No. 13-3408

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff - Appellant,

v.

KAPLAN HIGHER EDUCATION CORPORATION,
KAPLAN, INC.; and IOWA COLLEGE ACQUISITION
CORPORATION, dba Kaplan University,

Defendants - Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
Honorable Patricia A. Gaughan, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE CATO INSTITUTE, THE CENTER FOR EQUAL OPPORTUNITY, THE COMPETITIVE ENTERPRISE INSTITUTE, AND PROJECT 21 IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

MERIEM L. HUBBARD
JOSHUA P. THOMPSON
ANASTASIA P. BODEN
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: apb@pacificlegal.org

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Number: 13-3408

Case Name: *EEOC v. Kaplan Higher Education Corp., et al.*

Name of Counsel: Anastasia P. Boden

Pursuant to 6th Cir. R. 26.1, Pacific Legal Foundation, Cato Institute, Center for Equal Opportunity, Competitive Enterprise Institute, and Project 21 make the following disclosure:

1. Are any of said parties a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 14, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Anastasia P. Boden

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Statute

Page

Rule

Miscellaneous

Page

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation, the Cato Institute, the Center for Equal Opportunity, the Competitive Enterprise Institute, and Project 21 respectfully submit this brief amicus curiae in support of the Appellees.

For nearly 40 years, Pacific Legal Foundation (PLF) has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has addressed the inequities of the disparate impact theory in *Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, U.S. No. 11-1507; *Magner v. Gallagher*, 132 S. Ct. 548 (2011), *cert. dismissed*, 132 S. Ct. 1306 (2012); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005); *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Adams v. Florida Power Corp.*, 535 U.S. 228 (2002); and *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF has also participated as amicus curiae in nearly every major Supreme Court case involving racial classifications in the past three decades, including *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (*PICS*); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v.*

Pena, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. The Cato Institute has participated as amici curiae in numerous cases relevant to the analysis of this case. *See, e.g.*, *Mt. Holly Gardens*, U.S. No. 11-1507; *Magner*, 132 S. Ct. 548.

The Center for Equal Opportunity (CEO) is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color-blind public policies and seeks to block the expansion of racial preferences and to prevent their use in employment, education, contracting, and voting. CEO has participated as amicus curiae in numerous equal protection cases, such as *Fisher*, 133 S. Ct. 2411; *Ricci*, 557 U.S. 557; *PICS*, 551 U.S. 701; *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306; *Sandoval*, 532 U.S. 275; and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

The Competitive Enterprise Institute (CEI) is a nonprofit public interest organization dedicated to individual liberty and limited government. CEI publishes original scholarly studies and pursues pro-freedom advocacy in court. To that end, CEI has participated as amicus, or counsel for amici, in past cases raising civil-rights issues. *See, e.g.*, *Mt. Holly Gardens*, U.S. No. 11-1507; *PICS*, 551 U.S. 701; *Magner*, 132 S. Ct. 548.

Project 21 is an initiative of The National Center for Public Policy Research designed to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work. Project 21 has participated as amicus curiae in numerous relevant cases, including *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford*, 553 U.S. 181.

Amici seek permission to file this brief pursuant to 6th Cir. R. 29(b).

SUMMARY OF THE ARGUMENT

Like any prudent employer, after Kaplan University experienced employee theft, it instituted new screening criteria for job applicants. *EEOC v. Kaplan Higher Learning Educ. Corp.*, No. 1:10 CV 2882, 2013 WL 322116, at *1 (N.D. Ohio Jan. 28, 2013) [hereinafter District Ct. Op.]. Under its new policy, Kaplan screened the applicants' credit histories for indications of financial stress on the theory that individuals who were subject to a financial burden would be more likely to steal from the company. *See id*. Kaplan's policy was entirely race-neutral. The race of the applicants was not reported with the credit check results. And Kaplan's policy was business-related, as evidenced by the Equal Employment Opportunity Commission's [EEOC] own use of credit checks to evaluate potential employees. *Id.* at *3. Nevertheless, EEOC brought a Title VII claim against Kaplan alleging that the University's use of credit checks disproportionately affected black applicants. *Id*.

