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The Honorable Charlotte A. Burrows
Chair, Equal Employment Opportunity Commission
131 M Street, N.E.
Washington, D.C. 20507
EEOCopinionletters@eoc.gov

Re: Request for Interpretive Rulemaking/Guidance on Employment Tests as a Substitute for College-Degree Requirements

Dear Chair Burrows:

We are writing as experienced labor policy practitioners.¹ We seek new guidance, which would allow employers to reduce their reliance on college-degree requirements. We have observed that college degrees are widely considered in hiring and promotion decisions. Such a requirement, however, may unreasonably limit the pool of available qualified applicants for certain positions, a particularly troubling development given the existence of widespread labor shortages across the country. Moreover, preferring candidates with a college degree may adversely impact Black and Hispanic candidates, especially given the data that establishes that these protected class groups obtain college degrees at a significantly lower rate than others.

We stand in good company with these worries. As you have recently explained, “[n]ot every job requires a four-year degree, yet that default assumption limits many employers from finding qualified candidates.”² Longstanding EEOC policy reflects the same concern.³ And President Biden, in his State of the Union address last year,

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G. Roger King is a highly regarded labor relations attorney, whose career spans more than 40 years. Roger recently retired as a partner with the Jones Day law firm. Earlier, he served as Professional Staff Counsel to the U.S. Senate Labor Committee. He now serves as Senior Labor and Employment Counsel for the HR Policy Association.

² EEOC Press Release, U.S. Department of Labor, Equal Employment Opportunity Commission Host HIRE Roundtable on Making Workplaces More Inclusive (June 29, 2022) (quoting EEOC Chair Charlotte A. Burrows), <https://www.eeoc.gov/newsroom/us-department-labor-equal-employment-opportunity-commission-host-hire-roundtable-making>.

³ In the EEOC Compliance Manual, the Commission provides a hypothetical of an employer that “has violated Title VII because [its] college-degree requirement screens out African Americans and Hispanics to a significant degree but it has not been demonstrated to be job related and consistent with business necessity.” EEOC Compliance Manual, Section 15 Race and Color Discrimination, EEOC-CVG-2006-1 (Apr. 19, 2020), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIB2>. In the Commission’s Instructions to Federal Agencies for EEO MD-715, the Commission describes “[r]equiring a college degree

emphasized the need to “offer every American a path to a good career, whether they go to college or not.”⁴ Opportunity@Work defines the problem this way: Employers have chosen to “screen out” job candidates with college-degree requirements, rather than “screen in” talent “by verifying skills developed through other means.”⁵ And as the *Wall Street Journal* and *Bloomberg News* recently reported, companies are increasingly interested in removing college degree requirements to address their labor shortage. Yet, the share of jobs going to candidates without degrees has barely budged because hiring managers are reluctant to pull the trigger on non-college candidates.⁶

We now propose a way forward. Specifically, the EEOC should create a safe harbor for employers who currently rely on college-degree requirements but decide to create a new alternative pathway for prospective employees that uses an employment test. When employers create that kind of “screen-in” testing program, they should not be forced to comply with the typical validation requirements for employment tests. In other words, an employer that currently requires a college degree for a position should be encouraged to create a new door for non-college workers: just passing a test.

This approach would help employers fill open jobs with more productive hires, promote a fairer labor market, and improve job market prospects for underrepresented minorities.

I. Employers often require college degrees for middle-skills jobs, which limits opportunities for workers without degrees and expands the number of unfilled positions during a labor shortage.

Employers today face an acute labor shortage, yet they continue to attach college degree requirements to more and more jobs.⁷ Indeed, college degree requirements in job

for clerical positions” as an example of a potential “institutional barrier” “that limits or tends to limit employment opportunities for members of a particular EEO group based on their sex, race, ethnic background, or disability status,” which agencies must proactively take steps to eliminate. Instructions to Federal Agencies for EEO MD-715, *Barrier Identification and Elimination*, <https://www.eeoc.gov/federal-sector/management-directive/instructions-federal-agencies-eeo-md-715-1#:~:text=E.&text=MD%2D715%20requires%20agencies%20to,ethnic%20group%20in%20federal%20agencies>.

⁴ Remarks of President Joe Biden, State of the Union Address as Prepared for Delivery (Feb. 7, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/>.

⁵ Opportunity@Work, *The Problem*, <https://opportunityatwork.org/problem/>.

⁶ Lauren Weber, *62% of Americans Lack a College Degree. Can They Solve the Labor Shortage?* WALL STREET JOURNAL (Feb. 16, 2024), <https://www.wsj.com/lifestyle/careers/employers-open-more-doors-to-workers-without-degrees-but-few-are-getting-in-732f1098>; Matthew Boyle, *‘Skills First’ Still Means ‘College Required’ at US Firms*, Bloomberg News (Feb. 14, 2024) (noting that “45% of large US firms ... declared a college degree unnecessary for many roles and then didn’t change their hiring practices”).

⁷ The Commission has also recently highlighted the value of skill-based education to private employers

postings are pervasive—even in jobs where most employees who currently hold that position lack a college degree.

At the same time, the number of unfilled jobs continues to rise. Compared to February 2020, today the American labor force is down by 2.1 million workers, leaving 10.8 million unfilled jobs across the economy.⁸ The shortage is especially acute for clerical and other typically “white-collar” positions. In December 2023, state and local governments reported 833,000 unfilled positions, an amount about 40 percent higher than it was as recently as 2019.⁹ The number of unfilled positions in professional and business services likewise rose by nearly 600,000 during the same period.¹⁰ Yet, at the same time, 6.1 million job-seekers remain unemployed. With this gap, it is clear that matching American workers to employers remains one of the central labor-force challenges of the day.

