to employment for people with records are significant—particularly for people of color.

The stigma of criminal justice involvement is often lifelong, with lasting impacts on employment opportunities. While quantifying the extent of these struggles is impossible, research and surveys provide glimpses into the barriers faced by many. One study of individuals seeking expungement of past records in Illinois revealed that their records continued to significantly inhibit their employment prospects for many years, even if the offense was minor or the person had merely been arrested but not convicted. Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record*, 54 Criminology 387, 36-40 (2016), http://bit.ly/2ngY3zn. In sharp contrast to employer practices in the twentieth century, surveys now indicate that nearly nine in ten employers perform background checks for some or all of their positions. Soc'y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3 (Jul. 19, 2012), http://bit.ly/2mhlrzh. And when a job application

conveys a candidate's record, he is much less likely to get a callback. One prominent study found that indicating a record halved the callback rate for white applicants from 34% to 17%. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Sociology 937, 955-56 (2003), http://bit.ly/1vNQBJk. Yet white applicants *with* records received more callbacks than black applicants *without* records, who had a 14% callback rate. *Id.* at 957-58. And black candidates with records were penalized even more significantly than whites, with their callback rate reduced by almost two-thirds to 5%. *Id.*

Legal restrictions further compound the effects of voluntary employer screening. Many laws and regulations mandate background checks or prohibit people with certain convictions from working in specified roles or for particular types of employers. A nationwide inventory of collateral consequences documents over 26,000 state and federal laws and regulations that restrict the employment options of people with records. *See* Council of State Gov't*s*, Justice Ctr., *National Inventory of Collateral Consequences of Conviction*, http://bit.ly/2lFhpxP (last visited Mar. 2, 2017) (select "Employment" from "Categories" dropdown menu to generate list of laws). Some of these restrictions are mandatory and others discretionary, but, in both cases, they frequently prevent people with records from obtaining employment.

Before ever encountering these employer- or legislature-created barriers at the hiring stage, many people with records are screened out of entire professions when attempting to obtain an occupational license. Approximately one in four U.S. workers must obtain an occupational license to do her job, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: Data on Certifications and Licenses* tbl. 1 (Apr. 15, 2016), http://bit.ly/2n1uNjM, and many state licensing boards mandate background checks and frequently exclude applicants because of their records, *see generally* Michelle Natividad Rodriguez & Beth Avery, Nat'l Emp't Law Project, *Unlicensed & Untapped* (Apr. 2016), http://bit.ly/1rwd2ry. The nationwide inventory of collateral consequences noted above documents over 27,000 licensing restrictions in state laws. *Id.* at 6 (citing Council of State Gov'ts, *supra*). These laws and regulations form yet another obstacle between people with records and gainful employment.

3. Public policy does not support these immense barriers to employment for people with records, which devastate families and communities and hinder economic health and public safety.

Instead of protecting the public, reduced access to jobs by people with records weakens our economy and communities. The inability to find work translates into an inability to provide for family members, leaving those with records to instead lean on their families for support. For instance, interviews with family members of formerly-incarcerated men revealed that 83% had provided the

recently released person with financial support, half reported that providing this support was "pretty or very hard," and 30% were facing "financial hardships." Rebecca L. Naser & Christy A. Visher, *Family Members' Experiences with Incarceration and Reentry*, 7 W. Criminology Rev. 20, 26 (2006). Another survey of family members reported that 68% of returning parents had difficulty paying child support. Tracey Lloyd, Urban Inst., *When Relatives Return* 15-16 (2009), http://urbn.is/2m1Hzxm. These are not just short-lived problems, but long-term struggles that significantly diminish upward mobility by, for example, more than doubling the likelihood that a man in the lowest quintile of earners will remain there twenty years later. Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 4 (2010), http://bit.ly/1YjcAau.

Far from representing the full extent of harm, financial difficulties faced by individual families also have an effect on the overall economy. In total, economists estimate that reduced prospects in the labor market translated into a $78 to $87 billion reduction in U.S. gross domestic product in 2014. Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies* 1 (2016), http://bit.ly/2atNJBu. Individual lost earnings also mean forgone income taxes, reduced spending and sales tax revenue, and missing out on the benefits of

employment to recidivism. Providing a snapshot of the potential impact of employment, one 2011 study estimated that putting 100 formerly incarcerated people back to work would increase their collective lifetime earnings by $55 million, their income tax contributions by $1.9 million, and their sales tax payments by $770,000—all while saving over $2 million annually by helping them stay out of the criminal justice system. Econ. League of Greater Phila., *Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia* 11-13, 18 (2011), http://bit.ly/2m2dei3. Because employment is one of the most crucial factors to decreasing recidivism, eliminating barriers to employment for people with records also has the benefit of enhancing public safety. Research published in 2011 revealed that employment was the single most important influence on decreasing recidivism by the formerly incarcerated subjects of the study; two years after release, nearly twice as many employed individuals had avoided another interaction with the criminal justice system when compared with their unemployed counterparts. Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind*, 28 Just. Q. 382, 397-98 (2011).

