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 ANTONIO, *et al.*,

Respondents.

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

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law submits this brief as *amicus curiae* urging affirmance.[1]

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous persons in administrative proceedings and lawsuits under Title VII. *E.g.*, *Lewis v. Bloomsburg Mills, Inc.*,

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[1] Pursuant to Rule 36.2, the Lawyers' Committee is filing herewith written consents of the parties to the submission of this brief as *amicus curiae*.

773 F.2d 561 (4th Cir. 1985); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Sledge v. J. P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *E.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. , 108 S.Ct. 2777 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

The questions presented by this case raise important and recurring issues in Title VII law. In particular, the allocation of the burdens of proof in disparate impact cases and the nature of plaintiffs' burden in presenting a *prima facie* case of disparate impact are issues that affect virtually every class action brought under Title VII. This Court's decision will undoubtedly have significant implications on present and future Title VII suits in which the Lawyers' Committee participates. In addition, the Lawyers' Committee has a longstanding interest in persuading the Court to adopt principles that will result in the sound administration of the discrimination laws, so that findings of liability will be obtainable by persons with legitimate claims and limited resources. In this case, the Lawyers' Committee also brings to the Court the benefit of its actual experience in marshalling the facts in complex employment discrimination class actions, and discusses in practical terms the flaws in the approach taken by petitioners and the United States as *amicus curiae* to disparate impact cases.

QUESTIONS PRESENTED

1. Whether, in a disparate impact case under Title VII, plaintiffs' *prima facie* showing shifts a burden of persuasion to the employer to prove the business necessity of the personnel practices at issue or merely a burden of production?

2. Whether, in order to make a *prima facie* showing in a disparate impact case, plaintiffs are required to identify specific employment practices at issue and prove a specific causal link between each practice and an identifiable disparate impact?

3. Whether the statistical showing made by plaintiffs in this case, which demonstrated a significant racial disparity between

petitioners' cannery workers and non-cannery workers, was sufficient to make out a *prima facie* case?

SUMMARY OF ARGUMENT

1. Petitioners contend that the Ninth Circuit Court of Appeals erred by placing the burden on them of disproving plaintiffs' statistical showing of disparate impact before, in petitioners' view, plaintiffs had even made out a *prima facie* case. (Pet. Brief at 37-47.) Petitioners have misconstrued the Ninth Circuit's holding: The Ninth Circuit held only that, if employers attempt to dispute plaintiffs' statistical showing with statistics of their own, those statistics must be probative and relevant. Here, petitioners' labor force statistics relied on job criteria and qualifications that were not shown to be actually used by petitioners. The Ninth Circuit properly held that those labor force statistics were not sufficiently probative to dispute plaintiffs' *prima facie* showing of disparate impact.

The United States as *amicus curiae* goes further than petitioners. The United States argues that, on this appeal, this Court should discard the order of proof in disparate impact cases that has been controlling since *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and, for the first time, expressly hold that the employer's burden in rebutting a *prima facie* showing of disparate impact is one of mere production, rather than persuasion. In short, the United States urges this Court to apply the individual disparate treatment order of proof, as set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to disparate impact cases.

The argument of the United States is, we submit, fatally flawed. It ignores the critical differences between individual disparate treatment cases and disparate impact cases that make *Burdine* inappropriate and inapplicable in the disparate impact context. In individual disparate treatment cases, where the employer's motivation is the ultimate issue, the plaintiff's *prima facie* case eliminates only the "most common" nondiscriminatory reasons for differences in treatment. It is not until the employer responds by articulating the "real" reason for its different treatment of plaintiff that the plaintiff ultimately

proves discrimination by eliminating the so-called real reason as well.

In disparate impact cases, in contrast, the plaintiffs face a much heavier *prima facie* burden. There, plaintiffs, in order to make a *prima facie* showing, must demonstrate that the employer's facially neutral practices have caused a significant disparate impact upon minorities. Because proof of discriminatory motive is not necessary in disparate impact cases, a *prima facie* showing, unless rebutted by the employer by proof of the business necessity of the practices at issue, mandates a holding in favor of plaintiffs. Obviously, employers have far better access to evidence concerning the business necessity of their employment practices. There is nothing unfair about asking them to carry the burden of proving that affirmative defense.

In sum, the far heavier *prima facie* burden imposed on disparate impact plaintiffs amply justifies a heavier rebuttal burden on defendant employers. This Court has uniformly applied that very order of proof in past disparate impact decisions and there is, we submit, no reason to alter that rule now.

2. Petitioners further contend that plaintiffs should not be allowed to challenge the cumulative disparate impact of petitioners' personnel system. Petitioners assert that disparate impact plaintiffs must be required to identify specific practices at issue and demonstrate in detail the specific disparate impact caused by each practice. Otherwise, petitioners contend, the employer faces the unfair burden of defending the business necessity of every aspect of his personnel system. That issue is not fairly presented on this appeal.

This is not a case where the plaintiffs launched a "shotgun" attack on an employer's entire personnel system. Here, as the Ninth Circuit found, plaintiffs proved the disparate impact of six specific employment practices. Those six practices—the use of subjective criteria, nepotism, separate hiring channels, word-of-mouth recruiting, race labelling and segregated facilities-- are well-established causes of disparate impact. Thus, plaintiffs amply carried their *prima facie* burden of proving that the practices at issue caused the disparate impact shown.

Moreover, there is nothing unfair in shifting the burden of proof to an employer once disparate impact of his personnel system has been demonstrated. It is well-established that disparate impact creates a presumption of discrimination because a fair, nondiscriminatory employment system should ordinarily produce a racially balanced workforce. Thus, to hold that an employer with a demonstrably unbalanced workforce is immune from Title VII challenge simply because the plaintiffs are unable to prove which specific practices caused what part of the disparity would, in all likelihood, allow significant violations of Title VII to go unremedied.

Furthermore, in many instances, the plaintiffs are unable to prove specific causation because either the evidence, such as detailed employment records, is unavailable or because plaintiffs lack sufficient expertise, resources or access to the place of employment. There is nothing unfair in asking the employer—who controls the maintenance of employment records, who is, of course, most expert in his own employment system and job criteria, and who enjoys complete access to the place of employment—to carry the burden of explaining away a demonstrable, significant racial disparity in his workforce.

