No. 87-1387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC., and
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

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, on the facts of this case, the court of appeals correctly held that the evidence established a prima facie case of disparate impact.

2. Whether this Court should overrule the evidentiary standards for disparate impact cases articulated in Griggs v. Duke Power Co. and its progeny.

3. Whether, on the facts of this case, the court of appeals correctly considered the cumulative effect of a range of employment practices as demonstrating the consequences of discriminatory practices that had already been independently established.

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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICI CURIAE

Amicus NAACP Legal Defense and Educational Fund, Inc., is a national civil rights legal organization that has litigated many cases on behalf of black

persons seeking vindication of their civil rights, including Griggs v. Duke Power Co., 401 U.S. 424 (1971). Amicus Mexican American Legal Defense and Educational Fund and amicus Puerto Rican Legal Defense and Education Fund are national civil rights organizations that have brought various lawsuits on behalf of Latino persons subject to discrimination in employment, education, voting rights and other areas of public life. Letters from the parties consenting to the filing of this brief have been filed with the Court.

SUMMARY OF ARGUMENT

Amici, supporting respondents, principally address the important issue raised by the second question presented in the petition for certiorari -- viz., the continued vitality of Griggs v. Duke Power Co.

In Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2785 (1988)(part IIA), Justice O'Connor, writing for the Court and citing Griggs, reiterated that Title VII proscribes not only intentional, disparate treatment discrimination but also disparate impact discrimination: "This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent." The Watson opinion also observed that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." Id. (emphasis added).

The petitioners in this case concede that, "[u]nder a strict reading of

Griggs," once the plaintiff has established a prima facie case of disparate impact the employer "must come forward with what amounts to an affirmative defense of business necessity." Brief for Petitioners at 42 (citation and footnote omitted). The Solicitor General, however, distorts the language of Watson to argue that Griggs' burden of proof standards are "[b]ased on the assumption that certain other exclusionary practices are 'functionally equivalent to intentional discrimination.'" Brief for the United States as Amicus Curiae at 13. The Solicitor General then goes on to argue that, once the plaintiff has established a prima facie case of disparate impact discrimination, the employer's burden of demonstrating business necessity should be revised to conform to the employer's

minimal burden of production imposed under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), in individual disparate treatment cases. Id. at 27 ("Nothing about disparate impact cases justifies a departure from the model for litigating disparate treatment cases"). Compare Watson, 108 S. Ct. at 2787-2791 (parts II C&D) (O'Connor, J.).[1]

The Solicitor General's argument conflicts with the language of the statute, its legislative history and contemporaneous administrative interpretations, the prior decisions of

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[1]In Watson, the Solicitor General argued that subjective employment practices could only be analyzed under an intentional discrimination standard. See 108 S. Ct. at 2786. The Court rejected the argument. In the present case, the Solicitor General seeks to accomplish indirectly -- through the subterfuge of modifying disparate impact standards of proof to conform to individual disparate treatment standards -- what the Court directly rejected in Watson.

this Court, and the remedial purpose of Title VII.

1. "A disparate impact claim reflects the language of §703(a)(2)," Connecticut v. Teal, 457 U.S. 440, 448 (1982), which proscribes practices that "deprive or tend to deprive any individual of employment opportunities." 42 U.S.C. §2000e-2(a)(2). The individual disparate treatment analysis, on the other hand, is one of several evidentiary models for analyzing violations of §703(a)(1), 42 U.S.C. §2000e-2(a)(1).

2. The legislative history of Title VII's enactment in 1964, and of its amendment in 1972, both undermine the Solicitor General's argument. In 1964, Congress made unmistakably clear that it intended to prohibit both intentional discrimination and disparate impact discrimination. Purposeful, overt

discrimination was not regarded as a paradigm; Congress expressly declared that Title VII reached beyond overt practices. In 1972, Congress specifically ratified Griggs and its evidentiary standards for disparate impact cases. Contemporaneous administrative interpretations of Title VII, including those of the Department of Justice and the EEOC, have uniformly applied the Griggs disparate impact analysis to all selection procedures with an adverse impact, and they have separately prohibited disparate treatment.

3. Based on the language and legislative history of §703(a), the Court has developed separate evidentiary analyses that recognize the basic differences between disparate treatment and disparate impact discrimination. The individual disparate treatment analysis of McDonnell Douglas serves different ends

than those served by the disparate impact analysis of Griggs; the stages of the two evidentiary models are specific to each analysis and are in no way comparable. The more appropriate analogy for the employer's burden in a disparate impact case -- if an analogy is necessary-- would be the employer's burden in class-based disparate treatment cases, such as International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

4. The Solicitor General's theory, if accepted, would frustrate the remedial purpose of Title VII by overruling Griggs and effectively repealing §703(a)(2)'s prohibition of arbitrary practices that have the effect of depriving minorities or women of employment opportunities.

Amici also submit that the first and third questions presented in the petition for certiorari are not actually presented by the facts of this case, and that the Court should not attempt to resolve those questions on this record.

