No. 87-1387

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

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

v.

FRANK ATONIO, *et al.*,
Respondents.

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

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a plaintiff-class may state a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) §§ 2000e *et seq.*, based on the cumulative effect of a wide range of non-racially motivated employment practices.

2. Whether proof that non-white persons are more heavily represented in one level of an employer's work force than in another level of that work force establishes as a matter of law that the employer's selection and employment practices have had a disparate impact on non-white persons.

3. Whether the court below improperly shifted the burden of proof and/or applied an incorrect standard of proof in holding that the selection and employment practices challenged in this case were not sufficiently justified so as to rebut any prima facie case of disparate impact made against them.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS	1
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. A TITLE VII PLAINTIFF-CLASS MAY NOT CHALLENGE THE CUMULATIVE EFFECT OF A WIDE RANGE OF SELECTION AND EMPLOYMENT PRACTICES UNDER THE DISPARATE IMPACT ANALYSIS	9
A. This Court Has Approved The Application Of Disparate Impact Theory Only In Cases Where A Specific Employment Practice Is Itself Shown To Cause A Significantly Disparate Exclusion Of Individuals In A Protected Group	10
B. Extending The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Would Produce Results That Are At Odds With The Balance Struck By Congress In Title VII	12
C. The Decisions Of The Courts Of Appeals That Have Extended The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Are Based On Improper Concerns	16
II. INTERNAL WORK FORCE STATISTICS CANNOT DEMONSTRATE THAT MINORITIES HAVE BEEN DISPROPORTIONATELY EXCLUDED FROM JOBS UNLESS THE EMPLOYER HAS A POLICY OF PROMOTING FROM WITHIN	19

TABLE OF CONTENTS—Continued

Page

III. AT THE REBUTTAL STAGE OF A DISPARATE IMPACT CASE, AN EMPLOYER NEED ONLY SHOW THAT ITS SELECTION DEVICES ARE REASONABLE IN LIGHT OF THE JOB AT ISSUE AND THE NATURE OF THE BUSINESS 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases Page

AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) 12
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 12, 15, 25, 27
Anderson v. Bessemer City, 470 U.S. 564 (1985) 23
Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981) 17
Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982) 23
Connecticut v. Teal, 457 U.S. 440 (1982) 12, 14, 17
Coser v. Moore, 739 F.2d 746 (2d Cir. 1984) 23
Dothard v. Rawlinson, 433 U.S. 321 (1977) 12, 20
EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983), *rev'd sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) 22
Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) 19
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 24, 27
General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) 19
Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141) 16, 18
Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) 16, 18
Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... *passim*
Harbison-Walker Refractories v. Brieck, No. 87-271 (U.S. *cert. granted*, March 21, 1988) 2
Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) 18, 20
Hilton v. Wyman-Gordon Co., 624 F.2d 379 (1st Cir. 1980) 23
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 18, 20, 25
Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987) 11, 14, 15, 23
Johnson v. Uncle Ben's, Inc., 628 F.2d 419 (5th Cir. 1980), *vacated*, 451 U.S. 902 (1981) 21
Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) 15
Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) 23

TABLE OF AUTHORITIES—Continued

	Page
Mohasco Corp. v. Silver, 447 U.S. 807 (1980)	19
NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981)	25
New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979)	*passim*
Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982)	13, 18
Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982)	22
Robinson v. Polaroid Corp., 732 F.2d 1010 (1st Cir. 1984)	13
Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985)	16
Ste. Marie v. Eastern R.R. Ass'n, 650 F.2d 395 (2d Cir. 1981)	21-22
Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977)	17
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	11, 17, 25
U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983)	17
United Steelworkers v. Weber, 443 U.S. 193 (1979)	11, 14, 15
Washington v. Davis, 426 U.S. 229 (1976)	12
Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988)	*passim*

Statutes and Regulations

42 U.S.C. § 1981	3
Title VII of the Civil Rights Act of 1964, as amended, ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*	3
Title VII § 703(a); 42 U.S.C. § 2000e-2(a)	6, 10
Title VII § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2)	7, 11
Title VII § 703(j), 42 U.S.C. § 2000e-2(j)	*passim*

TABLE OF AUTHORITIES—Continued

Page

Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607 19

29 C.F.R. § 1607.16Q 19
29 C.F.R. § 1607.3A 19

Miscellaneous

B. Schlei and P. Grossman, *Employment Discrimination Law* (1983) 17
Baldus and Cole, *Statistical Proof of Discrimination* § 4.11 20
Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299 (1984) 16, 18
H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2 (1963) 15
Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 Sup. Ct. Rev. 17 26
Maltz, *Title VII and Upper Level Employment—A Response To Professor Bartholet*, 77 Nw. U.L. Rev. 776 (1983) 14

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INTEREST OF THE AMICUS *

The Chamber of Commerce of the United States of America, a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade, and professional organiza-

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* Counsel for both parties have consented to the filing of this amicus brief. Their consents have been filed with the Clerk of this Court.

tions in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations. Many of the Chambers' members use multi-component selection and decision-making processes. Thus, the resolution of the questions presented in this case—involving whether disparate impact theory applies to challenges to the cumulative effect of multiple selection and employment practices; whether a disparity in the percentages of minorities employed in different job categories is a sufficient basis for establishing a prima facie disparate impact case; and whether and to what extent an employer must prove that a racial workforce disparity is justified by business necessity—is of significant interest to the Chamber and its members. In similar circumstances, the Chamber has filed amicus briefs with this Court. *See, e.g., Harbison-Walker Refractories v. Brieck*, No. 87-271 (U.S. *cert. granted* March 21, 1988); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

