No. 87-1387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC.,
CASTLE & COOKE, INC.,
Petitioners,

v.

FRANK ATONIO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief as amicus curiae in support of the Petitioners. The parties' written consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The EEAC is an association of employers organized to promote sound, practical approaches to equal employment opportunity and affirmative action. Its membership comprises a broad segment of the employer community in the United States, including about 190 large employers and trade and industry associations located throughout the country. Its governing body is a Board of Directors

composed of experts in equal employment opportunity. Their combined experience gives the Council an in-depth understanding of the practical, as well as legal aspects of equal employment policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members are subject to Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, the statute at issue in this case, as well as other equal employment statutes and regulations. Last term, in *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), this Court expanded the applicability of the disparate impact theory to subjective criteria and practices involving an individual plaintiff. A plurality of the Court suggested an analytical framework for applying the disparate impact theory in such cases. This case presents the first opportunity for the full Court to apply and clarify the *Watson* decision in the context of a class action under Title VII. As a result, EEAC's members are vitally interested in the issues before the Court in this case, which concern the proper use of statistics and the burdens of proof under the disparate impact theory when the employer selects skilled and unskilled employees from different labor markets using multiple, subjective and objective criteria and practices.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Court stated that, in appropriate circumstances, either a disparate treatment or disparate impact theory may be applied to a particular set of facts. With respect to the use of statistics in class actions to establish a prima facie case, lower courts, including the Ninth Circuit, have failed to take into account the different purposes of the two theories. The Court in this case has an opportunity to make clear that the same set of statistics may not necessarily establish disparate treatment and impact in a particular case.

That is, although statistical disparities may sometimes be probative of disparate treatment, they are not probative of disparate impact unless a causal connection is shown between the disparities and some specific, facially neutral employment practice.

Furthermore, in *Watson* a majority of the Court recognized the difficulties of validating subjective selection criteria and a plurality of the Court stated that the employer's rebuttal burden is to state a legitimate business reason. For the benefit of Title VII litigants and the lower courts, this Court should clearly adopt the *Watson* plurality's discussion of the defendant's rebuttal burden in a disparate impact case, and should make clear that it is the same for both objective and subjective criteria.

EEAC has filed amicus curiae briefs in numerous cases concerning the appropriate use of statistics and the applicability of the disparate impact theory to subjective criteria. *See Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988); *Atonio v. Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987) (en banc); *Green v. USX Corporation*, 843 F.2d 1511, (3d Cir. 1988), *pet. for cert. pending* (No. 88-141); and *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982). EEAC also has filed several briefs amicus curiae in this Court in cases involving burden of proof and statistical issues. *See, e.g., Bazemore v. Friday*, 106 S. Ct. 3000 (1986); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The defendant companies operate five canneries located in remote and widely separated areas of Alaska. The canneries are open only for a short period of time during the salmon runs each summer and are vacant the rest of the year. Skilled workers are brought in prior to the fishing season to assemble canning equipment, repair winter damage to the facilities and otherwise prepare the entire cannery for the season. They are retained during and after the season to maintain and disassemble equipment. The trial court found there was too little time during the preseason to train unskilled workers for these skilled jobs, because the work is intense and involves extensive overtime. Pet. for Cert. I-18-19. The unskilled cannery workers, who comprise most of the summer work force, arrive shortly before the fishing begins and remain at the cannery as long as there are fish to be canned. Because salmon are very perishable, the canneries operate virtually around the clock during fishing season.

Hiring for all jobs except for some cannery workers living in Alaska occurs at the defendants' home offices in Seattle, Washington and Astoria, Oregon during the first three months of the year. Many of the jobs at the defendants' facilities are covered by union contracts which have rehire preference clauses. The defendants receive many more applications than there are vacancies for the upcoming season. The district court found that the majority of the applicants for skilled positions were whites, and relatively few non-whites applied for those positions. *Id.* at I-31-32. It also concluded that, because of the sparse population in Alaska, it would not be reasonable from a business standpoint to seek applicants there for skilled jobs. *Id.* at I-32. Unskilled cannery jobs are filled through rehire preferences or through the dispatch procedure of a Filipino union local in Seattle, and workers performing those jobs are predominantly non-white. The

trial court also found that the skills acquired in most cannery worker jobs did not provide training for skilled jobs. *Id.* at I-40.

