No. 20-1691

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees

JOHN M. JOHNSON; ROBERT TINKER,

Plaintiffs

v.

CITY OF BOSTON, MASSACHUSETTS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued) **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULE:

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which involves the standards establishing liability and entitlement to individual relief in disparate-impact cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII). The Attorney General and the Equal Employment Opportunity

Commission (EEOC) share responsibility for enforcing Title VII. See 42 U.S.C. 2000e-5(a) and (f)(1). Title VII also applies to the United States in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the district court correctly ruled that once a Title VII plaintiff shows a particular employment practice (here, a promotional examination) has a disparate impact based on race, and the employer fails to demonstrate the challenged practice is job-related and consistent with business necessity, then the plaintiff prevails without also having to demonstrate a less discriminatory alternative practice.

2.a. Whether the district court correctly ruled that once plaintiffs prevailed on their disparate-impact claim, they were presumptively entitled to an award of back pay without needing to prove that, but for Boston's use of the unlawful examination, they would have been promoted.

b. If yes, whether the district court correctly ruled that, even though Boston's allegedly improved 2014 examination had a greater disparate impact on

Black candidates than the challenged 2008 examination, Boston failed to rebut the presumption that plaintiffs were entitled to back pay.

STATEMENT OF THE CASE

1. Background

The plaintiffs, ten Black police sergeants, filed suit in 2012, alleging Boston's use of a 2008 promotional exam (2008 Exam) for the position of lieutenant had a disparate impact based on race in violation of Title VII. *Smith* v. *City of Boston*, 144 F. Supp. 3d 177, 181 (D. Mass. 2015) (*Smith I*).

The 2008 Exam consisted of a multiple-choice exam and an education and experience (E&E) rating. *Smith I*, 144 F. Supp. 3d at 189. Of the 91 sergeants who took the 2008 Exam, 65 were white, 25 were Black, and one was Hispanic. *Id.* at 191. The passing rate was 94% for white candidates and 69% for minority candidates. *Ibid.* Boston promoted 33 candidates: 28 were white, and 5 were Black. *Ibid.* When plaintiffs sued, a disparate-impact challenge to Boston's similar promotional exam for police sergeant was pending in *Lopez* v. *City of Lawrence*, No. 07-11693 (D. Mass.).

a. Smith I

The district court bifurcated the *Smith* case into liability and relief phases. *Smith I*, 144 F. Supp. 3d at 181. After a bench trial, the court found that Boston violated Title VII because the 2008 Exam "had a racially disparate impact and was

not sufficiently job-related to survive Title VII scrutiny." *Ibid.* First, the court, relying on statistical evidence, ruled that plaintiffs satisfied their (Prong 1) burden to demonstrate the 2008 Exam had a disparate impact. *Id.* at 198-199. The court next found that Boston failed to demonstrate that the 2008 Exam was job-related and consistent with business necessity (Prong 2). *Id.* at 200-211. As a result, the court concluded that plaintiffs "have won their case," rejecting Boston's argument that plaintiffs first needed to demonstrate the existence of a less discriminatory alternative. *Id.* at 181 n.3, 211.

b. *Lopez* v. *City Of Lawrence*

While the relief phase of *Smith* was pending, this Court decided *Lopez* v. *City of Lawrence*, 823 F.3d 102 (1st Cir. 2016), cert. denied, 137 S. Ct. 1088 (2017). In a split decision, the Court affirmed the district court's decision that Boston's 2005 and 2008 promotion examinations for sergeant did not violate Title VII. *Id.* at 107.

As relevant here, this Court ruled that Boston's challenged sergeant exams were job-related and consistent with business necessity, even though the district court found they were only "minimally valid." *Lopez*, 823 F.3d at 114, 120 (citation omitted). In so ruling, the Court recognized that because of this "plainly supported finding," there was no need to "debate in the abstract how much better the exam might have been." *Id.* at 119-120. For this reason, the Court remarked,

"it makes sense to turn the focus sooner rather than later to the question of whether there is an alternative option that is as good or better, yet has less adverse impact," and then determined that the plaintiffs failed to show an alternative. *Id.* at 120-121. In that discussion, the Court noted that "had the remedy phase of trial proceeded," "each officer would have needed to show that, more likely than not, he or she would have been promoted had Boston used an equally or more valid selection tool with less impact." *Id.* at 121 n.16.

