1988 WL 1026070 (U.S.) (Appellate Brief)
Supreme Court of the United States.

WARDS COVE PACKING COMPANY, INC., Castle & Cove, Inc., Petitioners,
v.
Frank ATONIO, et al., Respondents.

No. 87-1387.
October Term, 1988.
November 4, 1988.

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

Brief for the American Civil Liberties Union, National Women's Law Center, Now Legal Defense and Education Fund, Women's Legal Defense Fund, Amici Curiae, on Behalf of Respondents

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*1 INTEREST OF *AMICI CURIAE*[1]

Amici curiae are non-profit legal, education and research organizations concerned about the legal rights and economic status of women and minority workers.[2]

Amici believe that this case has potentially far-reaching implications for the rights secured by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.* ("Title VII"). In particular, arguments pressed by petitioners and the United States, as *amicus curiae,* would, if accepted, seriously undermine the ability of any worker who has ***2** jected to discriminatory employment practices to receive the remedy Congress intended. We write especially to urge the Court to reject this unwarranted departure from established precedent.

Statement of the Case

This class action, filed in 1974, alleges employment practices that, individually and in combination, have created a patently racially stratified work environment at three Alaska salmon canneries. Among the elements contributing to this discriminatory result are (1) a history of job segregation; (2) recruitment practices which targetted non-whites for lower-paying jobs, while applicants for better jobs were sought from a predominantly white labor force; (3) rehire preferences, word-of-mouth hiring and nepotistic practices; (4) subjective hiring ***3** practices; (5) segregation in the provision of housing and meals; and (6) common use of overt racial designations and characterizations.

The evidence reveals that non-whites were concentrated in lower-paying cannery jobs, and whites predominated in higherpaid positions. At Bumble Bee Cannery, more than 90% of all hires over a nine year period in seven of twelve departments were white. Non-whites predominated in only one department -- cannery worker -- and represented a third of hires in three other departments (laborer, culinary, quality control). Joint Excerpt of Record (hereinafter "ER") at 35. The

same kind of stratification was evident at Red Salmon: whites obtained more than 75% of jobs in nine of twelve departments. Non-whites filled the majority of the laborer and ***4** cannery worker positions. ER 36. At Wards Cove and Red Salmon, between a third and two-fifths of all hires were non-white, but they were largely confined to two departments -- cannery worker and culinary. ER 36, 37.

Even within apparently "integrated" departments, there was job segregation. At Bumble Bee, in the Fish House and Cannery departments, butcher and slimer jobs were filled exclusively by non-whites, and filler feeder and retort jobs were held almost exclusively by whites. ER 42. At Red Salmon, whites in the same department worked only in cold storage, fish weigher, and egg puller jobs, and non-whites held all other positions. ER 50; *see also* ER 54. At the Warehouse department at Wards Cove, whites represented 48% of the hires (N=28), but all except one were assigned to ***5** the warehouse job category, while non-whites were spread throughout seven job categories. ER 55.

The "inexorable zero" is evident in the record as well. At Bumble Bee, in two job categories comprising 304 hires, *no* non-whites were hired at all from 1971 to 1980, and in five other categories, with 437 jobs at stake, non-whites obtained only 20 positions, fewer than 7% of the total. ER 35. At Red Salmon, no non-whites were hired into two job categories, involving 39 jobs; non-whites held only 11 out of 379 positions in three other departments. ER 36. At Wards Cove, in six job categories non-whites got only 16 of 614 jobs. ER 37.

The industry has traditionally employed non-white laborers for the hardest, least lucrative positions, a pattern that persisted well past the ***6** passage of Title VII. The recruitment practices at issue in this case are particularly instructive. Non-whites were recruited specifically for cannery work, although there is no apparent reason why the employers did not make the full range of employment opportunities available to all potential applicants. Undoubtedly, many of the native Alaskans and Filipino workers recruited for cannery work would have preferred other jobs, especially if the pay and working conditions were better. But the preferred jobs were not offered, and inquiries about the availability of other positions were met by a variety of evasive responses.[3] Higher-paying "at ***7** issue" jobs were generally filled through offices in Washington and Oregon, that drew from a predominantly white labor force, a practice that was common in the industry well before the institution of this lawsuit.[4] Thus, by selectively controlling the labor market from which employees in different positions were drawn, the employers controlled the racial make-up of both the applicant pool and hires in various jobs.[5]

Although certain skills are claimed as necessary for some "at issue" jobs, no ***8** skill or education requirements were ever actually imposed.[6] The desirable skills were identified only in preparation for litigation, and many of the incumbents did not possess them. Subjective judgments thus clearly controlled the selection of employees for "at issue" jobs, although the pool from which such employees were drawn largely excluded non-whites.

