(3)

No. 87-1387

In the Supreme Court of the United States

OCTOBER TERM, 1988

WARDS COVE PACKING COMPANY, INC., ET AL., PETITIONERS

v.

FRANK ATONIO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. In this discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, whether the court of appeals correctly held that respondent-employees' statistical evidence, which showed a marked disparity between the proportion of minorities in the jobs at issue in the case and the proportion of minorities in other jobs of the same employers, made out a prima facie case of disparate impact in selection for the jobs at issue.

2. Whether the court of appeals improperly allocated the burdens of proof and engaged in impermissible factfinding in applying disparate impact analysis to the challenged employment practices.

3. Whether disparate impact analysis allows employees to challenge the cumulative effect of a wide range of alleged employment practices.

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the meaning and application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Attorney General has significant Title VII enforcement responsibilities. The United States, as the nation's largest employer, is also subject to Title VII requirements.

STATEMENT

1. Petitioners Wards Cove Packing Company and Castle & Cooke, Inc., operate salmon canneries in Alaska (Pet. App. I4). Most of the canneries are located in remote, widely separated, and sparsely populated areas of Alaska (*id.* at I16-I17, I32). They operate only during the salmon run for several months each summer: they lie vacant during the winter and are reopened and prepared for operation in May and June (the preseason) (*id.* at III3-III4). Accordingly, petitioners hire most of their employees from areas distant from the canneries, and the canneries furnish on-site housing and dining for the employees (*id.* at I17, I41, III8).

Petitioners' workforce is to a large extent racially stratified. The workforce as a whole has been approximately 43% minority (principally, Filipino and Alaska Native) since 1970 (Br. in Opp. 1), and that figure is representative of the entire Alaska salmon canning industry (*ibid.*). Minorities, however, are heavily concentrated in the lower paying cannery-line jobs and, at some canneries, in certain laborer positions (Pet. 4-5; Br. in Opp. 1-2). The higher paying noncannery jobs, including clerical, administrative, machinist, and other positions, are predominantly white (Pet. 4; Br. in Opp. 1-2).[1]

Respondents are a class of former and current nonwhite cannery employees of petitioners (Pet. App. I2). In 1974, they brought this suit under Title VII alleging that petitioners discriminate on the basis of race in hiring, firing, paying, promoting, housing, and dining at the canneries (*ibid.*).[2] Pointing principally, though not only, to the disproportionate concentration of minorities in the cannery jobs, they sought to establish class-wide and individual liability both on disparate treatment and disparate impact theories.

2. After trial, the district court made detailed findings of fact on each of the many challenged practices and entered judgment for petitioners (Pet. App. I1-I130).

a. Describing petitioners' employee-selection practices, the district court found that many jobs are filled pursuant to rehire-preference clauses of union contracts. Those clauses operate like seniority provisions, so that employees who have satisfactorily worked in particular jobs in a prior season are rehired for the same jobs in the new season (Pet. App. I29, I35). The

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[1] At issue in this case are the jobs other than those on the cannery line (noncannery jobs) (Pet. 4; Pet. App. I28). Respondents note some variation in the minority percentage in various noncannery jobs (Br. in Opp. 1-2), while petitioners state that the overall percentage of minorities in noncannery jobs at the particular canneries at issue for the period at issue in the district court was 21% (Pet. 4). There is no dispute that minorities are heavily concentrated in the cannery jobs.

[2] Suit was originally brought against Columbia Wards Fisheries as well as petitioners, but the claims against that defendant were dismissed (see Pet. App. III13) and are not at issue in this Court.

court also found that, while some workers are hired from the areas surrounding the canneries, the remainder are hired at petitioners' home offices in Washington and Oregon and transported to the canneries when their jobs begin (*id.* at I30). Notwithstanding those common elements, the channels for selection of cannery and noncannery workers are generally distinct. In particular, except for local Alaska residents and persons with a rehire preference, cannery jobs are filled through the dispatch procedure of Local 37 of the International Longshoremen's Workers Union (Local 37) (*id.* at I32-I33). By contrast, with the rehire-preference exception, noncannery jobs are filled by applications submitted during the fall and winter preceding the upcoming season (*id.* at I30-I31).[3] Petitioners generally do not post notices at the canneries for any jobs (*id.* at I29).

Those selection mechanisms largely determine the workforce, because petitioners' policy and practice have been to hire from outside its current workforce and not to promote employees from one position or department to another (Pet. App. I33-I34, I39). "Employees and non-employees are free to apply for any job for which they feel qualified," however, and "[s]imilarly situated applicants are treated equally" (*id.* at I33). Nevertheless, most applicants for noncannery positions are white, and few nonwhites have applied for those positions (*id.* at I31-I32).[4] By contrast, Local 37 "provides an oversupply of nonwhite cannery workers for all [but one of petitioners' canneries]" (*id.* at I35). The court found that most cannery workers are nonwhite and that that is so because Local 37 is the primary source of such workers and Local 37 is predominantly Filipino in its membership (*id.* at I36).[5]

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[3] Petitioners receive far more applications than there are vacancies, and they generally do not consider applications or oral inquiries made during or just after the preceding season (Pet. App. I31-I32).

[4] The court found (Pet. App. I40): "There has been a general lack of interest by cannery workers in applying for noncannery workers jobs."

[5] Nonunion members may be hired "although they must join the union" (Pet. App. I33). At the one cannery where Local 37 has not asserted jurisdictional rights and hence does not supply cannery workers, the minority percentage of the cannery workforce is "significantly less" than at the other

The court found that the job qualifications for the cannery and noncannery jobs are generally different. All but certain designated noncannery jobs require skills and experience, and some require off-season or preseason availability (Pet. App. I30, I35-I36, I55-I76).[6] Cannery jobs generally require unskilled labor (*e.g.*, *id.* at I37), and none requires preseason availability (*id.* at I40-I41). In contrast, many of the noncannery jobs require skills that the unskilled cannery workers do not possess and cannot readily acquire on the job during the short season (*id.* at I35, I40, I47). Petitioners do not provide on-the-job training (*id.* at I45), and they try to hire experienced persons for all jobs (*id.* at I46). The court stated that cannery workers and laborers do not make up a labor pool for other jobs (*id.* at I39).