After *Lopez*, Boston sought an interlocutory appeal of *Smith I*. This Court denied the petition without prejudice to renewal after the district court itself applied *Lopez*. *Smith* v. *City of Boston*, No. 16-8034 (1st Cir.).

c. Smith II

In *Smith* v. *City of Boston*, 267 F. Supp. 3d 325 (D. Mass. 2017) (*Smith II*), the district court analyzed its original findings in light of *Lopez*, *id.* at 328, noted key differences in the evidence presented at the two trials, *id.* at 334, and reaffirmed its liability determination against Boston, *id.* at 337-338. In doing so, the court dismissed Boston's argument that the court could not reject the 2008 Exam unless plaintiffs first proved the existence of a less discriminatory, alternative examination that would serve Boston's legitimate needs. *Id.* at 336-337. The court found that nothing in *Lopez* changed "the traditional burden-

shifting framework" of disparate-impact cases and indeed that *Lopez* had reaffirmed it. *Id.* at 337 (citing *Lopez*, 823 F.3d at 110-111).

d. Smith III

The district court then held a bench trial on relief. *Smith* v. *City of Boston*, 460 F. Supp. 3d 51, 54 (D. Mass. 2020) (*Smith III*). The parties disputed plaintiffs' entitlement to back pay but agreed to a formula for valuing back pay if awarded. *Id.* at 53-60, 62-64. The trial also focused in large part on the "import, if any," of Boston's 2014 lieutenant promotional exam (2014 Exam), which, although "qualitatively far superior to the 2008 exam," had "a greater adverse impact on black candidates than did the 2008 exam." *Id.* at 54.

Boston asserted that to receive back pay, *Lopez* required plaintiffs to prove that they "would have been promoted had Boston used an equally or more valid selection tool with less impact." *Smith III*, 460 F. Supp. 3d at 56 (quoting *Lopez*, 823 F.3d at 121 n.16). The district court rejected this language from *Lopez* as dicta and ultimately relied on the Supreme Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), as establishing a rebuttable presumption that the 2008 Exam harmed the plaintiffs by denying or delaying their promotions, which entitled them to relief. *Smith III*, 460 F. Supp. 3d at 57-60. And because plaintiffs were so entitled, the court held that the Supreme Court's decision in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975),

presumptively required the court to award back pay. *Smith III*, 460 F. Supp. 3d at 57-58 & n.2. The court further ruled that Boston's evidence that the allegedly improved 2014 Exam had a greater disparate impact on Black candidates than the 2008 Exam did not rebut the presumption of plaintiffs' entitlement to relief because Boston failed to answer "the crucial question" about "how *these plaintiffs* would have performed on a counterfactually similar exam in 2008." *Id.* at 60-61.

Consequently, the district court awarded back pay to plaintiffs using the parties' stipulation and parameters established at trial. *Smith III*, 460 F. Supp. 3d at 63-65. The individual back pay awards totaled $485,865. Doc. 308 (Judgment).[1]

2. The Appeal

Boston appealed. Boston asserts numerous errors in the district court's liability and relief decisions. As relevant here, Boston renews its argument that the court erred in finding the 2008 Exam not job-related and consistent with business necessity without first requiring plaintiffs to demonstrate a less discriminatory alternative to that exam. Br. 45-55. Boston also asserts that there is no

[1] "Doc. __" refers to the docket number on the district court docket sheet. "Br. ___" refers to page numbers in defendant-appellant's opening brief.

"presumption" favoring an award of back pay, and even if there were, that Boston rebutted the presumption with evidence from its 2014 Exam. Br. 56-68.[2]

SUMMARY OF ARGUMENT

The United States submits this amicus brief to address two issues raised on appeal:

1. Having found that Boston failed to demonstrate the job-relatedness and business necessity of the 2008 Exam, the district court properly ruled that, to prevail on their Title VII claim, plaintiffs were not required to demonstrate the existence of a less discriminatory alternative. Title VII creates a burden-shifting framework for establishing disparate-impact liability. Its text provides that a plaintiff may prevail in two ways after demonstrating a prima facie case of disparate-impact discrimination: either (1) because the employer fails to demonstrate that the employment practice is job-related and consistent with business necessity; *or* (2) because the plaintiff demonstrates the existence of a less discriminatory alternative. A plaintiff bears no burden to demonstrate a less discriminatory alternative unless the employer first demonstrates job-relatedness and business necessity.

---

[2] The United States takes no position on Boston's other challenges to the district court's rulings.