ARGUMENT

I. TITLE VII, BY ITS TERMS, PROHIBITS DISPARATE IMPACT DISCRIMINATION AS WELL AS DISPARATE TREATMENT DISCRIMINATION.

The individual disparate treatment model of McDonnell Douglas, which the Solicitor General would extend to disparate impact cases, was developed to analyze claims of intentional discrimination against individual plaintiffs under §703(a)(1) of Title VII. See McDonnell Douglas, 411 U.S. at 676-77. "A disparate impact claim," on the other hand, "reflects the language of §703(a)(2)." Teal, 457 U.S. at 448.

The two subparts of §703(a) state:

> It shall be an unlawful employment practice for an employer:
>
> 1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> 2. 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). This statutory language establishes a comprehensive framework embracing both forms of employment discrimination: disparate treatment and disparate impact.

The Court has applied §703(a)(1) in a variety of circumstances involving

intentional discrimination. See e.g., McDonnell Douglas (individual disparate treatment); Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) (direct evidence of a policy of disparate treatment); Teamsters (pattern or practice of disparate treatment). The Court, however, has "not decide[d] whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of §703(a)(1)." Nashville Gas Co. v. Satty, 434 U.S. 136, 144 (1977).[2]

The separate and distinct objective of Congress in enacting §703(a)(2) "is plain from the language of the statute."

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[2]Several lower courts have held that disparate impact challenges may also be brought under §703(a)(1). See, e.g., Colby v. J.C. Penney Co., 811 F.2d 1119, 1127 (7th Cir. 1987); Wambheim v. J.C. Penney Co., 705 F. 2d 1492, 1494 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984).

Griggs, 401 U.S. at 429. Section 703(a)(2) "speaks, not in terms of jobs and promotions, but in terms of limitations and classifications that would deprive any individual of employment opportunities." Teal, 457 U.S. at 449 (original emphasis).

> A disparate impact claim reflects the language of §703(a)(2) and Congress' basic objectives in enacting that statute: "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." [Griggs,] 401 U.S. at 429-430 (emphasis added).

Id. (original emphasis). See Satty, 434 U.S. at 141 (ruling that denial of pregnancy benefits is permissible under §703(a)(1) "does not allow us to read §703(a)(2) to permit an employer to burden female employees in such a way, as to deprive them of employment opportunities").

"Proof of discriminatory motive . . . is not required," Teamsters, 431 U.S. at 335 n.15, by the terms of §703(a)(2). As then-Justice Rehnquist put it, "Griggs held that a violation of §703(a)(2) can be established by proof of a discriminatory effect." Satty, 434 U.S. at 144.

II. THE LEGISLATIVE HISTORY OF TITLE VII, THE 1972 AMENDMENTS, AND THE UNIFORM ADMINISTRATIVE INTERPRETATION OF THE STATUTE DEMONSTRATE THAT THE EVIDENTIARY STANDARDS ARTICULATED IN GRIGGS AND ITS PROGENY ARE CONSISTENT WITH THE INTENT OF CONGRESS.

A. In Enacting §703(a)(2) In 1964, Congress Specifically Intended To Prohibit "Institutionalized" Disparate Impact Discrimination Not Motivated By Any Discriminatory Purpose.

The 1964 legislative history confirms this Court's assessment of Title VII seven years later in Griggs, 401 U.S. at 429-30, that: "The objective of Congress in the enactment 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," whether those barriers were erected by intentional, racially motivated discrimination or by unjustified practices with a disparate impact.[3] Congress did not see disparate impact discrimination as another form of disparate treatment discrimination, but rather as a separate evil which Title VII separately addressed.

The forerunner of §703(a)(2) was contained in House and Senate bills introduced in the 88th Congress, from

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[3]See Rose, Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?, 25 San Diego L.R. 63, 73-81 (1988) (author was chief of the section of the Department of Justice's Civil Rights Division responsible for enforcement of Title VII).

which Title VII of the omnibus Civil Rights Act of 1964 eventually emerged. Section 5(a)(2) of H.R. 405, which was favorably reported in H.R. Rep. No. 88-570 (1963), prohibited the limitation, segregation, or classification of employees "in any way which would deprive or tend to deprive any person of employment opportunities or otherwise adversely affect his status as an employee" because of prohibited discrimination. Id. at 8.

The House Committee reported that discrimination in employment was "a pervasive practice" throughout the country and that it "permeate[d] the national social fabric -- North, South, East and West." Id. at 2.

> . . . Job discrimination is extant in almost every area of employment and in every area of the country. It ranges in degrees from patent absolute rejection to more subtle forms of invidious

> distinctions. Most frequently, it manifests itself through relegation to "traditional" positions and through discriminatory promotional practices.

Id. The House report attributed high minority unemployment and underemployment in part to such discriminatory practices. Id. Opponents of the bill attacked the breadth of the prohibition.[4] However, with the addition of sex as one of the prohibited bases for unlawful employment practices, H.R. 405 passed without any amendment of this substantive provision.

In the Senate, language similar to §703(a)(2) appeared in S. 1937, a bill introduced by Senator Humphrey, who was later the floor manager for the omnibus

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[4]H.R. Rep. No. 88-570 at 110-11 (minority view of Reps. Poll and Crames.)

Civil Rights Act of 1964.[5] The bill was reported favorably out of the Senate Labor Committee on February 4, 1964. S. Rep. No. 88-867 (1964). Section 4(a) of S. 1937 made unlawful the discriminatory denial of "equal employment opportunity," including any practice which "results or tends to result in material disadvantage or impediment to any individual in obtaining employment or the incidents of employment for which he is otherwise qualified." Id. at 24. The Senate report, written by Senator Clark, who was later the bipartisan floor leader for Title VII, explained that:

> Overt or covert discriminatory selection devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures

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[5]Senators Clark and Case, who were later the bipartisan Senate floor leaders for Title VII, were co-sponsors.