Analyzing the relevance of respondents' statistics to determining the labor pool, the court found that the available labor supply for cannery, laborer, and other unskilled jobs is 90% white and that Filipinos make up only about 1% of the population and labor force of Alaska, California, and the Pacific Northwest (Pet. App. I36-I37). That nonwhites fill so large a proportion of cannery jobs thus means that they are greatly overrepresented in those jobs (*id.* at I37). For that reason, although 48% of the employees in the Alaska salmon canning industry *as a whole* are nonwhite, the court declined to assign much weight to that fact, explaining that "[t]he institutional factor of Local 37's overrepresentation of non-whites accounts for this statistic" (*id.* at I42). Looking particularly at the noncannery jobs, the court

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canneries (*id.* at I37). Similarly, Alaska Natives make up a high proportion of the resident cannery workers in the canneries located in communities where there are substantial numbers of Alaska Natives and a significantly lower proportion at the one cannery where there are not such numbers in the community (*id.* at I37-I38).

[6] The court listed 16 supervising jobs that require management abilities and extensive experience to perform successfully (Pet. App. I55-I56) and 27 jobs that require substantial skill and experience to perform successfully (*id.* at I57-I58). It also set forth, for numerous jobs, detailed lists of qualifications that are "reasonably required for successful performance" (*id.* at I58, I58-I75). Finally, the court identified certain jobs that are the only noncannery jobs that are not skilled positions (*id.* at I75-I76; see also *id.* at II2-II3 (correcting list)).

made no finding of a general underrepresentation of nonwhites in those jobs. To the contrary, the court listed (*id.* at I43-I45) numerous noncannery jobs in which it found, by reference to the relevant labor supply, that either nonwhites were overrepresented or whites were not overrepresented by a statistically significant amount.[7]

b. Based on those factual findings, the district court rejected respondents' challenges. After stating that the burden of proof shifts to the employer once employees have made out a prima facie case under the disparate impact theory of discrimination (Pet. App. I97-I98), the court concluded that disparate impact analysis applies only to objective practices, not to subjective employer decisionmaking (*id.* at I99-I102). In this case, the court stated, disparate impact analysis applies to petitioners' English-language requirement for many jobs and to the "nepotism" that allegedly influenced the selection of employees for some jobs (*id.* at I102-I105). The court, however, found no basis for liability in either area.[8] Although the court did not expressly find disparate impact analysis applicable to other practices, it examined the validity of the rehire preference without regard to the existence of discriminatory intent, finding (*id.* at

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[7] The court also found some use of racial and ethnic labeling at the canneries (Pet. App. I76-I80); recounted individual instances of alleged discrimination, without making findings on whether there was discrimination (*id.* at I84-I94); found that petitioners' dining practices originated in petitioners' deference to the leadership of Local 37 (*id.* at I80-I81); and found that petitioners' housing practices, which had segregative effects, were based on workers' department and arrival time, not on race (*id.* at I81-I84).

[8] As to the language requirement, the court found that petitioners had proved that that requirement was justified by business necessity (Pet. App. I102-I103). As to the "nepotism," the court found that, although "[r]elatives of whites and particular[] nonwhites appear in high incidence at the canneries" (*id.* at I104-I105), those persons were highly qualified and "were chosen because of their qualifications." In addition, the court found that respondents' statistics failed to account for post-hiring marriages (*id.* at I105). Accordingly, the court concluded, "the nepotism which is present in the at-issue jobs does not exist because of a 'preference' for relatives" (*ibid.*). The court also noted that "numerous white persons who 'knew' someone were not hired due to inexperience" (*id.* at I122).

I121-I122) that the preference was justified by business necessity, given the importance of experience in work involving a short season, perishable foods, susceptibility of the product to lethal diseases like botulism, and other dangers.[9]

In analyzing respondents' other claims under the disparate treatment theory of Title VII liability, the court first reiterated that all noncannery jobs except certain designated ones were skilled and that even some of the exceptions required that the employees be available prior to the onset of the canning season (Pet. App. I107-I109). The court then discussed the statistical evidence that respondents introduced in an effort to make out a prima facie case. It found, first, that respondents were incorrect in arguing that the historical percentage of Filipinos and Alaska Natives hired in the Alaska salmon canning industry as a whole represented the available labor pool, because institutional factors (notably, the use of Local 37) "greatly distort the racial composition of the workforce" and "Alaskan Natives and Filipinos, combined, represent only about one percent of the population of Alaska, Washington, and Oregon from which state[s] [petitioners] draw their workforce" (*id.* at I110-I111). Second, the court found that the high percentage of nonwhites in the cannery jobs was sufficient to make out a prima facie case of disparate treatment in certain unskilled noncannery jobs (*id.*

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[9] The court found (Pet. App. I126-I127) that petitioners' housing practices would survive disparate impact analysis as well as disparate treatment analysis. It explained that petitioners "established that workers arriving preseason and staying post-season required better insulated housing," that "workers are hous[ed] departmentally because the various departments worked the same shifts" (*id.* at I125), and that "[i]t is not efficient or economically feasible to open all bunkhouses perseason to assign workers arriving preseason to different housing with a result of maintaining more housing than necessary for longer periods of time" (*id.* at I126-I127). The court similarly found (*id.* at I127-I129) that petitioners' dining hall practices would survive disparate impact (as well as disparate treatment) scrutiny, because the creation of dining arrangements along essentially racial lines was the responsibility of Local 37, which asked for and received a separate mess and culinary crew for its members (white members included). As the court explained, the cooks "simply acceded to the wishes of the older workers who preferred the traditional food that was served" (*id.* at I129).

at I111-I112). But the court then found that respondents had articulated legitimate nondiscriminatory reasons for the disparity between minority representation in the cannery jobs and in unskilled noncannery jobs—chiefly, the lack of timely and formal applications from nonwhites for those jobs. The court found that respondents had not shown that those reasons were pretexts (*id.* at I112). Third, as to the skilled noncannery jobs, the court found that the statistics concerning the percentage of minorities in the cannery jobs "have little probative value" (*id.* at I114). The court explained that cannery workers do not constitute the proper labor force because they do not possess the skills and preseason availability required for the skilled noncannery jobs (*id.* at I113).[10]

Although the district court found no prima facie case of a pattern or practice of discriminatory treatment in hiring, promoting, paying, or firing with respect to the skilled noncannery jobs based on respondents' statistics alone, the court nevertheless concluded that respondents had "raised a marginal inference of discriminatory treatment" based on the collective effect of the statistical evidence, the nepotism evidence, and individual instances of claimed discrimination (none of which the court found separately to have much probative value) (Pet. App. I118-I119).[11] The court found, however, that petitioners had met their burden of producing evidence that their hiring, promoting, paying, and firing practices were motivated by reasons other than race. The court also found that respondents

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[10] The court observed that respondents "were general[l]y aware of [the] important qualification [of preseason availability]" and that "this is not a promotion-from-within case" (Pet. App. I114).

