

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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GEORGE MANDALA and CHARLES )  
BARNETT, individually and on behalf of )  
all others similarly situated, )  
 )  
Plaintiffs, ) Case No. [XX-CV-XXXX]  
 )  
v. )  
 )  
NTT DATA, INC., )  
 )  
Defendant. )

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO**

**DEFENDANT'S MOTION TO DISMISS**

**PRELIMINARY STATEMENT**

This case presents a question of exceptional importance that has divided this Circuit: whether African-American workers challenging a blanket criminal conviction bar must possess employer-specific statistical data *before filing suit*—data that, by definition, lies exclusively in the defendant's possession. The answer must be no.

As five judges of this Circuit recently warned in dissenting from denial of rehearing en banc, a heightened pleading standard for disparate impact claims "threatens to 'shut[] the courthouse door' to those who may have valid disparate impact claims." *Mandala v. NTT Data, Inc.*, 988 F.3d 664, 670 (2d Cir. 2021) (Chin, J., dissenting from denial of rehearing en banc). Judge Chin, joined by Judges Pooler, Katzmann, Lohier, and Carney, observed that "significant racial disparities in arrest, conviction, and incarceration rates persist in this country, disparities that have resulted in unfair and unnecessary barriers to employment." *Id.* at 670.

The Supreme Court's recent decisions in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), and *Ames v. Ohio Department of Youth Services*, 605 U.S. \_\_\_\_ (2025), reaffirm that courts should not impose heightened evidentiary burdens that find no support in Title VII's text. Defendant's motion should be denied.

## **I. FACTUAL BACKGROUND**

Plaintiffs George Mandala and Charles Barnett are African-American men who applied for positions with NTT Data, a multinational IT services company. (Compl. ¶¶ 1-4.) Both Plaintiffs were deemed qualified for the positions they sought. (Compl. ¶ 4.) Both received conditional offers of employment. (Compl. ¶ 5.)

NTT Data maintains a companywide policy under which applicants with felony convictions are categorically excluded from employment. (Compl. ¶¶ 8, 14.) This is not an individualized assessment—it is a blanket bar. After background checks revealed that Plaintiffs had prior felony convictions, NTT Data rescinded both offers. (Compl. ¶¶ 10-12.) The sole stated reason was the existence of the convictions. (Compl. ¶ 12.) Plaintiffs were otherwise qualified and met all other hiring criteria. (Compl. ¶ 13.)

The Complaint alleges—and Defendant does not dispute—that African-Americans are convicted of felonies at significantly higher rates than other racial groups nationwide. (Compl. ¶ 18.) According to the Bureau of Justice Statistics, African-Americans constitute approximately 13% of the U.S. population but account for approximately 33% of the prison population. Bureau of Justice Statistics, *Prisoners in 2021* (Dec. 2022). As the Pew Research Center has documented, "African-Americans are incarcerated at a rate roughly seven times per capita higher than white Americans." John Gramlich, *Black imprisonment rate in the U.S. has fallen by a third since 2006*, Pew Research Center (May 6, 2020).

## **II. LEGAL STANDARD**

On a motion to dismiss, the Court must "accept as true all of the allegations contained in a complaint." *Iqbal*, 556 U.S. at 678. A complaint survives if it contains "sufficient factual matter" to state a claim that is "plausible on its face." *Id.* The plausibility standard "is not akin to a 'probability requirement,'" but requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

The Second Circuit has repeatedly emphasized that, in employment discrimination cases, a plaintiff has only a "'minimal burden' of alleging facts 'suggesting an inference of

discriminatory motivation." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015) (quoting *Littlejohn v. City of New York*, 795 F.3d 297, 310 (2d Cir. 2015)). As the Second Circuit held in *Littlejohn*, "[t]he facts required by *Iqbal* to be alleged in the complaint need not give plausible support to the ultimate question" of discrimination. 795 F.3d at 311. "They need only give plausible support to a *minimal inference* of discriminatory motivation." *Id.* (emphasis added).

Moreover, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), remains good law. As recently confirmed by the Supreme Court in *Ames v. Ohio Department of Youth Services*, 605 U.S. \_\_\_\_ (2025), "the facts necessarily will vary in Title VII cases" and "the prima facie proof required can therefore differ from case to case." Slip op. at 8 (quoting *McDonnell Douglas*). The Court specifically cited *Swierkiewicz* with approval. *Id.*

### **III. ARGUMENT**

#### **A. Recent Supreme Court Precedent Supports Plaintiffs' Pleading Standard**

The Supreme Court's 2024 decision in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), unanimously rejected the imposition of heightened pleading requirements not found in Title VII's text. There, the Court held that employees need only show "some harm"—not "significant" or "material" harm—to state a claim. *Id.* at 354. Justice Kagan, writing for the Court, explained that "courts rewrote Title VII, compelling workers to make a showing that the statutory text does not require." *Id.* at 353.