2.a. Assuming this Court affirms the district court's liability decision, then the district court also correctly ruled that plaintiffs were presumptively entitled to back pay unless Boston demonstrated a lawful reason that it denied or delayed promotions to plaintiffs after they took the 2008 Exam. The Supreme Court has directed that a district court's discretion in awarding equitable relief under Title VII tips in favor of awarding individual relief, including back pay, to make whole the victims of unlawful discrimination. In determining who is a victim, the Court presumes that an individual who suffered an adverse employment action (*e.g.*, a missed promotion) is entitled to relief unless an employer can demonstrate a lawful reason for that action. Boston's contrary argument that plaintiffs must demonstrate they would have been promoted "but for" Boston's use of the 2008 Exam departs from controlling precedent and conflicts with Title VII's make-whole purpose.

b. Evidence demonstrating that Boston's allegedly improved 2014 Exam had a greater disparate impact on Black candidates than the 2008 Exam does not rebut the presumption that plaintiffs were victims of discrimination entitled to back pay. This group-based evidence does not demonstrate that Boston lawfully denied any individual plaintiff a promotion from the 2008 Exam or how any individual plaintiff would have performed on the 2014 Exam had it been given in 2008. Thus, Boston failed to rebut the presumption.

ARGUMENT

I

A PLAINTIFF NEED NOT DEMONSTRATE A LESS DISCRIMINATORY ALTERNATIVE UNLESS THE EMPLOYER DEMONSTRATES JOB-RELATEDNESS AND BUSINESS NECESSITY

The district court properly held that once a plaintiff has demonstrated that an employment practice has a disparate impact, the plaintiff need not also demonstrate the existence of a less discriminatory alternative unless an employer first meets its burden of demonstrating that the challenged employment practice is job-related and consistent with business necessity.[3]

Title VII courts must analyze disparate-impact claims via a three-pronged, burden-shifting framework. 42 U.S.C. 2000e-2(k)(1); 42 U.S.C. 2000e(m). Under Prong 1, a plaintiff must show that the defendant uses "a particular employment practice that causes a disparate impact" on a prohibited basis, such as race. 42 U.S.C. 2000e-2(k)(1)(A)(i). If a plaintiff makes this showing, then the burden shifts to the employer under Prong 2 to demonstrate that the "challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i); *Jones* v. *City of Bos.*, 752 F.3d 38, 54 (1st Cir. 2014). At this step, an employer must show that the practice "measure[s] a characteristic

[3] We do not address here whether the district court correctly found that Boston failed to make this required showing.

that constitutes an important element of work behavior" and that outcomes of the practice are "predictive of or significantly correlated" to that characteristic. *Jones*, 752 F.3d at 54 (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975)). If the defendant fails to do so, then a Title VII violation has occurred. 42 U.S.C. 2000e-2(k)(1)(A)(i); *Jones*, 752 F.3d at 54. However, if an employer satisfies Prong 2, a plaintiff may still prevail on Prong 3 by identifying an alternative employment practice that has less disparate impact and serves the defendant's legitimate needs. *Ricci* v. *DeStefano*, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. 2000e-2(k)(1)(A)(ii) and (C)); *Jones*, 752 F.3d at 54.

Thus, Title VII's text and controlling precedent establish that, when an employer fails to meet its Prong 2 burden, the plaintiff wins.

A. Title VII's Text Establishes That A Plaintiff Can Prevail Without Demonstrating A Less Discriminatory Alternative

Once a plaintiff demonstrates that an employment practice has a disparate impact, Title VII's text establishes that a plaintiff need not introduce evidence of a less discriminatory alternative unless the employer first demonstrates that the challenged employment practice is job-related and consistent with business necessity. Title VII states that an employment practice has an unlawful disparate impact only if:

> (i) a complaining party demonstrates [that the practice] causes a disparate impact on the basis of race * * * *and* the respondent *fails* to demonstrate that the challenged practice is job related * * * and consistent with business necessity; *or*
>
> (ii) the complaining party makes the [required] demonstration * * * with respect to an *alternative employment practice* and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. 2000e-2(k)(1)(A)(i)-(ii) (emphasis added); see also 42 U.S.C. 2000e-2(k)(1)(C).

By using the term "or" between Subsections (i) and (ii), Section 2000e-2(k)(1)(A) indicates that there are two ways for plaintiffs to prevail on a disparate-impact claim. The first is for a plaintiff to show that a practice has a disparate impact and for the defendant to fail to demonstrate, in response, that the practice is job-related and consistent with business necessity. See 42 U.S.C. 2000e-2(k)(1)(A)(i). If these two conditions are satisfied, no further showing is required and a violation is established. The text also makes clear that only the second way of establishing a violation (after the "or") requires a plaintiff to demonstrate the existence of "an alternative employment practice"; such a showing is necessary only if the plaintiff has not prevailed under the first approach. 42 U.S.C. 2000e-2(k)(1)(A)(ii).

That plaintiffs are not required to demonstrate an alternative employment practice unless the employer succeeds in showing job-relatedness and business necessity is supported further by the provision's use of the term "demonstrate."