Overt discrimination was evident in the housing and meals arrangements and in the race-typing of jobs and workers. Many of the employment practices have changed little since the days when the cannery owners openly embraced and espoused race-based practices. A report by the Alaska Historical Commission observed:

> ***9** The cannery workers were divided into two groups, or crews, those that worked inside the canneries processing fish and those in cannery maintenance and operations.... [t]he fish and processing crew was mainly composed of racial and ethnic minorities, and after [the arrival of] Chinese contract laborers, it retained a primarily Oriental composition for decades. Sometimes Caucasians might be found within the "China" crew, yet the opposite was seldom found.[7]

***10** Originally shaped by intentionally discriminatory practices, the system challenged here incorporated elements of intentional discrimination, both covert and overt, along with identifiable neutral practices applied alike to whites and non-whites, that served to maintain the status quo.[8]

SUMMARY OF ARGUMENT

The record in this case is replete with evidence that petitioners' employment practices have operated to freeze historical patterns of race discrimination. *See* ***11** *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). Yet petitioners ignore this overwhelming body of evidence, focussing their attack on only a small piece, and in so doing seriously distort the reality that workers in these Alaskan Salmon canneries experience.

This case recalls an earlier era of Title VII enforcement when race and sex typing in employment was rampant, often overt and institutionalized. Although the law has developed to address more sophisticated and subtle forms of discrimination, there is nothing sophisticated or subtle about this case. Only by viewing the totality of the evidence, *Bazemore v. Friday,* 478 U.S. 385 (1986), rather than forcing the facts into a legal straight jacket never intended for this kind of ***12** situation, can this case be properly analyzed. *See* Point I, *infra.*

The rules and definitions established in *Griggs,* refined in *Albemarle,* and reaffirmed in *Connecticut v. Teal,* 457 U.S. 440 (1982), directly govern this case, and compel the conclusion that petitioners have wholly failed to rebut the evidence of discrimination or to demonstrate that their practices are justifiable. *See also International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). The defense consists of speculative attacks on plaintiffs' evidence, unsupported assertions of necessity, and hypothetical allegations as to the cost of improvements. Thus, petitioners and the United States propose dispensing with the authoritative interpretation of Title VII that has governed for 17 years, even though Congress ***13** has expressly ratified this application of the statute. *See* Point II, *infra.*

Principles of *stare decisis* preclude the result petitioners urge. The Court should instead affirm its long-standing rule that practices "fair in form, but discriminatory in operation" are unlawful unless affirmatively justified as necessary to the business. *See* Point III, *infra.*

ARGUMENT

Introduction

Many industries have been marked by the pervasive stratification and stereotyping apparent in this case. Historically, for example, the trucking industry was stratified by race and sex. Whites predominated in the lucrative over-the-road ("OTR") tractor trailer driving jobs, while minorities were initially confined to certain shop positions and later obtained ***14** employment driving local routes and working on the loading dock. *See Teamsters,* 431 U.S. at 337-38; *Franks v. Bowman Transp. Co.,* 495 F.2d 398, 410 n.10 (5th Cir. 1974), *rev'd on other grounds,* 424 U.S. 747 (1976); *Jones v. Lee Way Motor Freight, Inc.,* 431 F.2d 245 (10th Cir. 1970), *cert. denied,* 401 U.S. 954 (1971). This allocation of jobs was maintained by a system of subjective and discretionary hiring practices, often in combination with neutral rules, like no-transfer provisions, that operated to freeze and perpetuate the discriminatory practices. *See also Kilgo v. Bowman Transp. Inc.,* 789 F.2d 859, 869-75 (11th Cir. 1986) (women excluded from OTR driving jobs as a result of a neutral prior experience requirement and other practices, including unequal and inconsistent application of job requirements, ***15** failure to provide adequate bathroom and bunk facilities, and other practices designed to deter women applicants).