> operate together with widespread built-in administrative processes through which nonwhite applicants are automatically excluded from job opportunities. Channels for job recruitment may be traditionally directed to sources which by their nature do not include nonwhites; trainees may be selected from departments where Negroes have never worked; promotions may be based upon job experience which Negroes have never had.
>
> As Secretary of Labor Wirtz stated in his testimony before the committee:
>
> > Discrimination has become, furthermore, institutionalized so that it obtains today in some organizations and practices and areas as the product of inertia, preserved by forms and habits which can best be broken from the outside.

Id. at 5. According to the Committee, S. 1937 defined "equal employment opportunity in broad terms to include a wide range of incidents and facilities, and encompasse[d] all aspects of discrimination in employment because of race, color, religion, or national

origin." Id. at 10. The report declared that the substantive provision was "designed specifically to reach into all of the institutionalized areas and recesses of discrimination, including the so-called built-in practices preserved through form, habit or inertia." Id. at 11. See also, Hearings on Equal Employment Opportunity Before the Subcommittee on Employment of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. 144-45 (1963) (remarks of Sen. Humphrey).

Senator Humphrey, as principal floor manager, introduced the omnibus bill that contained Title VII, H. 7512, on the floor of the Senate on March 30, 1964. 110 Cong. Rec. 6307. While the omnibus bill opted for court enforcement as opposed to the administrative cease-and-desist authority proposed in the Labor Committee

bill, the substantive focus of §703(a)(2) -- the broad prohibition of practices resulting in the denial of employment opportunities -- remained the same. In explaining the bill, Senator Humphrey stated that, "at the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments. . . . The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them." Id. at 6547, 6548.

The language of §703(a)(2) passed both houses intact.

B. In Amending Title VII In 1972, Congress Ratified The §703(a)(2) Evidentiary Standards Articulated In Griggs.

As the Court concluded in Teal, "[t]he legislative history of the 1972

amendments to Title VII . . . demonstrates that Congress recognized and endorsed the disparate impact analysis employed by the Court in Griggs." 457 U.S. at 447 n.8.[6] The Court explained that "[b]oth the House and Senate reports cited Griggs with approval, the Senate report noting that:

> 'Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts

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[6]The legislative history of the 1972 amendments is relevant here because those amendments extended the protection of §703(a)(2) to "applicants for employment" (such as the respondents in the present case) as well as employees, and because the amendments extended the coverage of Title VII to federal and state employees. §§701(a),(b), and (e), 42 U.S.C. §§2000e-(a), (b), and (e); §717, 42 U.S.C. §2000e-16. See Teal, 457 U.S. at 447 n.8; Franks v. Bowman Transportation Co, 424 U.S. 747, 764 n.21 (1976); see also, id. at 796 n.18 (Powell, J., concurring in part and dissenting in part); Albemarle, 422 U.S. at 420-21; Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). Compare Teamsters, 431 U.S. at 354 n.39 (1972 legislative history entitled to little if any weight in construing §703(h), which was unaffected by 1972 amendments).

> familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs.'"

Id. (quoting S. Rep. No. 92-415 at 5 (1971)). See also H.R. Rep. No. 92-238 at 8 (1971).

Congress in 1972 reiterated in even stronger terms than in 1964 that Title VII prohibited disparate impact discrimination as well as disparate treatment discrimination. Indeed, congressional recognition that "institutional" discrimination was an evil different from discrimination motivated by ill will or animus was the impetus for several of the more significant amendments.[7] "[W]here

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[7]Senator Dominick, who sponsored the Nixon Administration's court-enforcement approach as an alternative to the proposal to give EEOC cease-and-desist powers, stated that "'most discriminatory treatment is institutional; subtle practices that leave minorities at a disadvantage.'" 118 Cong. Rec. 697 (1972) (quoting Wall Street Journal article).

discrimination is institutional, rather than merely a matter of bad faith, . . . corrective measures appear to be urgently required." S. Rep. No. 92-415 at 14.[8]

See also 118 Cong. Rec. 944-45 (1972) (remarks of Sen. Spong) ("a significant part of the problem today is not the simple, willful act of some employer but rather the effect of long-established practices or systems in which there may be no intent to discriminate or even knowledge that such is the effect").

[8]Congress in 1972 extended Title VII to federal employees, who previously could invoke only Civil Service Commission administrative remedies. This change was necessary because the Commission had erroneously "assume[d] that employment discrimination in the Federal Government is solely a matter of malicious intent on the part of individuals," and "ha[d] not fully recognized that the general rules and procedures that it had promulgated may in themselves constitute systemic barriers to minorities and women." S. Rep. No. 92-415 at 14; see also, H.R. Rep. No. 92-238 at 24. Title VII was extended to state employees for similar reasons. See H.R. Rep. No. 92-238 at 17 ("widespread discrimination against minorities exists in state and local government employment and . . . the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices").