STATEMENT

1. Petitioners operate five salmon canneries in remote and widely-separated areas of Alaska. Pet. App. III:2-3. Petitioners begin operations each year in May or June, a few weeks before the anticipated salmon runs, with a period known as the "preseason." *Id.* at III:4-5. During this preseason, petitioners bring in employees to assemble equipment, repair any winter damage to the facilities, and prepare the canneries for the onset of the canning season. *Id.* at III:5. The individuals who staff the canning lines during the season—the "cannery" workers—arrive toward the end of the pre-season. *Ibid.* The cannery workers remain as long as the salmon runs last, and depart when the canning is completed. *Id.* at III:5-6. The canneries lie vacant for the rest of the year. *Id.* at III:3.

Most of the jobs in the canneries are seasonal and petitioners must reconstitute their work forces each year. Pet. App. III:8. Petitioners hire the cannery workers, who are the lowest paid members of the summer workforce, principally from native villages in Alaska and from the dispatcher of a primarily Filipino union local in Seattle, Washington. *Id.* at III:11. Petitioners hire the more highly-paid "non-cannery" workers—e.g., machinists and engineers who maintain the canning equipment; quality control personnel who conduct government-required inspections and recordkeeping; boat crews that operate transport equipment; and a variety of support personnel—from a multi-state region encompassing Alaska, the Pacific Northwest, and California. *Id.* at I:36, III:7. Petitioners select the non-cannery employees from among off-season applicants, word-of-mouth recruits, and "rehires" who worked at the canneries during prior seasons. *Id.* at III:11. They transport nearly all of these employees to and from the canneries each year, and house and feed them while they are there. *Id.* at III:8.

2. Respondents, a class of non-white employees at the canneries, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981, claiming that petitioners had discriminated against them because of their race. Pet. App. III:2, 9. Specifically, respondents alleged that petitioners had intentionally discriminated against them by using certain employment and selection practices, including separate hiring channels, word-of-mouth recruiting, nepotism, rehire preferences, language skill requirements, subjective job qualifications, and segregated housing and messing facilities. *Id.* at III:9-12. Respondents further alleged that these practices had an unlawful disparate impact on their opportunity to obtain the higher-paying non-cannery worker jobs. *Id.* at III:9.

During a lengthy non-jury trial, respondents supported their claims by showing that approximately 48 percent

of the individuals employed in the Alaska salmon canning industry since 1970 were non-white and that these non-white persons had principally been employed as cannery workers. Pet. App. I:35-36, 42. Respondents also showed that petitioners had not posted job vacancies in non-cannery positions or promoted cannery workers to non-cannery positions (*id.* at I:28-29, 33-34, 39); and that petitioners had frequently hired relatives of existing white employees (*id.* at I:104-05). Finally, respondents argued that petitioners had followed race-labeling practices and maintained racially-segregated housing and messing facilities (*id.* at I:76-84).

In rebuttal, petitioners demonstrated that, while census data indicated that the potential applicant pool for petitioners' facilities was only 10 percent non-white (without regard to place or position of current employment, skills, or pre-season availability), non-whites had been employed in 21 percent of the non-cannery positions. Pet. App. I:35-37; Pet. 4. Petitioners explained that the canning industry attracted applicants—for cannery and non-cannery positions—from a multi-state region, principally because of the high wages that were guaranteed to workers. Pet. App. I:41. Petitioners further explained that non-whites were more heavily represented in cannery worker positions than in either non-cannery jobs or the potential applicant pool, both because non-whites were concentrated in the communities surrounding the canneries and in the union from which petitioners obtained many of their cannery workers, and because the short and intense canning season generally precluded mid-season training and promoting of cannery workers and required resort to the external labor market. *Id.* at I:18-19, 32, 36-38, 41-43, 45-46. Finally, petitioners showed that their housing and messing practices were structured to accommodate workers' preferences, the workers' arrival times and departmental assignments, the cost of providing such benefits, and the demands of the

employees' collective bargaining representatives. *Id.* at I:81-84, 126-29.

The district court entered judgment in favor of petitioners. Pet. App. I:1-130. It held that petitioners' subjective decision-making criteria could not be challenged under the disparate impact theory. *Id.* at I:102. It also held that respondents had failed to prove that petitioners' language skill requirements and alleged nepotism policy had an unlawful disparate impact on non-whites. *Id.* at I:102-105. It then determined that, viewing all of the practices together, respondents had failed to establish disparate treatment. *Id.* at I:106, 119. The court found, *inter alia*, that any employee could apply for any job at the canneries (*id.* at I:33); that respondents' statistics were not probative of discrimination in the non-cannery jobs requiring skills, experience, or availability (*id.* at I:113-14); that the over-representation of non-whites in the cannery positions was attributable to non-discriminatory factors, i.e., the undue concentration of non-whites in the local communities and in the referrals from the union dispatcher (*id.* at I:109-11); and that, while respondents' evidence as a whole "raised a marginal inference of discriminatory treatment" (*id.* at I:119), petitioners had successfully rebutted that inference with relevant statistics and other evidence showing that their practices were motivated by legitimate business considerations. *Id.* at I:35-43, 110-14, 119-22, 124-29.