The same patterns occurred in many settings. Whites entered the preferred lines of progression, and minorities and women were routed to race and sex-typed positions, often the lowest paid, with the least likelihood of advancement.[9] Subjective assessments, selective recruitment, experience and education requirements, and paper and pencil tests were all employed, often simultaneously.

***16** Vigorous enforcement of Title VII, and judicial scrutiny of employment practices that resulted in marked workforce stratification has made this a less familiar, but by no means non-existent, pattern. Women workers, in particular, are still subject to stereotypes about their interests and skills and to pervasive discrimination in male-dominated industries and professions. *See, e.g., Catlett v. Missouri Highway & Transp. Comm'n,* 828 F.2d 1260 (8th Cir. 1987) *cert. denied,* ___ U.S. ___, 108 S.Ct. 1574 (1988); *EEOC v. Rath Packing Co.,* 787 F.2d 318, 328 (8th Cir.), *cert. denied,* 479 U.S. 910 (1986); *Kilgo v. Bowman Transp. Inc.,* 789 F.2d 859. No one familiar with the efforts to eradicate widespread employment discrimination, to which Title VII was originally dedicated, can fail to recognize the ***17** pattern present in this case. This case, like *Griggs,* 401 U.S. 424, and *Albemarle,* 422 U.S. 405, had its genesis in the overtly discriminatory practices pursued widely in this industry prior to the enactment of Title VII. And, like *Griggs* and *Albemarle,* this case also involves neutral practices, applied to all, that fall more harshly on one group and that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs,* 401 U.S. at 430.[10]

I. THE TOTALITY OF THE EVIDENCE, INCLUDING STATISTICAL EVIDENCE OF RACIAL STRATIFICATION, EASILY ESTABLISHES A *PRIMA FACIE* CASE OF DISPARATE IMPACT DISCRIMINATION.

***18** The parable of the blind describing an elephant[11] is an apt metaphor for the mischaracterization of this case by petitioners and some supporting *amici.* By focussing their attack on a single element of the case, namely the comparison between the proportion of non-whites in cannery jobs and non-whites in better paying, more desirable "at issue" jobs, as if no other evidence exists, the employers distort reality. The record establishes pervasive evidence of discrimination, of which this particular statistical ***19** comparison is only a part: discrimination is apparant "by the manner in which [an employer] publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of minority groups." *Teamsters,* 431 U.S. at 365.

Petitioners do not contest many of the facts upon which respondents rely, but they question the relevance and probative value of this evidence and assert that some of the practices are defensible. Specifically, the employers do not deny that general hiring, hiring of relatives, recruitment, rehire, bunking and messing practices occur essentially as respondents describe them. They claim that there is no ***20** statistical evidence of discrimination, because they allegedly hire in proportion to the "qualified" labor pool.

Both parties attempted to define the appropriate comparative reference to measure statistically the significance of the obvious racial stratification in the labor force, and there was and is sharp dispute on this issue. This dispute, however, should not obscure the agreement regarding the other factual elements of the employment process (even if the legal implications are debated), and the fact that these elements can and should be considered in determining the existence of the prima facie case. *Cf. Bazemore v. Friday,* 478 U.S. at 400.

The dispute over the statistical evidence of impact ultimately involves two questions: (1) whether qualifications that ***21** have not actually been uniformly applied in the selection of employees and that themselves may disproportionately exclude non-whites may be used to define the relevant labor pool for purposes of statistical evidence of impact; and (2) whether the employers may themselves manipulate the labor pool, by selectively seeking employees for some jobs in a predominantly white area and employees for other jobs in predominantly non-white areas.