Despite this pressing shortage, a recent Harvard Business School (HBS) report observed that the “rising demand for a four-year college degree for jobs that previously did not require one [] is a substantive and widespread phenomenon.”¹¹ The trend is most pronounced for so-called “middle-skills” jobs—positions that have traditionally required more training than a high school diploma, but not a college degree. Such positions include executive assistants, production supervisors, distribution managers, and insurance claims clerks.¹² Comparing its database of millions of job postings with education credentials of the existing workforce, data analytics firm Burning Glass found “a broad range of occupations where employers are seeking a bachelor’s degree for jobs that formerly required less education, even when the actual skills required haven’t changed or when this makes the position harder to fill.”¹³

amidst the current labor shortage. *See* EEOC Press Release, Experts Examine the Current State of The U.S. Workforce and What Jobs May Be in Future Demand (Apr. 10, 2017) (“[T]here simply aren’t enough skilled workers to fill these positions . . . [T]he nation should recognize that there are good jobs available to those who pursue vocational or technical education to learn a trade. We do our students a disservice when we suggest to them, directly or indirectly, that admission to a four-year college is the only kind of success that matters.” (quoting Michael D’Ambrose, Senior Vice President and Chief of Human Resources officer for Archer Daniels Midland Company) (internal quotation marks omitted)), <https://www.eeoc.gov/newsroom/experts-examine-current-state-us-workforce-and-what-jobs-may-be-future-demand-0>.

⁸ U.S. Chamber of Commerce, America Works Data Center, <https://www.uschamber.com/workforce/america-works-data-center> (last accessed Feb. 18, 2024).

⁹ U.S. Bureau of Labor Statistics, Econ. News Rel. Table A, Job Openings and Labor Turnover (Dec. 2023), <https://www.bls.gov/news.release/jolts.a.htm>.

¹⁰ *Id.*

¹¹ Joseph Fuller et al. *Dismissed by Degrees*, ACCENTURE, GRADS OF LIFE, HARVARD BUSINESS SCHOOL, 1, 2 (2017), <https://www.hbs.edu/managing-the-future-of-work/Documents/dismissed-by-degrees.pdf> (“HBS Analysis”).

¹² BURNING GLASS TECHNOLOGIES, MOVING THE GOAL POSTS: HOW DEMAND FOR A BACHELOR’S DEGREE IS RESHAPING THE WORKFORCE, 4–8 (2014) (“Burning Glass Report”).

¹³ *Id.* at 1.

The trend spans myriad fields, from clerical to retail to manufacturing. For example, according to the Burning Glass analysis, only 19% of executive secretaries currently hold a bachelor's degree, while 65% of job postings for these positions require one; only 32% of distribution managers currently hold one, while 74% of job postings require one; and only 17% of existing first-line production supervisors hold one, while 62% of job postings require a four-year degree.¹⁴

The implications of this phenomenon are sobering for the estimated 68 million American workers without college degrees.¹⁵ A 2020 National Bureau of Economic Research study found that nearly 29 million U.S. workers without college degrees already have the skills necessary to transition to higher-wage middle-skills jobs, a move that could increase their income by more than 70% on average.¹⁶ But these workers cannot make that move when employers require a college degree for hiring or advancement.

The trend also generates artificial incentives for would-be employees to attend college and assume significant debt when a degree requirement is not justified by business necessity. As one commentator put it, “[r]equiring a bachelor’s degree for a job that doesn’t truly need one is asking students and taxpayers to spend \$120,000 over four years for no good reason.”¹⁷ What is more, many do not complete their degree (the six-year graduation rate is 64% overall, and much lower at the least selective institutions).¹⁸ Among those who do graduate, many report that student loan debt has delayed home ownership, retirement

¹⁴ *Id.* at 5, 8.

¹⁵ Based on data from the 2018 Census Bureau Current Population Survey. Peter Q. Blair, et al., *Searching for Stars: Work Experience as a Job Market Signal for Workers Without Bachelor’s Degrees* 12 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26844, 2020), <http://www.nber.org/papers/w26844> (“NBER Study”).

¹⁶ NBER Study, at 22.

¹⁷ Andrew Gillen, *Credential Inflation: What’s Causing It and What Can We Do About It?* JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL (Aug. 12, 2020), <https://www.jamesgmartin.center/2020/08/credential-inflation-whats-causing-it-and-what-can-we-do-about-it/>.

¹⁸ National Center for Education Statistics, Table 326.10: “Graduation rate from first institution attended for first-time, full-time bachelor’s degree-seeking students at 4-year postsecondary institutions, by race/ethnicity, time to completion, sex, control of institution, and percentage of applications accepted: Selected cohort entry years, 1996 through 2014”, https://nces.ed.gov/programs/digest/d21/tables/dt21_326.10.asp.

Less selective institutions have much lower graduations rates than highly selective institutions. For example, the 6-year graduation rate at open admissions colleges is 27.9%, compared to 90.4% for highly selective institutions. *Id.* Policies that create artificial incentives to pursue a college degree are likely to encourage matriculation of students who are less well-prepared and less academically inclined. These students tend to enroll at less selective institutions, are statistically less likely to graduate, and are therefore most likely to be harmed by such incentives. See Russell F. Pinizzotto, *SAT/ACT Scores: Predictors of Higher Education Outcomes*. HIGHEREDJOBS (April 13, 2020), <https://www.higheredjobs.com/Articles/articleDisplay.cfm?ID=2203>

savings, and family formation.¹⁹ Those who do not often take on student loan debt that cannot be discharged in bankruptcy but lack the wherewithal to repay it. Incentives that have the effect of encouraging those lacking a strong academic interest in pursuing education beyond high school to do so anyway likely enlarges the number of college students at risk of noncompletion.