3. A panel of the Ninth Circuit affirmed the judgment of the district court. Pet. App. III:1-56. The *en banc* court subsequently vacated that judgment, however, and held that petitioners' subjective employment practices could be challenged under the disparate impact theory. *Id.* at V:1-75. On remand from the *en banc* court, the panel then vacated the judgment of the district court and remanded for further proceedings. *Id.* at VI:1-44.

The panel did not disturb the district court's conclusion that intentional race discrimination had not been established. Pet. App. VI:16. But the panel found that a prima facie case of disparate impact against non-whites had been demonstrated. Pet. App. VI:13-19. The panel noted that respondents had both introduced statistics showing "racial stratification by job category" and "identified certain practices which cause[d] that impact." *Id.* at VI:18, 19. The panel found that, in combination, such evidence was "sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race . . . ." *Id.* at VI:18.

Having so held, the panel turned to the particular practices at issue to determine whether each was "linked causally with the demonstrated adverse impact" and, if so, whether it was justified by business necessity. Pet. App. VI:19-39. The panel found that each practice had an "obvious" or "necessar[]y" or "clear" link to the racial disparity in the work force. *Id.* at VI:21, 28, 36. The panel then either rejected the justifications that petitioners had offered for their practices—with the exception of the language skills and rehire policies—or remanded for further development of the facts supporting those justifications. *See id.* at VI:21, 25-27, 28, 30-32, 37-39.

SUMMARY OF ARGUMENT

A. Congress carefully accommodated competing objectives when it enacted Title VII in 1964. It sought in § 703(a) of the statute to achieve equality of employment opportunities by removing arbitrary and unjustified barriers to the employment of members of minority groups. But, as § 703(j) of the statute makes clear, it did so intending not to disturb traditional management prerogatives or to require employers to engage in preferential treatment of minorities or work force balancing. Recognizing this accommodation, this Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), held that a violation of

§ 703(a)(2) may be established without a finding of illicit motivation where an employment practice disproportionately excludes individuals in a protected group and is not justified by legitimate business needs. In its subsequent decisions, the Court has approved the disparate impact theory only where these two limiting conditions have been met—i.e., where the plaintiff has established that a particular employment practice is itself the cause of a significant racial disparity and where the practice is not justified by business necessity.

Extending the disparate impact analysis to challenges to the cumulative effect of multiple employment practices would force employers seeking to avoid Title VII liabilities to take actions that are at odds with the balance struck by Congress in Title VII and recognized by the Court in *Griggs* and its progeny. To do so would force employers, at the rebuttal stage of a disparate impact case, either to identify the practice, if any, that caused the disparity and demonstrate that that practice is justified by business necessity or to show that each component of the selection process, regardless of its individual impact, is so justified. But this shifting of evidentiary burdens would be inconsistent with this Court's statements that the plaintiff, not the employer, bears the burden of producing evidence that the challenged practice has *caused* the alleged statistical disparity and that proof of a mere work force imbalance will not suffice. Alternatively, of course, employers could abandon or modify their multiple selection and employment practices in an effort to avoid such challenges. But forcing employers to restructure their business practices would be inconsistent with Congress's intent that Title VII not be interpreted to allow undue governmental intervention into private business decisions. Finally, employers could superimpose numerical quotas on their selection and employment processes to ensure that they achieve a racially-balanced work force. But, again, this result would be inconsistent

with Congress' intention that employers not be required to use quotas to avoid Title VII liabilities.

The concerns expressed by some courts of appeals—(a) that plaintiffs cannot identify and prove the effects associated with the various selection and employment practices used by an employer, and (b) that several components which individually have no adverse impact may "interact" to cause a racially-imbalanced work force—do not justify the extension of disparate impact theory to the cumulative effect of multiple employment practices. Plaintiffs can use multiple regression analyses —i.e., statistical analyses that produce estimates of weights for each variable in a multi-factor process, thus indicating the effect that each variable has on an outcome —to identify and isolate the causes of racial work force disparities; plaintiffs can obtain information about an employer's selection and employment practices through the liberal rules of discovery and access to the Equal Employment Opportunity Commission's ("EEOC") investigatory files; and the fact that no single component of a multiple component process has an adverse effect on minorities establishes that any disparity associated with the overall process is a result of either lawful factors or disparate treatment, neither of which justifies application of disparate impact analysis.

B. Respondents' internal work force statistics are insufficient as a matter of law to establish a prima facie case of disproportionate racial impact. While statistical evidence may take a variety of forms, it must, at a minimum, establish a reasonable proxy for the relevant applicant pool so that, by comparison to the pool of employees actually hired, reasonable conclusions about rates of selection and rejection can be drawn. Respondents' statistics—which focus on an internal work force imbalance and the concentration of non-white persons in the canneries' lowest paying jobs—do not establish such a proxy. Petitioners receive applications from persons both

within and without the work force, and respondents' statistics thus measure only a subset of the potential applicant pool. Reasonable conclusions about rates of selection and rejection cannot and should not be drawn from such obviously incomplete and under-inclusive data.

C. The court below misunderstood the nature of the rebuttal burden in a disparate impact case. By requiring petitioners to prove by a preponderance of the evidence that the challenged practices were justified by business necessity, the court below improperly relieved the plaintiff of its ultimate burden of persuasion in a Title VII case, equated a prima facie showing with a factual finding of discrimination, and in effect held that a practice producing an adverse impact violates Title VII even though it may be justifiable. Moreover, in applying a standard of business necessity that requires employers to demonstrate more than that their practices are reasonably related to the requirements of their business, the court below erroneously rejected the substantial business justifications that petitioners proffered in defense of their selection and employment practices.