A. Petitioners Have Failed to Demonstrate that Observed Disparities Are Attributable to Valid Skill or Qualifications Requirements

Evidence of racial, ethnic, or sex-based stratification in employment compellingly suggests the presence of discriminatory practices or the residue of intentional, ***22** historical discrimination.[12] Such Such stratification is unlikely to occur as a result of choice when the jobs to which minorities or women are confined are the least desirable ones. It is equally unlikely that qualifications or skills fully account for the disparities, especially in the jobs "at issue" in this case: until this litigation, the employer had no defined requirements for the jobs, and many of the incumbents were unskilled. The selection process for at issue jobs was highly subjective.[13] Under these ***23** circumstances, the skill level, for purposes of identifying comparative labor force data, must be based on the "nondiscriminatory standards actually applied ... to individuals who were in fact hired." *Franks v. Bowman Transp. Co.,* 424 U.S. at 772 n.32. *See also Albemarle,* 422 U.S. at 433. Since the evidence demonstrates that no standards were developed or consistently applied to actual hires, labor force comparisons cannot be restricted by hypothetical skill levels. Indeed, the notion that the Beach Gang truck driver job is a "skilled" job conflicts with this Court's repeated statements, in the context ***24** of OTR trucking cases, that this is a skill widely possessed or easily obtained. *See, e.g., Franks* and *Teamsters.*

It is hard to imagine that driving a truck around a cannery requires more skill than driving an 18 wheel tractor-trailer across country. Similarly, it is hard to understand why Alaskan native Americans are deemed not sufficiently skilled to cook on board fishing boats, or to be deckhands. They lack the requisite "skill" level, according to petitioners, because they have previously been excluded from these jobs.

It is the defendant's burden to prove the necessity of special qualifications, if they are in doubt. *EEOC v. Radiator Specialty,*

Co., 610 F.2d 178, 185 n.8 (4th Cir. 1979); *Davis v. Califano,* 613 F.2d 957, 964-65 (D.C. Cir. 1979); ***25** *Harrell v. Northern Elec. Co.,* 672 F.2d 444, 448 (5th Cir. 1982). Where the very subjectivity of the practice is challenged as contributing to, or creating, the discriminatory result, numerous courts have held that comparative labor force data may be limited only by reference to the "minimum objective qualifications" for the job. *Davis v. Califano,* 613 F.2d at 964. There were no minimum objective qualifications for the jobs at issue in this case because none had been identified and none was uniformly required.

Furthermore, prior experience and skill requirements would themselves be discriminatory. Defining the labor pool according to discriminatory standards would be entirely inappropriate:

> The circuitousness of this bootstrap argument becomes obvious when one recalls that it is [the] *qualifications* for flight officer that appellant claims are discriminatory.

***26** *Spurlock v. United Airlines,* 475 F.2d 216, 218 (10th Cir. 1972) (emphasis in original).[14] In such a case, it would be unreasonable to require plaintiffs to rely on the very data that "may be biased against them." *De Medina v. Reinhardt,* 686 F.2d 997, 1010 n.8 (D.C. Cir. 1982).

Lower federal courts are virtually unanimous in imposing on employers the burden of proving the existence and/or necessity of special job qualifications or skills where the requirements are not uniformly imposed, where they are not clearly justifiable, or where they may themselves cause or contribute to discriminatory exclusions. *See EEOC v. Rath Packing Co.,* 787 F.2d at 327, 336 ("Rath could not ***27** identify any criteria it used in selecting employees or any common qualifications or skills that its employees possessed"); *Crawford v. Western Elec. Co.,* 614 F.2d 1300, 1315 (5th Cir. 1980) ("an employer may not utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion procedure is challenged as discriminatory"); *Kinsey v. First Regional Securities,* 557 F.2d 830, 837-38 (D.C. Cir. 1977) ("objective criteria" had not been uniformly applied; skill requirements should be scrutinized if the evidence showed systematic exclusion of blacks).

Petitioners further assume that skills and qualifications are unevenly distributed in the population on the basis of race or ethnicity. The "more logical assumption," ***28** however, is that skills of the sort involved in this case[15] are evenly distributed. *De Medina v. Reinhardt,* 686 F.2d at 1008 n.7; *United States v. County of Fairfax,* 629 F.2d at 939. The employer bears the "burden of producing evidence from which it is possible to evaluate the likelihood that the disproportionate impact was caused by unequal qualifications." *De Medina,* 686 F.2d at 1009 n.7 (quoting D. Baldus and I. Cole, *Statistical Proof of Discrimination* 194-195 (1980)). *See also Catlett v. Missouri Highway & Transp. Comm'n.,* 828 F.2d at 1266 (employers burden to show that statistical disparity results from women's lack of interest).