3. Finally, petitioners contend that plaintiffs' statistics showing a significant disparity between the racial composition of petitioners' lower paid cannery workers and that of their higher paid non-cannery workers were not sufficient to carry plaintiffs' *prima facie* burden. Petitioners contend that only comparisons to the qualified labor pool are relevant.

Petitioners miss the point. This case is about barriers to *opportunity*. The plaintiffs' complaint here is that petitioners' employment practices unfairly denied them even the opportunity to compete for the higher paying non-cannery jobs. As this Court long ago recognized in *Griggs*, a core objective of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. In short, plaintiffs' statistics amply demonstrate discrimination in job opportunities; petitioners' labor force statistics are not even relevant to that claim.

ARGUMENT

I. IN A DISPARATE IMPACT CASE, AS THE NINTH CIRCUIT PROPERLY HELD, ONCE THE PLAINTIFF HAS MADE A PRIMA FACIE SHOWING, THE BURDEN OF PERSUASION SHIFTS TO THE EMPLOYER TO REBUT THAT PRIMA FACIE SHOWING.

Petitioners, supported by various *amici* including the United States, contend that in this case the Ninth Circuit Court of Appeals "fashion[ed] a new allocation of the burdens of proof in a [disparate] impact case, drastically lowering respondents' and raising petitioners'." (Pet. Brief at 37.) In summary, petitioners contend that the Ninth Circuit erred by holding that petitioners had the burden of disproving the plaintiffs' *prima facie* showing of disparate impact before plaintiffs had ever made out a *prima facie* case. (Pet. Brief at 37-47.) Petitioners argue that the Ninth Circuit improperly placed on them the burden of proving, rather than merely articulating, flaws in plaintiffs' *prima facie* showing of disparate impact. (*Id.*)

Petitioners miss the point of the Ninth Circuit's holding. The Ninth Circuit did not place the burden of disproving plaintiffs' statistics on petitioners; the Ninth Circuit held only that petitioners' objections to plaintiffs' *prima facie* showing must be relevant and probative. Because petitioners' objections were neither relevant nor probative, they failed to preclude a finding that plaintiffs had made out a *prima facie* case. There is nothing new or novel about that holding.[2]

The United States goes even further than petitioners. The United States contends that the Ninth Circuit erred by holding

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[2] For example, the Ninth Circuit held that petitioners' labor force statistics were not relevant to undermine plaintiffs' workforce imbalance statistics because petitioners had failed to demonstrate that the qualifications criteria that underlay their labor force statistics were in fact used by petitioners. Indeed, plaintiffs presented evidence that those criteria were not used by petitioners. *Antonio v. Wards Cove Packing Co.*, 827 F.2d 439, 446 (9th Cir. 1987). That holding is nothing more than a straightforward application of this Court's holding in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n. 32 (1976) that only non-discriminatory standards "actually applied" are relevant.

that, once plaintiffs in a Title VII case have made a *prima facie* showing of disparate impact, the burden of persuasion of rebutting that *prima facie* case shifts to the defendant employer. Rather, the United States contends, the employer's burden should be only to *articulate* a rebuttal to plaintiff's *prima facie* case. In short, the United States argues that the allocation of burdens of proof in a disparate impact class action should be exactly the same as in an individual disparate treatment case. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); (Brief for the United States as *Amicus Curiae* at 25-28.) Because of the far reaching implications of the United States' argument, we address it in detail below.

Simply put, the United States is wrong. *First*, individual disparate treatment cases and class action disparate impact cases are fundamentally different in theory and in practice and those differences amply justify a different allocation of burdens of proof. *Second*, the decisions of this Court applying disparate impact theory have, without exception, held that, once a *prima facie* case of disparate impact is established, the burden of *persuasion* shifts to the employer to rebut that *prima facie* case. Thus, the Ninth Circuit's ruling is not only not a "new allocation" of the burdens of proof in impact cases, it is the only ruling the Ninth Circuit could have made consistent with this Court's prior decisions. For this Court to adopt the United States' approach, it would have to overrule a long and unbroken line of authority set forth in this Court's own decisions. And *third*, there are sound public policy and practical reasons why in disparate impact cases the burden of persuasion should shift to the employer once a *prima facie* showing is made.

A. *The Differences between Individual Disparate Treatment Cases and Class-wide Disparate Impact Cases Warrant a Different Allocation of the Burdens of Proof.*

Title VII cases generally fall into two categories: disparate treatment and disparate impact.[3] Disparate treatment cases

[3] A particular case can utilize either or both methods of proof. As this Court has recognized, "[e]ither theory may, of course, be applied to a particular set

seek to remedy the most obvious evil Title VII was designed to eradicate, namely situations where an employer intentionally treats some people less favorably because of their race, color, religion, sex or national origin. In a disparate treatment case, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Teamsters*, 431 U.S. at 335 n. 15.

Disparate impact claims, in contrast, focus on employment practices and procedures that are facially neutral in their treat-

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of facts." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n. 15 (1977).

Pattern and practice disparate treatment cases present yet a third category, combining elements of both disparate impact and individual disparate treatment cases. Pattern and practice disparate treatment cases are, at bottom, class actions predicated on allegations of disparate treatment. Like an individual disparate treatment case, the crux of a pattern and practice disparate treatment case is an employer's intentional and less favorable treatment of minority employees. Like a disparate impact case, however, the proof of discrimination in a pattern and practice disparate treatment case is generally statistical. In such a case, the mere articulation of a defense—such as the employer's assertion that it hires and promotes the "best-qualified" candidates—is insufficient. *Teamsters*, 431 U.S. at 342 n. 24; *Payne v. Travenol Laboratories*, 673 F.2d at 818. Similarly, the mere articulation of a potential flaw in plaintiffs' statistics is insufficent; the defendant has the burden of persuasion that the problems it cites are real, and that they explain so much of the disparities proven by plaintiffs that their probative value is destroyed. *Payne*, 673 F.2d at 822; *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. den.*, 449 U.S. 1078 (1981).