ARGUMENT

I. A TITLE VII PLAINTIFF-CLASS MAY NOT CHALLENGE THE CUMULATIVE EFFECT OF A WIDE RANGE OF SELECTION AND EMPLOYMENT PRACTICES UNDER THE DISPARATE IMPACT ANALYSIS

The court below held that respondents had successfully established a prima facie case of race discrimination prohibited by Title VII. The court did not question the district court's finding that respondents failed to demonstrate intentional race discrimination. But the court concluded that respondents had established a prima facie case of disparate impact with evidence (1) that petitioners' work force is racially stratified and (2) that certain selection and employment practices are "obviously", "nec-

essarily", and "clearly" linked to that overall racial work force imbalance. This conclusion—i.e., that, without regard to the issue of motive or the significance of the disparity caused by any particular practice, plaintiffs in a Title VII suit may state a cause of action merely by identifying employment or selection practices that are collectively linked to a racially-imbalanced work force—constitutes an unwarranted extension of the disparate impact theory and should be rejected by this Court.

A. This Court Has Approved The Application Of Disparate Impact Theory Only In Cases Where A Specific Employment Practice Is Itself Shown To Cause A Significantly Disparate Exclusion Of Individuals In A Protected Group

This Court has said, and the language of § 703(a) of Title VII makes clear,[1] that Congress' basic objective in enacting Title VII was "to achieve equality of employment opportunities and [to] remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. at 429-30. This Court has also recognized, however, that Congress had additional, competing objectives in mind when it enacted Title VII; specifically, the Court has recognized that, in § 703(j) of the

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[1] Section 703(a) of the statute (42 U.S.C. § 2000e-2(a)) provides that:

> 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.

statute,[2] Congress expressed its concern that Title VII not be interpreted unduly to interfere with management discretion or to require employers to grant preferential treatment to minorities. *See Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1450-51 n.7 (1987); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979). It is against the background of these competing statutory provisions and congressional objectives that the Court has shaped the contours of the disparate impact theory.

The Court first approved the use of disparate impact theory as a means of establishing unlawful employment discrimination in *Griggs*. At issue in *Griggs* were written aptitude tests and a high school diploma requirement that the employer had adopted for the purpose of improving the general quality of its work force. Reversing a contrary holding of the court of appeals, this Court held that, in appropriate circumstances, a violation of § 703(a)(2) of the statute may be established without a finding of illicit motivation. 401 U.S. at 429-430. The Court acknowledged that "the Act does not command that any person be hired simply because . . . he is member of a minority group." *Id.* at 430-31. But the Court concluded that no such preference is required, and, indeed, an unlawful preference for members of the majority group is eliminated, by prohibiting employment practices which disproportionately exclude individuals in a protected group and which have no "demonstrable relationship to successful performance of the jobs for which [they are] used." *Id.* at 431. Because the high school diploma requirement and written aptitude tests at issue each had its own significant exclusionary effect on blacks, and

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[2] Section 703(j) of the statute provides that "[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance" in the employer's work force. 42 U.S.C. § 2000e-2(j).

because neither selection criteria had a manifest relationship to the requirements of the jobs for which each was used, the Court held that a violation of Title VII had been established. *Id.* at 430 n.6, 431-32, 436.

In its subsequent decisions, the Court has approved the disparate impact theory only where these two limiting conditions have been met—i.e., where a specific employment practice has itself caused a significantly disproportionate exclusion of individuals in a protected group and where that practice is not manifestly related to legitimate business needs. *See, e.g., Connecticut v. Teal*, 457 U.S. 440 (1982) (written examination); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (prohibition on employment of methadone users); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *Washington v. Davis*, 426 U.S. 229 (1976) (written test); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (employment test). Indeed, a plurality of the Justices stated just last Term that these two limitations are irreducible requirements for establishing a disparate impact violation. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2788-91 (1988); *see also id.* at 2792 and n.2 (concurring opinion); *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985) (Kennedy, J.) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process").

B. Extending The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Would Produce Results That Are At Odds With The Balance Struck By Congress In Title VII

As at least a plurality in *Watson* and several court appeals have recognized, it would be improper to extend the disparate impact analysis to challenges to the cumulative effect of multiple employment practices. *See Watson*

v. Fort Worth Bank & Trust, 108 S. Ct. at 2788; *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800-02 (5th Cir. 1982); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1016 (1st Cir. 1984). Such an extension would force an employer wishing to avoid Title VII liabilities either to: (1) identify the particular practice that has caused a significant exclusion of minorities and demonstrate that that practice is justified by business necessity, or show that, without regard to impact, each component of the overall employment system is individually so justified; (b) restructure its employment system—by abandoning complex, multi-step selection and employment practices and, where possible, dividing multiple task jobs into single task jobs for which simplified, and thus less difficult to defend, selection and employment practices are more suitable; and/or (c) adopt surreptitious numerical quotas to ensure achievement of a racially-balanced, and thus unchallengeable, work force composition. None of these alternatives is reconcilable with the intent of the Congress that enacted Title VII or with this Court's application of the disparate impact theory.