In ratifying Griggs, Congress understood that such institutional practices could be justified only if the employer discharged a heavy burden of showing "overriding" business necessity. The House report summarized Griggs as holding that "employment tests, even if valid on their face and applied in a non-discriminatory manner, were invalid if they tended to discriminate against minorities and the company could not show an overriding reason why tests were necessary." H.R. Rep. No. 92-238 at 21 (emphasis added); see also id. at 22 ("If the use of the test acts to maintain existing or past discriminatory imbalances in the job, or tends to discriminate against applicants on the basis of race, color, religion, sex or national origin, the employer must show an overriding business necessity to justify use of the

test"); id. at 8 ("showing of an overriding business necessity for the use of such action").[9]

Finally, in language "that could hardly be more explicit," Franks, 424 U.S. at 764 n.21, the section-by-section analyses submitted to both houses "confirm[ed] Congress' resolve to accept prevailing judicial interpretation regarding the scope of Title VII." Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 470 (1986). See 118 Cong. Rec. 7166, 7564 (1972) ("present case law as developed by the courts would continue to

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[9]Congress did not consider the employer's burden to be merely that of articulating a legitimate reason for engaging in practices that systematically excluded minorities or women. Id. Senator Dominick, for instance, explained that under Griggs, "'employment tests, even if fairly applied are invalid if they have a discriminatory effect and can't be justified on the basis of business necessity.'" 118 Cong. Rec. 697 (1972) (citation omitted) (emphasis added).

govern the applicability and construction of Title VII"). As the Court concluded in Teal, Congress made an explicit statement "that in any area not addressed by the amendments, present case law -- which as Congress had already recognized included our then recent decision in Griggs -- was intended to continue to govern." 457 U.S. at 447 n.8.

C. The Evidentiary Standards Of Griggs And Its Progeny Have Been Uniformly Confirmed By Administrative Interpretations Of §703(a)(2).

The Court's construction of §703(a)(2) in Griggs is "confirmed by the contemporaneous interpretations of . . . both the Justice Department and the EEOC, the two federal agencies charged with enforc[ement responsibility]." Local 28, 478 U.S. at 465-66. The enforcement agencies' administrative guidelines on this subject have been construed as

"express[ing] the will of Congress." Griggs, 401 U.S. at 434; see Albemarle, 422 U.S. at 431.[10]

In guidelines initially adopted in 1966 and elaborated in 1970, see Griggs, 401 U.S. at 434 n.9, the EEOC interpreted §703(a)(2) as prohibiting the use of any test or other selection technique that was discriminatory in operation unless the employer could establish job-relatedness.[11] These guidelines, as

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[10]Because the guidelines are consistent with the statutory language and the legislative history, they are "entitled to great deference." Albemarle, 422 U.S. at 431; Griggs, 401 U.S. at 433-34; see also Local 28, 478 U.S. at 465-66; Local 93, Firefighters v. City of Cleveland, 478 U.S. 501,518 (1986). Cf. General Electric Co. v. Gilbert, 429 U.S. 125, 141-45 (1976)(EEOC guidelines on sex discrimination not followed because they contradicted agency's earlier positions and were inconsistent with Congress' plain intent); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93-94 (1973).

[11]EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12334 (1970), codified at 29 C.F.R.

revised by the EEOC in 1970 prior to the Court's 1971 decision in Griggs, treated disparate impact discrimination as an evil separate from disparate treatment, and they interpreted Title VII as prohibiting both forms of discrimination.

> The principle of disparate or unequal treatment must be distinguished from the concepts of validation. A test or other employee selection standard--even though validated against job performance in accordance with the guidelines in this part -- cannot be imposed upon any individual or class protected by Title VII where other employees, applicants or members have not been subject to that standard.

35 Fed. Reg. at 12336 (29 C.F.R. §1607.11).[12]

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§§1607.3, 1607.13 (1970) (elaborating EEOC Guidelines on Employment Testing Procedures, reprinted in CCH Empl. Prac. Guide ¶16,904 (1967)).

[12]The Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (1978), codified at 29 C.F.R. §1607 (1986) -- which superseded the EEOC Guidelines and were adopted by the EEOC, the Department of Justice, and other agencies

III. THE SEPARATE EVIDENTIARY ANALYSES DEVELOPED BY THE COURT REFLECT THE DISTINCT NATURE OF THE DISCRIMINATORY PRACTICES CONGRESS INTENDED TO PROSCRIBE IN §§703(a)(1) AND 703(a)(2).

Nothing on the face of the statute or in its legislative history supports the Solicitor General's argument that the §703(a)(1) evidentiary standards of McDonnell Douglas should supplant the §703(a)(2) evidentiary standards of Griggs. Indeed, this Court has developed different standards precisely because it is necessary to take into account the

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in 1978 -- similarly require the application of disparate impact analysis to "any selection procedure" and embrace the evidentiary standards of Griggs. See 29 C.F.R. §1607.3 Like the EEOC Guidelines, the Uniform Guidelines separately prohibit both unjustified disparate impact and disparate treatment in the use of selection procedures. See 29 C.F.R. §1607.11 ("The principles of disparate or unequal treatment must be distinguished from the concepts of validation").

distinctions among various kinds of disparate treatment cases as well as the basic distinction between disparate treatment discrimination and disparate impact discrimination. Moreover, with respect to the separate disparate treatment and disparate impact analyses, the Court has ruled that "[e]ither theory may, of course, be applied to a particular set of facts," Teamsters, 431 U.S. at 335 n.15, not that the two analyses are functionally indistinguishable.