The plaintiffs brought a class action against the Petitioner companies alleging disparate treatment and impact under Title VII of the 1964 Civil Rights Act, *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Specifically, they claimed that as unskilled cannery workers, they were discriminated against in hiring and promotion to skilled jobs, as well as with respect to the companies' housing and messing practices. In a wide-ranging attack, the plaintiffs identified 16 practices which they asserted caused a concentration of nonwhites in the cannery positions, including English language skill requirements and nepotism. In addition to anecdotal evidence, they attempted to support their claims of disparate treatment and impact with two kinds of general statistical evidence—(1) comparisons between the racial composition of the defendants' skilled jobs and the racial composition of the available external labor supply, and (2) comparisons between the racial composition of defendants' skilled jobs and the racial composition of the defendants' unskilled jobs.

With respect to the allegations of disparate treatment, the trial court concluded that the plaintiffs had not proved the individual instances of discrimination and accorded the plaintiffs' statistics little probative value because they did not reflect the pool of employees who had the requisite skills or who were available for preseason work. The district court applied a disparate impact analysis to the English language requirement and nepotism claims, and found for the defendants. It declined to apply the disparate impact theory to subjective criteria and practices.

On appeal, a Ninth Circuit panel in *Atonio I* affirmed the decision of the lower court. In particular, it held that:

> [P]ractices and policies such as a lack of well-defined criteria, subjective decision making, hiring from different sources or channels, word-of-mouth recruitment, and segregated housing and messing, which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination. Consequently, we hold that disparate impact analysis was correctly withheld by the district court when considering these claims.

Atonio v. Wards Cove Packing Company, 768 F.2d 1120, 1133 (9th Cir. 1985).

Thereafter, the case was presented for *en banc* review. Consistent with this Court's subsequent decision in *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988), the *en banc* panel in *Atonio II* held that:

> [D]isparate impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class. The three elements of the plaintiffs' prima facie case are that they must (1) show a significant disparate impact on a protected class, (2) identify specific employment practices or selection criteria and (3) show the causal relationship between the identified practices and the impact.

810 F.2d 1477, 1482 (9th Cir. 1987). Significantly, a concurring opinion stressed that the disparate impact theory is designed to be applied to certain types of cases only, and that the disparate treatment and impact theories may not be used interchangeably in any given fact situation. *Id.* at 1486-1494.

Contrary to the plurality of this Court that reached the issue in *Watson*, however, the *en banc* panel also held that:

> The crucial difference between a treatment and impact allegation is the intermediate burden on the employer. To rebut the prima facie showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exists. But if the employer defends by explaining the reason for the disparity he must do more than articulate the reason. He must prove the job relatedness or business necessity of the practice.

Id. at 1485.

On remand from the Ninth Circuit *en banc*, the original panel erroneously held in *Atonio III* that the "quantity and quality of the statistical evidence which will give rise to an inference [of disparate impact] is the same as that which will give rise to an inference of discriminatory intent." 827 F.2d 439, 442 (9th Cir. 1987). The panel noted that the district court had found the plaintiffs' comparative statistics showing a concentration of minorities in unskilled cannery worker jobs to be probative of intentional discrimination. Nevertheless, it found that they had established disparate impact, even though the plaintiffs did not show that the workforce imbalance was specifically due to particular criteria, as required by *Atonio II*.

Moreover, the panel simply disregarded the defendants' statistics showing that, while external availability of nonwhites for skilled jobs was 2.5 percent to 20 percent, nonwhites actually were employed in about 21 percent of the non-cannery positions in the defendants' Alaska operations. In addition, even though the plaintiffs had not shown that their statistical disparities were caused by the adverse impact of the identified selection criteria and practices, as required by the *en banc* decision, the *Atonio III* panel proceeded to consider defendants' business explanations for those criteria and practices and found them insufficient to prove business necessity.

SUMMARY OF ARGUMENT

Numerous federal appellate courts, and at least four justices of this Court, have correctly recognized that the disparate impact theory is appropriate, not for wide-ranging attacks on a company's employment practices, but only for challenges aimed at clearly delineated, facially neutral employment policies that can be shown to have significantly disparate effects on different race or sex groups. *See, e.g., Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 2777 (1988) (plurality opinion); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), and *Maddox v. Claytor*, 764 F.2d 1539, 1548 (11th Cir. 1985). The Ninth Circuit therefore erred in requiring the trial court to evaluate the business necessity of almost all of the defendants' hiring and promotion practices and criteria, when none had been shown to cause the workforce imbalance. Unless such a causal connection is shown, it cannot be said with any degree of certainty that the statistical disparity to which the plaintiffs point was an "effect", or resulted from the "impact", of the defendant's employment practices. Hence, there is no basis under a disparate impact or "effects" test for requiring the defendants to justify those practices.