Title VII defines "demonstrate" to mean carrying the "burdens of production and persuasion." 42 U.S.C. 2000e(m). When read together, Section 2000e-2(k)(1)(A) requires employers to bear both burdens with respect to job-relatedness and business necessity. By placing these burdens on the employer, Title VII makes clear that plaintiffs need not provide *any* evidence with respect to job-relatedness and business necessity, including evidence about alternatives.

B. Supreme Court And First Circuit Precedent Also Make Clear That A Showing Of A Less Discriminatory Alternative Is Required Only After An Employer Demonstrates Job-Relatedness And Business Necessity

Supreme Court precedent recognizes that a plaintiff must demonstrate a less discriminatory alternative only after an employer has demonstrated that the challenged practice is job-related and consistent with business necessity. See *Ricci*, 557 U.S. at 578; *Albemarle*, 422 U.S. at 425. In *Albemarle*, the Court described the burden-shifting framework that applies to Title VII disparate-impact claims, which Congress later codified in the Civil Rights Act of 1991. See Pub. L. No. 102-166, §§ 3, 105, 105 Stat. 1071, 1074. The Court explained first that the employer's burden to demonstrate job-relatedness and business necessity "arises, of course, only after the complaining party * * * ha[s] made out a prima facie case of [disparate-impact] discrimination." *Albemarle*, 422 U.S. at 425. The Court further observed, "[i]f an employer does then meet the burden of proving that its tests are job-related, it remains open to the complaining party to show that other

tests or selection devices without a similarly undesirable racial effect, would also serve the employer's legitimate interest." *Ibid.* (internal quotation marks and citation omitted); see also *Ricci*, 557 U.S. at 578 ("Even if the employer meets that burden, however, a plaintiff may still prevail by showing * * * an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.").

This Court also has recognized that a plaintiff can prevail without having to demonstrate a less discriminatory alternative. See, *e.g.*, *Lopez* v. *City of Lawrence*, 823 F.3d 102, 110-111 (1st Cir. 2016); *Jones*, 752 F.3d at 54. In *Lopez*, this Court, construing the statute, identified the three questions central to a disparate-impact case:

> [1] Do the plaintiffs show * * * that the employer is utilizing an employment practice that causes a disparate impact[?]
>
> [2] If so, does the employer show that the challenged * * * practice * * * is nevertheless job-related * * * and consistent with business necessity[?]
>
> [3] If so, do the plaintiffs show that the employer has refused to adopt an alternative [employment] practice that equally or better serves the employer's legitimate business needs, yet has a lesser disparate impact?

823 F.3d at 110-111. To succeed, this Court observed, "plaintiffs require a 'yes' answer to the first question, and *either* a 'no' to the second question *or* a 'yes' to the third question." *Id.* at 111 (emphasis added). Similarly, this Court noted in *Jones* that if an employer demonstrates job-relatedness and business necessity, "a

plaintiff has one final path to success[] by proving the existence of an alternative employment practice." 752 F.3d at 54 (citing 42 U.S.C. 2000e-2(k)(1)(A); internal quotation marks omitted).

Thus, this Court's precedents establish that a district court can find a Title VII violation if the employer fails to meet its Prong 2 burden without plaintiffs first demonstrating a less discriminatory alternative.

C. Boston's Argument Relies On A Misreading Of First Circuit And Supreme Court Cases And Is Impracticable

Relying on isolated statements in *Lopez* and *Texas Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), Boston argues that plaintiffs were required to demonstrate a less discriminatory alternative *before* the district court could rule that it failed to demonstrate job-relatedness and business necessity. Br. 45-47. However, neither case supports Boston's contention.

First, Boston emphasizes this Court's statement in *Lopez* that "it makes sense to turn the focus sooner rather than later to the question of whether there is an alternative option that is as good or better, yet has less adverse impact." Br. 45-46 (quoting 823 F.3d at 119-120). While it urged courts to "turn the focus sooner rather than later" to alternatives, this Court did so only after affirming the "plainly supported finding" that Boston had demonstrated job-relatedness and business necessity, albeit "minimally." *Lopez*, 823 F.3d at 114, 119-120. Having done so,

this Court recast plaintiffs' objections to Boston's demonstration as an abstract "debate" about "how much better the exam might have been" and affirmatively shifted the burden to plaintiffs to demonstrate a less discriminatory alternative that would serve Boston's legitimate needs. *Id.* at 119-120. Thus, nothing in *Lopez* suggests this Court changed Title VII's burden-shifting framework.