A. The Court Has Articulated Evidentiary Standards For Analyzing Disparate Treatment Claims Under Section 703(a)(1).

The Court has articulated several methods of analyzing disparate treatment claims under §703(a)(1). The proper analysis varies depending upon the nature of the claims and the evidence presented in each case.

1. Individual Disparate Treatment.

The McDonnell Douglas model for individual disparate treatment cases is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination," Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981), when direct evidence of discrimination is absent. Thurston, 469 U.S. at 121. Under the individual disparate treatment analysis, the plaintiff must establish a prima facie case through circumstantial evidence -- by showing, for example, that he or she belongs to a group protected by Title VII; that he or she applied and was qualified; that the application was rejected; and that the position remained open after the rejection. McDonnell Douglas, 411 U.S. at 802. "The prima facie case . . . eliminates the most

common non-discriminatory reasons for the plaintiff's rejection . . . [and] 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.'" Burdine, 450 U.S. at 253-55 (quoting Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978)).

A prima facie case of individual disparate treatment, however, is "insufficient to shift the burden of proving a lack of discriminatory intent to the defendant." Watson 108 S. Ct. at 2793 (Blackmun, J., concurring in part and concurring in the judgment) (original emphasis). Such a prima facie showing merely shifts to the employer the burden of producing admissible evidence that the plaintiff was rejected for a legitimate,

nondiscriminatory reason, thereby rebutting the presumption and raising a genuine issue of fact as to whether the employer discriminated against the plaintiff. Burdine, 450 U.S. at 254-55. As a result, the employer "frames[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." Id.

2. Direct Evidence of Intentional Discrimination.

"[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." Thurston, 469 U.S. at 121; see Teamsters, 431 U.S. at 358 n.44. Where plaintiff's direct evidence of discrimination is accepted, an employment practice is established as "discriminatory on its face" without further need to show a

discriminatory intent. Thurston, 469 U.S. at 121 (policy conditioning transfer rights on age of airline captains is discriminatory on its face under the Age Discrimination in Employment Act); Manhart, 435 U.S. at 708 (policy requiring female employees to make larger contributions to pension fund than male employees is discriminatory on its face under §703(a)(1)); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) (policy of hiring men but not women with pre-school age children is discriminatory on its face under §703(a)(1)).

Where plaintiffs' direct evidence establishes disparate treatment, the burden shifts to the employer to justify the practice by proving the applicability of any statutory immunities or affirmative defenses. See Thurston, 469 U.S. at 122-

25 (rejecting employer's statutory bona fide occupational qualification and bona fide seniority system defenses); Manhart, 435 U.S. at 716-17 (rejecting cost justification defense as unavailable in a disparate treatment case); Phillips, 400 U.S. at 544 (remanding for evidence on bona fide occupational qualification defense).

3. Pattern or Practice of Intentional Discrimination.

In class actions and other cases involving claims of widespread intentional discrimination against members of a race, sex, or ethnic group, statistical or other evidence of a "pattern or practice" of disparate treatment is sufficient to establish a prima facie violation in the absence of direct evidence of intentional discrimination. Teamsters, 431 U.S. at 360; Franks, 424 U.S. at 751. "The burden

then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that [plaintiffs'] proof is either inaccurate or insignificant." Teamsters, 431 U.S. at 360. See also Hazelwood School District v. United States, 433 U.S. 299, 310 (1977). If the employer fails to rebut the prima facie case, the court concludes that a violation has occurred and enters appropriate classwide declaratory and injunctive relief without hearing further evidence. Teamsters, 431 U.S. at 361.

B. The Court Has Articulated Separate Evidentiary Standards For Analyzing Disparate Impact Claims Under Section 703(a)(2).

In enacting §703(a)(2), "Congress required '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.'" Dothard v. Rawlinson, 433 U.S. 321, 328 (1977) (quoting Griggs, 401 U.S. at 431).

> The gist of [a §703(a)(2)] claim . . . does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualifications work in fact disproportionately to exclude women from eligibility for employment. . . [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.
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> Since it is shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question." Griggs v. Duke Power Co., 401 U.S. at 432. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in 'efficient and trustworthy workmanship,'

> Albemarle Paper Co. v. Moody, 422 U.S. at 425 quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801.

Dothard, 433 U.S. at 329-30.[13]

When a plaintiff proves that a facially neutral practice has significant adverse impact, the plaintiff has established the very conduct that §703(a)(2) prohibits. Watson, 108 S. Ct. at 2794 (Blackmun, J., concurring in part and concurring in the judgment) ("unlike a claim of intentional discrimination, which the McDonnell Douglas factors establish only by inference, the disparate impact caused by an employment practice is

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[13]This analysis is typically used in class actions under Rule 23, Fed. R. Civ. P., and government pattern or practice actions under §707 of Title VII, 42 U.S.C. §2000e-6, because disparate impact discrimination is by its nature broadly applicable to a group. However, the analysis has also been utilized in cases seeking relief only for individual plaintiffs. See, e.g., Teal, 457 U.S. at 442-44; Lowe v. City of Monrovia, 775 F.2d 998, 1004 (9th Cir. 1985).

directly established by the numerical disparity"); see Satty, 434 U.S. at 144 ("Griggs held that a violation of §703(a)(2) can be established by proof of a discriminatory effect"). Similarly, in both the direct evidence (Thurston) and pattern or practice intentional discrimination (Teamsters) models, the prima facie case directly establishes the discrimination prohibited by §703(a)(1). The direct evidence and pattern or practice models, like the disparate impact model, were developed for analyzing evidence concerning employment practices and policies that affect large numbers of people on a classwide basis.