An employer cannot be required—merely on account of a workforce imbalance—to identify and justify the particular practice, if any, of its multiple employment practices that has caused the exclusion of a significant number of protected individuals. *See Pouncy v. Prudential Ins. Co.*, 668 F.2d at 800-801. Simply put, such a requirement would wrongly shift the burden of proof on the issue of causation to the defendant; it would require the defendant, rather than the plaintiff, either to show causation does not exist with respect to all or some of the employer's component practices or to assume that causation exists and to justify all of its employment practices.[3] But, as a plurality of this Court noted in

[3] For example, in this case, petitioners had to justify each of their component practices, even though the court of appeals admitted that two of the practices allegedly contributing to the work force imbalance—the language skills requirement and the rehire policy—were

Watson (108 S. Ct. at 2787), "[i]t would be . . . unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." Moreover, this Court has made clear that the plaintiff, not the defendant, bears the burden in a disparate impact case of showing that a "facially neutral employment practice had a significantly discriminatory impact" (*Connecticut v. Teal*, 457 U.S. at 446), that is, of showing the cause of a challenged disparity. And the Court has also made clear that § 703(j) of the statute precludes a plaintiff from arguing that an employer's work force balance is a sufficient basis for inferring the requisite causation and for shifting the burden of production to the defendant. *See Johnson v. Transportation Agency*, 107 S. Ct. at 1452-53; *United Steelworkers v. Weber*, 443 U.S. at 207 n.7. In short, the Court has indicated that the employer cannot be made—merely on account of a work force imbalance—to carry the burden of proof on the issue of causation.

Nor can an employer be required to restructure its employment practices to avoid the spectre of Title VII liability and the concomitant costs of defending Title VII suits. This Court has noted that "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." *United Steelworkers v. Weber*, 443 U.S. at 206. These legislators' resistance arose from their belief that "[a]ny attempt to prescribe the qualifications that employers may or may not use in job selection necessarily conflicts with a value that is deeply held by members of a broad spectrum of American society—the value of employer autonomy." Maltz, *Title VII and Upper Level Employment—A Response To Professor Bartholet*, 77 Nw. U.L. Rev. 776, 789

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justified by business necessity, and even though respondents presented no evidence that the disparity attributable to the remaining practices was substantial.

(1983). These "legislators demanded as a price for their support that 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' " *United Steelworkers v. Weber*, 443 U.S. at 206, quoting H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Thus, even assuming that an employer could simplify its selection processes or separate its job tasks, which often would not be the case, requiring the employer to do so would represent precisely the type of federal intervention into private business that the key legislators would not accept.

For similar reasons, an employer plainly cannot be put in the position of having to adopt surreptitious quota systems in order to avoid Title VII liabilities. This Court has, of course, held that Title VII *permits* employers to engage in limited forms of voluntary affirmative action. *See Johnson v. Transportation Agency*, 107 S. Ct. at 1450-51. But, as noted above, the Court has also recognized that § 703(j) was added to Title VII to ensure that the statute would not be interpreted to "require employers or labor unions to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination." *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 453 (1986). The congressional record is replete with comments "that employers would not be *required* to institute preferential quotas to avoid Title VII liability." *United Steelworkers v. Weber*, 443 U.S. at 207 n.7. A rule of law that "leave[s] the employer little choice . . . but to engage in a subjective quota system of employment selection" would thus be "far from the intent of Title VII." *Albemarle Paper Co. v. Moody*, 422 U.S. at 449 (Blackmun, J., concurring).

C. The Decisions Of The Courts Of Appeals That Have Extended The Disparate Impact Analysis To Challenges To The Cumulative Effect Of Multiple Employment Practices Are Based On Improper Concerns

The courts of appeals that have permitted plaintiffs to challenge the cumulative effect of a wide range of employment practices under the disparate impact theory have been concerned (a) that plaintiffs do not have sufficient ability or information to isolate the particular practice, if any, that has actually caused a work force imbalance, and (b) that imbalances attributable to the interaction of several practices will escape judicial scrutiny if such challenges are not allowed. *See Green v. USX Corp.*, 843 F.2d 1511, 1522-25 (3d Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141); *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1271-1272 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985). Neither concern justifies the legal rule that these courts have applied.

The concern that plaintiffs cannot isolate the particular practice or practices, if any, actually causing a work force imbalance slights both the tools available to plaintiffs in Title VII cases and the burden of proof that rests with plaintiffs. Plaintiffs in Title VII cases can employ multiple regression analyses—i.e., statistical analyses that produce estimates of weights for each variable in a multifactor process, thus indicating the effect that each variable has on an outcome—to identify and isolate the effects attributable to the various employment practices used by an employer. *See* Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stan. L. Rev. 1299 (1984). Moreover, information concerning the effects of the employer's employment practices is readily available to plaintiffs through the liberal rules of dis-

covery and through access to the EEOC's investigatory files; thus, just as a plaintiff has sufficient means for obtaining the information necessary to establish that elusive concept of discriminatory "motive," the plaintiff has sufficient means for obtaining the information necessary to establish the more tangible concept of discriminatory "effect." *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981); *see also U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716-717 (1983). Finally, while there may be instances in which multiple regression analysis does not provide a clear answer, or in which sufficient information is not available, this Court has made clear that plaintiffs bear the burden of proof in impact cases and, *a fortiori*, that plaintiffs bear the risk of loss associated with uncertainty or unavailability of proof about causation. *See Connecticut v. Teal*, 457 U.S. at 446; *see also Watson v. Fort Worth Bank and Trust*, 108 S. Ct. at 2790 (plurality opinion).[4]