***29** In sum, the assertion that skills, qualifications, or interest level precludes the statistical comparisons undertaken by respondents is neither apparent from the nature of the jobs nor is it factually supported in the record. The burden was on the employers to prove the existence of minimum, objective qualifications actually applied during the relevant period to individuals actually hired so that respondents could, if necessary, adjust their statistical presentation. *EEOC v. Radiator Specialty,* 610 F.2d at 185-86. Absent this showing, respondents' statistical data cannot be rejected or discounted for failing to account for spurious or hypothetical skills and qualifications that are allegedly lacking ***30** in the excluded class and that may themselves foster discrimination.[16]

B. The Data Comparing Non-White Representation In Cannery and Non-Cannery Jobs, Along With Other Evidence, Demonstrates the Impact of the Employers' Practices

Petitioners and the United States challenge the Ninth Circuit's reliance on the patent racial stratification in this workforce in finding a prima facie case.[17] To make this argument, they are ***31** forced to rely on petitioners' own practices - the very subject of this lawsuit - to construct an argument that this evidence is irrelevant. In particular, petitioners rely on their practice to hire from outside the workforce to fill non-cannery jobs to justify the contention that comparisons to the external labor market are more relevant than internal comparisons. The government relies, ultimately, on the claim that use of Local 37 as a referral source results in the "overrepresentation" of non-whites in cannery jobs, distorting any comparison between

that group and non-cannery hires. Neither addresses the anomaly their arguments suggest: that the employers' own challenged acts become the basis for defeating liability. Both ignore the fact that it was the employers' own decision to ***32** hire for non-cannery jobs through offices in Washington and Oregon, and that the labor agreement with Local 37 gave management the exclusive right to select new hires.[18] The rehire preference compounded the harmful effects of this management prerogative.

The contention that non-whites are "overrepresented" is itself ironic: both the government and petitioners claim that application of *Griggs* will "force" employers to adopt "quotas" to avoid potential liability. Both now seek the benefit of a "ceiling" quota. They argue ***33** that their practices should be insulated from liability so long as their hiring is proportionate with the appropriate labor pool as they define it, whether or not the practices impact more heavily on non-whites than whites.[19]

In any event, the record is devoid of any factual verification for the claim that non-whites are "overrepresented." In fact, the high proportion of non-whites may as easily reflect the fact that whites, having more options, are less willing to do this hard, seasonal work in remote locations. These factors, far from supporting the "overrepresentation" theory, suggest that the best comparison available is the actual workforce, a figure that avoids speculation about which elements of the labor force ***34** might be available for or interested in this employment.

The other comparative data all suffer serious, if not fatal, flaws. The district court's own characterization of census data[20] reveals why census figures are singularly inappropriate: they are largely comprised of individuals in year-round, fixed location jobs near their place of residence; the canneries are located in remote, sparsely-populated regions and provide only seasonal employment. There is no apparent relevance of this data to this case, and the district court provided no rationale for its acceptance. The finding ***35** in this regard is simply devoid of any foundation and is clearly erroneous.

Especially in the absence of minimum objective qualifications, the apparent restriction of minorities and women to lower paying less desirable jobs has often been viewed by the courts as highly probative evidence of discrimination, and sufficient to support a prima facie case. *See Shidaker v. Tisch,* 833 F.2d 627 (7th Cir. 1986), *cert. denied,* ___ U.S. ___, 108 S.Ct. 2900 (1988); *EEOC v. Radiator Specialty Co.,* 610 F.2d at 181-82, *Muller v. U.S. Steel Corp.,* 509 F.2d 923. A "plaintiff in a Title VII suit need not prove discrimination with scientific certainty." *Bazemore v. Friday,* 478 U.S. at 400 (Brennan, J., concurring).

The evidence of racial stratification does not exist in a vacuum, and the ***36** totality of the evidence clearly supports the finding of a *prima facie* case of discrimination *Id.* at 401-02.