The McDonnell Douglas individual disparate treatment model, on the other hand, was developed to analyze the very different kinds of evidence typically presented in a case involving a discrete

act of intentional discrimination against a single individual. A prima facie showing in a McDonnell Douglas case is not comparable in either its nature or its effect to a prima facie showing in a Griggs disparate impact case. A McDonnell Douglas prima facie case does not in itself establish the intentional discrimination prohibited by §703(a)(1); it only "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." Burdine, 450 U.S. at 255; see Teamsters, 431 U.S. at 358 n.44.

This Court has uniformly held that, once the plaintiff establishes a prima facie disparate impact case under §703(a)(2), the burden shifts to the employer to prove that the challenged practice is justified. See, e.g., Teal, 457 U.S. at 446 ("employer must . . .

demonstrate that any given requirement [has] a manifest relationship"); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) (prima facie case "rebutted by [employer's] demonstration that its narcotics rule . . . 'is job related'"); Dothard, 433 U.S. at 329 (employer must "prov[e] that the challenged requirements are job related"); Albemarle, 422 U.S. at 425 (employer has "burden of proving that its tests are 'job related'"); Griggs, 401 U.S. at 431, 432 ("The touchstone is business necessity"; "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"); see also Watson, 108 S. Ct. at 2794 (Blackmun, J., concurring in part and concurring in the judgment).

While it is true that an evidentiary burden may be either one of persuasion or one of production, this Court in Title VII disparate impact cases has always imposed on the employer the burden to persuade the trier of fact of its justification for using practices that have a discriminatory impact. Indeed, as petitioners here concede, see Brief for Petitioners at 42, the employer has the burden of demonstrating business necessity as an "affirmative defense to claims of violation" of §703(a)(2). Guardians Association v. Civil Service Commission, 463 U.S. 582, 598 (1983) (White, J., announcing the Court's judgment and delivering an opinion joined by Rehnquist, J.) (Title VI case).

In trying to force the Griggs analysis into the McDonnell Douglas formula, the Solicitor General ignores the

Court's repeated admonitions that McDonnell Douglas does not provide the proper model for analyzing all Title VII claims.[14] In an individual disparate treatment case, it is appropriate to impose a minimal burden of production on the employer because the plaintiff's prima facie showing is itself "not onerous," Burdine, 450 U.S. at 253, and does not in itself establish a violation of §703(a)(1). That same slight burden would be inappropriate in a disparate impact case, where the prima facie showing usually includes substantial statistical

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[14]See, e.g., McDonnell Douglas, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from the complainant in this case is not necessarily applicable in every respect to differing factual situations"); Teamsters, 431 U.S. at 358 ("Our decision in [McDonnell Douglas] . . . did not purport to create an inflexible formulation"); Furnco, 438 U.S. at 575 (McDonnell Douglas formulation "was not intended to be an inflexible rule").

evidence of adverse impact and constitutes direct evidence of a violation of §703(a)(2).

C. The Griggs Disparate Impact Analysis Is Analogous To The Teamsters And Thurston Disparate Treatment Analyses.

The Solicitor General's theory fails on its own terms. If there is a need analogize disparate impact analysis to some disparate treatment mode of proof, amici submit that the Teamsters "pattern or practice" model and the Thurston "direct evidence" model provide more appropriate analogies than the McDonnell Douglas "individual case" model. In the Teamsters and Thurston models, the allegedly discriminatory conduct is not a single, isolated decision affecting only one individual, but rather a broadly applicable practice of intentional discrimination affecting a class as a

whole. The purpose of these analyses is comparable to the purpose of the disparate impact model, with its parallel focus on "artificial, arbitrary, and unnecessary barriers to employment." Griggs, 401 U.S. at 431. In the Solicitor General's terms, classwide disparate treatment discrimination is the "functional equivalent" of disparate impact discrimination.

Because of the similarity in the practices analyzed, the evidentiary models are also similar. In the Teamsters and Thurston models, plaintiffs establish a prima facie case by introducing statistical or other evidence of a "standard operating procedure" of classwide disparate treatment, Teamsters, 431 U.S. at 336, or by proving the classwide application of a facially discriminatory policy. Thurston, 469 U.S.

at 121. In the Griggs disparate impact model, plaintiffs establish a prima facie case by marshalling comparable evidence of a practice affecting an entire class of employees or applicants. Moreover, in the Teamsters and Thurston disparate treatment models, as in the Griggs disparate impact model, proof of a prima facie case shifts the burden of persuasion, not the burden of production, to the employer. See Teamsters, 431 U.S. at 360; Thurston, 469 U.S. at 122-25. In all three models, plaintiff has borne his burden of proof to establish a violation of Title VII; defendant then has the burden of proving a justification, establishing what is, in essence, an affirmative defense.