There is nothing unusual or unjust in these rulings. No matter how massive a plaintiff's statistical showing may be, it can never cover every possible factor. Universal analyses come only at infinite expense. To allow a probative statistical showing to be defeated by mere articulation or speculation that other factors or analyses might lead to a different result, without imposing any burden of persuasion on the defendant, would result in the defeat of every statistical showing of disparate treatment. It is for those reasons that Judge Higginbotham stated in *Vuyanich v. Republic National Bank of Dallas*, 521 F. Supp. 656, 661 (N.D. Tex., 1981), *rev'd on other grounds*, 723 F.2d 1195 (5th Cir.), *cert. den.*, 469 U.S. 1073 (1984), that "[i]n a complex class action, utilizing statistical proof and counterproof, the value of the *Burdine* sequence—to highlight the issues in context— is about as relevant as a minuet is to a thermonuclear battle."

ment of different groups but nevertheless in fact fall more harshly on one or more groups.[1] Proof of discriminatory motive is not necessary in disparate impact cases. Indeed, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

As a unanimous Court recognized in *Griggs*, disparate impact analysis promotes Congress' intent in Title VII to outlaw not only overt, intentional discrimination but also more subtle, unintended discrimination:

> What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
>
> . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

Griggs, 401 U.S. at 431.

In an individual disparate treatment case, the plaintiff's burden in establishing a *prima facie* case is "not onerous". *Burdine*, 450 U.S. at 253. Essentially, the plaintiff need only prove that he is a member of a racial minority and eliminate the most common reasons for his failure to be hired or promoted or otherwise treated equally. *See, e.g., id.* at 253-54; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Such a minimal showing "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978).

The employer in an individual disparate treatment case then need only articulate a legitimate, nondiscriminatory reason for

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[1] Most disparate impact cases are class actions. Individual disparate impact cases do exist, however, and the order of proof in such cases is, and should be, the same as in class action disparate impact cases.

its treatment of plaintiff and produce sufficient evidence to raise "a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254. The minimal burden on the employer in responding to an individual disparate treatment plaintiff's *prima facie* case is commensurate with the low *prima facie* threshold for the plaintiff. The entire purpose of the order of proof in individual disparate treatment cases is to narrow the issue of the employer's intent gradually. Thus, the ultimate issue of discriminatory motive is most often decided, assuming plaintiff made a *prima facie* showing, at the final stage, when the plaintiff must prove that the employer's articulated non-discriminatory motive is a mere pretext for discrimination.

Said another way, it is not until the third and final stage of the order of proof in a disparate treatment case that the plaintiff actually proves discrimination by eliminating not only the most common nondiscriminatory motivations for the employer's apparently discriminatory treatment but also the particular nondiscriminatory reasons proferred by the employer. For that reason, this Court in *Burdine* refused in an individual disparate treatment case to place any burden of persuasion on the employer at the second stage in the order of proof.

In a disparate impact case, in contrast, the order of proof, and particularly the plaintiffs' *prima facie* burden, are significantly different. As this Court itself noted in *Burdine*, "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." 450 U.S. at 252 n. 5. *See also Teamsters*, 431 U.S. at 336 n. 15 ("[c]laims of disparate treatment may be distinguished from claims that stress 'disparate impact' ").

Thus, in a disparate impact case, the plaintiffs face a much higher *prima facie* burden of proof. There, the plaintiffs must prove, in order to make a *prima facie* showing, that the employer's facially neutral employment practices and procedures cause a disparate impact upon a protected class. *E.g.*, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). That standard requires a substantial showing. The plaintiffs must prove, gener-

ally through the use of probative statistics, that the practices and procedures about which plaintiffs complain have a substantially disproportionate exclusionary impact on minorities. *Dothard v. Rawlinson*, 433 U.S. 321, 328-30 (1977).[5]

Once that standard is met, however, disparate impact plaintiffs have done far more than simply dispel the "most common" nondiscriminatory explanations for differences in employment results (as is the case with a disparate treatment *prima facie* case). *See Furnco*, 438 U.S. at 577. Rather, a *prima facie* showing in a disparate impact case convincingly demonstrates the very evil that that type of analysis is designed to uncover, in a fashion that unless rebutted by the employer will compel a ruling for the plaintiffs.[6] The heavier burden carried by plaintiffs in *prima facie* showings in disparate impact cases thus amply justifies the shifting of a burden of persuasion to the defendant. *See* B. Schlei and P. Grossman, *Employment Discrimination Law* at 1328 n. 139 (2d ed. 1983) ("[t]he heavier burden placed upon the defendant in responding to a prima facie case under the adverse impact model corresponds with the plaintiffs' heavier burden of establishing a prima facie case").

Indeed, the employer's burden in responding to a disparate impact *prima facie* case—to justify the business necessity of the challenged practices and procedures—is in the nature of an

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[5] As this Court is well aware, and as this case convincingly demonstrates, the probative value of the statistics relied upon by a plaintiff class in a disparate impact case is often hotly disputed. The plaintiffs' burden to establish disparate impact by statistics is indeed an onerous one. *See* Part III *infra*. *See also Teamsters*, 431 U.S. at 340 & n. 20 (statistics come in an "infinite variety" and their usefulness "depends on all surrounding facts and circumstances").