The concern that an employer may devise a scheme under which several components of a selection process, none of which individually causes a disparate impact, "interact" to produce a work force imbalance is equally unfounded. An employer who, without intending to disadvantage members of the minority group, devises a system of employment practices in which no single prac-

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[4] Of course, while plaintiffs may sometimes be unable to carry their burdens of proof under the disparate impact theory, they are much more likely, in such circumstances, to be able to carry their burdens under the disparate treatment theory. Courts applying disparate treatment theory have been most likely to find illicit motive where a plaintiff has shown that the employer's selection process produced immeasurable results, relied on immeasurable judgments, was not well documented, and resulted in a gross work force disparity. *See Bauer v. Bailar*, 647 F.2d 1037, 1045 (10th Cir. 1981); *Stewart v. General Motors Corp.*, 542 F.2d 445, 450-451 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law*, 191-205 (1983).

tice itself causes a disproportionate exclusion of minorities simply has not violated Title VII. In such a case, the bottom line disparity is attributable to an aggregation of plainly lawful factors—e.g., applicant drop-out or employee self-selection, facially neutral practices without adverse impact, and/or chance—and Title VII cannot reasonably be interpreted to prohibit employers from engaging in a combination of lawful acts. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2787; *Pouncy v. Prudential Ins. Co.*, 668 F.2d at 801-02; Campbell, *supra*, 36 Stan. L. Rev. at 1318. Cases such as *Green v. USX Corp.*, *supra*, and *Griffin v. Carlin*, *supra*, provide absolutely no reasoning to support their contrary and unfounded, assertions.

The Chamber does not mean to suggest that anything in this Court's cases or the policies of Title VII would prohibit a Title VII plaintiff, in an appropriate case, from using the cumulative effect of an employer's decision-making process as proof of a Title VII violation. In appropriate circumstances, a significant imbalance in a work force, supported by probative statistical analyses, may fairly lead to an inference of intentional discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-340 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 306-313 (1977). But, in approving the use of statistical imbalances to establish intentional discrimination in such circumstances, the Court has stressed (*Teamsters*, 431 U.S. at 339-340 n.20) that:

> the statistical evidence [cannot be] offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less

> representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

Implicit in this reasoning is the quite correct conclusion that § 703(j) bars the imposition of liability in non-intent cases merely because of the cumulative effect of an employer's overall employment practices. For, if a finding of intent is not required, and a showing of racial disproportion in the bottom line is, without more, sufficient to prove a prima facie violation of Title VII, the very purpose of § 703(j)—to preclude the imposition of liability merely because the employer has a racial imbalance in its work force—would be defeated.[5]

II. INTERNAL WORK FORCE STATISTICS CANNOT DEMONSTRATE THAT MINORITIES HAVE BEEN DISPROPORTIONATELY EXCLUDED FROM JOBS UNLESS THE EMPLOYER HAS A POLICY OF PROMOTING FROM WITHIN

Even assuming that the cumulative effect of petitioners employment practices can be challenged under a disparate impact theory, the court below erred in concluding that

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[5] The Chamber recognizes that the Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607, define a "selection procedure" to include "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision" (29 C.F.R. § 1607.16Q) and subject all such selection procedures to disparate impact analysis (29 C.F.R. § 1607.3A). But, to the extent the Guidelines approve the application of disparate impact theory to the cumulative effect of multiple practices, they are inconsistent with § 703(j) and, therefore, not deserving of deference from this Court. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

respondents had successfully established that they were disproportionately excluded from non-cannery jobs. Internal work force statistics, such as those relied upon by the court below, cannot demonstrate that minorities have been disproportionately excluded from jobs unless the employer has a policy of promoting from within, which petitioners do not.

It is well-settled that a plaintiff can establish a prima facie case of disparate impact based on statistical evidence showing that an employment practice has had a disproportionate exclusionary effect on individuals in a protected minority group. *See Griggs v. Duke Power Co.*, 401 U.S. at 430 and n.6; *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979). To do so, the plaintiff must proffer statistics effectively measuring the effect that a challenged selection or employment process has had on applicants or employees and show that any measured disparity is "sufficiently substantial" to establish a prima facie case of discrimination. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2788-89. Statistics, of course, "come in infinite variety." *International Bhd. of Teamsters v. United States*, 431 U.S. at 340; *see generally* Baldus and Cole, *Statistical Proof of Discrimination* § 4.11 (at 106-11). But, whichever kind of statistics are used, the resulting data must establish a reasonable proxy for the relevant potential applicant pool; otherwise, reasonable conclusions about the rates of applicant selection and rejection cannot be drawn. *See Hazelwood School Dist. v. United States*, 433 U.S. at 310-12; *Dothard v. Rawlinson*, 433 U.S. at 348 (White, J., dissenting).

This Court has accordingly rejected statistical proffers that distort the potential applicant pool available to the employer. In *Hazelwood*, for example, the Court found that including a school district that maintained a teaching staff that was 50 percent black "in the relevant market area [might] distort[] the comparison." 433 U.S. at 310-11.