Workers are not alone in suffering harm from the trend of favoring degree holders. HBS found that degree inflation makes middle-skills jobs harder for employers to fill, results in wage inflation, and leads to higher employee turnover.²⁰ In addition, employers perceive degree holders in middle-skills jobs to be less engaged in their work and to require just as much on-boarding as those without degrees.²¹ Indeed, as degree programs have proliferated, the signaling value of a college degree has decreased, providing less information to employers regarding the degree holder’s capabilities.²² Instead, employers increasingly acknowledge that skills-based criteria more effectively measure the abilities and promise of candidates.²³ The result: a small but growing number of employers—spanning technology, publishing, retail, and hospitality—are eliminating college degree requirements altogether.²⁴

Numerous state governments have now followed suit. In March 2022, then-Governor Lawrence Hogan announced a new initiative to eliminate the four-year degree requirement for thousands of state jobs in recognition that workers can be “skilled through alternative routes” (STARS).²⁵ He speculated that the STARS initiative could ultimately open over half of the state’s 38,000 jobs to applications without a four-year credential. In December 2022, Utah Governor Spencer Cox announced an initiative removing four-degree requirements for 98 percent of state jobs.²⁶ In January 2023, Pennsylvania Governor

¹⁹ American Student Assistance, *Life Delayed: The Impact of Student Debt on the Daily Lives of Young Americans* (2015), <https://file.asa.org/wp-content/uploads/2019/01/28203317/Life-Delayed-2015.pdf>.

²⁰ HBS Analysis, at 18.

²¹ *Id.* at 19.

²² As education and career expert Dr. Marty Nemko observed, “There is tremendous pressure to push kids through [college] . . . That piece of paper no longer means very much, and employers know that . . . Everybody’s got it, so it’s watered down.” Kristi Oloffson, *The Job Market: Is a College Degree Worth Less?* TIME (Dec. 8, 2009), <http://content.time.com/time/business/article/0,8599,1946088,00.html>.

²³ See e.g., Jennifer Arnold, *How to Adopt Skills-based Hiring Practices*, SHRM (Feb. 20, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0318/pages/hiring-for-skills-not-pedigree.aspx>. Even the Supreme Court has recognized “the infirmity of using diplomas or degrees as fixed measures of capability.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

²⁴ *15 More Companies That No Longer Require a Degree—Apply Now*, GLASSDOOR (Jan. 10, 2020), <https://www.glassdoor.com/blog/no-degree-required/>; Roy Maurer, *Employers Open to Ditching Degree Requirements When Hiring*, SHRM (July 11, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/eliminating-degree-requirements-hiring-ibm-penguin.aspx>.

²⁵ Press Release, Off. of Gov. Larry Hogan, Governor Hogan Announces Elimination of Four-Year Degree Requirement for Thousands of State Jobs (March 15, 2022), <https://governor.maryland.gov/2022/03/15/governor-hogan-announces-elimination-of-four-year-degree-requirement-for-thousands-of-state-jobs/>

²⁶ Press Release, Off. of Gov. Spencer Cox, Gov. Cox Launches Skills-First Hiring Initiative For State

Josh Shapiro issued an executive order eliminating four-year degree requirements for 92 percent of the state’s jobs—roughly equivalent to 65,000 jobs.²⁷ Since then, the governors of Alaska, New Jersey, Colorado, North Carolina, South Dakota, and Virginia have issued similar executive orders, and the Georgia and Florida legislatures enacted laws requiring the same.²⁸ And Arizona has loosened college degree requirements for public school teachers.²⁹

The movement has reached the federal government as well. The Office of Personnel Management has put forward guidance encouraging agencies to focus on skills-based hiring and move away from college-degree requirements.³⁰ Finally, pending federal legislation would direct the Office of Management and Budget to revise federal competitive service requirements to only allow education requirements to the extent required by state or local law.³¹

II. Black and Hispanic workers obtain college degrees at significantly lower rates than White and Asian workers.

Government (Dec. 13, 2022), <https://governor.utah.gov/2022/12/13/news-release-gov-cox-launches-skills-first-hiring-initiative-for-state-government/>.

²⁷ Press Release, Off. of Gov. Josh Shapiro, Executive Order 2023-03 – Creating Opportunities by Prioritizing Work Experience for State Government Jobs (January 18, 2023), https://www.governor.pa.gov/wp-content/uploads/2023/01/20230117_EO%202023-03_Final_EXECUTED.pdf.

²⁸ See Press Release, Off. of Governor Mike Dunleavy, Governor Dunleavy Champions Economic Opportunities for Alaska Workers, Orders Removal of Four-Year Degree Requirements for Most State Jobs (Feb. 14, 2023), <https://web.archive.org/web/20230325011620/https://gov.alaska.gov/governor-dunleavy-champions-economic-opportunities-for-alaska-workers-orders-removal-of-four-year-degree-requirements-for-most-state-jobs/>; Press Release, Off. of Gov. Phil Murphy, Governor Murphy Signs Executive Order to Prioritize Work Experience and Skills Training Over Four-Year Degrees for Certain State Employment Opportunities (Apr. 10, 2023), <https://web.archive.org/web/20230504191956/https://www.nj.gov/governor/news/news/562023/20230410a.shtml>; Press Release, Off. of Gov. Jared Polis, Gov. Polis Takes Innovative Action to Attract New & Skilled Talent to State Workforce (Apr. 14, 2022), <https://www.colorado.gov/governor/news/7741-gov-polis-takes-innovative-action-attract-new-skilled-talent-state-workforce>; Roy Cooper, Governor of the State of North Carolina, Executive Order No. 278, Recognizing the Value of Experience in State Government Hiring (Mar. 13, 2023), <https://governor.nc.gov/executive-order-no-278/open>; Press Release, Off. of Gov. Kristi Noem, Gov. Noem Signs Executive Order Expanding Job Opportunities (Apr. 24, 2023), https://news.sd.gov/news?id=news_kb_article_view&sysparm_article=KB0040145&sys_kb_id=74573157_db926d104a395425f396193c&spa=1; News Release, Off. of the Gov. Glenn Youngkin, Governor Glenn Youngkin Announces Landmark Change in State Agency Hiring Practices (May 30, 2023), <https://www.governor.virginia.gov/newsroom/news-releases/2023/may/name-1004029-en.html>; J. Thomas Perdue, *Georgia to eliminate barriers to work in state government*, Ga. Pub. Pol’y Found. (Apr. 20, 2023), <https://www.georgiapolicy.org/news/georgia-to-eliminate-barriers-to-work-in-state-government/>; Fla. S.B. No. 1310, 2023 Fla. Laws Ch. 2023-256, Fla. Stat. § 112.219 (2023).