If plaintiffs can establish prima facie discrimination under the impact theory simply by introducing general comparative statistics showing a workforce imbalance, without having to show that the imbalance is causally linked to one or more specific practices of the employer, then employers will effectively be forced to justify their entire selection processes in virtually every Title VII lawsuit, unless they can rebut the plaintiff's statistics. And if, to meet this rebuttal burden, employers are then required to prove legitimate business reasons for their selection procedures by validation or some other strict standard, a *prima facie* case will almost inevitably lead to a finding of discrimination. As a consequence, "quotas

and preferential treatment [may] become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability" for employers. *Watson*, 108 S.Ct. at 2788 (O'Connor, J., for a plurality of the Court). That result would be directly contrary to the expressed will of the Congress that enacted Title VII. Accordingly, this Court should eschew the reasoning of the Ninth Circuit panel in *Atonio III*, and instead apply the principles articulated by the *Watson* plurality.

ARGUMENT

I. THE DISPARATE IMPACT THEORY OF TITLE VII MAY BE USED ONLY WHERE A SPECIFIC, FACIALLY NEUTRAL EMPLOYMENT PRACTICE OR CRITERION APPLYING TO A GROUP OF EMPLOYEES IS SHOWN TO CAUSE AN ADVERSE IMPACT ON A PROTECTED CLASS OF EMPLOYEES.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Supreme Court stated that, in appropriate circumstances, either a disparate treatment or disparate impact theory may be applied to a particular set of facts. For both theories to be applicable in a particular case, however, the plaintiff must allege facts that give rise to the application of both theories. Although the plaintiffs here have identified 16 practices or criteria that they contend resulted in adverse impact, they have failed to show a causal link between any of those criteria or practices and the statistical disparities to which they point. Proof of such a causal connection must be recognized as a *sine qua non* of the disparate impact theory. Without such a connection, there is no basis for finding that the perceived disparity was in fact an "effect," or resulted from the "impact", of the challenged criteria or practices.

If a *prima facie* case can be based on statistics like those relied on by the plaintiffs here—showing only that

a workforce imbalance exists but telling nothing whatever about its cause—then an employer charged under that theory will effectively be required to justify all of its employment practices, when in fact, none of them may have caused the imbalance. Such a result would be contrary to well established Title VII principles and precedents, as discussed below. Glaring workforce imbalances revealed by general comparative statistics may be sufficient in some cases to raise an inference of discriminatory intent, but in this case the trial court specifically found that the plaintiffs' statistics were inadequate to show disparate treatment. For the court of appeals to hold, nevertheless, that these same statistics could establish a *prima facie* case under the impact theory was, we submit, clear error.

A. This Court has Applied the Disparate Impact Theory Only in Cases Challenging Specific, Facially Neutral Employment Practices or Criteria When the Plaintiff Has Shown a Direct Link Between Those Practices or Criteria and Adverse Impact on a Group of Employees.

The Court has carefully guarded the distinction between the disparate impact and disparate treatment theories of Title VII. Consistently, the Court has applied disparate impact only to claims challenging specific, facially neutral employment practices or criteria that adversely affect a protected class of employees.

The Court adopted the impact theory in *Griggs v. Duke Power Co.*, 401 U.S. 424, (1971), as a judicial gloss on Section 703(a)(2) of Title VII.[1] *Griggs* held that "prac-

[1] Section 703(a)(2) provides:

> It shall be an unlawful employment practice for an employer—
> * * * * to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (1981).

tices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430 (emphasis added). The "practices, procedures or tests" at issue in *Griggs* were requirements for a high school education and a passing score on a standardized general intelligence test. The Court found those requirements to be in violation of Title VII because they were insufficiently related to the jobs for which they were used. *Id.* at 431-34. Thus, *Griggs* interpreted Section 703(a)(2) to prohibit specific, facially neutral employment practices or criteria that operate to discriminate against protected classes of employees.[2]

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court expressly contrasted devices like those at issue in *Griggs* with selection procedures with multiple practices or criteria. The plaintiffs in *Furnco* challenged

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[2] A number of other decisions of this Court applying disparate impact analysis also have been limited to the narrow context of specific, facially neutral practices or criteria. For example, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) applied the impact theory to employment tests that "select[ed] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court relied on the impact theory in reviewing a rule that excluded women from a disability plan based on pregnancy. *Dothard v. Rawlinson*, 433 U.S. 321 (1977), presented the Court with height and weight criteria that adversely affected women and could not be shown to have a "business necessity." The Court recognized that in dealing with such "facially neutral qualification standards" impact analysis should be allowed, and emphasized that a *prima facie* case is shown under the impact theory by demonstrating that the particular criteria in question actually caused the selection of applicants in a discriminatory manner. *Id.* at 328-29. *See also Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (impact analysis applied to rule denying accumulated seniority to employees return to work after pregnancy); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (impact theory used to review anti-narcotics rule).

practices by which the employer hired only persons he considered to be experienced and competent or who were referred to him as similarly skilled. The Court refused to apply the impact theory, noting that the case "*did not involve* employment tests . . . or *particularized requirements* such as . . . height and weight specifications . . . ." *Id.* at 575 n. 7 (emphasis added). Moreover, this Court in *Connecticut v. Teal*, 457 U.S. 440, 455 (1982), acknowledged that the practices in *Furnco*, like some of the selection practices identified in *Atonio I*, 768 F.2d at 1133 (quoted at p. 6, *supra*) involved facially discriminatory rather than facially neutral policies.