Similarly, in *Beazer*, the Court held that the exclusion of methadone users in private treatment programs from the available pool improperly skewed the final statistical analysis. 440 U.S. at 585-86. In short, where a statistical proffer has improperly included or excluded particular groups of individuals from the potential applicant pool, the Court has been unwilling to find that a prima facie discriminatory rate of selection or rejection has been proved.

The statistics upon which the court below relied are likewise distorted. Respondents offered no applicant flow statistics. Moreover, under the comparative statistics they offered, the pool of cannery workers was treated as the relevant applicant pool for non-cannery worker jobs. But petitioners receive applications for non-cannery work from persons residing in Alaska, the Pacific Northwest, and California. In short, the members of the cannery worker pool at most constitute only a subset of the group of persons who reasonably can and do apply for the non-cannery worker jobs. Reasonable conclusions about the rates of selection and rejection of non-whites simply cannot be drawn from such incomplete and under-inclusive data; in these circumstances, internal work force data show nothing about the percentages of minorities that an employer can reasonably be expected to hire in particular jobs. Accordingly, the court below was wrong in finding that non-whites had been disproportionately excluded from non-cannery worker jobs.

This is not to say that an internal work force comparison may never be relevant in a disparate impact case. Such a comparison may be relevant where an employer promotes only from within.[6] But, here, as the district

[6] Even in these circumstances, of course, the internal work force data must be adjusted to account for the minimum qualifications required by the positions in issue. *See Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 425 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 902 (1981); *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395,

court found and the court of appeals did not dispute, petitioners accept applications from persons both within and without the work force. Moreover, as the district court also found, it was plainly reasonable for the petitioners to do so: Not only do petitioners' non-cannery worker jobs often require skills, training and pre-season availability that the general cannery worker does not have, but the short and intense canning season generally precludes mid-season training and promoting of cannery workers and, rather, requires resort to the external labor market. Pet. App. I:33-36, 40-41, 46-47. Indeed, because the high wages that petitioners guarantee make employment in the canneries attractive to persons in a multi-state region, the demands of equal opportunity law may well require petitioners to give equal consideration to applications received from outside the work force. In short, it is clear that the pool of cannery workers is not a reasonable proxy for the relevant potential applicant pool for non-cannery worker jobs, much less the only reasonable proxy, as the court below implicitly held.[7]

Allowing a prima facie disparate impact case to be established simply by proof that an employer has an imbalanced work force would place such an employer between Scylla and Charybdis. On the one hand, the employer would be subject to disparate impact claims from the members of the minority group that are concentrated at one level of its work force—here, for example, the Filipino and Native Alaskan cannery workers. On the

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400-01 (2d Cir. 1981); *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 659-60 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540-43 (5th Cir. 1982). Respondents did not attempt to make such adjustments in this case.

[7] Not only did the court below accept respondents' plainly flawed statistical proffer, it ignored the district court's conclusion that petitioners' statistical proffer—showing that, even without regard to qualifications, the potential applicant pool in the states from which petitioners have received applications is only ten percent non-white,

other hand, were the employer to refuse to consider applications from persons outside the work force, it would be subject to disparate impact claims by members of minority groups (and, perhaps, whites) who would thereby be deprived of job opportunities—here, for example, the Hispanics residing in California who have reasonably applied for employment with petitioners. This Court has said that Title VII, and especially the disparate impact theory, should not be interpreted to impose such conflicting legal obligations on an employer. *See Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 & n.20 (1978); *Johnson v. Transportation Agency*, 107 S. Ct. at 1451-52.[8]

Rather, the statute should be interpreted to allow disparate impact claims only where they are based on reasonable proxies for the potential applicant pool. The only such proxy identified in this case was the one proffered by petitioners. Petitioners showed that they received applications from persons residing in Alaska, the Pacific

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while the non-cannery workers are 21 percent non-white—was the more convincing of the two. In ignoring this factual finding of the district court, the decision below conflicts with this Court's decision in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), as well as with the decisions of other courts of appeals, which have found that external labor market data effectively rebuts internal work force comparisons. *See, e.g., Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 382 (1st Cir. 1980); *Clark v. Chrysler Corp.*, 673 F.2d 921, 929 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982); *Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984).

[8] Moreover, one effect of holding that a prima facie disparate impact case is established by evidence of a mere work force imbalance would be to discourage employers from engaging in voluntary affirmative action. Any affirmative action that increases the percentage of minorities in some but not all job classifications might create the imbalance necessary for a disparate impact suit and, accordingly, employers would have great reason not to engage in affirmative action (as opposed to mere quota hiring) at all. The Court has said that Title VII should not be interpreted to create such disincentives against voluntary affirmative action. *See Johnson v. Transportation Agency*, 107 S. Ct. at 1450-51.

Northwest, and California. They further demonstrated through census data that, even without regard to the qualifications required for the non-cannery positions, the potential applicant pool in these states is only ten percent non-white; and that, by comparison, non-whites have filled 21 percent of their non-cannery positions and thus are over-represented in those positions. Only one conclusion follows: that petitioners' selection and employment practices have had no cumulative adverse impact on non-whites.

III. AT THE REBUTTAL STAGE OF A DISPARATE IMPACT CASE, AN EMPLOYER NEED ONLY SHOW THAT ITS SELECTION DEVICES ARE REASONABLE IN LIGHT OF THE JOB AT ISSUE AND THE NATURE OF THE BUSINESS

Having wrongly concluded that respondents established a prima facie case of discrimination, the court below exacerbated its error by concluding that, with two exceptions, petitioners had failed to meet their burden of showing that their employment practices were justified by business necessity. The court below not only placed too heavy a burden on petitioners—to "*prove* the job relatedness or business necessity of the practice" giving rise to the disparity (Pet. App. VI:5; emphasis added)—but it ignored substantial evidence that petitioners' practices were in fact so justified.