[11] The court pointed to the evidence of individual instances of discrimination, but it found that, with one exception, all of the applicants either had no preseason availability (as far as the evidence showed) or made only oral inquiries, which "are not treated as applications in the cannery industry[, as respondents] appeared to have understood" (Pet. App. I115-I116). The court noted some evidence that some respondents were deterred from applying for better jobs. Although the court found that evidence insufficient to establish that petitioners' practices caused the deterrence, it observed that a prima facie case did not require such proof (*id.* at I116-I118).

had not shown that petitioners' asserted motivations were pretextual or that petitioners had acted as a result of racial animus (*id.* at I119-I124). Thus, the court found that petitioners' statistics were significantly more probative than respondents'. In particular, it found that the census data, which showed a 90% white unskilled labor force and only 1% Filipino and Alaska Native population in the states from which petitioners hired employees, provided the best evidence of the available labor pool (*id.* at I119-I120).[12] In addition, few respondents made timely and proper applications for jobs.[13] As for the hiring officials' decisions themselves, the court found that "regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job related criteria" (*id.* at I122).[14]

3. A three-judge panel of the court of appeals affirmed (Pet. App. III1-III56). With respect to disparate treatment, it found that the relevant district court factual findings were not clearly erroneous and were sufficient to support the finding that none of the challenged practices resulted in disparate treatment because of race (*id.* at III20-III43). With respect to disparate impact, the court of appeals ruled that the district court had correctly declined to apply that theory of Title VII liability to the various subjective employment practices challenged by respondents (*id.* at III43-III54).[15]

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[12] The court also criticized respondents' statistics for not controlling for the (substantial) group of rehires, because the rehire preference was justified by business necessity, and because past discriminatory employment practices had not been established in this case (Pet. App. I120-I122).

[13] While some made oral inquiries about jobs, those inquiries did not constitute applications for jobs and "were generally made of persons without hiring authority." The court further found that applications were typically made too late in the season for preseason jobs or by applicants who were not available for those jobs. Pet. App. I123.

[14] The court found, too, that "whites hired were paid no more than nonwhites" (Pet. App. I123), that it was "unable to find a practice of deterrence," and that various instances of race labeling were "not persuasive evidence of discriminatory intent" (*ibid.*).

[15] The court rejected the disparate impact challenge to the alleged practice of nepotism, explaining that the district court had not erred in finding "that no

4. The court of appeals granted rehearing en banc and vacated the initial panel opinion (Pet. App. IV1-IV2). The en banc court held that disparate impact analysis applies to subjective employment practices "provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class" (*id.* at V16; see *id.* at V5). The court also explained how such analysis should work and remanded the case to the panel for application of the standards.

To establish a prima facie case of discrimination under the disparate impact theory, a plaintiff "must (1) show a significant disparate impact on a protected class, (2) identify specific employment practices or selection criteria and (3) show the causal relationship between the identified practices and the impact" (Pet. App. V19-V20).[16] "Once the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer" (*id.* at V35). Although the employer in any Title VII case may refute the statistical evidence, the court of appeals held that the employer's burden in a disparate impact case is different from its burden in a disparate treatment case. Whereas in the latter the employer must merely articulate a nondiscriminatory reason for the disparity, and the plaintiff retains the burden of persuasion, in the former the employer "must prove the job relatedness or business necessity of the practice" that is challenged, and the burden of persuasion on that issue is shifted from the plaintiff to the employer. *Id.* at V35-V36. Meeting that burden "may be

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pattern or practice of nepotism existed because there was no preference for relatives" (Pet. App. III56). The district court's rejection of the challenge to the English-language requirement was not challenged on appeal (*id.* at III46 n.5). Without elaboration, the court of appeals found the challenges concerning the rehire preference and termination of Alaska Natives to be without merit (*id.* at III56).

[16] See also Pet. App. V34-V35 ("the plaintiffs must prove that a specific business practice has a 'significantly discriminatory impact,' " citing *Connecticut* v. *Teal*, 457 U.S. 440, 446 (1982)); *id.* at V35 ("plaintiffs' prima facie case consists of a showing of significant disparate impact on a protected class, caused by specific, identified, employment practices or selection criteria").

an arduous task," the court noted (Pet. App. V38 (internal quotation marks omitted)), but the burden does not shift "until the plaintiff has shown a causal connection between the challenged practices and the impact on a protected class" (*ibid.*).[17]

5. On remand, the panel elaborated on the disparate impact standards set forth by the en banc court, applied those standards to respondents' allegations, and remanded the case to the district court (Pet. App. VII-VI44). With respect to the burden on the employer once a prima facie case has been made out, the panel explained that the burden in cases involving selection criteria may be met "by demonstrating that the selection criteria applied are essential to job safety or efficiency or correlated with success on the job (*id.* at VI6-VI7 (citations omitted)).[18] It also explained that, once the employer proves the business necessity of the challenged practices, the employees may "demonstrate that other employment practices or selection devices

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[17] Judge Sneed, joined by three other judges, concurred separately (Pet. App. V40-V75). After explaining that the causation requirement articulated by the majority demands that there be a significant number of members of the protected group at issue who are qualified for the positions at issue (*id.* at V55-V56), he argued that disparate impact analysis should not apply to all types of employment practices. It should apply only when the plaintiff claims that "the employer has articulated an unnecessary practice that makes the plaintiff's true qualifications irrelevant"—*i.e.*, that allows the employer not to ascertain the plaintiff's true qualifications (*id.* at V59, V60). By contrast, Judge Sneed argued that disparate treatment analysis should apply when the plaintiff claims that the employer, knowing the plaintiff's qualifications, ignores them because of the plaintiff's membership in a protected group (*id.* at V59). Applying that distinction, Judge Sneed concluded that disparate impact analysis was applicable to the use of separate hiring channels and word-of-mouth recruitment for the noncannery jobs and to the rehire preference, which allowed petitioners to ignore respondents' true qualifications, but not to the housing and dining practices, which did not allow rejection of prospective minority employees without considering their qualifications (*id.* at V65-V70, V72, V73-V75).

[18] When employment practices other than selection devices are at issue, the court continued, the practice must be supported by "more than a business purpose"; it must " 'substantially promote the proficient operation of the business' " (Pet. App. V17-V18, quoting *Chrisner* v. *Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981)).

could serve the employer's needs with a lesser impact on the protected class" (*id.* at VI9).

The court began its application of those standards by concluding that respondents' statistical showing of a disparity between the racial composition of the cannery jobs and that of the noncannery jobs was "sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs" (Pet. App. VI18). In so concluding, the court rejected the district court's finding that the same statistics were not probative for skilled noncannery positions because they did not reflect the pool of persons who had the required skills and were available for preseason work (*id.* at VI17). The court stated that that finding "was error because when job qualifications are themselves at issue, the burden is on the employer to prove that there are no qualified minority people for the at-issue jobs" and that "it is unrealistic to expect statistics to be calibrated to reflect preseason availability when the preseason starts only one month earlier than the season" (*ibid.*).