In *Teal*, the Court for the first time applied the disparate impact theory to a multicriteria selection process involving a test, past work performance, supervisors' recommendations and seniority. Unlike the plaintiffs herein and in *Furnco*, the plaintiffs in *Teal* were able to demonstrate that one of the criteria—the test—had an adverse impact against minorities even though the overall selection process did not have adverse impact against minorities. The Court emphasized that its decisions applying the impact theory had "consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*" and had "never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted." 457 U.S. at 450 (emphasis in original). In the context of this case, *Teal* means that, just as a racially balanced "bottom line" does not insulate an employer from liabilty from disparate impact under Title VII, a workforce imbalance that has not been shown to be caused by a specific, facially neutral selection criterion or practice cannot serve as the basis for establishing a *prima facie* case of disparate impact.

Finally, in *Watson*, Justice O'Connor, in an opinion joined by at least a plurality of the Court, effectively summarized the rules for establishing a prima facie case

of disparate impact that have been consistently applied by the Court since *Griggs*:

> First, we note that the plaintiff's burden goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . [T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. *Cf. Connecticut v. Teal*, 457 U.S. 440 . . . (1982).
>
> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations . . . have consistently stressed that statistical disparities must be sufficiently subtantial that they raise such an inference of causation.

108 S.Ct. at 2788-2789 (O'Connor, J.); *id.* at 2792 n.2 (Blackmun, J.), *See also AFSCME v. State of Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (Kennedy, J.) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process"). Amicus urges the full Court to endorse these principles here.

In this case, while the plaintiffs have identified and challenged *en masse* 16 specific employment practices and criteria, they have not isolated any particular criterion or practice nor shown it to be causally linked to the statistical disparities to which they point. Thus, they have failed to establish the *sine qua non* of disparate impact—a showing that the disparity was, in fact, the *effect* of the employer's practice.

To the extent that the court below ignored the requirement of proof of causation articulated in *Watson*, it also erred in asserting as a general proposition that "statistical evidence, which will give rise to an inference [of disparate impact] is the same as that which will give rise to an inference of discriminatory intent." 827 F.2d at 442. The proposition, as stated, is overly broad. Glaring statistical disparities standing alone may sometimes be sufficient to raise an inference of discriminatory intent, but without proof of a causal link to some specific employment criterion or practice, the same statistics will not suffice to make out a case of disparate impact.

In any event, amicus further contends that qualified applicant flow statistics showing selection rates based on specified criteria, not representation statistics, are the appropriate statistical basis for determining whether there was disparate impact in this case. In *Teamsters*, 431 U.S. at 342 n.23, and *Hazelwood School District v. United States*, 433 U.S. at 308 n.13, the Court recognized the superiority of actual applicant flow data over representation statistics for purposes of pass-fail comparisons of adverse impact. Moreover, in *Beazer*, the Court required the use of actual applicant flow data to determine adverse impact, holding that general population data "tells us nothing about the class of otherwise qualified applicants and employees" and, therefore are "virtually irrelevant." 440 U.S. at 585-86. Indeed, as the trial court found in this case, nonwhites did not apply nor were they deterred from applying to skilled jobs. The absence of interest in these positions by minorities serves as an absolute defense to allegations of job segregation.[3]

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[3] *See, e.g., Ste. Marie v. Eastern Railroad Association*, 650 F.2d 395, 403 (2d Cir. 1981) (women not interested in being railroad inspectors); *Mazus v. Department of Transportation*, 629 F.2d 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (few women sought road maintenance positions); *Hilton v. Wyman-Gordon Co.*, 624 F.2d 379 (1st Cir. 1980) (distribution of workers due to nu-

B. Numerous Well Reasoned Decisions of Courts of Appeals Have Held That The Disparate Impact Theory Is Limited To Claims Involving The Application Of Specific, Facially Neutral Employment Practices Or Criteria, Because Only In Such Cases Is It Possible To Demonstrate A Causal Connection Between A Particular Practice Or Criterion And Adverse Impact On Protected Employees.