C. The Employers' Use of An Undifferentiated Hiring Procedure Makes the End Result Appropriate For a Measurement of Disparate Impact

Petitioners contend that the plaintiffs improperly relied on the "cumulative effects" of their employment practices and that, having failed to demonstrate the individual impact of each specific practice, their challenge must fail. Having created a multifactorial selection process, with subjective elements and unweighted components, the employers cannot assert that the system is immune from attack because it does not have separate, scored or weighted factors whose impact can be separately and independently ascertained.

***37** In some cases, it might be entirely appropriate to require a plaintiff to demonstrate the discriminatory effect of identifiable criteria by which employees or applicants are selected. For example, police departments commonly subject new potential recruits to paper and pencil tests, medical examinations, physical ability tests, and background inquiries. Each one of these pre-employment hurdles is scored: a certain number of applicants are eliminated, the remaining may be ranked. The system contains both objective and subjective elements. Those who would challenge its validity may reasonably be expected to identify where the discrimination, if any, occurred, because in such a system the effects of each aspect of the screening process can be separately ***38** ascertained. *Cf. Connecticut v. Teal,* 457 U.S. 440.

But where the elements of the hiring process are not so clearly identifiable and applicants neither pass, fail nor score at any point until the end of the process when they are either hired or not, the only reasonable target for challenge is the result of the

process. Even the United States recognizes that in such a situation the impact of each element in a multifactorial process cannot be demonstrated.[21]

II. TITLE VII REQUIRES MORE THAN A SHOWING OF BUSINESS RELATED PURPOSES TO DEFEND APPARENTLY DISCRIMINATORY EMPLOYMENT PRACTICES

***39** Flouting seventeen years of Title VII jurisprudence, and Congressional ratification of that caselaw, the employers and the government in this case advocate abandonment of the central tenet of *Griggs:* that equal employment opportunity may not be offered "merely in the sense of the fabled offer of milk to the stork and the fox, ... [but] that the vessel in which the milk is proferred be one all seekers can use. The Act proscribes ... practices that are fair in form, but discriminatory in operation. *The touchstone is business necessity*." 401 U.S. at 431 (emphasis added).

Instead, the employers argue that they should be able to defend their practices simply by offering "reasonably clear and specific" reasons. Petitioner's Brief at 39; *see also* U.S. Brief at 27. In fact, ***40** the government would dispense with *Griggs* entirely: "Nothing about disparate impact cases justifies a departure from the model for litigating disparate treatment cases." *Id; see also* Petitioner's Brief at 47 ("Indeed, the rigid formula of *Griggs* itself should be reexamined in this context").

Thus, the government suggests that employers should be able to defend discriminatory practices for any reason other than "non-business," U.S. Brief at 24-25, & n. 35. It would accept an employer's sincere but unsupported assertions.[22] It ***41** was precisely this contention that this Court rejected over fifteen years ago when it held in *Griggs* that the employer's attempt to improve the overall quality of the workforce through educational and testing requirements, a "reasonably clear and specific" business related purpose, failed to provide an adequate defense. *Stare decisis* precludes such a departure from established law, ratified by Congress.

A. Congress Has Ratified This Court's Requirement That Employers Must Demonstrate the Business Necessity of Practices Which Result in Discrimination.

In 1971 this Court expressly rejected Duke Power Company's defense that its educational and testing requirements, adopted in response to the increasing complexity of its business, served a ***42** "legitimate business purpose": the company wanted to improve its efficiency and have some assurance that employees would be able to advance through the ranks.

In *Griggs,* the Court determined that the statutory exemption for professionally developed tests, 42 U.S.C. §2000e-2(h), did not shield Duke Power since the test had been "used to discriminate," as demonstrated by its effect on blacks. Such tests, like other neutral practices with disproportionately adverse effects, could only be justified if the employer could show a "manifest relationship" to successful job performance or business necessity. *Id.* at 433.

The same year, Congress expressly endorsed the *Griggs* interpretation of Title VII, retaining the statutory language cited in *Griggs.* The House Report also explicitly ***43** quoted *Griggs*[23] and endorsed both the effects test and the holding that an employer's good faith could not defeat a finding of discrimination, if the employer failed to prove the existence of an overriding business necessity. H.R. 92-238, 92d Cong., 1st Sess. 8 (1971).[24] The Court has itself recently acknowledged that "Congress recognized and endorsed the disparate impact analysis employed by the Court in *Griggs.*" *Connecticut v. Teal,* 457 U.S. at 447 n. 8.