In addition to the many public policy reasons to employ people with records, employers may also be less justified in their general aversion to hiring people with records than most realize. Although a somewhat new area of research, studies are beginning to emerge that confirm the relatively high quality of employees with

records. Recent research on military members with past felony convictions (granted waivers by the government) reveals that they are no more likely to be terminated and, in fact, are promoted more than individuals without records. Jennifer Lundquist, et al., Does a Criminal Past Predict Worker Performance? 27 (Dec. 2, 2016) (unpublished manuscript), http://bit.ly/2lloRle. Researchers from Northwestern University studied tenure and turnover at one large private employer, finding that employees with records have lower turnover as well as less likelihood of voluntarily separating from the employer. Dylan Minor, et al., Criminal Background and Job Performance 11 (Oct. 30, 2016) (unpublished manuscript), http://bit.ly/2mzFsCj.

Employer fears about hiring someone with a record may also rest on somewhat shaky ground because risk of recidivism is often overstated. In fact, one notable study concluded that, six or seven years after release from incarceration, the risk of recidivism among people with records is only marginally higher than among those who have never offended. Megan C. Kurlychek, et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483, 483 (2006).

While research in this area continues to expand, currently available studies expose the general imprudence of erecting and expanding barriers to work for people with records.

4. The legal framework and facts of this case ought not be considered in isolation from this stark real-world context and the public policy concerns it presents.

The labyrinth of employment barriers facing people with records is sufficiently vast and debilitating without judicial expansion of the legal restrictions imposed by Congress. As explained by the Equal Employment Opportunity Commission ("EEOC") in its 2012 guidance document, any aspect of an employer's policy on hiring those with records that exceeds the mandatory exclusions imposed by federal law is subject to a thorough application of Title VII analysis. *See* EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.*, § VI(A) (Apr. 25, 2012), http://bit.ly/2m3K4gJ ("[I]f an employer decides to impose an exclusion that goes beyond the scope of a federally imposed restriction, the discretionary aspect of the policy would be subject to Title VII analysis.").[2] That scrutiny ought not ignore the very real struggles endured by people with records, particularly those of color. In the least, such Title VII analysis requires the judiciary to force open their eyes to the broken criminal justice system and sprawling collateral consequences when evaluating business necessity, job relatedness, compelling need, and less

[2] As supporting authority for its guidance on appropriately considering conviction records, the EEOC heavily relies on this Court's decision in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977). EEOC, *supra*.

discriminatory alternatives in the context of employment background checks. *See, e.g.*, *Davey v. City of Omaha*, 107 F.3d 587, 591-92 (8th Cir. 1997).

People with records face often insurmountable hurdles at various stages of the employment process. Through its expansive reading of Section 19's mandates, Wells Fargo attempts to skirt its responsibility to uniformly apply any federal restriction in a way that does not disproportionately impact people of color. *See* EEOC, *supra*, § VI(C). While the district court refused to look beyond Wells Fargo's assertion that Section 19 required it to summarily terminate workers with relevant offenses, *Williams v. Wells Fargo Bank, N.A.*, No. 4-15-cv-038-CRW-SBJ, slip op. at 3-4 (S.D. Iowa Oct. 26, 2016), the fact remains that less discriminatory alternatives existed—such as informing the employee about the Section 19 waiver, sponsoring the waiver application, and permitting leave to seek the wavier—but were offered only to certain white employees. This approach runs directly contrary to the EEOC's guidance with regard to waivers of federally imposed restrictions: "While Title VII does not mandate that an employer seek such waivers, where an employer does seek waivers[,] *it must do so in a nondiscriminatory manner*." EEOC, *supra*, § VI(C) (emphasis added). If anything, Wells Fargo compounded the disparate impact of its Section 19 termination policy by offering alternatives only to certain white employees.

The barriers to employment facing workers with records are far-reaching and frequently hold back communities of color.[3] While some restrictions are mandated by law, opportunities to minimize these barriers often exist, and employers should, as a matter of public policy, take advantage of such options to reduce the severe impact of legal restrictions on people with records and communities of color. If permitted, Wells Fargo's approach will instead further broaden the employment barriers facing workers of color with records.

CONCLUSION

In light of the importance of these issues and their significant impact on the lives of workers with records, the arguments of Plaintiffs-Appellants deserve more thorough consideration than the cursory analysis performed by the district court. That court failed to grasp the basic contours of Title VII disparate impact doctrine, let alone appreciate the context surrounding these issues and the public policy consequences of its decision. For all of these reasons, this Court should revisit the flawed Title VII analysis conducted by the district court and reverse that court's improper grant of summary judgment.

[3] *See* Sections 2 and 3 of this amicus brief.

Respectfully submitted,

Dated: March 9, 2017

NATIONAL EMPLOYMENT LAW PROJECT

/s/ Elizabeth L. Avery
Elizabeth L. Avery

Attorney for Amicus Curiae National Employment Law Project

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the word limit of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because the document contains 3,074 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This amicus brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 word processing program, a 14-point font size, and the Times New Roman font style.

Respectfully submitted,

Dated: March 9, 2017

NATIONAL EMPLOYMENT LAW PROJECT

/s/ Elizabeth L. Avery
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CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on March 9, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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