Reviewing the challenged employment practices, the court stated that, if there was nepotism, that is by definition a policy of preferring relatives, and such a policy would have to be justified by business necessity (Pet. App. VI20-VI22).[19] The court next observed that, while the district court had found that there were in fact objective criteria for noncannery jobs, it had not found that those criteria "were actually applied by those who made hiring decisions"; as the court of appeals construed them, the district court's findings showed only that skill and experience were the general qualifications looked for by the hiring officers (*id.* at VI22-VI23). As to respondents' challenge to the

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[19] We read the court of appeals' somewhat opaque discussion on this point to leave open on remand to the district court the question whether petitioners had a policy of preferring relatives to others. The court of appeals cited evidence showing that, if the incidence of relatives in the workforce is the result of such a policy, the policy has a significantly disparate impact on nonwhites in certain departments (Pet. App. VI21), because petitioners' hiring officers are predominantly white.

subjective hiring process, therefore, the court of appeals ruled that the district court must determine whether the identified job qualifications "were actually applied in a non-discriminatory manner" (*id.* at VI25), bearing in mind that "the burden is on the employer to prove the lack of qualified people in the non-white group" (*id.* at VI26). In addition, the court ruled, the district court must make findings as to the job-relatedness of the criteria actually applied (*id.* at VI27). With respect to petitioners' use of word-of-mouth recruitment for the noncannery jobs rather than the hiring channels used for cannery jobs, the court of appeals found that there was some evidence—and that logic suggested—that some of the cannery workers had the skills for the noncannery jobs; therefore, the court held, petitioners must prove the business necessity of that hiring practice (*id.* at VI27-VI31).[20] The court further concluded that the district court's finding of business necessity for the rehire preference was supported by the evidence (*id.* at VI32-VI33).[21]

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as applied to employee selection procedures, makes it unlawful for covered employers not to hire an individual "because of such individual's

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[20] The court also stated that there was insufficient evidence to support the district court's finding that the people available through the channels for cannery-worker hiring (Local 37 and local Alaska populations) were not available for the preseason (Pet. App. VI31-VI32).

[21] With respect to the challenged practices other than selection criteria, the court ruled that the district court must determine whether the race labeling that was found "operates as a headwind to minority advancement" (Pet. App. VI33), that the efficiency justification for the housing practices was not sufficient to sustain a finding of business necessity unless "the companies substantiate that these measures are clearly necessary to promote the proficient operation of the business" (*id.* at VI37), that the dining practices must be analyzed anew under the disparate impact theory (*id.* at VI36), that individuals' claims (and the defense that the individuals failed to file timely formal applications) must be evaluated after the district court completes its disparate impact analysis of petitioners' process for selecting noncannery workers (*id.* at VI39-VI43).

race" (42 U.S.C. 2000e-2(a)(1) and (2)).[22] Intentional discrimination based on race is the primary way in which an employer can act unlawfully "because of" race. As the legislative history of the 1964 Act makes clear and as this Court has said, "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters* v. *United States,* 431 U.S. 324, 335 n.15 (1977).

Based on the assumption that certain other exclusionary practices are "functionally equivalent to intentional discrimination" (*Watson* v. *Fort Worth Bank & Trust,* No. 86-6139 (June 29, 1988), slip op. 6), this Court in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), identified a second way in which an employer's nonhiring decision might be found to be "because of" race. Under that theory, known as the "disparate impact" theory, a selection practice can be found unlawful even in the absence of a subjective intent to discriminate, if the practice has a significantly disproportionate impact on a protected group and has no "manifest relationship to the employment in question" (*id.* at 432). See *Connecticut* v. *Teal,* 457 U.S. 440, 446-447 (1982); *New York Transit Authority* v. *Beazer,* 440 U.S. 568, 584, 587 (1979); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975). Once the challenged selection practice is identified, the disparate impact theory does not focus on the historical fact of what the employer intended, as the disparate treatment theory does; rather, it aims at removing "artificial, arbitrary, and unnecessary barriers" to employment (*Griggs,* 401 U.S. at 431) by

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[22] Petitioners have challenged the court of appeals' decisions in this Court only insofar as those decisions concern employee selection procedures. The housing, dining, and other nonselection employment practices are not separately at issue in this Court. Accordingly, we limit our discussion of disparate impact analysis to selection devices. We note that this Court has not applied disparate impact analysis to nonselection employment practices and that, if such application is proper at all, it would require, at a minimum, reformulation of the standards that have been articulated to date.

Because this case involves only racial discrimination, we limit our discussion to "race," although the statute prohibits hiring decisions because of "race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2(a)(1) and (2)).

focusing on the racial impact and the business justification for the device.[23]

This Court's decisions have established a three-part structure for analysis of disparate impact claims: the first stage requires proof of disparate impact caused by an identified selection device (the prima facie case); the second requires a showing of job-relatedness by the employer; the third provides the plaintiff with an opportunity to demonstrate that there are effective alternatives to the challenged practice that have a less severe racial impact. That structure reflects the fact that Title VII was not designed to force employers to justify every selection practice. Hence, the most fundamental and well-established element of the structure is the principle that judicial inquiry into business justification in a disparate impact case is not called for until the complaining party proves a disparate impact that is caused by the challenged selection practice. See *Teal*, 457 U.S. at 446-447; *Albemarle Paper Co.*, 422 U.S. at 425 (business justification is demanded "only after the complaining party or class has made out a prima facie case of discrimination"). The precise contours of the other elements of disparate impact analysis are less well settled, as this Court's decision in *Watson* shows.

Petitioners' first question involves the well-established requirements of a prima facie case. The court of appeals ruled that respondents' statistics were sufficient to carry their burden of proving a disparate impact in petitioners' selection of employees for noncannery jobs. That conclusion is incorrect:

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[23] The meaning given by the disparate impact theory to the statutory concept, "because of" race, is different from the meaning given by the disparate treatment theory. Whereas the latter asks whether race actually motivated the nonhiring decision, the former makes an inquiry more analogous to the statistical inquiry of what factors account for, or explain, a particular phenomenon. Moreover, rather than looking at all possible nondiscriminatory explanations, disparate impact theory narrows the focus to possible business justifications. If a selection device is found to have a disparate impact on a particular group, and no explanation for the selection device (and hence the employer's hiring decisions) can be found among sound business justifications, the only explanation remaining is race, and the nonhiring, in the terms of the statute, is therefore "because of" race.

there was no basis for the court's finding that petitioners' selection practices had a disparate impact on minorities within the pool of applicants, or persons qualified, for those jobs. Indeed, the district court's findings strongly suggest that there was no such disparate impact. Most notably, the intra-workforce stratification shown by respondents (*i.e.*, the statistical disparity between the number of minorities in the cannery jobs and the number in the noncannery jobs) is explained by the use of Local 37 for hiring in the cannery jobs; and because minorities are for that reason *overrepresented* in the cannery jobs, the stratification does not suggest that exclusionary practices cause any underrepresentation in the noncannery jobs that are at issue.