EEOC's actions in this case present serious equal protection concerns. As courts and commentators have noted, disparate impact enforcement can put employers between the rock of disparate impact liability and the hard place of disparate treatment liability. *See, e.g.*, *Ricci*, 557 U.S. at 594-95 (Scalia, J., concurring); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989); *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 448 (1975). By subjecting employers to liability for hiring disparities—even those that arise from race-neutral criteria—disparate impact theory

encourages employers to engage in race-conscious measures, including prophylactic racial balancing, or discarding race-neutral standards after they are found to result in employment disparities. *See Ricci*, 557 U.S. at 594-95 (Scalia, J., concurring). But EEOC's application of disparate impact theory in this case is especially suspect. Rather than asking the applicants to self-identify their race—as EEOC itself counsels employers to do[1]—EEOC resorted to establishing a panel of "race raters" to assign a race to each Kaplan applicant based on nothing more than the applicant's driver's license photo. *See* District Ct. Op. at *5.

EEOC's race-based measures must be subjected to strict scrutiny in order to ensure that they meet the demands of equal protection. Under strict scrutiny, a racial classification is unconstitutional unless it is narrowly tailored to further a compelling state interest. *Adarand*, 515 U.S. at 227. EEOC's use of race raters to classify job applicants cannot meet these demands. Because its use of race raters is unreliable, EEOC could not achieve its stated end of determining disparate impact. Further, EEOC's actions offend basic principles of equal protection. Its use of race raters relies on stereotypes, and demeans its subjects. Thus, regardless of its implications under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), EEOC's use of race raters violates the Fifth Amendment's promise of equal protection.

---

[1] *See* EEOC, *Questions and Answers - Implementation of Revised Race and Ethnic Categories*, http://www.eeoc.gov/employers/eeo1/qanda-implementation.cfm (last visited Aug. 23, 2013).

I

EEOC'S USE OF RACE RATERS VIOLATES EQUAL PROTECTION

A. EEOC's Actions Are Subject to Strict Scrutiny

Even if EEOC's use of race raters satisfied *Daubert*, it would present equal protection concerns. All race-based measures are subject to strict scrutiny under an equal protection analysis, as race-based distinctions are among the most dangerous and destructive actions government can take. *See, e.g.*, *PICS*, 551 U.S. at 741. Even purportedly beneficial race-based measures are subject to strict scrutiny. *See, e.g.*, *Grutter*, 539 U.S. at 326 (applying strict scrutiny to racial preferences in university admissions); *Adarand*, 515 U.S. at 227 (applying strict scrutiny to government contracting preferences); *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (applying strict scrutiny to redistricting). Even if made with the benign purpose of effectuating Title VII, EEOC's race-based actions must be subjected to strict scrutiny to ensure that they comport with the demands of equal protection.

The Supreme Court requires such thorough vetting because it is otherwise impossible to determine whether a race-based classification is harmless. Where, as here, the government asserts it is taking a race-based measure for a supposedly "benign" purpose, the term "benign" may merely incorporate that generation's tolerance of prejudices. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610

(1990) (O'Connor, J., dissenting), *overruled by Adarand*, 515 U.S. 200.[2] Strict scrutiny is required because federal courts are unable to accurately distinguish between good and bad uses of race. *PICS*, 551 U.S. at 742.

Further, "benign" classifications may be just as destructive as malevolent ones. *See Adarand*, 515 U.S. at 241 (Thomas, J., concurring). Racial classifications can create new animosities. *See Croson*, 488 U.S. at 493. Or, they may perpetuate old stereotypes. *See Bakke*, 438 U.S. at 298. Government imposed racial classifications suggest that race matters—and even defines an individual. *See Anderson v. Martin*, 375 U.S. 399, 402 (1964). Whether a classification is "benign" or harmful; racial classifications stimulate "society's latent race consciousness." *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part). Accordingly, many scholars across the political spectrum now advocate eliminating racial classifications altogether. *See* Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. Rev. 1455, 1456 (2002) (describing a new cadre of liberal professors who see racial classifications as perpetuating subjugation).

[2] Justice O'Connor wrote the opinion in *Adarand*, which adopted the argument in her *Metro Broadcasting* dissent that the Court should apply strict scrutiny to all government racial classifications. *Adarand*, 515 U.S. at 227.

All of these concerns are present here. EEOC's use of race raters has the potential to create new animosities by allowing EEOC to decide, solely on a physical basis, who identifies as a member of a given race and who does not, and correspondingly, the benefits they are entitled to, or what burdens they must bear. Further, by relying on assumptions about the way that races "look," EEOC's use of race raters perpetuates simplistic stereotypes about the nature of racial identity. How each individual chooses to identify is quintessentially a private matter and not the government's business.

The Supreme Court has consistently taken the view that race-based classifications are inherently dangerous. Thus, EEOC's actions must be subjected to strict scrutiny to ensure that they satisfy equal protection.