Under a proper interpretation of Title VII, disparate impact analysis is not the "appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Spaulding v. University of Washington*, 740 F.2d 686, 707 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984), *quoting Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982). When removed from the context of challenges to "*clearly delineated* neutral policies of employers," the disparate impact theory becomes too vague to be applicable. *Id.* at 708 (emphasis added). Thus, because impact analsyis was developed "to handle specific employ-

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merous factors including employee preferences, job qualifications, and economic conditions affecting job availability); and *Lee v. Washington County Bd. of Educ.*, 625 F.2d 1235 (5th Cir. 1980) (school board rebutted prima facie case by demonstrating that lack of blacks hired for positions in question was due solely to lack of black applicants).

Even with respect to the plaintiff's disparate treatment claims, it is well settled that disparities in female and minority representation in higher level jobs compared to their representation in lower levels is not probative of discrimination absent proof that the women and minorities in lower positions were qualified for the higher level positions. *See, e.g., Hill v. Western Electric Co., Inc.*, 596 F.2d 99, 105 (4th Cir. 1979) ("The assumption that minimally qualified hourly rated employees were qualified for promotion to a salaried position is simply unfounded"), *Pack v. Energy Research and Development Administration*, 566 F.2d 1111, 1113 (9th Cir. 1977) ("No evidence whatsoever was introduced to demonstrate that the lower-grade professional women were qualified to occupy the higher positions or that there elsewhere existed a pool of qualified women applicants").

ment practices not obviously job-related," *id.* at 707, it clearly should not be applied to attacks on employment practices or criteria without establishing a clear link to the practices causing the adverse impact.

The First Circuit in *Latinos Unidos de Chelsea En Accion v. Secretary of Housing and Urban Development*, 799 F.2d 774, 786-87 (1st Cir. 1986), has pointed out that:

> Without the threshold of a specific, facially-neutral procedure (or possibly, a combination of procedures, *see Griffin v. Carlin*, 755 F.2d at 1525), the disparate impact test is simply a stripped-down version of the discriminatory treatment test. We do not believe the Supreme Court in *Griggs* intended to set up an alternative test for finding discrimination that simply dropped the requirement of intent. Rather, the disparate impact model was created "to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by their nature make intentional discrimination difficult or impossible to prove". If plaintiffs' claims do not focus on a specific practice, it is impossible to apply the *Griggs* analysis, which envisions the employer rebutting a prima facie case of discrimination by showing that the practice leading to a disparate impact was justified as necessary to the employer's business, *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854. (Footnote omitted.)

Numerous other federal appellate courts have adopted this interpretation of the appropriate context for applying the disparate impact theory. *See Maddox v. Claytor*, 764 F.2d 1539, 1548 (11th Cir. 1985) (even where impact analysis is applied to subjective practices, plaintiffs must identify particular steps in the selection process). *See also Atonio II*, 810 F.2d at 1485; *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1014 (1st Cir. 1984); *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984); *Carroll*

v. Sears, Roebuck & Co., 708 F.2d 183, 189-90 (5th Cir. 1983); *Pope v. City of Hickory, North Carolina*, 679 F.2d 20, 22 (4th Cir. 1982).

The Fifth Circuit's decision in *Pouncy*, the first case to address whether impact analysis should be applied to a wide-ranging attack on multiple employment practices or criteria, explains why the disparate impact theory is inappropriate for such an attack. After holding that the theory "applies only when an employer has instituted a *specific procedure* . . . that can be shown to have a *causal connection* to a class-based imbalance in the work force," *Pouncy*, 668 F.2d at 800 (emphasis added), the appellate court explained:

> Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy . . . . We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices. . . .

Id. at 801.

Only specific, facially neutral practices or criteria are amenable to the required showing of a causal connection. As recognized by *Atonio I*:

> Were the facial neutrality threshold to disappear or be ignored, the distinction between disparate impact and disparate treatment would diminish and intent would become a largely discarded element. Rather than being an irrelevant factor as envisioned, race (or sex, etc.) could then become an overriding factor in employment decisions. *Employers with work forces disproportionate to the minority representation in the labor force could then face the choice of either hiring by quota or defending their selection procedures against Title VII attack.* We do not find such

> a result has been mandated by Congress or through Supreme Court interpretation of Title VII. Therefore, *practices and policies such as a lack of well-defined criteria, subjective decision making, hiring from different sources or channels, word-of-mouth recruitment, and segregated housing and messing, which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination.*

768 F.2d at 1133. *See also Griffin v. Bd. of Regents of Regency Universities*, 795 F.2d 1281, 1288 n.14 (7th Cir. 1986) endorsing this view. As the Fifth Circuit explained further in *Pouncy*:

> The disparate impact model requires proof of a *causal connection* between a challenged employment practice and the composition of the work force. Aptitude tests, *height and weight requirements*, and *similar selection criteria* all may be shown to affect one class of employees more harshly than another *by controlling for the impact of the employment practice* on one class in the employer's work force so that it can be measured.