Petitioners' other questions are broad enough to encompass a challenge to the court of appeals' definition of the structure of proof in a disparate impact case. We address four aspects of that structure that the Court could appropriately address to clarify the proper functioning of disparate impact analysis. First, a plaintiff who challenges a nonselection decision must, as part of the prima facie case, identify the actual mechanism used for the particular selection decision at issue. It is that selection mechanism that is the proper subject of disparate impact analysis when the plaintiff has alleged discrimination in hiring. The court should not focus on various practices that are not shown to have been part of the hiring decision, let alone practices that were concededly not part of the selection mechanism at all. Second, after a prima facie case has been made out, the question should be whether legitimate business goals are significantly served by the use of the selection device at issue. Third, the employer should have the burden of production on that issue, but not the burden of persuasion. Fourth, the plaintiff may prevail either by disproving the employer's assertion that the selection device significantly serves legitimate business goals or by showing that alternatives exist that equally serve those goals but that have a lesser racial impact. In short, we urge the Court to adopt a framework based on the plurality opinion in *Watson*.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY HELD THAT RESPONDENTS' STATISTICS MADE OUT A PRIMA FACIE CASE OF DISPARATE IMPACT

A. As the en banc court of appeals recognized (Pet. App. V19-V20), a prima facie case of disparate impact in selection for particular jobs requires that members of a protected group demonstrate that the selection mechanism caused a disparate impact on that group. That requires the plaintiffs to "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs * * * because of their membership in a protected group." *Watson*, slip op. 14 (plurality opinion); see also *id.* at 2 n.2 (Blackmun, J., concurring in the judgment). Where, as here, minorities put forth statistics to show underrepresentation in the jobs at issue by comparing the number of minorities actually selected to the number of minorities in some larger pool, the definition of the pool must take account of the qualifications (including availability and interest) for the jobs at issue. A pool that is defined without reference to such qualifications cannot provide the basis for a prima facie case, because it does not support the inference that nonhiring of minorities was "because of" race rather than because of lack of qualifications.

Because the strength of statistical proof is subject to infinite gradations, the question whether particular statistics are "sufficiently substantial that they raise * * * an inference of causation" (*Watson*, slip op. 14 (plurality opinion)) calls for-case-by-case analysis. *Id.* at 14-15 n.3. But the common theme reflected in this Court's decisions is that the comparison must be made by reference to a pool of individuals who are in the relevant labor market and are at least minimally qualified for the jobs at issue. *Id.* at 16 ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value"); *Hazelwoood School Dist.* v. *United States*, 433 U.S. 299, 308 (1977) (footnote omitted) ("proper comparison was between the racial composition of [the employer's] teaching staff and the racial composition of the

qualified public school teacher population in the relevant labor market"); see *Beazer*, 440 U.S. at 586 n.29 (citation omitted) (" 'qualified job applicants' "); *Teamsters*, 431 U.S. at 338-340 n.20 (same); *Dothard*, 433 U.S. at 330 ("otherwise qualified people").[24] A comparison with a pool that is too small (because it excludes substantial parts of the qualified labor pool) or too large (because it includes a substantial number of unqualified persons) does not support an inference that there are barriers to employment opportunities for minorities that are not present for others.

Typically, the pool of actual applicants—or, better, of qualified applicants—provides the proper benchmark for measuring disparate impact. See, *e.g.*, *Beazer*, 440 U.S. at 585 (rejecting statistics because they told "nothing about the class of otherwise-qualified applicants and employees" who are members of the protected class); *Dothard*, 433 U.S. at 329; *Albemarle Paper Co.*, 422 U.S. at 425; *Griggs*, 401 U.S. at 426. See also *Hazelwood School Dist.*, 433 U.S. at 308 n.13 (applicant flow data would be "very relevant" and employer should be permitted to introduce such data).[25] In some cases, however,

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[24] See *Metrocare* v. *Washington Metro. Area Transit Authority*, 679 F.2d 922, 930 (D.C. Cir. 1982) ("statistics must compare the percentage of blacks hired for given jobs with the percentage of blacks qualified for those positions"); *Lewis* v. *NLRB*, 750 F.2d 1266, 1275 (5th Cir. 1985); *Grano* v. *Dep't of Development*, 637 F.2d 1073, 1078 (6th Cir. 1980); *Piva* v. *Xerox Corp.*, 654 F.2d 591, 595 (9th Cir. 1981).

[25] See *Hammon* v. *Barry*, 813 F.2d 412, 427 n 31 (D.C. Cir. 1987), cert. denied, No. 87-1150 (May 31, 1988); *United States* v. *County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *Hester* v. *Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974); *Rowe* v. *Cleveland Pneumatic Co. Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982); *Mister* v. *Illinois Cent. Gulf R.R.*, 832 F.2d 1427, 1435 (7th Cir. 1987); *EEOC* v. *Rath Packing Co.*, 787 F.2d 318, 337 (8th Cir. 1986), cert. denied, No. 86-67 (Oct. 14, 1986); *Moore* v. *Hughes Helicopters, Inc.*, 708 F.2d 475, 483 (9th Cir. 1983).

Adverse impact under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, is determined primarily by reference to applicant pools. See 44 Fed. Reg. 11998 (1979) (questions and answers on the meaning of the Uniform Guidelines).

the applicant pool may not be good evidence of the relevant qualified labor pool, because, for example, the plaintiff can prove that applications were deterred by the employer's conduct. See *Dothard*, 433 U.S. at 330 (no need to use applicant pool where "otherwise qualified people might be discouraged from applying" by the height and weight requirements); *Teamsters*, 431 U.S. at 365-367; *Reynolds* v. *Sheet Metal Workers, Local 102*, 702 F.2d 221, 225 (D.C. Cir. 1981); *Wheeler* v. *City of Columbus*, 686 F.2d 1144, 1152 (5th Cir. 1982); *Eubanks* v. *Pickens-Bond Constr. Co.*, 635 F.2d 1341, 1350 n.10 (8th Cir. 1980).[26] Even general population statistics may be sufficient evidence for particular jobs, but when that is so, it is because those statistics "accurately reflect the pool of qualified job applicants" (*Teamsters*, 431 U.S. at 339-340 n.20). "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value" (*Hazelwood School Dist.*, 433 U.S. at 308 n.13). Cf. 42 U.S.C. 2000e-2(j).