B. EEOC's Use of Race Raters Cannot Withstand Strict Scrutiny

Any race-conscious policy will require the state to determine who belongs to which race—an inherently dangerous endeavor. *See Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting). Whereas equal protection demands that government "treat citizens as individuals," *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (citation omitted), categorizing people according to their race treats citizens as interchangeable elements of a group. The EEOC's use of race raters to ascertain and classify individuals according to their race is especially pernicious: it defies accepted scientific norms, perpetuates racial stereotypes, and demeans its individual subjects.

Moreover, it flies in the face of EEOC's own stated policy. Equal protection does not countenance such unacceptable governmental actions.

1. EEOC's Use of Race Raters Is Unscientific

Using physical attributes to determine an individual's race is unscientific. Race has less to do with genetics than with sociopolitical factors. *See, e.g., Saint Francis Coll. v. Al-Khazraji,* 481 U.S. 604, 610 n.4 (1987). And whatever minor genetic significance race has, genes have even less to do with external appearance. *See* Benjamin Kohler, *Racial Voice Identification: Judicially Condoning the Bogus Science of "Hearing Color"*, 77 Temp. L. Rev. 757, 761 (2004). Courts have largely rejected the purported usefulness of physical attributes in indicating race. For instance, in a case involving a *Batson* challenge, the First Circuit noted that the defense counsel's initial misidentification of a Hispanic juror as African-American indicated that "visual observation alone is not always the most accurate way to discern race." *See Gray v. Brady*, 592 F.3d 296, 304 n.2 (1st Cir. 2010). In a similar case, the Eleventh Circuit noted that "one could not identify Hispanic jurors . . . simply by their appearance and accent." *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1043 (11th Cir. 2005); *see also CBS, Inc. v. Partee*, 198 Ill. App. 3d 936, 944 (1990) ("Race . . . is not always a 'self-evident' characteristic."). Biology is not determinative of race.[3]

[3] A recent *New York Times* piece on Christopher and Laura Castoro is illustrative. In the article, the couple recounts how they did not realize they belonged to different (continued...)

Race is a much richer concept than "looks," and encompasses many factors, including ancestry, nationality, language, and culture. *See* Kohler, *supra*, at 761. Because these attributes have nothing to do with phenotype, physical attributes alone are a very "weak proxy" for race. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 Wash. U. L.Q. 675, 722 (2000). Indeed because race is so indeterminate, individuals may choose to hold themselves out as one race or another. *See generally* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. Rev. 1134, 1136 (2004). This is especially the case for individuals of mixed races. According to the 2012 Census, 5,499,000 individuals chose to identify as belonging to two or more races in 2010, and 6,435,000 U.S. residents are expected to do the same in 2015. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2012–Table 12*, http://www.census.gov/compendia/statab/2012/tables/12s0012.pdf (last visited Aug. 23, 2013).

---

[3] (...continued)
races until their first date. Laura assumed Christopher was black, and Christopher assumed Laura was white. They were both wrong. Christopher is Italian, and Laura is African-American. Speaking of their three kids, who all look very different, Laura says, "They all identify as biracial. We taught them that they did not have to choose. You are what you are and if someone wants to make it a problem it is theirs." *See* Erika Allen, *A Couple Who See Race Clearly*, N.Y. Times, Aug. 23, 2013, *available at* http://www.nytimes.com/2013/08/23/booming/starting-out-us-against-the-world-but-still-together.html?pagewanted=all&_r=0.

Here, EEOC's panel of race raters relied on nothing more than the applicants' driver's license photos and names when assigning them to a racial category. The "qualifications" of these race raters varied; the members of the panel hold a variety of liberal arts degrees, including cultural anthropology, education, human development, psychology, and economics. *See* District Ct. Op. at *5. Not one of the race raters had experience identifying individuals' race merely by looking at them. *Id.* No accepted scientific theory justifies this crude method.

2. EEOC's Race Raters Relied on Stereotypes

Stereotypes of any kind are repugnant to the Constitution. *See, e.g., United States v. Virginia*, 518 U.S. 515, 565 (1996) (Rehnquist, C.J., concurring); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630-31 (1991). Stereotyping "consists of inferring a relatively complete idea about a specific subject based on a small amount of information." Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. Rev. 155, 187 (2005). Thus, stereotypes reduce race to a simplistic notion, and reduce an individual to his or her race. *See Miller*, 515 U.S. at 912, 920 (The assumption that individuals of a same race "think alike, share the same political interests, and will prefer the same candidates at the polls" is "racial stereotyping at odds with equal protection mandates.").