[6] As this Court has noted, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters*, 431 U.S. at 340 n. 20. Thus, as Justice Blackmun stated in *Watson*, "[u]nlike a claim of intentional discrimination, which the *McDonnell Douglas* factors establish only by inference, the disparate impact caused by an employment practice is directly established by the numerical disparity." 487 U.S. at 108 S. Ct. at 2794.

affirmative defense. Once the plaintiffs have made a *prima facie* showing in a disparate impact case that the employment practices at issue are presumptively illegal, the employer can "save" those practices by demonstrating their business necessity. Unlike individual disparate treatment analysis—where, because the ultimate issue is the employer's intent, the employer need only articulate a nondiscriminatory motivation not already disproven by the plaintiff's *prima facie* showing—under disparate impact analysis the employer's burden is, after plaintiffs' have proven disparate impact, to avoid the conclusion of unlawful discrimination by proving the business necessity of the practices and procedures causing the disparate impact upon minorities. *See, e.g., Albermarle Paper Co.*, 422 U.S. at 425.[7]

In sum, disparate impact analysis focuses solely on the *effect* of an employer's practices. A *prima facie* showing of a statistical disparity in such a case is thus complete proof of unlawful discrimination by the employer that, unless rebutted by proof of the business necessity of the challenged practices, mandates a finding in favor of plaintiffs. In contrast, a *prima facie* showing in an individual disparate treatment case is nothing more than the first step in a process designed to ferret out the employer's intent. That is the difference between an individual disparate treatment *prima facie* showing and a disparate impact *prima facie* showing. And that is why it is entirely appropriate to shift the burden of proof, rather than merely production, to the employer in disparate impact analysis.

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[7] That is not to say, of course, that the employer may not challenge the accuracy or significance of plaintiffs' statistics. *Dothard*, 433 U.S. at 431 However, once the court has found disparate impact, the employer can only *rebut* that finding by proving the business necessity of the offending practice. *E.g., Griggs*, 401 U.S. at 431-32. That is the very nature of an affirmative defense. *See* Fed. R. Civ. P. 8. Significantly, even petitioners agree that "business necessity" is an affirmative defense in disparate impact cases. (*See* Pet. Brief at 42 ("if the employer remains silent on the issue of disparate impact, that issue is established and he must come forward with what amounts to an affirmative defense of business necessity")).

B. ***This Court Has Uniformly Held that the Burden of Proving Business Necessity Shifts to the Employer Following a Prima Facie Showing in a Disparate Impact Case.***

Contrary to the suggestion of the United States (Brief for the United States at 25-28), this Court has consistently, indeed uniformly, held that in disparate impact cases, following a *prima facie* showing by plaintiffs, the burden of persuasion, not merely production, shifts to the employer. For this Court now to hold that the employer's burden in disparate impact cases is one of production alone would require the overruling of a long and unbroken line of decisions dating back to *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There is no basis, we submit, for such a radical departure from well-established authority.

Thus, in *Griggs* itself, this Court flatly held that, once a statistical showing of disparate impact is made, "Congress has placed on the employer *the burden of showing* that any given requirement must have a manifest relationship to the employment in question". 401 U.S. at 432 (emphasis added). Indeed, in *Griggs*, the employer articulated—but failed to prove—that its high school degree and standardized test requirements were related to successful job performance. This Court flatly rejected that proffer as insufficient to carry the employer's burden and reversed the Fourth Circuit's holding in favor of the employer. *Id.* at 431-36.

Similarly, in *Albermarle Paper Co.*, this Court expressly held that the burden of persuasion of business necessity shifts to the employer, once plaintiffs make a *prima facie* showing:

> Title VII forbids the use of employment tests that are discriminatory in effect unless *the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question'*. This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *If an employer does then meet the burden of proving that its tests are 'job related'*, it remains open to the complaining party to show that other tests or selection devices, without a similarly undesira-

> ble racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'.

422 U.S. at 425 (citations omitted; emphasis added).

In *Albermarle*, as in *Griggs*, the defendant employer argued—but did not prove—that the tests at issue were job related, offering a post-litigation validation study done using job criteria that were not in fact used by the defendant but rather were created by defendant's expert. This Court had little trouble in rejecting that "proof" as insufficient to carry the defendant's burden. *Id.* at 429-36.

Likewise, in *Dothard*, this Court held that, once a *prima facie* showing of disparate impact is made, the burden shifts to the employer to "prove[] that the challenged requirements are job related". 433 U.S. at 329. The Court further held that, in a disparate impact case, "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge". *Id.* at 332 n. 14. In *Dothard*, the employer articulated that its height and weight requirements for prison guards were related to strength, which the employer further hypothesized was related to effective performance as a prison guard. This Court quickly rejected that business necessity defense on the ground that the employer had failed to prove the relationships it articulated:

> We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are job related. . . . In the District Court, however, the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards.

433 U.S. at 331.

In short, this Court has consistently, and often, held that the employer's burden in a disparate impact case is one of persuasion, not merely articulation. That is, and always has been, the understanding of Title VII practitioners representing both defendants and plaintiffs. There is no reason, we respectfully submit, for this Court now to overrule that long line of authority.

C. *Sound Reasons of Public Policy and Practicality Warrant the Shifting of the Burden of Persuasion to the Employer in Disparate Impact Cases.*

The only practical allocation of the burdens of proof in disparate impact cases is to shift the burden of persuasion of business necessity to the employer. Once the discriminatory effect of an employer's practices is shown by the plaintiff's *prima facie* case, only the employer can fairly be expected to demonstrate that the practices in question are necessary.

For example, in a disparate impact case concerning an employment test or other objective measurement, an employer will most often defend job relatedness based upon validation of the measurement in question. *See, e.g., Furnco*, 438 U.S. at 579-80. Validation is a complex, time consuming process and, as a practical matter, only the employer has sufficient access to, and familiarity with, the employment records and jobs at issue to conduct a validation study.* Indeed, validation studies generally cannot be done properly simply by reviewing existing records. The party conducting such a study needs substantial access to current employees in order to administer a test and to compare job success as predicted by the job requirement at issue to actual job success. Civil discovery and access to Equal Employment Opportunity Commission files are simply not adequate substitutes for the everyday access to the workplace enjoyed by employers. Indeed, plaintiffs are sometimes barred from any access to the workplace. *See Belcher v. Bassett Furniture Industries Inc.*, 588 F.2d 904 (4th Cir. 1978) (order granting plaintiffs' counsel and expert five days access to defendant's plant reversed as an abuse of discretion). Moreover,

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* *Cf. Teamsters*, 431 U.S. at 360 n.45:

> [T]he employer [is] in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records [are] the most relevant items of proof. If the refusal to hire [was] based on other factors, the employer and its agents [know] best what those factors were and the extent to which they influenced the decision making process.