²⁹ Ariz. SB 1159, 55th Leg. (2022), <https://www.azleg.gov/legtext/55leg/2R/laws/0337.pdf>.

³⁰ U.S. Office of Personnel Management Press Release, OPM Releases Skills-Based Hiring Guidance (May 19, 2022), <https://www.opm.gov/news/releases/2022/05/release-opm-releases-skills-based-hiring-guidance/>.

³¹ Federal Skills Act, S. 383, 118th Cong. (2023).

More troubling than harm to employers, the practice of requiring a four-year degree for positions currently filled by those without degrees disproportionately affects Black and Hispanic workers, who obtain college degrees at substantially lower rates than their Asian and White counterparts. According to U.S. Census Bureau data, in 2018 nearly 64% of Asian workers and 45% of non-Hispanic White workers, ages 25 to 64, had college degrees.³² In comparison, only 31% of Black workers and only 21% of Hispanic workers in the same age range possessed a four-year degree.³³ And among those without college degrees, Black and Hispanic workers are more likely to be concentrated in low income jobs, meaning college degree preferences lock out a greater share of Black and Hispanic workers from promotion and advancement.³⁴

Disparities in degree attainment also exist among other protected classes, including sex and national origin: a smaller share of men than women in the workforce hold a bachelor's degree, and foreign-born workers are less likely than native-born workers to have completed college.³⁵ Men and foreign-born workers thus have more to lose from degree inflation trends.

Artificial employment incentives to pursue a four-year degree also negatively affect underrepresented minority students in higher proportions. For example, graduation rates are lower for Black (45%), Hispanic (58%), and American Indian students (42%) than for white (67%) and Asian students (77%).³⁶ Black recipients of baccalaureate degrees are also more likely than other racial groups to incur student loan debt³⁷ and have the highest average student loan balance (\$44,880).³⁸

³² Analysis based on educational attainment of U.S. workers ages 25 to 64. 2018 U.S. Census Bureau Current Population Survey, <https://www.census.gov/cps/data/cpstablecreator.html>.

³³ *Id.*

³⁴ Among those without college degrees, Black and Hispanic workers make up 17% and 20%, respectively, of low income job-holders, and only 8% and 10%, respectively, of high income job-holders. NBER Study at 23, Fig. 12; Peter Q. Blair and Shad Ahmad, *The Disparate Racial Impact of Requiring a College Degree*, WALL STREET JOURNAL (June 28, 2020), <https://www.wsj.com/articles/the-disparate-racial-impact-of-requiring-a-college-degree-11593375171>.

³⁵ Among U.S. workers ages 25 to 64, approximately 38% of male workers have college degrees, compared to 44% of female workers, and approximately 37% of foreign-born workers have college degrees compared to 41% of native-born workers. 2018 U.S. Census Bureau Current Population Survey, *supra* note 32.

³⁶ National Center for Education Statistics, Table 326.10

³⁷ Seventy-six percent of Black degree recipients in 2017-18 borrowed under federal loan programs compared to 57% of white graduates and 38% of Asian graduates. National Center for Education Statistics, Table 331.95: Percentage of undergraduate degree/certificate completers who ever received federal loans and parent PLUS loans and average cumulative loan amount, by degree level, selected student characteristics, and institution control: 2017-18, https://nces.ed.gov/programs/digest/d21/tables/dt21_331.95.asp?current=yes

³⁸ Board of Governors of the Federal Reserve System, *Survey of Consumer Finance, 1989-2019: Education Installment Loans*, https://www.federalreserve.gov/econres/scf/dataviz/scf/table/#series:Education_Installment_Loans;demographic:racecl4;population:all;units:mean

III. Title VII prohibits employment practices that disparately impact members of a protected class unless those practices are justifiably “job related” and “consistent with business necessity.”

Section 703 of Title VII of the Civil Rights Act of 1964 makes it illegal for an employer “to limit, segregate, or classify” employees in any way that would “adversely affect” an individual’s “status as an employee, because of . . . race, color, religion, sex, or national origin.”³⁹ The Supreme Court first held that this provision prohibits facially-neutral employment practices that produce adverse effects correlated to race—so-called “disparate impact” practices—in 1971’s *Griggs v. Duke Power Co.*⁴⁰ There, the Court pronounced that “practices that are fair in form, but discriminatory in action” are prohibited by Title VII unless “related to job performance” and justified by “business necessity.”⁴¹

In 1989’s *Wards Cove Packing Co. v. Atonio*, however, a five justice majority narrowed the *Griggs* construction of Title VII, holding that “there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business to pass muster” as a sufficient business justification.⁴² “Congress responded to [*Wards Cove*] with the Civil Rights Act of 1991, which codified disparate-impact liability and specified its parameters.”⁴³ In the Act, Congress sought to harmonize the newer *Wards Cove* approach to business necessity with the more entrenched *Griggs* standard for justifying employment practices that have adverse effects.⁴⁴ Section 703, as modified by Congress, now prohibits employment practices that have “a disparate impact on the basis of race, color, religion, sex, or national origin,” unless the employer “demonstrate[s] that the challenged practice is *job related for the position in question and consistent with business necessity.*”⁴⁵

“The analysis of job-relatedness and business necessity is fact specific—there are no absolutes.”⁴⁶ Since 1991, various tests have been developed to determine whether challenged employment practices meet the job related and consistent with business

³⁹ 42 U.S.C. § 2000e-2(a)(2).

⁴⁰ 401 U.S. 424, 431 (1971).