B. The court of appeals in this case was wholly unjustified in concluding (Pet. App. VI18) that respondents' statistics sufficed to meet their burden of making out of a prima facie case of disparate impact.[27] Those statistics did not compare the number of selected minorities to the number that applied for the noncannery jobs. And the court of appeals did not have before it

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[26] Similarly, if an employer has made special recruiting efforts to increase the number of applicants from a particular protected group, the applicant pool may not represent the qualified labor pool from that group, and a disparate applicant selection rate may not show a disparate impact on the qualified labor pool.

[27] The district court was less than clear about precisely what decision rules petitioners applied in selecting individuals for noncannery jobs—*e.g.*, whether there was in fact a preference for relatives, and whether objective criteria were actually applied by the various hiring officers. But any uncertainties on that score are irrelevant to evaluating the court of appeals' finding of a prima facie case of disparate impact in the selection of the noncannery workforce as a whole, which was based on the proportion of minorities in the entire pool of persons selected for noncannery positions, whatever the selection device employed.

any finding that a significant number of minorities had been deterred from applying or that, for any other reason, applicant pool data were unreliable.[28]

The court of appeals relied only on comparisons between, on the one hand, the number of minorities in petitioners' noncannery jobs and, on the other hand, the number in petitioners' cannery jobs, the number in the Alaska salmon canning industry as a whole, and the number in petitioners' workforce as a whole. Because cannery workers made up a large portion of the latter two pools, the sufficiency of the evidence turns on whether the pool of cannery workers fairly represented the relevant labor pool for various noncannery jobs. The court of appeals had before it no findings sufficient to conclude that it did.[29]

In particular, the court of appeals had before it no findings, and no basis to believe, that cannery workers made up more than a small portion of the entire relevant labor pool for unskilled potential noncannery positions, or that the cannery workers were representative of that pool. Nor did the court have before it any findings, or any basis to believe, that cannery workers were even part of the relevant qualified labor pool for skilled positions. To the contrary, the district court found that respondents' statistics had "little probative value" for the skilled jobs (Pet. App. I114) and that petitioners' statistics had significantly more probative value than respondents' even for the unskilled jobs (*id.* at I119-I120).[30]

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[28] The district court did note that there was some evidence of individual instances of respondents feeling deterred from applying for noncannery positions (Pet. App. I116-I118). Without reference to deterrence, the court also found that cannery workers generally showed little interest in applying for noncannery jobs (*id.* at I40). It found, too, that employees and nonemployees "were free to apply for any job for which they feel qualified" (*id.* at I33).

[29] The importance of the requirement of such findings, and of the overall adequacy of the statistical case, is highlighted in cases where disparate impact analysis is applied to subjective selection processes, as the nature of such processes may make the judicial inquiry into business justification particularly difficult.

[30] The district court also correctly criticized respondents' statistics for not controlling for the substantial number of persons who were hired under the

In fact, the district court's findings strongly suggest the opposite conclusions from those drawn by the court of appeals.[31] As to unskilled noncannery positions, the district court found that the best evidence of the relevant labor pool showed that 90% of that pool was white and only 1% was either Filipino or Alaska Native (Pet. App. I36-I37, I110-I111, I119-I120). Those figures show that the cannery workers, most of whom were Filipinos or Alaska Natives, were not representative of the relevant unskilled labor pool; and it is apparently not contended, in light of the actual minority representation in the noncannery workforce (see Pet. 4; Br. in Opp. 1-2; Pet. App. I43-I45), that those figures would sustain a prima facie case of disparate impact.[32] As to skilled noncannery jobs, the district court found that such jobs required skills (or preseason availability) not possessed or readily acquirable or acquired on the job by cannery workers and, indeed, that cannery workers and laborers do not make up a labor pool for other jobs (*id.* at I30, I35-I36, I39-I41, I47, I107-I109, I113).

Notably, the district court found that there was an obvious explanation for the disparity disclosed by respondents' statistics (that is, a significant difference in racial composition of the cannery and noncannery workforces). Simply put, "[t]he institutional factor of Local 37's overrepresentation of non-whites accounts for this statistic" (Pet. App. I42; *id.* at I35-I36, I110). That obvious cause of minority overrepresentation in the cannery jobs explains the disparities to which respondents point,

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rehire preference (Pet. App. I120-I122). That preference was upheld by the lower courts, a ruling that is not challenged in this Court.

[31] 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. For that reason, and because there is some confusion in the district court's findings, we suggest that this Court should remand on that issue for the court of appeals to determine whether a further remand to the district court is needed for additional factual findings.

[32] The district court did find respondents' statistics sufficient to make out a prima facie case of disparate *treatment* as to unskilled jobs (Pet. App. I111-I112).

without suggesting that there is underrepresentation, or that there are exclusionary practices, in the noncannery jobs. Indeed, according to the district court's findings, if petitioners ceased using Local 37 as a hiring channel for cannery jobs, the intra-workforce stratification would apparently disappear or dwindle to insignificance—and with it the presence of large numbers of Filipinos and Alaska Natives in the industry workforce as a whole—even if there were no change whatever in the methods of selecting noncannery workers. If there would be no case of disparate impact alleging exclusion from the noncannery jobs in that circumstance, surely there should be no liability simply because petitioners have hired disproportionately large numbers of minorities for the cannery jobs.

II. AFTER A PLAINTIFF MAKES OUT A PRIMA FACIE CASE SHOWING THAT AN IDENTIFIED SELECTION MECHANISM CAUSES A DISPARATE IMPACT, THE EMPLOYER HAS THE BURDEN OF PRODUCING ENOUGH EVIDENCE TO SUSTAIN A JUDGMENT IN ITS FAVOR THAT THE CHALLENGED MECHANISM SIGNIFICANTLY SERVES LEGITIMATE BUSINESS GOALS, AND THE PLAINTIFF MAY THEN PREVAIL BY PROVING THE CONTRARY OR BY SHOWING THAT AN ALTERNATIVE PRACTICE WITH A LESS DISPARATE IMPACT EQUALLY SERVES THOSE GOALS

A holding that respondents failed to make out a prima facie case would make unnecessary any further analysis of the disparate impact challenge to the selection of the noncannery workforce as a whole. If this case is to be remanded, however, as we suggest (see note 31, *supra*), it would be appropriate for the Court to address some of the questions about disparate impact analysis that the *Watson* case left unresolved. The plurality opinion in *Watson* furnishes a proper framework for answering those questions.