Here, the race raters' phenotypical stereotypes literally judge individuals based on the color of their skin, and the shape of their physical features. These

classifications—which were necessarily premised upon stereotypes of the way certain races "look"—are pernicious. Whereas *Grutter*, 539 U.S. at 330, and *Fisher*, 133 S. Ct. at 2418, permitted race-conscious measures in order to break down stereotypes, the EEOC's actions here expressly rely on and perpetuate racial stereotypes. Regardless of one's purpose, to rely on stereotypes "retards . . . progress and causes continued hurt and injury." *Edmonson*, 500 U.S. at 630-31. Thus, even if the race raters could determine the race of the Kaplan applicants by looking at their driver's license photo, they would do so at a significant cost; they would violate the individualized treatment promised by the Constitution.

3. EEOC's Use of Race Raters Is Demeaning

It "demeans a person's dignity and worth" to classify him or her according to race rather than "his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 496 (2000). Such attempts—especially those that use physical characteristics—harken to Germany's citizenship laws, South Africa's apartheid statutes, Social Darwinism, the Black Codes, and eugenics. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting), *overruled on other grounds by Adarand*, 515 U.S. at 202; *Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting); *Cotter v. City of Boston*, 193 F. Supp. 2d 323, 329 (D. Mass. 2002), *aff'd in part, rev'd in part*, 323 F.3d 160 (1st Cir. 2003); Natalie Quan, *Black and White or Red All Over? The Impropriety of Using Crime Scene DNA to*

Construct Racial Profiles of Suspects, 84 S. Cal. L. Rev. 1403, 1417-21 (2011). Under these schemes, supposedly "objective" and "measurable" differences in physiology were used to justify differential treatment of races. As a result, "racial inequality became accepted as a biological reality." *Id*. at 1418. EEOC's use of race raters similarly reinforces the notion that judgments according to the color of one's skin are relevant, and meaningful.

Further, categorizations based on physical characteristics discount multi-racialism by reducing race to a few crude categories. Simplistic conceptions of race can be damaging even where one can choose his or her own crude category. *See* Tanya Kateri Hernandez, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 Md. L. Rev. 97, 98 (1998) (describing the "Multiracial Category Movement (MCM)" to add a multiracial race category on the decennial census). But such labels are even more offensive where they are placed onto individuals without their consent, as they are "label[s] that an individual is powerless to change." *PICS*, 551 U.S. at 797 (Kennedy, J., concurring). Here, the race raters were tasked with fitting the Kaplan applicants into groups of "African-American," "Asian," "Hispanic," "White," or "Other." These five boxes offer little space for individuals of diverse backgrounds. Thus they are demeaning both to the concept of race, and to the individual.

The EEOC apparently recognizes the ineffectiveness and danger inherent in defining one's race, given its preference of self-identification. *See* EEOC, *supra*. Indeed, the EEOC mandates that employers accept their employees' responses even if they believe the employee to be of a different race than what the employee claims. *Id.* Yet its use of race raters directly contradicts its own directives. When the government refuses to rely on self-identification, it must resort to using so-called racial identifiers, and thus stereotypes and sweeping assumptions. By opting not to ask the individuals to identify themselves, EEOC unilaterally made itself the definer and decider of race. It is impossible to define race in such a simplistic way, stamp an individual with a racial classification, and simultaneously treat them with dignity. *See PICS*, 551 U.S. at 797 (Kennedy, J., concurring). EEOC's actions undermine the very purpose of equal protection.

4. EEOC's Use of Race Raters Violates Equal Protection

Any government mandated criteria for race are dangerous. *See Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) ("[T]he very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals."); *see also Cotter*, 193 F. Supp. 2d at 328 ("The very idea of imposing some lexicon of United States government racial definitions is revolting."). But EEOC's criteria here are especially abhorrent. Even if guesswork based on stereotypical assumptions about physical traits was reliable—which it is not—it would be

inappropriate, and contravene the central policy of our civil rights laws: individuals should not be judged by the color of their skin. "Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake." *See PICS*, 551 U.S. at 795. Equality before the law means that government will not categorize people based on unscientific, stereotypical criteria, and it allows each person to define himself or herself, and thrive as an individual.