validation requires scores of hours of work and a thorough familiarity with the requirements of the jobs at issue. Very few, if any, Title VII plaintiffs have the resources and the particular expertise necessary for such a validation, even if they had the requisite access to the workplace.[9]

Finally, sound public policy mandates that the burden of proving business necessity rest on the employer. If an employer's personnel practices and procedures result in a statistically significant disparate impact on a protected class or classes, the employer should immediately, as a matter of public policy, validate the business necessity of those practices and procedures. *See Uniform Guidelines on Selection Procedures*, 29 C.F.R. §§ 1607, 1615 (1978).[10] The employer should not wait until he is

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[9] For much the same reason, plaintiffs in disparate impact cases and pattern and practice disparate treatment cases cannot be expected to foresee each and every objection that employers might articulate at trial to their statistics. Plaintiffs cannot, in discovery, prepare for every such objection. Thus, as a practical matter, only the employer has adequate access to the facts to prove that its objections to plaintiffs' statistics are soundly based in fact, and not merely hypothetical, and the employer should bear the burden of proving the factual basis of its objections. *See, e.g. United States v. County of Fairfax*, 629 F.2d at 940.

[10] That is not to say that an employer has a legal obligation to conduct validation studies as soon as a racial disparity is observed. We suggest only that this Court should encourage, rather than discourage, such employers from attempting to discover why such disparities exist and determining if the job requirements causing the disparity are truly necessary. Moreover, not all practices require formal validation studies. Many are valid on their face.

The Equal Employment Advisory Council ("EEAC") suggests in its *amicus* brief that validation studies cost between $100,000.00 and $400,000.00. (Brief for EEAC at 21 n. 4.) That estimate appears substantially high. Indeed, a survey of 1339 employers found that most validation studies cost as little as $5,000.00. *See* Friedman and Williams, *Current Use of Tests for Employment*, in 2 Ability Testing: Uses, Consequences, and Controversies 104, 110-11 (1982) ("In all size categories, most companies that validated their test or nontest selection procedures spent less than $5000 per job studied"). The EEAC further suggests that the Uniform Guidelines on Selection Procedures are inconsistent with "generally accepted professional practices in test development". (*Id.* at 21-22.) The American Psychological Association ("APA"), however, has gone on record with exactly the opposite position. Thus, in 1985, the APA wrote to EEOC Chairman Clarence Thomas that there was "no

sued under Title VII to verify the business necessity of such practices and procedures. If, however, the employer's burden in a Title VII disparate impact action is merely one of articulating business necessity, employers will be discouraged from conducting job validation studies in advance of litigation because to do so will expose them to a greater risk of liability (if, for example, the study fails to show validity) than they face in litigation where the plaintiffs are unlikely to be able to conduct a definitive validation study.[11]

II. SPECIFIC CAUSATION IS NOT THE APPROPRIATE STANDARD IN A DISPARATE IMPACT CASE

Petitioners further contend that, in a disparate impact case, the plaintiffs should not be allowed to challenge the cumulative effect of an employer's personnel practices but rather should be required to identify specific practices and demonstrate a specific disparate impact causally associated with each practice at issue. (Pet. Brief at 30-36.) Relying on *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982) , petitioners argue that the disparate impact model is not "the appropriate vehicle from which to launch a wide-ranging attack on the cumulative effect of a company's employment practices." (Pet. Brief at 30 (*quoting Pouncy*, 668 F.2d at 800).)

Petitioners' argument addresses an issue not fairly presented by this case. Indeed, the short answer to petitioner's contention

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compelling reason for revising" the uniform Guidelines on "technical grounds". 110 Daily Labor Rep. (BNA) A-3 (June 7, 1985).

[11] That analysis does not change when an employer's subjective personnel policies are at issue. *First*, subjective personnel policies, like objective tests and other measurements, can be validated. *See, e.g.*, Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 San Diego L. Rev. 63, 87-89 (1988). And *second*, in any event, the employer, who is by definition the party most familiar with the requirements of the jobs at issue, is still in the best position to defend the necessity of the practices at issue. That fact does not change simply because the practices are subjective in nature. And if the employer cannot defend the business necessity of his subjective personnel system in a Title VII case where disparate impact has been proven, he should not prevail.

is that this is not a case in which the plaintiffs made a shotgun, undifferentiated attack on the cumulative effect of an employer's personnel practices and procedures. To the contrary, plaintiffs challenged sixteen specific personnel practices used by petitioners. With respect to six of those practices, the Ninth Circuit Court of Appeals held that plaintiffs' challenges were well-founded. Thus, upon a review of the trial record, the Ninth Circuit found that petitioners' use of subjective criteria in making hiring decisions, petitioners' nepotism policy, petitioners' use of separate hiring channels and word-of-mouth recruitment for cannery and non-cannery jobs, and petitioners' race labelling and segregated facilities caused a discriminatory impact upon minorities. For each of those practices, we submit, simple logic and well-established legal authority in this Court and the courts of appeals amply demonstrate a causal connection to disparate impact.

1. *Subjective Criteria*: As this Court recognized only last term, the use of subjective criteria by a predominantly white, male supervisory force inevitably raises problems of "subconscious stereotypes and prejudices". *Watson v. Fort Worth Bank and Trust*, 487 U.S. , 108 S.Ct. at 2780 (1988). Courts of appeals have likewise recognized that the use of subjective criteria in employment decision-making presents a "ready mechanism" for discrimination, intentional or unintentional. *E.g.*, *EEOC v. Inland Marine Industries*, 729 F.2d 1229, 1236 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972).

2. *Nepotism*: Nepotism is, by definition, a practice of giving preference to relatives of current employees. Where the current employees are predominantly white, nepotism necessarily has an adverse impact on minorities. *See, e.g., Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984) ; *Gibson v. Local 40*, 543 F.2d 1259, 1268 (9th Cir. 1976) .