Nor does *Inclusive Communities* suggest that a Title VII plaintiff must demonstrate a less discriminatory alternative for a court to rule that an employer has failed to show job-relatedness and business necessity. Boston relies on the Supreme Court's statement that "before rejecting a business justification" for the challenged practice, "a court must determine that a plaintiff has shown that there is an available alternative." Br. 46-47 (quoting *Inclusive Communities*, 576 U.S. at 533 (quoting *Ricci*, 557 U.S. at 578)). But as is apparent from the Court's citation of *Ricci*, this statement reaffirms the longstanding principle that if an employer demonstrates that an employment practice is job-related and consistent with a *lawful* business justification, then such justification is sufficient to avoid liability unless a plaintiff demonstrates "an available alternative * * * practice that has less disparate impact and serves the employer's *legitimate needs*." *Ricci*, 557 U.S. at 578 (emphasis added). In any event, even if *Inclusive Communities* suggested the standard Boston prefers, it would not control here because that case arose under

the Fair Housing Act, which, unlike Title VII, does not expressly codify the evidentiary burdens for a disparate-impact claim.

Importantly, it is not practicable to require plaintiffs to demonstrate whether an alternative practice "equally or better serves the employer's legitimate business needs," *Lopez*, 823 F.3d at 111, without the defendant first establishing what those "legitimate business needs" are and how well the challenged employment practice serves them. If the defendant has not first demonstrated the "important element[] of work behavior" the challenged practice is measuring and how "predictive[ly]" the challenged practice measures that characteristic, *Jones*, 752 F.3d at 54 (quoting *Albemarle*, 422 U.S. at 431) (omission in original), there is no meaningful standard against which to judge an alternative practice.

II

HAVING ESTABLISHED A TITLE VII VIOLATION, PLAINTIFFS WERE PRESUMPTIVELY ENTITLED TO INDIVIDUAL RELIEF, AND BOSTON DID NOT REBUT THAT PRESUMPTION

The district court properly ruled that once plaintiffs prevailed on their disparate-impact claim, they were presumptively entitled to an award of back pay without having to show they would have been promoted "but for" Boston's use of the 2008 Exam. The court also correctly found that Boston failed to rebut the presumption.

A. Albemarle *And* Teamsters *Together Create A Presumption That Victims Of Discrimination Are Entitled To Individual Relief, Including Back Pay*

As the district court explained, the Supreme Court's decisions in *Albemarle*, 422 U.S. at 421, and *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), instruct that victims of an employer's discriminatory practice are presumptively entitled to individual relief, including back pay, if they suffered an adverse action and the employer does not demonstrate that it took the adverse action for lawful, non-discriminatory reasons. *Smith III*, 460 F. Supp. 3d at 57-59 & n.2.

First, in *Albemarle*, a disparate-impact case, the Supreme Court addressed the discretionary nature of Title VII's remedial provision. 422 U.S. at 417; see also 42 U.S.C. 2000e-5(g)(1) (describing equitable relief a court "may" award). The Court recognized that Congress used discretionary language vesting courts with broad equitable powers to "fashion the most complete relief possible." *Albemarle*, 422 U.S. at 421 (citation omitted). As a result, the Court found that Title VII courts have "not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 418 (citation omitted; emphasis added).

Against this backdrop, the Court ruled in *Albemarle* that, given a finding of unlawful discrimination, a district court should deny an award of back pay "only for reasons which, if applied generally, would not frustrate" Title VII's goals of

"eradicating discrimination" and "making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. Thus, "*Albemarle* taught that back pay is a presumptive entitlement of a victim of discrimination and that the discriminating employer is responsible for all wage losses that result from its unlawful discrimination." *Smith III*, 460 F. Supp. 3d at 55 (quoting *Johnson* v. *Spencer Press of Me., Inc.*, 364 F.3d 368, 382 (1st Cir. 2004)). Although *Albemarle* addressed only back pay, the Supreme Court has since extended *Albemarle*'s presumption to other types of retroactive equitable relief, including retroactive seniority. See *Teamsters*, 431 U.S. at 364-365.[4]

Second, following *Albemarle*, the Supreme Court in *Teamsters* explained how a court should identify "victims" of an employer's discriminatory practice who *Albemarle* holds are presumptively entitled to back pay. The Court held that once a finding of liability is made, an individual "need only show that [he or she] unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." *Albemarle*, 431 U.S. at 362. The employer then bears the burden

[4] Boston argues (Br. 61-62) that in *City of Los Angeles, Department of Water & Power* v. *Manhart*, 435 U.S. 702, 719 (1978), the Supreme Court retreated from *Albemarle*'s presumption that a court should award back pay to victims of discrimination. As support, Boston emphasizes *Manhart*'s description of the presumption as "in favor of *retroactive liability*" rather than back pay specifically. *Ibid.* (emphasis added). But this language simply means that *Albemarle* tipped the scales in favor of awarding all appropriate forms of retroactive equitable relief, not just back pay.