⁴¹ *Id.*

⁴² 490 U.S. 642, 659 (1989).

⁴³ *Davis v. D.C.*, 925 F.3d 1240, 1257 (D.C. Cir. 2019) (Katsas, J., concurring in part and dissenting in part) (citing Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75).

⁴⁴ “The [Civil Rights Act of 1991] interpretive memorandum . . . states in relevant part: ‘The terms ‘business necessity’ and ‘job related’ are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*’” *Lanning v. SEPTA*, 181 F.3d 478, 488 (3rd Cir. 1999) (quoting 137 Cong. Rec. 28,680 (1991)); see also *Davis*, 925 F.3d at 1260 (Katsas, J., concurring in part and dissenting in part).

⁴⁵ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added). Certain specified practices that may have an adverse impact, including seniority or merit systems, are expressly exempted from the prohibition. 42 U.S.C. § 2000e-2(h).

⁴⁶ EEOC Compliance Manual, Section 15 Race and Color Discrimination, EEOC-CVG-2006-1 (Apr. 19, 2020), Section V.B, note 77, <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIB2>.

necessity standard.⁴⁷ Some courts “require[] employers to demonstrate that their [practice] measures the *minimum qualifications necessary* for successful performance of the job in question” for the practice to survive a disparate impact challenge.⁴⁸ Other courts require that the practice “be predictive of or *significantly correlated* with important elements” of the position in question.⁴⁹ EEOC guidance indicates that, to survive a charge of disparate impact, the employer must provide “evidence that a college degree is more predictive of, or correlated with, job performance than” other relevant “credentials and experiences that would render a person qualified for the job.”⁵⁰ These are not perfunctory tests, but rather implement the rigorous *Griggs* directive that an employment practice with disparate impact is only permissible if the employer demonstrates it has a “manifest relationship” to the job in question.⁵¹

IV. The Uniform Guidelines describe how employers can validate practices as job related and consistent with business necessity.

EEOC’s Uniform Guidelines on Employee Selection Procedures⁵² provide guidance on how employers can validate an employment practice as job related and consistent with business necessity to comply with Section 703. The Guidelines apply to “[a]ny measure, combination of measures, or procedure used as a basis for any employment decision”—expressly including “educational” requirements—that have a disparate impact on members of a protected class.⁵³

Under the Uniform Guidelines, a practice that “has an adverse impact on the hiring, promotion, or other . . . employment” opportunities of members of a protected group is considered discriminatory—and in violation of Section 703—“unless the procedure has been validated in accordance with” the Guidelines.⁵⁴ The Guidelines go on to provide three evidence-based methods for validation—criterion-related, content, and construct studies—and include detailed technical standards for implementing each technique.⁵⁵ Under the Guidelines, an employer must document the validity of a practice that has an adverse

⁴⁷ See, e.g., *Easterling v. Dep’t of Corrections*, 783 F. Supp. 2d 323, 335 (D. Conn. 2011) (discussing judicial interpretations of “job related” and “business necessity”).

⁴⁸ *Lanning*, 181 F.3d at 489 (emphasis added).

⁴⁹ *Guilino v. N.Y. State Education Dep’t*, 460 F.3d 361, 383 (2nd Cir. 2006) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)) (emphasis added).

⁵⁰ EEOC Compliance Manual, Section 15 Race and Color Discrimination, EEOC-CVG-2006-1 (Apr. 19, 2020), Section VI.B.2, Example 14, <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIB2>.

⁵¹ *Griggs*, 401 U.S. at 432; see also *Ricci v. DeStefano*, 557 U.S. 557, 636 (2009) (Ginsburg, J., dissenting) (observing that, in the 1991 Act, “Congress repudiated *Wards Cove* and reinstated the ‘business necessity’ rule attended by a ‘manifest relationship’ requirement”).

⁵² 29 C.F.R. Part 1607.

⁵³ 29 C.F.R. §§ 1607.2(B), 1607.16(Q).

⁵⁴ 29 C.F.R. § 1607.3(A).

⁵⁵ 29 C.F.R. §§ 1607.5, 1607.15(B)–(D).

impact prior to using the practice.⁵⁶ Employers also must maintain various records related to its application of the practice.⁵⁷

Courts consistently apply rigorous validation standards to employment tests and other assessments used in employment decisions. The United States Court of Appeals for the Ninth Circuit’s approach is representative. Observing that validation requirement “must be vigilantly enforced” for tests,⁵⁸ the Ninth Circuit applies a three-step analysis, requiring the employer to precisely identify the trait measured by the test, to establish that the trait “is an important element of work behavior,” and to “demonstrate by ‘professionally acceptable methods’” that the test is job related and consistent with business necessity.⁵⁹ Courts and employers, alike, routinely rely on the evidence-based studies outlined by the Uniform Guidelines to prove validation of employment tests,⁶⁰ and the EEOC advises employers that they “*first* must have the test *professionally* validated to ensure that [it] is predictive of, or significantly correlates with, important elements” of job performance to avoid running afoul of Title VII.⁶¹ This means that expert validation is functionally required before any case is brought to ensure compliance.

Courts have been less consistent, however, in the scrutiny they bring to bear on educational qualifications, often applying far less exacting standards for validation. A number of courts have found educational requirements to be job related based solely on lay

⁵⁶ 29 C.F.R. §§ 1607.5(D), 1607.15(A). Under certain limited circumstances, an employer may use a selection procedure that “is not at the moment fully supported by the required evidence of validity” on an interim basis. 29 C.F.R. § 1607.5(J).

⁵⁷ 29 C.F.R. § 1607.15.

⁵⁸ *Assoc. of Mexican-American Educators v. California*, 231 F.3d 572, 598 (9th Cir. 2000) (Reinhardt, J., concurring).

⁵⁹ *See id.* at 582 (majority op.) (citations omitted); *see also Guilino*, 460 F.3d at 383 (“[T]he basic rule has always been that ‘discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.’” (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975))).