A. In addition to making a statistical case of disparate impact in selection, a plaintiff's prima facie case challenging an employer's adverse selection decision must identify the decision

process that was actually used to make hiring decisions. See *Watson*, slip op. 13 (plurality opinion) ("[t]he plaintiff must begin by * * * isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities"); see also *id.* at 2 n.2 (Blackmun, J., concurring in the judgment); Pet. App. V19-V20. Thus, as part of their prima facie case, respondents had to identify the process for selecting noncannery workers—whether by subjective judgment by individual hiring officers or by the application of objective criteria or a policy of nepotism. To be sure, certain nonselection practices may be relevant to determining the relevant labor pools—for example, if certain on-the-job practices such as segregated housing deter applicants, the applicant pool may not be a proper measure of disparate impact. But practices that are not part of the selection mechanism (including the failure to use proposed alternatives) are not themselves properly subject to disparate impact analysis in a selection case.

Of course, a decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole.[33] But disparate impact analysis is designed to root out " 'built-in headwinds' " and "barriers" to selection (*Griggs*, 401 U.S. at 432; see also *Teal*, 457 U.S. at 440), and not otherwise needlessly to intrude upon employer practices (see *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 206 (1979)). Hence, in its disparate impact decisions, this Court has properly focused on the specific devices or processes, including subjective ones, that

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[33] We do not here address whether, if an employer uses a multifactor decision process and the plaintiff proves disparate impact of the entire process, the plaintiff is required, in order to make out a prima facie case, also to test each component for disparate impact where that is possible. *Connecticut* v. *Teal* says that the plaintiff *may* do so in a multistage process. Whatever the scope of the third question in the petition, we limit ourselves to the point that only an employer's selection device or devices are subject to challenge in a disparate impact selection case. Other employer practices, if subject to challenge, must be separately challenged.

the employer uses to select employees, not on the employer's overall employment policies, including nonselection practices *Albemarle Paper Co.* (employment tests and seniority systems); *Washington* v. *Davis*, 426 U.S. 229 (1976) (aptitude tests); *Dothard* (height and weight requirements); *Teal* (written examination); *Beazer* (methadone user exclusion); *Watson* (subjective judgment by supervisor).

B. Once a prima facie case has been made out, judicial inquiry into the ultimate question whether the challenged nonhiring was "because of" race moves to the next two stages of disparate impact analysis—the first focusing on the justification for the selection device that produced the adverse selection decision, the second focusing on the availability of alternatives to the challenged practice that have lesser racial impact. Analytically, the two stages are closely related: they are both ingredients of the Title VII concept of business justification, because a challenged practice that causes a disparate racial impact is not justifiable—even if it is well-supported by business reasons—if there are equally good alternatives to the practice that cause a lesser impact. We discuss three aspects of the inquiry into business justification in an effort to identify a fair and workable approach to the inquiry.

1. This Court's decisions have used different formulations of the substantive standard governing the first stage of the inquiry into business justification that is required once a plaintiff makes out a prime facie case. See, *e.g.*, *Teal*, 457 U.S. at 446 (citation omitted) (" 'manifest relationship to the employment' "); *Albemarle Paper Co.*, 422 U.S. at 425 (" 'job related' "); *Dothard*, 433 U.S. at 329, 331-332 & n.14 ("job related"; "necessary to safe and efficient job performance"; "essential to good job performance"); *Griggs*, 401 U.S. at 431, 432 ("business necessity"; "manifest relationship to the employment"). Because those varying formulations suggest either higher or lower thresholds of justification, it would be useful for this Court to adopt a single governing formulation to

guide judicial application.[34] Most recently, in *Watson*, the plurality indicated (slip op. 17, 18) that "legitimate business reasons" would suffice to show a " 'manifest relationship to the employment.' " We think that the emphasis on reasonableness that is reflected in that approach was usefully encapsulated in the formulation this Court used when it found sufficient business justification in *New York Transit Authority* v. *Beazer*, 440 U.S. at 587 n.31, where the Court stated: the employer's "legitimate employment goals of safety and efficiency * * * are significantly served by—even if they do not require—[the challenged selection rule]."

That standard does not permit a justification based on a non-business reason or on a negligible contribution to a business purpose. So low a standard would threaten to undermine Title VII's concern to "promote hiring on the basis of job qualifications" (*Griggs*, 401 U.S. at 431, 434) and its use to root out exclusionary practices that are "functionally equivalent to intentional discrimination," even though intent cannot be proved

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[34] The different terms used by this Court have led the courts of appeals to articulate different standards as well. See, *e.g.*, *Kinsey* v. *First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977) (citation omitted) (practice must have an " 'overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business' "); *Burwell* v. *Eastern Air Lines, Inc.*, 633 F.2d 361, 370 (4th Cir. 1980) (practice must bear a "manifest relation to the * * * employment"), cert. denied, 450 U.S. 965 (1981); *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978) (citation and emphasis omitted) (practice must " 'foster safety and efficiency * * * [and] be essential to that goal' "), cert. denied, 441 U.S. 968 (1979); *Chrisner* v. *Complete Auto Transit, Inc.*, 645 F.2d at 1262 ("indispensability is not the touchstone"; "practice must substantially promote the proficient operation of the business"); *Aguilera* v. *Cook County Police & Corrections Merit Board*, 760 F.2d 844, 847 (7th Cir.) (practice must be "reasonable" or "efficient"), cert. denied, 474 U.S. 907 (1985); *Kirby* v. *Colony Furniture Co.*, 613 F.2d 696, 703 (8th Cir. 1980) (practice must be shown to be necessary to safe and efficient job performance); *Wambheim* v. *J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983) (citation omitted) (practice must have " 'legitimate and overriding business considerations' "), cert. denied, 467 U.S. 1255 (1984); *Williams* v. *Colorado Springs School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) ("practice must be essential, the purpose compelling").

(*Watson*, slip op. 6). At the same time, the *Beazer* standard does not require that the selection mechanism be absolutely essential to the business. So high a standard would not only be virtually impossible to meet but would threaten to put pressure on employers to avoid disparate impact liability by adopting quotas or otherwise turning their attention away from job qualifications and toward numerical balance. See *Watson*, slip op. 18 (plurality opinion). Indirectly compelling those results in the name of Title VII is not consistent with the statute, which does not contemplate so serious an intrusion on managerial prerogatives. See *id.* at 12; *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 11 n.7; *Weber*, 443 U.S. at 204-207 & n.7; *Albemarle Paper Co.*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment); *Griggs*, 401 U.S. at 431, 434. The *Beazer* standard strikes a reasonable balance.[35]