"to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Ibid.* Put another way, individuals subjected to an unlawful employment practice who demonstrate that they suffered an "adverse employment decision" (*e.g.*, a missed promotion) enjoy the presumption that the decision resulted from that unlawful employment practice and thus that they are victims presumptively entitled to retroactive equitable relief, unless the employer demonstrates a lawful reason for the adverse decision. See *Chin* v. *Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151-152 (2d Cir. 2012).

Applying *Albemarle* and *Teamsters* here, the district court correctly found that the individual plaintiffs, who missed promotions from the 2008 Exam, were presumptively entitled to back pay unless Boston could show a lawful reason they were not promoted. *Smith III*, 460 F. Supp. 3d at 59-60. Holding that Boston failed to rebut this presumption, the court awarded back pay to plaintiffs based upon the parties' agreed-upon valuation of back pay (and after making findings regarding other factual parameters relating to back pay). *Id.* at 64-65.

Boston disputes (Br. 60-65) that any presumption applies here. Boston appears to concede, however, that if plaintiffs were "actually harmed" (and thus victims of its discriminatory 2008 Exam), then it would be appropriate for the district court to award back pay. Br. 60. Thus, Boston's argument primarily attacks the *Teamsters* presumption (about who is a victim of a discriminatory

practice) rather than the *Albemarle* presumption (regarding awarding retroactive equitable relief, including back pay, to victims of a discriminatory practice). As discussed below, the district court's reliance on the *Teamsters* presumption was correct.

1. The Teamsters *Presumption Applies To Disparate-Impact Cases*

Boston argues that "there is no legally-binding presumption in favor of back pay" in "disparate impact, non-class action cases" and that, instead, plaintiffs must prove that, "but for" the 2008 Exam, they would have been promoted to lieutenant. Br. 60. Boston is wrong. The *Teamsters* presumption is not limited to either class actions or disparate-treatment cases.

Several courts of appeals have followed the *Teamsters* presumption (not always by name) in determining entitlement to relief in disparate-impact cases, including in both class and non-class actions. See, *e.g.*, *Chin*, 685 F.3d at 151-152 (adopting *Teamsters* in relief phase of disparate-impact, non-class action case); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978) (invoking *Teamsters* presumption in disparate-impact, class-action case); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998) (same); *Isabel* v. *City of Memphis*, 404 F.3d 404, 414-415 (6th Cir. 2005); *In re Emp. Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1315-1316 (11th Cir. 1999). For example, in *Isabel*, the Sixth Circuit affirmed individual relief awards in a non-class, disparate-

impact promotions case, noting that the employer failed to meet its burden to show that "factors other than the condemned discrimination" were the reason the victims were not promoted. 404 F.3d at 414-415 (citation omitted). Similarly, the Eleventh Circuit recognized that to receive relief, plaintiffs must show that they were "within the class of persons negatively impacted by" the practice having a disparate impact, and the employer must fail to "demonstrate a legitimate nondiscriminatory reason why" the adverse actions otherwise would have occurred. *In re Emp. Discrimination Litig.*, 198 F.3d at 1315-1316.

Furthermore, as the district court recognized, the rationale for the *Teamsters* presumption applies with equal force in the relief phase of disparate-impact cases. See *Smith III*, 460 F. Supp. 3d at 58. Having established liability, plaintiffs prevailed in demonstrating an "overall pattern" of discrimination, "creat[ing] a greater likelihood that any single decision" not to promote them was part of that pattern and shifting the employer's position to a "proved wrongdoer." *Teamsters*, 431 U.S. at 359 n.45. Most significantly, however, the employer is "in the best position to show why an individual employee" was not promoted, given its access to information about the "available vacancies," its own "evaluation of the applicant's qualifications," and its access to relevant "records." *Ibid.*

In short, it is appropriate to presume that the 2008 Exam caused plaintiffs' missed promotions, unless Boston demonstrates a lawful reason they were missed.

2. First Circuit Precedent Does Not Preclude Application Of The Teamsters *Presumption*

First Circuit precedent does not prevent application of the presumption favoring an award of back pay in this case. Boston argues (Br. 58) to the contrary, citing this Court's decisions in *Lopez*, 823 F.3d at 121 n.16, and *Azimi* v. *Jordan's Meats, Inc.*, 456 F.3d 228, 235 (1st Cir. 2006). However, neither case conflicts with the district court's application of the *Teamsters* presumption here.