⁶⁰ *See, e.g., Isabel v. City of Memphis*, 404 F.3d 404, 413 (6th Cir. 2005) (affirming that a city had not demonstrated the business necessity of a written test for promoting police officers in part because the test’s “cutoff score was never validated by any of the methods suggested in the Uniform Guidelines”); *M.O.C.H.A. Soc’y, Inc. v. City of Buffalo*, 2009 U.S. Dist. LEXIS 20070, at *35–56 (W.D.N.Y. Mar. 4, 2009), *aff’d* 689 F.3d 263 (2nd Cir. 2012) (applying the Uniform Guidelines for content validation to find that a city had demonstrated that its promotion exam was job related and consistent with business necessity); *Hearn v. City of Jackson*, 340 F. Supp. 2d 728, 741 (S.D. Miss. 2003), *aff’d* 110 Fed. App’x 424, 424 (5th Cir. 2004) (applying the Uniform Guidelines to find that a city demonstrated that its promotion test for police officers “was content valid and sufficiently reliable” to justify its use under Title VII).

⁶¹ EEOC Compliance Manual, EEOC Compliance Manual, Section 15 Race and Color Discrimination, EEOC-CVG-2006-1 (Apr. 19, 2020), Section VI.B.2, <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#VIB2> (emphasis added). The Second Circuit Court of Appeals has also observed, “employment testing is a task of sufficient difficulty to suggest that an employer dispenses with expert assistance at his peril. Certainly, the decision to forgo such assistance should require a Court to give the resulting test careful scrutiny.” *Guardians Assoc. of N.Y. City Police Dep’t, Inc. v. Civil Serv. Comm’n*, 630 F.2d 79, 96 (2nd Cir. 1980) (citations omitted).

witness testimony. In *Walls v. Mississippi State Dep't of Public Welfare*, the Fifth Circuit Court of Appeals held that educational prerequisites for state social workers, eligibility workers, and clerk-typists were “job related” based on the testimony of the state Civil Service Commissioner, who merely “expressed his strong belief” that these workers should have the specified educational qualification to adequately perform their duties.⁶² The Seventh Circuit Court of Appeals lowered the bar further in *Aguilera v. Cook County Police & Corrections Merit Board*, finding that the county’s high school diploma requirement for corrections officers was permissible, even though the record contained no “sworn evidence that the requirement of a high school education is ‘job-related.’”⁶³ Though *Aguilera*’s lenient standard for validation stands in tension with the subsequent 1991 Civil Rights Act,⁶⁴ lower courts continue to occasionally cite the case for its approach to the business necessity defense.⁶⁵

Some courts have suggested that a “lighter burden” for educational qualification validation applies “when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great,”⁶⁶ but require more

⁶² 730 F.2d 306, 316 (5th Cir. 1984), *aff'g in relevant part* 542 F. Supp. 281 (N.D. Miss. 1982). Other courts permit validation based on expert testimony. *See, e.g., Thompson v. Miss. State Personnel Bd.*, 674 F. Supp. 198, 209-10 (N.D. Miss. 1987) (holding that a college degree requirement for a supervisor position was job related based on expert testimony).

⁶³ 760 F.2d 844, 849 (7th Cir. 1985).

⁶⁴ In choosing not to apply the Uniform Guidelines’ validation standards to a high-school diploma requirement for corrections officers in *Aguilera*, Judge Posner reasoned that the “exacting criteria [of the Uniform Guidelines] are more applicable to tests than to educational requirements. Tests are made and scored by the employer, hence easily misused; degrees are awarded by schools that are independent of the employers who use the degrees as job qualifications.” *Id.* at 847 (citations omitted). Instead, Posner applied “a tolerant standard” akin to “reasonableness,” *id.* (citations omitted), and in a later opinion observed that his *Aguilera* standard “anticipated” the “dilute[d]” business necessity defense endorsed by the Supreme Court in *Wards Cove. Allen v. Seidman*, 881 F.2d 375, 377 (7th Cir. 1989). Two years later, Congress made clear the *Wards Cove* formulation would not eliminate disparate impact liability when it passed the 1991 Civil Rights Act, calling into question *Aguilera*’s current precedential value.

⁶⁵ *See, e.g., Chi. Teacher’s Union, Local 1 v. Bd. of Educ.*, 419 F. Supp. 3d 1038, 1050 (N.D. Ill. 2020) (relying on *Aguilera* and other cases to determine that the appropriate test of business necessity—in the context of enrollment-based layoffs of teachers—is “whether there is a reasonably tight fit between the challenged criterion and the actual demands of the job, such that the criterion reflects a *reasonable and practical* business choice.”) (emphasis added) (quotation marks and citations omitted).

⁶⁶ *Spurlock v. Un. Air Lines, Inc.* 475 F.2d 216, 219 (10th Cir. 1972); *see also Davis v. Dallas*, 777 F.2d 205, 217–18 (5th Cir 1985) (“holding that the City has a lighter burden in establishing the job relatedness of its educational requirement for police officers,” such “that empirical evidence is not required to validate the job relatedness of the educational requirement”).

rigorous validation for positions that do not impact public safety.⁶⁷ Other courts, however, accept lower validation standards irrespective of job category.⁶⁸

In short, despite the problems caused by college-degree requirements, current applications of Title VII make it much easier to require a college degree than to implement an employment test.

V. Consideration of college degree attainment poses a high risk of disparately impacting Black and Hispanic workers applying for middle-skills jobs.

In 1971, the *Griggs* Court recognized that educational requirements, insufficiently tethered to job performance, may “operate as ‘built-in headwinds,’” posing a barrier to employment and advancement for members of certain minority groups.⁶⁹ This observation is no less true in 2024, particularly for Black and Hispanic workers applying for middle-skills jobs.