In short, there is no need to change the Griggs disparate impact analysis to make it conform to the appropriate disparate treatment analysis. Existing

evidentiary standards for analyzing disparate impact discrimination are already closely analogous to the evidentiary standards for analyzing disparate treatment discrimination under Teamsters and Thurston.

IV. OVERRULING THE EVIDENTIARY STANDARDS OF GRIGGS AND ITS PROGENY WOULD BE CONTRARY TO THE REMEDIAL PURPOSE OF TITLE VII.

The Solicitor General argues, in essence, that Griggs and its progeny should be overruled in order to make the employer's burden in a Griggs disparate impact case conform to the employer's burden in a McDonnell Douglas individual disparate treatment case. Overruling the Court's prior decisions in this manner, however, would drastically alter the nature of disparate impact analysis under §703(a)(2). The employer's burden would be reduced to such an extent that all but

the most unimaginative employers -- unable even to articulate a legitimate reason for practices having a significant adverse impact -- would be able to rebut a showing of disparate impact discrimination, no matter how compelling. The result would be an effective repeal of §703(a)(2).

The Court in Griggs identified Title VII's fundamental purpose as "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." 401 U.S. at 431. The statute "police[s]" not only the problem of intentional discrimination through the disparate treatment analyses available under §703(a)(1), but also "the problem of subconscious stereotypes and prejudices," Watson, 108 S. Ct. at 2786 (part IIB), and "built-in practices preserved through

form, habit or inertia." S. Rep. No. 88-867 at 11. The latter purpose derives from the terms of §703(a)(2) and, as Congress recognized, is enforced by application of the disparate impact analysis articulated in Griggs. The Solicitor General's proposal to overrule the evidentiary standards of Griggs and its progeny is contrary to Title VII's fundamental purpose.

The Solicitor General would have the Court transmute the employer's burden of persuasion in a Griggs disparate impact case into the burden of production imposed on an employer in a McDonnell Douglas individual disparate treatment case -- a feat of judicial alchemy that would drastically change the nature of disparate impact analysis under §703(a)(2). The employer's burden in such cases of proving an "overriding business necessity," as

Congress termed it, is appropriately high because the challenged practice has been shown to violate §703(a)(2) as a prima facie matter. The Solicitor General's proposed standard, in contrast, would declare such practices lawful whenever the employer could simply articulate a "legitimate, nondiscriminatory reason" for its actions; the employer "need not [even] persuade the court that it was actually motivated by the proffered reason[ ]." Burdine, 450 U.S. at 254. The Solicitor General would then permit the plaintiff to introduce contrary evidence, but would put the risk of nonpersuasion of business necessity on the plaintiff. Failing this, all the plaintiff then could do to abate the exclusionary practice would be to present evidence of alternative selection devices. As a result, the plaintiff would have not only the burden of proving a

prima facie case of disparate impact, but also the burden of disproving business necessity.

The scheme proposed by the Solicitor General would thwart the specific remedial purpose of §703(a)(2) by making it virtually impossible for a plaintiff to prevail on a claim of disparate impact discrimination. As a practical matter, §703(a)(2) would be repealed as an independent substantive provision, and the evils to which that provision is addressed -- "the problem of subconscious stereotypes and prejudices" and "built-in practices preserved through form, habit or inertia" -- would go unremedied.

Ignoring that the Griggs disparate impact standard directly reflects statutory language and congressional will, the Solicitor General attempts to justify its revision by raising the specter of

quotas and intrusion on managerial prerogatives. See Brief for the United States as Amicus Curiae at 25. Griggs itself rejected such claims, 401 U.S. at 436, as did Congress when it ratified Griggs in 1972.[15]

Moreover, the suggestion that subjective selection procedures are impossible to validate[16] is simply wrong. The courts have identified specific characteristics of valid subjective rating procedures, such as using specific guidelines for raters, rating only

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[15] Congressional opponents specifically objected to the 1972 amendments on these grounds, but their views were not accepted. E.g., 117 Cong. Rec. 32108 (1971) (comments of Rep. Rarick that bill would require preferential treatment and maintenance of racial balance); 117 Cong. Rec. 38402 (1971) (comments of Sen. Allen that bill would infringe on discretion of state and local officials to select employees).

[16] See Brief for the United States as Amicus Curiae at 25 n.35; Brief for Petitioners at 47.

observable behaviors or performance, requiring raters to have knowledge of job responsibilities, and using an evaluative device with fixed content that calls for discrete judgments.[17] Subjective selection procedures can be and have been successfully validated.[18] See Rose, Subjective Employment Practices, 25 San Diego L. Rev. at 87-92.

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[17]See B. Schlei & P. Grossman, Employment Discrimination Law 202-05 (2d ed. 1983) (collecting cases).

[18]See, e.g., Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 362 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981) (interview and training simulations); Wade v. Mississippi Coop. Extension Serv., 615 F. Supp. 1574 (N.D. Miss. 1985) (promotional performance evaluation); Tillery v. Pacific Tel. Co., 34 FEP Cases 54 (N.D. Cal. 1982); Wilson v. Michigan Bell Tel. Co., 550 F. Supp. 1296 (E.D. Mich. 1982) (formal assessment procedures).

V. THE FIRST AND THIRD QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI ARE NOT PRESENTED BY THE FACTS OF THIS CASE.