3. *Separate hiring channels and word-of-mouth recruitment*: Where two work forces within a company

have significantly different racial compositions and the company employs both separate hiring channels and word-of-mouth recruitment the potential—indeed, the likelihood—for disparate impact upon minorities is obvious. Thus, where the already predominantly white supervisory force hires through word-of-mouth recruiting, it is only logical to expect that a predominantly white workforce will be perpetuated. *E.g.*, *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975) ; *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

4. *Race labelling and segregated facilities*: Race labelling and segregated facilities—particularly in combination with the use of subjective criteria and word-of-mouth recruiting—similarly have an obvious, and adverse, impact upon the employment opportunities of minorities. Race labelling and segregated facilities reflect an obvious attitudinal "headwind" in the way of employment opportunities for minorities. *See*, *e.g.*, *Griggs*, 401 U.S. at 432; *Lilly v. Harris-Teater Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988) . More to the point, if minorities are relegated to segregated facilities, they are isolated from the news of job opportunities spread by word-of-mouth among white employees. *See*, *e.g.*, *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973) ; *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 435 (W.D. Wash. 1977), *aff'd*, 727 F.2d 1429 (9th Cir.), *modified*, 742 F.2d 520 (9th Cir. 1984) .

In sum, the causal connection between the practices about which plaintiffs complain here and disparate impact upon minorities is well-established. For petitioners to claim that

plaintiffs did not prove a causal connection flies in the face of both law and logic.[12]

Moreover, it would be virtually impossible for plaintiffs to prove with any more specificity the causal connection between a particular subjective practice and a particular disparate impact. Employers often do not maintain records that clearly show why certain applicants were hired or promoted and others were not. Absent such records, plaintiffs cannot hope to prove specific causation of disparate impact in hiring or promotion. And even statistical techniques often cannot fill that evidentiary gap. For example, multiple regression analysis can identify the significance of specified objective criteria to pay rates or hire rates. *Bazemore v. Friday*, 478 U.S. 385 (1986); *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981), *vacated*, 459 U.S. 809 (1982), *aff'd on rehearing*, 695 F.2d 134 (5th Cir. 1983). However, multiple regression analysis is ill-suited to deal with unquantifiable variables such as subjective hiring criteria. Indeed, it is difficult to envision any method of isolating the significance of an individual subjective practice in such a situation, particularly by the plaintiffs who necessarily have far less

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[12] Moreover, the alternatives to these practices are obvious and cannot seriously be contended to be onerous. First, word of mouth recruiting can be easily replaced and/or supplemented with a job posting system at the canneries during the season, and at recruitment sites throughout the year. Second, the effect of separate hiring channels can be modified or eliminated by enabling company recruiters to recruit and provide information for all jobs (*i.e.*, a recruiter going to an Alaskan Native village would be in a position to recruit individuals with skill as mechanics and not just for cannery workers). Third, with regard to subjective criteria, it is not a tremendous burden for the employers to establish and use objective job descriptions; such job descriptions would allow an applicant to determine his or her qualifications for a position and would provide a standard by which applicants could reasonably be judged. Job descriptions are, in fact, a reasonable and fairly standard managerial practice. Fourth, with regard to race labelling and segregated facilities, the alternatives are simple and obvious. What justification can there be for assigning employee numbers by ethnic origin or referring to facilities — bunkhouses, mess halls, etc. — by racial terms. And fifth, nepotism plainly has no significant relationship to job performance. Relatives of existing workers have no special qualifications necessarily for the jobs at issue. There can be no hardship in simply eliminating nepotistic hiring.

familiarity with the personnel system at issue than the defendant employer.[13]

In any event, it lies ill in the mouths of these petitioners to contend that allowing a disparate impact attack on the cumulative effect of multiple employment practices is somehow unfair to employers. (*See* Pet. Brief at 30-36.) Notwithstanding their protestations of the inability of employers' to respond to cumulative attacks, petitioners flatly claim to have proven the business necessity of each and every practice at issue. (*See* Pet. Brief at 36 ("even if petitioners in this case had such a burden, they have met it").)

Finally, even if the issue of the viability of a cumulative effects challenge were properly before this Court in this case, there is nothing unfair or inconsistent with Title VII theory in such a challenge. Indeed, even the United States concedes in its *amicus* brief that, in at least a multistage decision case, multifactor selection decisions may be challenged as a whole. (Brief for the United States at 22). *See also Teal*, 457 U.S. at 450 (Powell, J., dissenting) ("our disparate impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group") (emphasis in original).

The Government's concession is, we submit, compelled by this Court's prior decisions and simple logic. *First*, it should not be forgotten that the *sine qua non* of a cumulative effects challenge is a statistical showing of a significant inequality in the employer's workforce statistics. If the employer's personnel system were working fairly and impartially, one would not expect to see such a statistical disparity. *E.g.*, *Teamsters*, 431 U.S. at 340 n.20.

[13] Even to attempt such proof of specific causation is a daunting task. For example, in a disparate impact case against the City of Houston, Texas, the Lawyers' Committee sought to "disaggregate" over twenty different standards used by the employer and identify their specific disparate impact. That effort required the duplication of almost 150,000 pages of the defendant's records and the employment of approximately twenty temporary workers to review those records. That effort was, to say the least, extremely expensive. *See Turver v. City of Houston*, 22 EPD 30,689 at p. 14,627 (S.D. Tex. 1980).

Thus, to hold that an employer is immune from Title VII challenge simply because the plaintiffs are unable to identify the specific practice or practices causing specific portions of the disparate impact would, in all likelihood, allow significant examples of employment discrimination to go unremedied. *See Green v. USX Corp.*, 843 F.2d 1511, 1521-22 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141).

Second, the broad remedial purpose, and express statutory language, of Title VII support the proposition that cumulative effects challenges are proper. Indeed, in a Senate Report prepared during the passage of the 1972 amendments to Title VII, Congress noted that employment "systems" can be, and often are, the cause of discrimination:

> Employment discrimination is viewed today as a ... complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of '*systems*' and '*effects*' rather than simple intentional wrongs.