According to Boston, it is *Lopez*, not *Teamsters*, that sets forth the applicable standard for determining whether plaintiffs were "actually harmed," requiring them to show that they "would have been promoted had Boston used an equally or more valid selection tool with less impact." Br. 58-60 (quoting *Lopez*, 823 F.3d at 121 n.16). Yet, this language from the *Lopez* footnote does not create a binding standard that conflicts with the district court's use of *Teamsters* here. First, as the district court noted, this language is dicta. *Smith III*, 460 F. Supp. 3d at 56-57. Having found no Title VII violation, this Court in *Lopez* never reached, and thus could not decide, any question regarding relief, including how to identify victims of a discriminatory practice for purposes of awarding back pay. 823 F.3d at 107. Further, the district court here, unlike in *Lopez*, found a violation at Prong 2, so the *Smith* plaintiffs were not required to demonstrate the existence of "an equally or more valid selection tool with less impact" to prevail. If plaintiffs need

not make such a showing to establish liability, then they should not be required to do so to establish their entitlement to individual relief.[5]

Boston also argues that the district court cannot apply any presumptions because Title VII plaintiffs "must prove their damages." Br. 58 (citing *Azimi*, 456 F.3d at 235). Relying on *Azimi*, Boston states that "[i]njuries allegedly caused by the violation of Title VII . . . must be proven to the fact finder," and a factfinder may reasonably find that "while there has been [injury], the plaintiff has not been injured in any compensable way by it." *Ibid.* (brackets in original). Boston's reliance on *Azimi* is misplaced for two reasons.

First, *Azimi*, a harassment case, addressed compensatory damages, which are not at issue here and are not even available in disparate-impact cases. 456 F.3d at 232-235; see 42 U.S.C. 1981a(a)(1); *Smith III*, 460 F. Supp. 3d at 57 n.1. Second, Boston conflates a plaintiff's burden to prove the *value* of any losses with the evidence necessary to show that the employment practice *caused* those losses (and

[5] Boston marshals additional out-of-circuit authorities (Br. 58-60, 63), but they are either consistent with *Teamsters* or inapposite. See, *e.g.*, *Tabor* v. *Hilti, Inc.*, 703 F.3d 1206, 1227 (10th Cir. 2013) (quoting case adopting *Teamsters* presumption); *Robinson* v. *Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 161-162 (2d Cir. 2001) (adopting *Teamster*s-style framework for individual relief); *Coe* v. *Yellow Freight Sys., Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) (addressing liability, not relief, standards).

thus that the plaintiff is entitled to a recovery).[6] *Teamsters* establishes the inference that it was the discriminatory practice that caused the denial or delay of plaintiffs' promotions. While this makes plaintiffs presumptive victims who, in turn, are presumptively entitled to back pay, plaintiffs are still required to prove the extent of any back pay losses. Here, plaintiffs were required to prove to the district court—and did prove—the value of lost wages (to which the parties stipulated in part), the start and end dates of their back-pay periods, and whether plaintiffs mitigated their losses. See *Smith III*, 460 F. Supp. 3d at 62-65. Thus, the *Teamsters* presumption does not conflict with *Azimi*.

3. Boston's Proposed Standard Conflicts With Title VII's Make-Whole Purpose

Requiring plaintiffs seeking back pay to prove they "would have been promoted" if Boston had not used the unlawful 2008 Exam is an impossible burden that conflicts with Title VII's make-whole purpose. See *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 764 (1976) (noting that Title VII is intended to "make the victims of unlawful employment discrimination whole"). If an employer

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[6] Boston makes this same mistake (Br. 63) citing *McClain* v. *Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008). In *McClain*, the Fifth Circuit noted that the *valuation* of back pay should be "tailored to the actual victims of discrimination" when "individual determinations of each claimant's position but for the discrimination are possible." *Id.* at 280-281. *McClain* does not address whether a presumption applies in determining entitlement to relief in the first place. See *ibid.* (rejecting class-based formula for calculating back pay).

cannot demonstrate that its exam validly establishes which candidates were qualified for promotion during the liability phase, it is unclear how plaintiffs could do so during the relief phase. As *Teamsters* counsels, *employers* are "in the best position to show why an individual employee was denied an employment opportunity." 431 U.S. at 359 n.45. For this reason, plaintiffs who prevail in showing a practice has an unlawful disparate impact are entitled to the inference that their missed promotions were caused by that practice, and employers must rebut that presumption. See *id.* at 362 (noting "proof of the [unlawful] pattern or practice supports an inference that any particular employment decision" was made "in pursuit of that [discriminatory] policy").

Boston's preferred standard is particularly problematic in circumstances where the number of potential victims of the discriminatory practice exceeds the number of vacancies filled by the practice. To fashion make-whole relief, a district court must "as nearly as possible, recreate the conditions and relationships that would have been had there been no unlawful discrimination." *Teamsters*, 431 U.S. at 372 (internal quotation marks and citation omitted); see *Smith III*, 460 F. Supp. 3d at 59 (making plaintiffs whole requires recognizing that they "*could* have been promoted," the position they would have been in "absent the discrimination") (citation omitted). Unless an employer has other non-discriminatory reasons it would have denied the position to specific individuals, then each plaintiff had an

equal chance of obtaining the lost position(s), and, as a matter of simple arithmetic, none could possibly show that he or she more likely than not would have been promoted.