The same logic applies here. Title VII's disparate impact provision, 42 U.S.C. § 2000e-2(k)(1)(A)(i), requires that a plaintiff demonstrate that a "particular employment practice . . .

causes a disparate impact." Nothing in that text requires employer-specific statistical evidence *at the pleading stage*. Defendant's argument would impose precisely the kind of extra-textual requirement that *Muldrow* rejected.

Similarly, in *Ames v. Ohio Department of Youth Services*, 605 U.S. \_\_\_\_ (2025), decided June 5, 2025, a unanimous Court struck down the "background circumstances" rule that required majority-group plaintiffs to provide additional statistical evidence. Justice Jackson, writing for the Court, held that "the standard for proving disparate treatment under Title VII does not vary" based on group membership, and that courts should not "uniformly subject[] all majority-group plaintiffs to the same, highly specific evidentiary standard in every case." Slip op. at 9-10. The principle is clear: courts may not impose heightened evidentiary burdens that lack textual support.

### **B. The Second Circuit Dissents in the Prior Mandala Litigation Correctly Identify the Flaw in Defendant's Position**

Defendant will undoubtedly cite the panel decision in *Mandala v. NTT Data, Inc.*, 975 F.3d 202 (2d Cir. 2020), which affirmed dismissal of a prior complaint raising similar claims. But that 2-1 decision prompted vigorous dissents from five judges of this Circuit when rehearing en banc was denied, revealing deep division over the appropriate pleading standard for disparate impact claims.

Judge Denny Chin, joined by Judges Pooler, Katzmann, Lohier, and Carney, dissented from the denial of en banc review, warning that "[t]he heightened pleading standard created by the panel majority for disparate impact cases brought pursuant to Title VII . . . presents a risk that

many meritorious civil rights cases will not be reached on the merits." *Mandala*, 988 F.3d at 670 (Chin, J., dissenting). Judge Chin observed:

This is particularly troubling now in light of the implications for the struggle for racial equality that Title VII reflects, as the nation continues to address the issue of systemic racism. As the panel majority observes, "[f]acts are stubborn things," . . . and the statistics cited by plaintiffs in this case highlight an indeed "stubborn"—and sobering—fact: significant racial disparities in arrest, conviction, and incarceration rates persist in this country, disparities that have resulted in unfair and unnecessary barriers to employment.

*Id.* at 670.

Judge Pooler, in a separate dissent, emphasized that national statistics "are a logical starting point for a disparate impact analysis, as plaintiffs are alleging a national impact." *Id.* at 670 (Pooler, J., dissenting). Judge Lohier's dissent, joined by Judges Pooler, Katzmann, Chin, and Carney, noted that "racial disparities in conviction and arrest rates will persist across all education levels," citing amicus briefs from criminologists demonstrating that "[b]lack men with some college education have imprisonment risks that are seven (7) times greater than white men with some college." *Id.* at 676 (Lohier, J., dissenting) (citing Brief for Megan C. Kurlychek et al. as Amici Curiae).

### **C. The Panel Majority's Reasoning Does Not Withstand Scrutiny**

The panel majority in *Mandala* speculated that because the positions at issue "require certain educational and technical credentials," national conviction statistics might not be representative of the qualified applicant pool. 975 F.3d at 211-12. The majority reasoned that "it is not much of a stretch to imagine that arrest and conviction rates are negatively correlated with education." *Id.* at 212.

But this reasoning, as the dissenting judges noted, requires the Court to *assume facts not in evidence*—and to assume them against the plaintiff at the pleading stage. Judge Lohier responded directly:

Applying the same common sense that most Americans exercise in their views of the criminal justice system and our judicial experience overseeing that system, we know more than this. We know that racial disparities in conviction and arrest rates will persist across all education levels.

*Mandala*, 988 F.3d at 676 (Lohier, J., dissenting). The amicus brief from criminologists confirmed this intuition: "[T]he data is quite clear" that "racial disparities in conviction and arrest rates will persist across all education levels." *Id.*

The majority's speculation about education levels illustrates the danger of resolving factual questions at the pleading stage. Whether conviction rates among highly educated African-Americans remain disproportionate to those of highly educated whites is an *empirical question* that should be answered through discovery—not assumed away on a motion to dismiss.