With respect to the first question presented in the petition (concerning the standards for establishing a prima facie case of disparate impact) and the third question presented (concerning the application of disparate impact analysis to multicomponent selection practices), amici rely on respondents' brief. However, as we briefly explain, it appears that neither question is actually presented by the record before the Court.

As to the first question, petitioners argue that the Ninth Circuit's reliance upon statistics comparing cannery with noncannery positions is erroneous because there was no showing of an internal promotion system. Such statistics would be marshalled as evidence of promotional discrimination where an employer maintains

an internal promotion system in which lower level employees are the selection pool for upper level positions. See, e.g., Paxton v. Union National Bank, 688 F.2d 552, 564 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983). However, petitioners err in arguing that comparative statistics can be used only where there are internal promotions.

In this case, plaintiffs challenged, on both disparate impact and disparate treatment grounds, several specific hiring practices -- nepotism, subjectively evaluated selection criteria, separate hiring channels and word of mouth recruitment, a rehire preference, and a series of related practices involving race labeling, housing and messing. Plaintiffs presented independent statistical or other evidence that each of these specific practices had a significant adverse impact

on minority class members. Except for the rehire preference, the district court erroneously failed to consider the challenge under, or erred in applying, the disparate impact standard. See App. Cert. VI-19-VI-39; see also, Brief for the United States as Amicus Curiae at 20 ("The district court did not apply disparate impact analysis to the selection of noncannery workers generally, and there is therefore no finding that respondents' statistics did not make out a prima facie case under the disparate impact model"). The Ninth Circuit, therefore, properly remanded these issues to the district court.

The comparative statistics to which petitioners object were not relied upon as the sole evidence of the disparate impact of the challenged practices. The Ninth Circuit upheld the use of these

comparative statistics on the limited ground that "such statistics can serve to demonstrate the consequences of discriminatory practices which have already been independently established." App. Cert. VI-16. The comparative statistics, which do not appear strictly to be necessary to establish the disparate impact of each of the challenged practices, were presented as additional evidence that "some practice or combination of practices has caused the distribution of employees by race." App. Cert. VI-18.[19]

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[19]On the facts of this case, the Ninth Circuit correctly considered these statistics given the difficulty of establishing the available labor pool for the migrant and seasonal noncannery jobs in question, the arbitrary nature of the qualifications actually imposed for the noncannery jobs, and the fact that minority cannery workers were apparently qualified and available. The Ninth Circuit's unwillingness to rely on petitioners' generalized census data, and its reliance instead on more probative

As to the third question presented, petitioners argue that only "cumulative" evidence of the impact of several employment practices was presented. For the reasons stated above, we believe petitioners have misstated the record: Specific, identified hiring practices were challenged, and both practice-specific evidence and cumulative statistical evidence were presented below.

However, if this were a case in which a plaintiff challenged a multicomponent employment practice, the adequacy of cumulative evidence of disparate impact would depend upon particular factual circumstances. If the practice consisted of a series of sequential steps, e.g.,

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practice-specific evidence of disparate impact coupled with respondents' comparative statistics, are understandable and proper in view of the record in this case.

Teal, 457 U.S. at 443-44 (a qualifying written examination followed by consideration of other criteria), the plaintiff might attack one or more steps, or the plaintiff might attack the process as a whole. While a plaintiff challenging one or more discrete steps in the process typically introduces evidence of the disparate impact of each challenged step, a plaintiff challenging the process as a whole is not required to introduce such evidence.[20]

Moreover, a plaintiff challenging a multicomponent practice in which the employer combines consideration of several factors, e.g., Teal, 457 U.S. at 444 (employees promoted from a list of

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[20]See Green v. USX Corp., 843 F.2d 1511, 1524 (3rd Cir. 1988); Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984). See also, 29 C.F.R. §1607.16Q (Uniform Guidelines apply to any "measure [or] combination of measures").

successful test takers, based on an amalgam of work performance, recommendations and seniority), should not be required to identify and present specific disparate impact evidence as to each factor. Title VII does not prohibit discrete discriminatory criteria in the abstract, but as "actually applied." Albemarle, 422 U.S. at 433. If an employer uses an amalgam of factors as a practice, and that practice has a disparate impact, the plaintiff should not be required to go through the academic exercise of disentangling the factors in order to ascertain which particular factors caused the disparate impact of the practice as a whole. That burden should be borne by the employer.[21]

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[21]It is the employer who presumably has an interest in distinguishing among several factors that produce a disparate impact in order to isolate the discriminatory factors and to save the

Amici respectfully submit that the first and third questions presented in the petition for certiorari are not actually presented by the facts of this case, and that those questions should not be decided on this record.

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rest. It is the employer who may wish to conduct separate validation studies of the factors. Moreover, it is the employer who has the obligation under administrative guidelines to "maintain and have available records or other information showing which components [of a multicomponent selection procedure] have an adverse impact." Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.15(a)(2) (employers with 100 or more employees should maintain component data if overall practice has adverse impact or for two years after impact eliminated). See Brief for the United States as Amicus Curiae at 22 ("certainly if [multiple] factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, the decision may be challenged (and defended) as a whole").

CONCLUSION

The order of the Ninth Circuit remanding the case for further proceedings should be affirmed.

Respectfully Submitted,

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