Faced with such circumstances, courts have recognized that identifying which individuals would have received the position in the absence of discrimination requires a "quagmire of hypothetical judgments" and "mere guesswork." *Catlett* v. *Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1267 (8th Cir. 1987) (citation omitted); accord *United States* v. *Brennan*, 650 F.3d 65, 139 (2d Cir. 2011); *Easterling* v. *Connecticut Dep't of Corr.*, 278 F.R.D. 41, 48 (D. Conn. 2011). To resolve this difficulty, courts routinely resolve against the employer any uncertainty about who would have been promoted, "since it is the defendant's discriminatory employment practices which are the source of the uncertainty." *EEOC* v. *Joint Apprenticeship Comm. of the Joint Indus. Bd. Of Elec. Indus.*, 186 F.3d 110, 122 (2d Cir. 1999) ("Any uncertainty as to whether plaintiff would have been hired is resolved against the defendant."); see also *United States* v. *City of Miami*, 195 F.3d 1292, 1299 (11th Cir. 1999) (same); *United States* v. *U.S. Steel Corp.*, 520 F.2d 1043, 1050 (5th Cir. 1975) (same).

Otherwise, as the district court recognized here, "to relieve an employer of the burden to show that they would not have [promoted] the plaintiff absent discrimination would contravene part of Congress's intent in enacting Title VII, in

that an employer would be less likely to avoid or eliminate discriminatory practices if it knew in advance it would never have to answer for those practices when faced with a claim for back pay." *Smith III*, 460 F. Supp. 3d at 59 (quoting *Joint Apprenticeship*, 186 F.3d at 123 (2d Cir. 1999)).

Placing this burden on the employer, however, does not mean that it will pay more than make-whole relief in circumstances where there are more victims than vacancies filled. Plaintiffs in such circumstances must account for the "probability" of receiving a vacancy in valuing their back pay losses. Here, the parties agreed in advance to a formula for awarding back pay according to a lost-chance ratio. See *Smith III*, 460 F. Supp. 3d at 54, 62.

B. Boston Failed To Rebut The Presumption That Plaintiffs Were Entitled To Individual Relief

Regardless of whether *Teamsters* applies, Boston argues (Br. 67-68) that it rebutted any presumption that plaintiffs were entitled to back pay. Because Boston's allegedly improved 2014 Exam had a greater adverse impact on Black candidates than the challenged 2008 Exam, Boston asserts plaintiffs would not have been promoted had the 2014 Exam been given in 2008. Br. 67-68. In so arguing, Boston does not rely on any individual plaintiff's performance on the 2014 Exam to rebut the presumption. Rather, Boston "make[s] some general group predictions" that individual plaintiffs would not have done better in 2008 because they are Black and because similar candidates took the 2008 and 2014

Exams. Br. 68-69. The district court correctly dismissed this argument. *Smith III*, 460 F. Supp. 3d at 60-62.

Evidence of Black candidates' performance as a group on the 2014 Exam cannot rebut the *Teamsters* presumption. Such evidence does not "demonstrate that the *individual* applicant was denied an employment opportunity for lawful reasons." *Teamsters*, 431 U.S. at 362 (emphasis added). By defendant's own admission, it is making only a "general group prediction[]" based on the results of the 2014 Exam that is not specific to any individual plaintiff's actual qualifications for promotion. Br. 69. Thus, this evidence cannot rebut plaintiffs' entitlement to back pay.

Additionally, as the district court observed, the key question is whether the 2014 Exam results reveal how "*these plaintiffs* would have performed" on a "similar exam *in 2008*." *Smith III*, 460 F. Supp. 3d at 61 (emphasis added to second quotation). In determining whether a plaintiff is entitled to back pay, a district court must "recreate the conditions and relationships that would have been had there been no unlawful discrimination" in 2008. *Teamsters*, 431 U.S. at 372 (internal quotation marks and citation omitted). Even Boston's experts agreed that "the 2014 exam reveals nothing about how these plaintiffs would have performed" on a "counterfactually similar exam in 2008." *Smith III*, 460 F. Supp. 3d at 60.

CONCLUSION

This Court should affirm the rulings below on the questions addressed herein.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES:

1. complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,500 words; and

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

s/ Barbara Schwabauer
BARBARA SCHWABAUER
Attorney

Date: April 2, 2021

CERTIFICATE OF SERVICE

I certify that on April 2, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINITFFS-APPELLEES with the United States Court of Appeals for the First Circuit via this Court's CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

s/ Barbara Schwabauer
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