***44** Nor does legislative history provide any basis for relaxing *Griggs*' requirements in cases involving subjective employment practices. The legislative history of the 1972 amendments is replete with examples of racial stratification in upper level positions, positions where subjective criteria are most likely to be used.[25]

Recognizing the increasingly subtle and complex nature of discrimination, the legislative history refers to "systems and effects." The House Report included within the ambit of prohibited "systems" practices relating to seniority, lines of progression, practices which perpetuate the ***45** present effects of earlier discrimination through various institutional devices, as well as testing and validation requirements. H.R. 92-238, 92d Cong. 1st Sess. 8 (1972).

The rule of law enunciated in *Griggs* has been adopted by Congress on other occasions, as well, in defining prohibited discrimination. For example, it has been used to define conduct prohibited by the Voting Rights Act as well as the Rehabilitation Act.[26] In sum, Congress has on several occasions relied upon, and ***46** endorsed, the *Griggs* decision, as interpreted in this and lower federal courts. An integral part of that decision is the insistence on business necessity as the standard by which practices, "fair in form but discriminatory in operation," must be justified.

B. Decisions of This Court Reveal That the Business Necessity Defense Is An Essential Element of Disparate Impact Analysis

Like Congress, this Court has consistently affirmed the rule of *Griggs* as originally enunciated, including its insistence on business necessity as the standard by which discriminatory practices must be judged. Thus, this Court has held that employment practices which "operate as 'built-in headwinds"' must be validated and "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with' important elements ***47** of work behavior which comprise or are relevant to the job...." *Albemarle,* 422 U.S. at 431 (quoting 29 C.F.R. §1607.4 (c)). The Court has specifically emphasized Title VII's rigorous burden:

> it is an insufficient response to demonstrate *some rational basis* for the challenged practices. It is necessary in addition, that they be 'validated' .... However this process proceeds, *it involves more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators.*"

Washington v. Davis, 426 U.S. 229, 247 (1976) (emphasis added) (distinguishing constitutional cases).[27]

***48** Allegations of good faith will not rebut a *prima facie* case of class-wide discrimination. *Griggs,* 401 U.S. at 431, *and see Teamsters,* 431 U.S. at 342 n.24. Nor will a desire to hire only the best qualified applicants. *Id.* Instead, the employer has to show that the challenged practices are of "great importance" or of a "compelling nature." ***49** *Connecticut v. Teal,* 457 U.S. at 451.[28] *Accord Nashville Gas Co. v. Satty,* 434 U.S. 136, 143 (1977); *Dothard v. Rawlinson* 433 U.S. at 331; *General Electric Corp. v. Gilbert,* 429 U.S. at 138 n.14 (1976); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 805 (1973).

Contrary to the government's and the petitioners' suggestion, the business necessity defense is an "affirmative defense," entirely distinct from the "much less burdensome riposte... applicable to ***50** individual disparate treatment cases." *Lewis v. Bloomsburg Mills, Inc.,* 773 F.2d 561, 571-72 (4th Cir. 1985). Articulation of a legitimate non-discriminatory reason "simply has no doctrinal relevance as a negating or justifying defense to statistically proven patterns and practices of discrimination ... [it is] 'about as relevant as a minuet is to a thermonuclear battle."' *Id.* at 572 n.19 (citation omitted.) *Accord Nash v. Consolidated City of Jacksonville,* 837 F.2d 1534, 1536 (11th Cir. 1986).

If the position now advocated by the government and the employers were the law, Title VII would have done little to desegregate the workplace. For example, the employer in *Dothard* may have sincerely believed that height and weight correlated with effectiveness as a corrections ***51** officer, but that belief was not factually supported. If a lower level of proof -- merely assertion of a business purpose -- had been accepted, women would still be virtually excluded from law enforcement jobs, many factory jobs, and other positions for which size has been wrongly assumed to be relevant.[29] *See also Weeks v. Southern Bell Tel. & Tel. Co.,* 408 F.2d 228, 236 (5th Cir. 1969) ("using these class stereotypes denies desirable ***52** positions to a great many women perfectly capable of performing the duties involved").