Courts have used different benchmarks to determine whether an employment practice has an “adverse impact.” Some courts insist on detailed statistical analyses to identify adverse impact. For example, courts sometimes require that the difference between the observed and expected racial representation be more than a few standard deviations⁷⁰ or that the difference be so large that it is extremely unlikely to arise by chance, as determined by commonly-accepted statistical tests.⁷¹

⁶⁷ See, e.g., *Thompson*, 674 F. Supp. at 210 (observing “that empirical evidence is not required in order to validate the job-relatedness of the educational requirements for the Supervisor” position in question “[b]ecause of the professional nature of the [] position and the public interest involved,” where “the job may at times involve high degree of risk to the public and requires a high degree of professionalism”); see also *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 622–23 (5th Cir. 1983) (noting that the employer “had never attempted to validate its educational requirement in accordance with Equal Opportunity Commission regulations” and finding that the employer’s “assert[ions] that a supervisory employee benefits from formal education” were not sufficient to validate educational requirement that had disparate impact on Black employees).

⁶⁸ See, e.g., *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815–16 (8th Cir. 1983) (stating that, though “[a] validation study would have strengthened the company’s case [and] is the preferred type of evidence in a disparate impact case,” the presented witness testimony was sufficient to show that a college degree requirement for a supervisory position in the operations department of a beer distributor “was job-related and justified by business necessity”).

⁶⁹ *Griggs*, 401 U.S. at 432.

⁷⁰ See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 312 n.17 (1977) (“a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race”); *McClain v. Lufkin Indus.*, 519 F.3d 264, 279–80 (5th Cir. 2008) (finding that a disparity in promotions of 2.02 standard deviations was sufficient to establish a prima facie showing of disparate impact).

⁷¹ For example, using the Chi Square Test. See, e.g., *Jones v. New York City Human Res. Admin.*, 391 F. Supp. 1064, 1071–72 (S.D.N.Y. 1975) (finding disparate impact where an expert analysis using the Chi Squared Test showed that the disparity in passing rates between White and minority candidates on a challenged employment test would “occur less than one time in 100 as the result of chance”).

Other courts endorse the Uniform Guidelines’ “four-fifths” rule.⁷² Under the four-fifths rule, adverse impact is inferred if the selection rate for any protected group using a particular procedure “is less than four-fifths [80%] . . . of the rate for the group with the highest rate” using the same procedure.⁷³ The selection rate reflects the proportion of individuals who are “hired, promoted, or otherwise selected” from the applicant pool using the procedure.⁷⁴ The Guidelines make clear that the four-fifths threshold is advisory, and that smaller or greater differences may constitute adverse impact depending on the circumstances of the particular position in question.⁷⁵

Determining whether a particular qualification has a disparate impact using the four-fifths rule requires identifying the proper applicant pool, and that pool must include *all* candidates capable of performing the required job duties—both those with and without the challenged qualification.⁷⁶ For a particular position, a comprehensive analysis of the applicant pool will consider the composition of the local workforce and whether those workers possess the necessary job-specific capabilities.

For positions—like middle-skills jobs—that do not require extensive, specialized skill sets, population-level analyses can provide a reasonable proxy applicant pool.⁷⁷ Analyses of nationwide educational attainment data⁷⁸ show that degree requirements pose a high risk of adversely impacting Black and Hispanic workers. Using the portion of the national workforce that has at least a high school diploma as a proxy for the middle-skills

⁷² See, e.g., *M.O.C.H.A. Soc’y, Inc. v. City of Buffalo*, 689 F.3d 263, 274 (2nd Cir. 2012) (applying the EEOC four-fifths rule to find that the challenged promotion exam had a disparate impact); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1222 (10th Cir. 2013) (“Although not controlling on courts, [the Uniform Guidelines’ four-fifths rule] is persuasive.”).

⁷³ 29 C.F.R. § 1607.4(D).

⁷⁴ 29 C.F.R. § 1607.16(R).

⁷⁵ 29 C.F.R. § 1607.4(D).

⁷⁶ *Smith v. Xerox Corp.*, 196 F.3d 358, 368 (2nd Cir. 1999) (“In the typical disparate impact case the proper population for analysis is the applicant pool *or the eligible labor pool.*” (emphasis added)). Restricting the applicant pool to those who actually did apply is inappropriate where “otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.” *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

⁷⁷ See, e.g., *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1371 (5th Cir. 1974) (permitting use of statistical data on high school diploma attainment in the entire state of Texas as representative of the potential applicant pool for a position at a rubber plant in Houston); see also *Hazelwood Sch. Dist.*, 433 U.S. at 308 n.13 (observing that “general areawide population” statistics can be “highly probative” where the required job skill “is one that many persons possess or can fairly readily acquire” or where the “comparative statistics . . . [are] properly limited” to those individuals who possess the required skills).

⁷⁸ While nationwide educational attainment data is used in this letter for convenience, a disparate impact analysis for a particular position should involve a comparison with the educational attainment of the local or regional population. See, e.g., *Carpenter*, 706 F.2d at 622 (finding disparate impact based on a statistical comparison with the residents in the surrounding county); *Johnson*, 491 F.2d at 1371 (observing that previous Supreme Court and Fifth Circuit cases have found disparate impact based on statistical comparisons with residents in the local metropolitan area, in the state, or in a multi-state region).

job applicant pool, a selection procedure that screens out those without a college degree results in selection rates for Black and Hispanic candidates that are 51% and 42%, respectively, of the selection rates for Asian candidates—the group with the highest rate.⁷⁹ These relative selection rates are well below the Uniform Guidelines’ minimum four-fifths (80%) threshold, raising a strong inference that college degree preferences have an adverse impact on Black and Hispanic applicants.

VI. To reduce the risk of disparate impact, employers who currently impose college-degree requirements should be allowed to use assessments as an alternative, without triggering additional validation requirements.