2. As Justice Blackmun explained in his concurring opinion in *Watson*, slip op. 2, many of this Court's decisions in disparate impact cases use language that can be and often has been read to mean that the employer assumes the burden of persuasion on the question of business justification once a prima facie case has been made out. See *Albemarle Paper Co.*, 422 U.S. at 425 (employer must "meet the burden of proving that its tests are 'job related' "); *Dothard*, 433 U.S. at 329 (employer must "prove[] that the challenged requirements are job related"); *Griggs*, 401 U.S. at 432 (employer has "the burden of showing" a manifest relationship to the job). But that language

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[35] That standard should, of course, be applied with an appreciation of the problems of proving the precise contribution of particular selection devices to discerning important qualifications, especially "personal qualities that have never been considered amenable to standardized testing" (*Watson*, slip op. 18 (plurality opinion)). Hence, the business justification standard does not entail a requirement of formal validation. *Watson*, slip op. 17 (plurality opinion); see *id.* at 7-8 (Blackmun, J., concurring in the judgment). In addition, the standard may be satisfied somewhat indirectly—for example, by a sufficient relationship, not directly to the job at issue, but to a legitimate training program. *Washington* v. *Davis*, 426 U.S. at 250-252. It should also "be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices' " (*ibid.*, quoting *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978)).

is ambiguous, as "burden of proof" and "showing" may be used to refer either to a burden of persuasion or to a burden of production. See E. Cleary, *McCormick on Evidence* § 336, at 783-784 (2d ed. 1972). For example, in *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 404 n.7 (1983), the Court ruled that "burden of proof" in the Administrative Procedure Act, 5 U.S.C. 556(d) (§ 7(c)), meant only "the burden of going forward, not the burden of persuasion." And in the disparate treatment context, several of the Court's decisions referred to the defendant's burden to "prove" (*Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978)) or to "show" (*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973)) a nondiscriminatory reason for a challenged employment decision, but the Court then made it clear that the employer's burden was one of production, not of persuasion (*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256-258 (1981); *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 24-26 (1978)).

We agree with the plurality in *Watson* (slip op. 17) that the same result should apply in the disparate impact context. Leaving the burden of persuasion on the plaintiff is consistent with the general rule (see Restatement (Second) of Torts § 433B (1965)) that a plaintiff at all times bears the burden of persuading the trier of fact on the basic causation element of a violation—here, that the nonhiring was "because of" race rather than for a sound business reason. Lack of business justification is a fundamental element of the violation under the disparate impact theory of Title VII liability, and a plaintiff alleging disparate impact has the "ultimate burden of proving a violation of Title VII" (*Beazer*, 440 U.S. at 587 n.31). Moreover, imposing only a burden of production keeps the disparate impact proof scheme in accord with the norm recognized in Fed. R. Evid. 301, which states that, unless otherwise provided by statute or rule, a "presumption" (here, a presumption of discrimination that arises from a prime facie case) shifts only the burden of going forward, not the burden of persuasion.[36] In

[36] See *Burdine*, 450 U.S. at 255 n.8. That Fed. R. Evid. 301 is relevant does not mean that it is controlling. The Court stated in *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. at 404 n.7, that the rule "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible."

addition, the "strong [congressional] desire to preserve managerial prerogatives" (*Weber*, 443 U.S. at 204-207) that is embodied in Title VII counsels against a rule that imposes liability unless an employer carries a burden of persuasion to justify its business practices.

Nothing about disparate impact cases justifies a departure from the model for litigating disparate treatment cases. In disparate impact cases, as in disparate treatment cases, the employer's "explanation of its legitimate reasons must be clear and reasonably specific" (*Burdine* 450 U.S. at 258); the plaintiff has liberal access to discovery from the employer; and the employer has an incentive to persuade the trier of fact of the justification for its practice (which has already been shown to have a disparate impact). See *ibid.* Once the employer produces evidence of business justification, the plaintiff may, of course, introduce contrary evidence, including testimony by experts and by employees themselves, concerning what qualifications are truly related to job performance. If the risk of nonpersuasion as to the employer's state of mind does not "unduly hinder" plaintiffs in disparate treatment cases (*ibid.*), neither should plaintiffs in disparate impact cases be unduly hindered by carrying the risk of nonpersuasion as to the business justification for the challenged selection device.

Finally, given an agreed-upon substantive standard for the first-stage inquiry into business justification, the plaintiff's bearing of the risk of nonpersuasion should tip the balance against the plaintiff only in a limited class of cases. As in disparate treatment cases, the burden of production requires that the employer put forth evidence that is "legally sufficient to justify a judgment for the defendant" (*Burdine*, 450 U.S. at 255). The burden of persuasion requires more; but because the issue is governed by a preponderance-of-the-evidence standard, the allocation of the risk of nonpersuasion should alter the result only in marginal cases. Moreover, even if the plaintiff fails to persuade the trier of fact that the challenged practice does not meet the threshold business-justification standard, because it does not significantly serve legitimate business goals, the plaintiff may still prevail by showing that an alternative exists, as we discuss below.

In short, the Court should recognize a parallelism between disparate impact and disparate treatment analysis. The distinctive questions presented in a disparate impact case "do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used" (*Watson*, slip op. 6). Indeed, because the disparate impact concept of discrimination is an alternative to disparate treatment, which was the "most obvious evil Congress had in mind when it enacted Title VII" (*Teamsters*, 431 U.S. at 335 n.15), it would be anomalous to shift the burden of persuasion on a critical issue in a disparate impact case when no such shifting occurs in a disparate treatment case. As the Court explained in *Watson* (slip. op. 6), an employer should not be held "liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination."

3. If the burden of persuasion on business justification remains with the plaintiff, and the employer meets the burden of production on business justification, the plaintiff may still prevail by putting forth sufficient evidence to persuade the trier of fact that the employer's claim of business justification is unconvincing. Even if the plaintiff does not overcome the employer's claim of business justification, however, the plaintiff can still prevail by showing " 'that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship' " (*Watson*, slip op. 17 (plurality opinion) (quoting *Albemarle Paper Co.*, 422 U.S. at 425)).

To meet the plaintiff's burden on the issue of alternative devices, it should not suffice merely to establish that there is some alternative selection procedure that has a less disparate impact. Rather, the plaintiff must show that the proposed alternative would serve the employer's business goals as effectively as the selection mechanism under challenge. "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals" (*Watson*, slip op. 17 (plurality opin-

ion)). See *Furnco Constr. Corp.* v. *Waters*, 430 U.S. at 577-578. But if the employer shows that a test or other selection device is job-related, the plaintiff should be allowed nonetheless to secure at least prospective relief by proffering a less discriminatory test or device that equally serves the employer's purposes. The failure to use such an alternative demonstrates that the employer's present practice is not truly justified in business terms.[37]

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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[37] As the *Watson* plurality observed of factors such as cost (slip op. 17), the ready availability of equally effective alternatives "would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment."

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