668 F.2d at 801 (emphasis added).

Other federal circuit courts also have recognized that proof of a causal connection between adverse impact and a particular practice or criterion is central to the disparate impact theory. The First Circuit has ruled that "plaintiffs must show a causal connection between the application of the criterion in question and an alleged discriminatory impact on the protected class," and that the causal link must be shown "*independent of other factors.*" *Robinson*, 732 F.2d at 1016 (emphasis added). In *Carroll*, 708 F.2d at 189, the Fifth Circuit held that the plaintiffs had not made a *prima facie* showing of disparate impact because they had failed "to establish the required causal connection between the challenged employment practice (testing) and discrimination in the work force." The court further observed:

> The causal requirement recognizes that underrepresentation of blacks might result from any number of factors, and it places an initial burden on the plaintiff to show that the *specific factor* challenged under the disparate impact model results in the discriminatory impact.

708 F.2d at 189-90 (emphasis added). As the plurality opinion in *Watson* stated:

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance . . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such . . . .

108 S.Ct. at 2787.

Consistent with the decisions of other appellate courts, the Ninth Circuit in *Atonio II* held that one of the three elements of a *prima facie* showing of disparate impact is to "show the causal relationship between the identified practices and the impact." 810 F.2d at 1482. That is, the "disparate impact analysis may be applied to challenge [both objective and] subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class." *Id.* Absent such proof, plaintiffs have not shown that the impact was "because of race, color, religion, sex, or national origin" within the meaning of Title VII. *Cf. New York City Transit Authority v. Beazer*, 440 U.S. 568, 598 n.3 (1978) ("The failure to hire is not 'because of' race, color, religion, sex, or national origin if the adverse relationship of the challenged practice to one of those factors is purely a matter of chance—a statistical coincidence.") (White, J., joined by Marshall, J., dissenting).

If the Ninth Circuit panel decision in *Atonio III* is allowed to stand, general unrefined statistics showing disparities in the representation of a protected class would be permitted to assume unwarranted importance in the determination of discrimination based on adverse impact, even if the general evidence is not linked to the selection practices at issue. EEAC urges this Court to prevent such a misapplication of Title VII, and to hold that statistics can be used to establish disparate impact only if they reflect the results of specific, facially neutral employment practices or criteria that have been identified as the cause of the statistically significant disparity.

II. REQUIRING A DEFENDANT TO PROVE THE BUSINESS NECESSITY OF ITS PRACTICES AFTER A *PRIMA FACIE* CASE HAS BEEN ESTABLISHED—THAT IS, SHIFTING THE BURDEN OF PERSUASION TO THE EMPLOYER—INTERFERES WITH TRADITIONAL MANAGEMENT PREROGATIVES AND, IN EFFECT, MEANS THAT EMPLOYERS MUST ADOPT EITHER "BEST" HIRING PRACTICES OR QUOTAS, CONTRARY TO THIS COURT'S HOLDINGS IN *WATSON, FURNCO* AND *BURDINE*.

As discussed below, as applied by the lower courts prior to *Watson*, the employer's rebuttal burden under the disparate impact theory is extremely difficult to meet. It requires the employer to prove by a preponderance of the evidence that particular selection procedures, whether objective or subjective, have "a manifest relationship to the employment in question" or to the safe and efficient operation of its business. *Griggs*, 401 U.S. at 432. The burden is especially difficult to the extent that employers are required to validate their employment practices in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.*

The *Watson* plurality opinion, however, sets forth a realistic apportionment of the burdens of proof under the adverse impact theory—one which is consistent with this

Court's prior decisions applying the theory and with Congressional intent. This case affords the full Court an opportunity to endorse the *Watson* plurality's approach, and thus add both clarity and reason to an area of Title VII law that has too long lacked both.

To rule otherwise—that is, to adopt an evidentiary rule that requires an employer to prove by a preponderance of the evidence the business necessity of both its objective and subjective business practices and criteria that have been shown to cause adverse impact—would mean that virtually no selection practices, except those which are recognized by a consensus as "best" practices, will survive under such a burden. As a result, even employers with the best of will and intention will be forced to hire by the numbers in order to avoid litigation; that is, establish quotas based on workforce and population statistics.