It is well-settled that a plaintiff in a Title VII case bears the "ultimate burden of proving a violation of Title VII." *New York Transit Auth. v. Beazer*, 440 U.S. at 587 n.31. It is equally well-settled that a "prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579 (1978). Thus, while the employer in a prima facie disparate impact case—like the employer in a prima facie disparate treatment case—has a rebuttal burden, that burden is not one of persuasion; it is a burden of production. A violation of the statute is established—

satisfying the plaintiff's burden of persuasion—only when an *unjustified* practice has been shown disproportionately to exclude minorities, and that conclusion can be drawn only *after* the assessment of business necessity has been made. *See Griggs v. Duke Power Co.*, 401 U.S. at 431. Thus, requiring the employer to "prove" business necessity at the rebuttal stage—as the court below did—effectively converts the plaintiff's prima facie showing into an ultimate finding of discrimination. Neither the statutory language nor this Court's cases justify such a requirement.[9]

Nor is there any proper justification for the overly demanding standard that the court below applied in rejecting petitioners' explanations for their employment practices. To be sure, this Court has described the rebuttal burden in a disparate impact case as focusing on the "business necessity" for the challenged practice (*Griggs v. Duke Power Co.*, 401 U.S. at 431) and, on occasion, has suggested that, in particular circumstances, this burden may necessitate a formal validation study (*see, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. at

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[9] To be sure, in *Burdine*, this Court "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." 450 U.S. at 252 n.5. But, although the "character of evidence presented" may differ, this does not mean that a plaintiff's burden of proof—to prove that he was a victim of discrimination—is any less in a disparate impact case. *See Watson*, 108 S. Ct. at 2785 ("Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination"); *Beazer*, 440 U.S. at 587 n.31. Indeed, it would be "illogical to impose a heavier burden on a defendant in a case where a neutral policy results in disparate impact than in one where the charge is unlawful animus" (*NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1335 (3d Cir. 1981)), since "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII" (*International Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15).

431). But the Court has also held that an employer may satisfy his rebuttal burden with evidence that the selection process serves the "legitimate employment goals of safety and efficiency" (*New York Transit Auth. v. Beazer*, 440 U.S. at 587 n.31), and that such evidence need not take the form of a validation study (*see ibid.*). On the contrary, as a plurality of the Justices recently reiterated in *Watson*, a disparate impact claim is rebutted when the evidence shows that "employment practices are based on legitimate business reasons" (108 S. Ct. at 2790); that is, a disparate impact claim is rebutted by evidence "that the[] selection devices—test or nontest—are justified in light of the nature of the job and its relation to the overall enterprise. Face validity, otherwise known as reasonableness, should suffice." Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 Sup. Ct. Rev. 17, 39.

Petitioners plainly established the "face validity"—or reasonableness—of each of the practices challenged in this case. Petitioners showed, and the district court found, that they did not engage in nepotism at all. Pet. App. I:103-05. Petitioners also showed that the subjective job qualifications applied by petitioners were necessary for safe and effective performance of the non-cannery worker jobs. *Id.* at I:35-36, 40-41, 45-47, 107-114. Petitioners further showed that job openings were not posted because petitioners received more applications than they had openings, because they received applications from a multi-state region, and because cannery workers could apply in the off-season—just like everyone else—for non-cannery worker jobs. *Id.* at I:28-34. Finally, petitioners showed that petitioners' race-labeling practices had no effect on non-white employees' job opportunities and, furthermore, that petitioners' housing and messing practices were structured to accommodate workers' preferences, the arrival time and departure of workers, the costs of providing such benefits, and the

union's demands. *Id.* at I:123-29. These explanations were entirely reasonable in light of the jobs in issue and the nature of petitioners' business, and the court below erred in holding that petitioners had failed to meet their rebuttal burden.

Of course, had respondents offered evidence that petitioners could have accomplished their legitimate business goals and still avoided a disparate impact, the courts would have had to consider it. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2790 ("the plaintiff must 'show 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' " (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. at 425)). But respondents did not do so. They simply argued that petitioners could have increased the percentage of non-whites in their non-cannery jobs by, for example, training cannery workers and promoting them to non-cannery positions. This argument ignores, of course, the canneries' legitimate business reasons for not implementing such practices—i.e., the short and intense canning season, the infrequency of mid-season job vacancies, and the cost of providing such training. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. at 2790 ("[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant . . ."). But, more importantly, the argument rests on a misperception that Title VII requires employers to maximize their hiring of minority applicants.

This Court has made abundantly clear that Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees" and that employers need not "pursue[] the course which would both enable [them] to achieve [their] own business goal[s] *and* allow [them] to consider the *most* employment applications." *Furnco Const. Corp. v. Waters*, 428 U.S. at

577-78 (emphasis in original). Any other conclusion would only invite courts to "require[] businesses to adopt what [they] perceive[] to be the 'best' hiring procedures" (*id.* at 578) and, as the plurality in *Watson* reiterated, " '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it' " (108 S. Ct. at 2791 (citation omitted)).

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed.

Respectfully submitted,

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