#### **D. Defendant's Position Creates an Insurmountable Catch-22**

Defendant's position creates an insurmountable barrier. Plaintiffs cannot obtain NTT Data's applicant demographics, hiring data, or the racial breakdown of applicants disqualified under the felony policy *without discovery*. But under Defendant's rule, Plaintiffs cannot *obtain* discovery without first possessing that very data. This Catch-22 would effectively immunize all facially neutral policies from disparate impact challenge.

Judge Chin addressed this concern directly: "By acquiescing to the panel majority's use of a heightened pleading standard, the Court weakens Title VII, and threatens to 'shut[] the courthouse door' to those who may have valid disparate impact claims." *Mandala*, 988 F.3d at 670 (Chin, J., dissenting).

This cannot be the law. Congress enacted Title VII's disparate impact provisions precisely to address facially neutral policies that perpetuate discrimination. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation."). The *Twombly/Iqbal* plausibility standard requires only "enough fact to raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 550 U.S. at 556. National statistics showing massive racial disparities in conviction rates satisfy that standard.

### **E. Disparate Impact Liability Remains Firmly Established Despite Recent Executive Action**

Defendant may point to Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy," signed on April 23, 2025, which directs federal agencies to "deprioritize" enforcement of disparate impact claims. But that Executive Order does not—and cannot—change the law. As every legal commentator has recognized, "[t]he order does not prohibit

private plaintiffs from pursuing disparate impact claims against private employers under Title VII." Duane Morris LLP, *Executive Order Rejects Disparate Impact Theory* (Apr. 25, 2025).

Disparate impact liability was "first recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)," and "Congress explicitly codified the concept of disparate impact into Title VII with the Civil Rights Act of 1991." Nelson Mullins, *Disparate Impact: Executive Order v. Title VII & the Courts* (Apr. 24, 2025). That statutory text, codified at 42 U.S.C. § 2000e-2(k), "remains the law" and "[u]nless and until Congress amends Title VII to repeal the provisions on disparate impact, employers can expect disparate impact theories to continue." *Id.*

An executive order cannot "unwrite" a statute enacted by Congress. This Court remains bound by *Griggs*, by the Civil Rights Act of 1991, and by Supreme Court precedent including *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), which reaffirmed disparate impact liability under similar statutory language.

#### **F. Business Necessity Is the Proper Defense—Not Dismissal at the Pleading Stage**

Defendant warns that permitting this case to proceed would make "every criminal background check policy presumptively unlawful." This is wrong. Title VII's disparate impact framework provides employers with a complete defense: the burden shifts to the defendant to prove 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).

If NTT Data can demonstrate that its blanket exclusion of applicants with felony convictions is job-related and consistent with business necessity—for example, because certain

positions require security clearances or involve access to sensitive client data—it may prevail on the merits. *See El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 243 (3d Cir. 2007) (upholding criminal background check policy where employer demonstrated business necessity for positions involving vulnerable passengers). But that is a fact-intensive inquiry that cannot be resolved on a motion to dismiss.

Moreover, the Complaint alleges that NTT Data's policy permits *no* individualized assessment—applicants are categorically excluded based solely on the existence of a felony conviction, without regard to the nature of the offense, its relationship to the job, or evidence of rehabilitation. (Compl. ¶ 14.) Whether a more tailored policy would serve NTT Data's legitimate interests while reducing disparate impact is precisely the kind of question that should be explored through discovery and, if necessary, trial.

#### **IV. CONCLUSION**

Five judges of this Circuit have warned that the heightened pleading standard advocated by Defendant "threatens to 'shut[] the courthouse door' to those who may have valid disparate impact claims." The Supreme Court's recent decisions in *Muldrow* and *Ames* confirm that courts should not impose extra-textual evidentiary requirements that find no support in Title VII.

Plaintiffs have identified a specific employment practice (blanket felony exclusion), alleged well-documented statistical disparities (African-Americans are convicted at rates 2-3 times their share of the population), and demonstrated causation (the policy caused the rescission of their job offers). This is sufficient to raise a "reasonable expectation that discovery will reveal evidence" of disparate impact. *Twombly*, 550 U.S. at 556.

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss.

Dated: \_\_\_\_\_

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the date indicated above, a true and correct copy of the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS was served upon all counsel of record via the Court's CM/ECF electronic filing system.

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[ATTORNEY NAME]