Like the defendants in this case, the vast majority of large and small employers rely on selection procedures involving a mix of objective and subjective criteria and practices. Relatively few employers rely exclusively on validated tests to screen candidates for hire or promotion. *See* Bureau of National Affairs, *Recruiting and Selection Procedures*, PF Survey No. 146 (May 1988) at 17-25. Ninety (90) percent of all employers use interviews to screen applicants for employment, relying on a wide variety of objective and subjective criteria related to job performance. *Id.* at 20-21.

The reason why employers do not currently rely extensively on objective, validated selection practices is because of the complexity and cost of validation[4] and the

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[4] The expenditure to employers to validate selection criteria is substantial. For example, the measurement of one simple characteristic reportedly costs up to $100,000, according to a 1979 study. Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame L. Rev. 633,

difficulty of compliance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607 *et seq.*, which vary from generally accepted professional practices in test development. *See generally*, Potter, *Employee Selection: Legal and Practical Alternatives to Compliance and Litigation* (1986).[5] This is true even though competitive pressures to select the most productive employees available dictate that companies should use validated, objective procedures. In 1982, after a 3-year study, the National Research Council found that "most [court] decisions have ruled against the challenged tests; no selection program seems to have survived when the Guidelines were applied in any detail." National Research Council, *Ability Tests: Uses, Consequences and Controversies* (1982) at 105. Moreover, a plurality of the Court in *Watson*, stated that: "It is self-evident that many jobs . . . require personal qualities that have never been considered amenable to standardized testing." 108 S.Ct. at 2791. Moreover, Justice Blackman in *Watson* recognized that the formal validation techniques of the Uniform

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643 (1979). Moreover, in 1978, the then EEOC Vice Chairman Daniel E. Leach stated that the cost of a criterion related validity study ranged from $100,000 to $400,000. Daily Lab. Rep. at D-14 (Dec. 5, 1978).

[5] In April 1976, David L. Rose, Chief of the Employment Section, Civil Rights Division, Department of Justice, stated in a memorandum to the Deputy Attorney General, that the thrust of the Guidelines was to: "place almost all test users in a posture of noncompliance; to give great discretion to enforcement personnel to determine who would be prosecuted; and to set aside objective selection procedures in favor of numerical hiring." 122 Cong. Rec. 22950 (daily ed. July, 1976) (emphasis supplied). *See also* Ballew, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection*, 36 Emory L.J. 203, 212-217 (1987), which documents the declining deference that this and other courts give to the technical validation requirements of the Uniform Guidelines and the differences between accepted professional practices and the Guidelines' requirements.

Guidelines "may sometimes not be effective in measuring the job-relatedness of subjective-selection processes." 108 S.Ct. at 2795.

In *Watson,* a plurality of the Court stated that the "business necessity" or "job relatedness" defense under *Griggs* did not shift the burden of persuasion to the defendant. 108 S.Ct. at 2790. It said that "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. *Id.* Even with respect to defending standardized or objective tests, the plurality held that employers are not required to introduce formal validation studies showing that particular criteria predict actual on-the-job performance. *Id.* Once "the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must 'show that other tests or selection devices, without a similarly undesirable facial effect, would also serve the employer's interest in efficient and trustworthy workmanship.'" *Id.* (citation omitted).[6] This burden of proof scheme is consistent with the principles articulated by this Court in *Furnco* and *Burdine* and the legislative history of Title VII.

Most if not all employment-related decisions are based on the employer's desire to choose the best person for the job. *See Furnco,* 438 U.S. at 577 ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underly-

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[6] In meeting the pretext burden, the plurality pointed out that:

> Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practic in serving the employer's legitimate business goals. The same factors would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment.

108 S.Ct. at 2690 (citation omitted).

ing reasons, especially in a business setting.") The purpose of Title VII is to ensure that those decisions are made without consideration of illegal and inappropriate factors such as race, sex, and national origin. *Griggs*, 401 U.S. at 431. However, as the Court in *United Steelworkers v. Weber* 443 U.S. 193, 206 (1979) recognized, the legislative history to Title VII shows that the statute would not have been enacted without recognition of and preservation of, managerial discretion in employment decisions:

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives . . . be left undisturbed to the greatest extent possible. H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p 29 (1963), U.S. Code Cong. & Admin. News 1964, p. 2391.