II

DISPARATE IMPACT THEORY RAISES SERIOUS EQUAL PROTECTION CONCERNS

While disparate impact theory was intended to combat employment practices that are the functional equivalent of intentional discrimination, in practice, the theory has the perverse effect of encouraging the very behavior our civil rights laws are designed to prevent. After its employees were caught stealing from the company, Kaplan determined that the best way to prevent future theft was to screen the credit histories of new applicants. This policy was entirely business-related, and race-neutral. If employers can be liable for even those hiring disparities that result from innocuous race-neutral job-related practices—the specter of that disparate impact liability will steer them toward race-based hiring criteria to prevent disparities from

arising in the first place. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53, 63 (2009). Employer responses may include deliberate racial balancing, or discarding race-neutral standards after they prove to result in imbalance. *See* Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L. J. 429, 461 (1985). In this way, disparate impact subverts Title VII's primary purpose—prohibiting disparate treatment, to its secondary purpose—preventing disparate impact.

In theory, an employer's ability to assert that its hiring criteria are "job-related" means that it should only be held liable if it uses potentially discriminatory measures. An employer's ability to prove its criteria are "job-related," or consistent with "business-necessity," reduces the likelihood that its criteria are designed to harm or help a given race. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (Title VII's job-related requirement ensures that "any tests used . . . measure the person for the job and not the person in the abstract."). In some cases, employers are even permitted to make classifications that would normally be considered impermissible where those classifications are a "bona fide occupational qualification

reasonably necessary to the normal operation of that particular business or enterprise." *See* 42 U.S.C.A. § 2000e-2(e) (2010).

It is evident disparate impact was never meant to require employers to hire individuals notwithstanding their qualifications, let alone require employers to hire individuals *on the basis of their race* in order to eliminate all racial disparities. *See Griggs*, 401 U.S. at 434. Disparate impact liability only makes unlawful those disparities that arise on one of the "prohibited bases." *Lewis v. City of Chicago, Ill.*, 130 S. Ct. 2191, 2194 (2010). Congress' concern that disparate impact would spawn quota systems resulted in a specific prohibition against interpreting the Act to require racial balancing. *See Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 Yale L.J. 98, 103-04 (1974).

But as demonstrated by EEOC's actions in the present case, even obviously job-related race-neutral criteria are subject to an EEOC lawsuit. And proving job-relatedness can be a technically difficult and economically burdensome endeavor. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1235 (1995). Given the threat of an expensive and onerous disparate impact lawsuit, an employer like Kaplan may use improper, *sub rosa* racial profiling in its hiring to

ensure that disparities do not arise from the outset. Unless employers are given wide discretion to choose their employment protocol, disparate impact theory "is a government mandate for proportional quotas." *See* Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 Notre Dame L. Rev. 1153, 1153 (1993).

CONCLUSION

Racial imbalance cannot justify racial preferences, let alone warrant racial quotas. *See, e.g.*, *Reed v. Rhodes*, 179 F.3d 453, 466 (6th Cir. 1999); *Brunet v. City of Columbus*, 1 F.3d 390, 407 (6th Cir. 1993). Because the government is prohibited from implementing quotas, it is also prohibited from enacting policies that force employers to do the same. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973). Disparate impact theory's coercive effect on employers raises serious equal protection concerns, and is even more dangerous as it is being employed here. EEOC created a panel charged with classifying individuals based on nothing more than the color of their skin. EEOC's actions cannot establish disparate impact because its unscientific evidence cannot establish the race of the applicants and even if the methodology were sound, the entire process offends the constitutional guarantee of equal protection.

For these reasons, this Court should affirm the district court's refusal to admit EEOC's statistics, as compiled by its panel of race raters.

DATED: October 14, 2013.

Respectfully submitted,

MERIEM L. HUBBARD
JOSHUA P. THOMPSON
ANASTASIA P. BODEN

By /s/ Anastasia P. Boden
ANASTASIA P. BODEN

Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: apb@pacificlegal.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   ☑ this brief contains 4,111 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14-point Times New Roman, *or*

   ☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

   DATED: October 14, 2013.

/s/ Anastasia P. Boden
ANASTASIA P. BODEN

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the
Appellate CM/ECF System

U.S. Court of Appeals Docket Number(s): 13-3408

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on October 14, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

ELIZABETH ELLEN THERAN
U.S. Equal Employment Opportunity Commission
Office of General Counsel
131 M Street NE
Washington, DC 20507

GERALD L. MAATMAN, JR.
Seyfarth Shaw
131 South Dearborn Street, Suite 2400
Chicago, IL 60603
Counsel for Defendants - Appellees

/s/ Anastasia P. Boden
ANASTASIA P. BODEN