S. Rep. No. 415, 92nd Cong., 1st Sess. 5 (1971) (emphasis added).

Similarly, the express language of 703(a)(2) of Title VII provides broadly that it is 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 (emphasis added).[11]

Congress' broad proscription of employment practices that discriminate "in any way" is certainly broad enough to encompass challenges to the cumulative effects of personnel systems. As this Court noted in *Griggs*, Congress intended in Title VII to

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[11] In *Teal*, 457 U.S. at 448, this Court noted that disparate impact analysis is based on § 703(a)(2) of Title VII.

outlaw any and all employment practices that unnecessarily operate "as 'built-in headwinds' for minority groups." 401 U.S. at 432. Thus, if the cumulative effects of an employer's entire personnel system deprive minorities of employment opportunities, it would be flatly inconsistent with the purpose of Title VII to exonerate that system absent a showing by the employer that its system is justified by business necessity (or, at least, that the practices and procedures the employer shows caused the disparate impact are justified).

Indeed, the Uniform Guidelines on Employee Selection Procedures promulgated by the EEOC, Civil Service Commission and Departments of Labor and Justice support that conclusion. Those Procedures specifically define the employment practices that are subject to disparate impact review to include combinations of practices. The Guidelines provide that disparate impact analysis applies to

> [a]ny measure, *combination of measures*, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational and work experience requirements through informal or casual interviews and unscored application forms.

29 C.F.R. § 1607.16(Q) (emphasis added).[15]

Third, contrary to the assertions of petitioners and the United States as *amicus curiae*, there is nothing unfair about shifting the burden to the employer to choose whether disaggregation would serve its interests and, if so, to identify the practices causing disparate impact and to justify the business necessity of those practices once the plaintiffs have shown a disparity. It is employers who are most knowledgeable about their own personnel systems. And it is employers who have the best access to evidence concerning those systems. As the Third Circuit recently noted:

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[15] This Court has expressly held that the Uniform Guidelines are "entitled to great deference" as "the administrative interpretation of [Title VII] by the enforcing agency". *Albermarle*, 422 U.S. at 431; *Griggs*, 401 U.S. at 433-34.

> Applying disparate impact analysis to this employer's hiring 'system' and measuring the disproportionate 'effects' on minority hiring that result may impose a difficult burden on the employer, but not an unfair one. *In these cases the employer has far better access and opportunity than the plaintiffs to evaluate critically the inter-relationship of the criteria that it uses in hiring practice, and to determine which aspects actually result in discrimination.*

Green v. USX Corp., 843 F.2d at 1524 (emphasis added). *See also Segar v. Smith*, 738 F.2d 1249, 1271 (D.C. Cir. 1984), *cert. denied*, 471, U.S. 1115 (1985).

And *fourth*, should this Court hold that it is always the plaintiffs' burden to link specific employment practices with specific disparities, the result will be to encourage employers to have no personnel system at all, or to structure their employment systems in as complicated a fashion as possible (which may be the functional equivalent of no system at all), and to maintain as few personnel records as possible. In that way, employers may well be able to render themselves immune from Title VII attack, no matter how skewed their employment statistics might be, because plaintiffs will be unable to identify the practice or prac-

tices that caused discrimination and/or prove the causal link. This Court, we submit, should not encourage such a result.[16]

III. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT RESPONDENTS' STATISTICS MADE OUT A PRIMA FACIE CASE OF DISPARATE IMPACT

Finally, petitioners contend, again supported by the United States as *amicus curiae*, that plaintiffs' statistics which show a

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[16] In its *amicus* brief, the United States suggests that this Court adopt a single governing formulation with respect to the inquiry into business justification once a plaintiff has made out a prima facie case under the disparate impact mode. (Brief for the United States at 23-25.) The United States proposes that this Court adopt a standard allegedly "encapsulated" in *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 n.31 (1979). Thus, the United States would find a challenged practice justified as a business necessity where the employer's "legitimate employment goals of safety and efficiency . . . are significantly served by—even if they do not require—[the challenged selection practice]". That issue is not presented in this case, however, and we respectfully submit that this Court should not address an issue not briefed, argued or decided in the courts below and not the subject of this Court's writ of certiorari.

Furthermore, the standard proposed by the United States is too low and would thwart the central purpose of Title VII. As Justice Blackmun recognized in his concurrence in *Watson*, "[p]recisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula". *Watson*, 487 U.S. at , 108 S.Ct. at 2794. Nevertheless, it is well-established that a mere "significant" relationship to "legitimate employment goals" is not enough. "Congress has placed on the employer the burden of showing that any given requirement must have a *manifest relationship* to the employment in question." *Griggs*, 401 U.S. at 432 (emphasis supplied). As *Griggs* made clear, "[t]he touchstone is business necessity." 401 U.S. at 301.

Moreover, in *Beazer*, this Court did not follow the standard that the United States proposes but merely recognized that the district court had made a finding that the defendant's employment goals of safety and efficiency actually *did* require the exclusion of all users of illegal narcotics. The Court did not adopt a mere "relationship" standard as the employer's burden in a disparate impact case. To the contrary, the Court expressly followed the standard articulated in *Griggs*, noting that the record in *Beazer* sufficiently reflected that the defendant's rule demonstrated a "manifest relationship to the employment in question". *Beazer*, 440 U.S. at 587 n. 31 (*quoting Griggs*, 401 U.S. at 438).

striking disparity between a concentration of minority workers in lower level, lower paid cannery jobs and a paucity of minorities in higher level, higher paid non-cannery jobs fail to make a *prima facie* showing of disparate impact. In summary, petitioners contend that only statistics which compare the number of minorities in non-cannery jobs and the number of minorities in the qualified labor force are relevant here. (Pet. Brief at 15-24. *See also* Brief for the United States at 16-21.)

Petitioners have missed the point. This case is not about a simple comparison of the number of minorities in the non-cannery jobs and in the qualified labor pool. This case is about petitioners' recruiting practices and the systematic exclusion of minorities in low paid cannery positions from the opportunity to even apply, much less be hired, for the higher paid non-cannery jobs. For those issues, plaintiffs' comparison between the number of minorities in cannery jobs and the number of minorities in non-cannery jobs is entirely proper.