In *Furnco*, the Court held that Title VII does not require businesses to adopt "best" hiring procedures or require an employer to "pursue [] the course which would both enable [it] to achieve [its] own busines goal *and* allow [it] to consider the *most* employment applications." 438 U.S. at 577 (emphasis in original). Importantly, with respect to the lower court's conclusion in *Furnco* that "different practices would have enabled the employer at least consider, and perhaps hire, more minority employees," this Court concluded that "courts may not impose such a remedy on an employer at least until a violation of Title VII has been proved." *Id.* at 578. It also emphasized that: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.*

In sum, under *Furnco*, an employer is not required to adopt "best" hiring procedures that would permit it "to

at least consider . . . the most minority employees." *Id.* Indeed, a unanimous Court expressly held in *Burdine* that Title VII "was not intended to 'diminish traditional management prerogatives' " and that an "employer has discretion to choose among equally qualified candidates." 450 U.S. at 259 (citation omitted).

However, a disparate impact burden of proof scheme that imposes on employers a burden of persuasion to prove the business necessity of its practices in effect compels employers to use "best" hiring practices or, alternatively to establish quotas. As recognized by the Court's plurality decision in *Watson*:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' expressed intent, and it should not be the effect of our decision today.

108 S.Ct. at 2788.[7]

As discussed above, even validated objective selection procedures have been difficult to justify under Title VII

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[7] One commentor has stated that the purpose of the disparate impact theory "is better served by placing a moderate burden upon defendants rather than a heavy burden that would in effect, prevent hidden discrimination only by requiring reverse discrimination". Rutherglen, "Disparate Impact Under Title VII: An Objective Theory of Discrimination," 73 Va. L. Rev. 1297, 1315 (1987). In addition, the commentator points out that:

> A heavy burden serves the more controversial purpose of promoting equal opportunity directly by discouraging employment practices with adverse impact but only at the risk of contradicting the prohibition against required preferences in section 703(j).

Id. at 1315-16.

because lower courts for the most part have required employers to show that the practice is absolutely essential or necessary to the operation of the business.[8] This has occurred even though no alternative to tests is currently available that is equally informative, and as technically and economically viable, with respect to assessing the capabilities of individuals. *Ability Tests* at 143-44. To impose a burden of persuasion on employers to justify validated as well as less precise measures literally condemns all employment selection practices and criteria when a company has an internal workforce imbalance or a workforce that is different from the general population. Indeed, three Justices of this Court in *Teal* recognized that "there are few if any tests . . . that accurately reflect the skills of every individual candidate. *Teal*, 457 U.S. at 463. (Powell, J., dissenting).

A requirement that the employer prove the business necessity of its practices also misapprehends the orderly burden of proof scheme established in *Griggs* and *Albemarle*. It merges the rebuttal and pretext stages, because the employer in proving that its job related criteria are essential to its business must also explain why it did not rely on other criteria and practices as well. For example, Section 3B of the Uniform Guidelines provides that:

> [W]henever a validity study is called for by these guidelines, the user should include, as part of the validity study, an investigation of suitable alterna-

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[8] *See, e.g., Kirby v. Colony Furnture Co., Inc.*, 613 F.2d 696 (8th Cir. 1980); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971). *Compare EEOC v. Kimbrough Investment Co.*, 703 F.2d 98, 100 (5th Cir. 1983) ("If the plaintiff succeeds in this showing [of a prima facie case of discrimination], the focus of attention shifts to the employer to persuade the court of the existence of a 'legitimate business reason' by a preponderance of the evidence."); and *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251 (6th Cir. 1981) (The practice must substantially promote the proficient operation of the business). *See also* Schlei and Grossman, *Employment Discrimination Law* at 1329-1330 n.148 (1983).

> tive selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines.

An employer may conduct this search voluntarily, but it is inconsistent under *Albemarle* to require the employer prove this as part of its rebuttal burden.[9] Indeed, the Court in *Albemarle* clearly stated that once the defendant meets its burden of proof, the complaining party can show the discriminatory pretext of the criteria or practices used by the employer by demonstrating "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and truthworthy workmanship.'" 422 U.S. at 425.

In sum, shifting the burden of proof to the defendant to prove the job relatedness of its selection procedures unnecessarily interferes with the rights of employers to determine its selection practices. Alternatively, permiting the defendant to state or produce its legitimate business reasons for relying on particular criteria or practices will not force employers to abandon nondiscriminatory employment practices or to engage in illegal quotas, but instead allows plaintiffs to show that the criteria or practice is a pretext for discrimination in accordance with *Albemarle*.

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[9] In addition, several lower courts have required the defendant to assume this burden as a part of showing the necessity of its selection criteria. *See, e.g., Kirby*, 613 F.2d at 703-04, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1376 (9th Cir. 1979) *cert. denied*, 446 U.S. 928 (1980); and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 244 n.87 (5th Cir. 1974), *cert. denied*, 467 U.S. 1243 (1984).

CONCLUSION

For the reasons stated herein, EEAC respectfully submits that the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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