Given all these problems, employers have made clear that they desire new hiring models that bring in prepared workers and increase diversity.⁸⁰ And scholars have suggested that using employment testing to replace college degree requirements would create a more fair, inclusive workplace.⁸¹ But the fear of disparate impact liability for using employment tests stands in the way of reforming this problematic hiring practice. The solution is to make clear that employers can create an alternative pathway for non-college candidates through employment testing, and if they do so, the typical validation requirements do not apply.

The EEOC should recognize that employment tests often *reduce* disparate impact. As multiple studies show, job testing can produce better hires for employers while increasing, or at least not harming, racial diversity.⁸² In one scholar’s words, there is “little reason to suspect that ... job tests are *more* biased against minorities than are informal screens,” meaning the “presumed equality-efficiency trade-off” from using tests is “largely irrelevant in practice.”⁸³ Given these findings, employment tests create a win-win: They let employers identify productive talent, while also opening the doors to millions of Americans, disproportionately from disadvantaged groups, who otherwise would have no chance to get hired because they have no college degree.

⁷⁹ Selection rates determined based on analysis of educational attainment of U.S. workers ages 25 to 64. 2018 U.S. Census Bureau Current Population Survey, <https://www.census.gov/cps/data/cpstablecreator.html>. Even when compared to White candidates (who have a lower selection rate than Asian candidates), the relative selection rates for Black (71%) and Hispanic (58%) candidates fall below the 80% threshold for adverse impact in the Uniform Guidelines. *Id.*

⁸⁰ See, e.g., Kirk Carapezza, *No College, No Problem. Some Employers Drop Degree Requirements to Diversify Staffs*, NPR (Apr. 29, 2021), <https://www.npr.org/2021/04/29/990274681/no-college-no-problem-some-employers-drop-degree-requirements-to-diversify-staff>.

⁸¹ Frederick M. Hess & Grant Addison, *When College Degrees Impede Opportunity*, Inside Higher Ed (Dec. 9, 2018), <https://www.insidehighered.com/views/2018/12/10/essay-how-employers-college-degree-requirements-can-harm-students#>.

⁸² David H. Autor & David Scarborough, *Does Job Testing Harm Minority Workers? Evidence from Retail Establishments*, *The Quarterly Journal of Economics* 219 (2008); Nicole M. Stephens, Lauren A. Rivera, & Sarah S. M. Townsend, *What Works to Increase Diversity? A Multi-Level Approach*, at 23 (2020).

⁸³ Autor & Scarborough, *supra*, at 269.

Despite all of these advantages, employment testing has failed to get off the ground as an alternative to college-degree requirements because of liability risks.⁸⁴ Employers have good reason to fear. Under the Uniform Guidelines, whenever an employment test produces a disparate impact on a racial group it is considered discriminatory until it meets heightened “validation requirements.” This requires funding a “validity study” that analyzes all aspects of the job, evaluates representative candidates, and uses “professionally acceptable statistical procedures.”⁸⁵ All of this entails considerable time, resources, and the hiring of outside experts. And after all of that, employers must ensure that there is not some other test out there that has less of a discriminatory impact.

That guidance does not account for the civil rights *benefits* that can result from tests—even tests that have a disparate impact—in a landscape so dependent on college requirements. Think of it this way. By adding an employment test option as a way for potential candidates to *get around* college degree requirements, employers are opening positions up to the disproportionately minority group of workers who lack a college degree. Even a test with a disparate impact likely improves the prospects of minorities when it serves as a “screen-in” that can bring in new candidates by circumventing a college-degree requirement. Confirming the point, one study explains that “if job tests are unbiased relative to the screens they supplement” (like a college degree requirement), adding a test does “not come at a cost of lower minority hiring.”⁸⁶

Employers need new guidance from the EEOC. As Byron Auguste of Opportunity@Work put it, employers have to hear the message from the EEOC that they are “on the right side” if they are finding new ways to include workers currently excluded by college-degree requirements.⁸⁷ If an employer allows a score on a test to substitute for a college degree that would otherwise be required, they should be praised, not assumed to be discriminatory and forced to comply with the typical validation requirements. The EEOC should create a safe harbor for “screen in” testing programs that mitigate the bite of college degree requirements.

VII. Conclusion

Widespread college-degree requirements cause significant challenges in the labor market. They can make it difficult to fill job vacancies. They can cause disparate impact because certain racial minorities obtain college degrees at significantly lower rates than Asian and White workers. And they drive more and more young people towards crippling student loan debt. But many employers feel like they must use degree requirements

⁸⁴ Matthew Camardella & Anthea Dexter-Cooper, *Putting Your Employment Tests to the Test*, Law360 (March 6, 2013).

⁸⁵ See 29 C.F.R. § 1607.5.

⁸⁶ Autor & Scarborough, *supra*, at 269.

⁸⁷ EEOC, *Skills-Based Hiring: Removing Barriers and Paving Pathways to an Inclusive Workforce*, YouTube (June 28, 2022), <https://www.youtube.com/watch?v=NrJmgxy8Zhc&t=4415s>.

nonetheless, for lack of viable alternatives. We request that the EEOC issue new interpretive guidelines to respond to these problems.

The EEOC should allow employers to create an alternative pathway for non-college candidates. This pathway would be simple: Instead of pointing to a college degree to get past an initial screen, a non-college candidate could just show that he passed an employment test. To make that possible, the EEOC should provide a “safe harbor” for employers who currently require college degrees but now would like to set up this additional pathway. Specifically, employers who wish to use employment tests as an alternative to their college-degree requirements should be permitted to do so under the validation standard currently applied to degree requirements. This change would soften the impact of college-degree requirements and enable employers to make their hiring processes more inclusive.

Thank you for your attention to the above analysis and our request.

Sincerely,

Jonathan Berry

G. Roger King

Cc:

The Honorable Jocelyn Samuels, Vice Chair

The Honorable Keith E. Sonderling, Commissioner

The Honorable Andrea R. Lucas, Commissioner

The Honorable Kalpana Kotagal, Commissioner