As the Fifth Circuit has stated:

> 'In the problem of racial discrimination, statistics often tell much, and Courts listen.' . . . Our wide experience with cases involving racial discrimination in education, employment, and other segments of society has led us to rely heavily in Title VII cases on the empirical data which shows an employer's overall pattern of conduct in determining whether he has discriminated against particular individuals or a class as a whole.

Burns v. Thiokol Chemical Corp., 483 F.2d 300, 305 (5th Cir. 1973) (citations omitted).[17]

There is no uniform rule that determines what types of statistics are useful in what types of cases. The relevancy of particular

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[17] *See also Teamsters*, 431 U.S. at 340 n. 20, *quoting* B. Schlei and P. Grossman, *Employment Discrimination Law* at 1161-93 (1976):

> Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.

statistical showings can only be determined on a case-by-case basis. *See, e.g., Hazelwood School District v. United States*, 433 U.S. at 311-12 ; *Falcon v. General Telephone Co. of the Southwest*, 626 F.2d 369, 382 (5th Cir. 1980), *vacated*, 450 U.S. 1036, *aff'd on rehearing*, 647 F.2d 633 (5th Cir. 1981); *Davis v. City of Dallas*, 483 F. Supp. 54, 60 (N.D. Tex 1979). As this Court pointed out in *Teamsters*, statistics "come in infinite variety" and "their usefulness depends on all of the surrounding facts and circumstances". 431 U.S. at 340. There is, in short, no hard and fast rule that statistical comparison in Title VII cases must be between the employer's workforce and the "qualified labor pool".

This is a unique case, involving seasonal work, often performed by migrant workers under exceptionally difficult conditions. Routine statistical analyses do not apply. The facts and circumstances of this case mandate an approach to the relevant statistics tailored to the facts of this case.

Thus, here, a comparison to the so-called qualified labor force is beside the point. The crux of the issues raised by plaintiffs' challenges to petitioners' employment practices is the claim that those practices denied cannery workers the opportunity to compete fairly for higher paying non-cannery jobs. By employing such hiring techniques as nepotism, word-of-mouth recruiting, separate hiring channels and use of subjective criteria, petitioners effectively precluded minority cannery workers from applying or being hired for non-cannery jobs. Similarly, such practices as race labelling and segregated facilities contributed substantially to a lack of knowledge of job opportunities on the part of minority cannery workers.[18] In total, those techniques assured that the current racial make-up of petitioners' non-cannery workforce would be perpetuated.

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[18] Petitioners contend that plaintiffs' workforce comparison statistics are irrelevant because petitioners do not have a "promote from within" policy. That again misses the point. Whether or not petitioners have such a policy, it is a violation of Title VII to use employment practices that actively preclude lower level minority workers from the opportunity even to be considered for higher level positions where those practices cause disparate impact.

The fact that petitioners' non-cannery workforce may reflect the racial breakdown of the qualified outside workforce is simply irrelevant to the issue of opportunity here. As this Court recognized in *Connecticut v. Teal*, 457 U.S. 440 (1982) , the "bottom line" of petitioners' hiring practices is not a defense to a claim that those practices unlawfully curtail employment opportunities for minorities:

> In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has 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.
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> * * *
>
> ... The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job related criteria.

Id. at 450-51 (emphasis in original).

Moreover, petitioners, as the Court of Appeals properly found, cannot properly rely on their so-called qualified labor force statistics. As an initial matter, and as the district court found, Pet. App. I at 75-76, many of the non-cannery jobs at issue here were unskilled and hence required no particular qualification. Accordingly, the cannery workers plainly should have been eligible for those jobs. More generally, however, petitioners never proved that their purported job qualifications criteria were actually applied.[19] Absent such proof, petitioners' qualified labor force statistics are irrelevant and worthless. *E.g.*, *Franks v. Bowman Transportation Co.*, 424 U.S. at 773 n. 32 (only non-discriminatory standards "actually *applied*" by employers are relevant).

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[19] *See, e.g.*, Pet. App. at A-574-75 (trial testimony of Larry L. DeFrance); Pet. App. at A-236 (Deposition of Warner Leonard).

In sum, the Ninth Circuit properly held that plaintiffs' statistics made a *prima facie* showing of disparate impact of discrimination in job opportunities.[20]

CONCLUSION

In recent years, the number of employment discrimination class actions filed has declined precipitously, from a peak of 1,174 in 1976 to only 46 in 1988.[21] A portion of that decrease may be attributable to a decline in employment discrimination in the United States, but there can be little doubt that private enforcement of Title VII through class actions has suffered substantially in recent years as the cost in money and effort of prosecuting Title VII class actions has risen substantially, if not exponentially. If the burdens of proof in disparate impact cases are revised as espoused by petitioners and the United States to further increase substantially, indeed drastically, the burden of proof on plaintiffs and correspondingly decrease the employer's rebuttal burden, we fear that no plaintiffs will have the resources or, indeed, the incentive to pursue Title VII class actions. The most important method of enforcement of Title VII—the class action—may, for all practical purposes, cease to exist. That would, we submit, be a most unfortunate result for the cause of equal employment opportunity.

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[20] If this Court should conclude that the facts of record do not make out a *prima facie* case of disparate impact, then we respectfully suggest that the Court remand this matter for the presentation of further evidence and findings by the District Court. As the appellate process in this case demonstrates, given two panel opinions and one *en banc* decision, as well as this Court's opinion, the legal standards governing plaintiffs' case have shifted considerably during the litigation. Accordingly, plaintiffs should be given an appropriate opportunity to conform the evidence to the proper legal standard. *See, e.g., Albermarle*, 422 U.S. at 436 (where the Court remanded the case to the District Court to allow both the plaintiffs and the defendant to revise their evidentiary showings to conform to the new legal standards set forth in the Court's opinion).

[21] 1977 Report of the Director, Administrative Office of the U.S. Courts, Table 32, p. 239; Table X-5, Unpublished Computer Analysis prepared by the Administrative Office of the U. S. Courts.

Accordingly, for the reasons set forth above, the Lawyers' Committee for Civil Rights Under Law respectfully submits that the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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