A simple explanation fails to rise to the level of the evidence of systematic discrimination inherent in a prima facie case of class-wide discrimination. Any employer can always articulate some business-related reason for its practices, but that does nothing to address the systematic impact of discriminatory practices. Title VII's focus is and should be on the eradication of practices that inhibit equal employment opportunity, regardless of motive.[30]

***53** Statistical data may always be challenged as irrelevant, unreliable or inaccurate, because the plaintiff's *prima facie* case can always be attacked directly. Class disparate treatment cases best define this process: the defendant must produce its own statistical analysis, or valid statistical critique, demonstrating why the statistics are incorrect or unworthy of credibility.

Teamsters, 431 U.S. at 340. In reviewing the statistical data in *Bazemore v. Friday,* the Court noted that the defendants failed to provide "evidence to show that there was in fact no disparity":

> ***54** Respondents' strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt that we are aware of-statistical or otherwise-to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites.

478 U.S. at 403-04 n.14 (references omitted) (Brennan, J., concurring). As *Bazemore* thus makes clear, affirmations of good intentions do not refute a statistical showing of discrimination - only facts suffice.[31]

Failing refutation of the statistical evidence, an employer is free to prove the business necessity of practices with ***55** discriminatory impact.[32] Here, the employers offered little other than assertions of their own good faith and the business related purposes that were allegedly served.[33]

In the context of both disparate impact and class disparate treatment cases, this Court has squarely and consistently rejected the assertions of business-related purposes to rebut a discrimination claim that relied in whole or in part on classwide ***56** statistical evidence of discrimination.[34]

C. Cost Considerations Do Not Establish Business Necessity Or Excuse The Necessity To Prove It

The employers and the government contend that the potential costs of nondiscrimination should excuse discriminatory practices, in essence arguing that the assertion of a cost-based rationale should ***57** suspend the obligation to prove business necessity. But this is simply another rendition of their contention that articulation of a business related purpose should provide a defense. Here, the claim regarding costs is wholly speculative and unsupported. On this basis alone it should fail.

Morover, Congress has rejected the notion of a cost-based defense. In 1978, opponents of the Pregnancy Discrimination Act complained that compliance would be too costly. Representative Hawkins, sponsor of the amendment, replied:

> Eradicating invidious discrimination by definition costs money: It is cheaper to pay all black workers less than all white workers, or all women less than all men. The fact that it would cost employers money did not prevent Congress from enacting the Equal Pay Act or title VII, and it should not prevent this Congress from making clear that title VII prohibits this form of sex discrimination as well.

***58** Legislative History of the Pregnancy Discrimination Act (1979) (committee print prepared for the Senate Committee on Labor and Human Resources) at 26. The Senate Report concluded:

> even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country.

Id. at 48.

This Court has explicitly rejected a cost-based defense on three separate occasions. *Los Angeles Dep't Water & Power v. Manhart,* 435 U.S. 702, *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669 (1983), and *Arizona Governing Committee v. Norris,* 463 U.S. 1073 (1983).[35] Even the *Griggs* Court must have ***59** recognized that validation and the alteration of unlawful practices would entail some costs, but mandated them anyway, and has repeatedly done so.

III. PRINCIPLES OF STARE DECISIS PRECLUDE ABANDONING OR ALTERING THE BUSINESS NECESSITY DEFENSE.

The decisions noted above constitute an integral part of Title VII jurisprudence and are central to the disparate impact theory. Principles of *stare decisis* dictate adherence to *Griggs, Albemarle,* and other authoritative interpretations of Title VII. The Court has held that *stare decisis* "weighs heavily" and precludes a departure from precedent where Congress had the opportunity to reject the "Court's interpretation of its legislation" but ***60** declined to do so. *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977). *Accord NLRB v. International Longshoremen Association, AFL-CIO,* 473 U.S. 61, 84 (1985). In deciding whether to overrule an earlier case, the Court is required to determine whether that act "would be inconsistent with more recent expressions of Congressional intent." *Patsy v. Florida Board of Regents,* 457 U.S. 496, 501 (1982); *Monell v. New York City Department of Social Services,* 436 U.S. 658, 695 (1978). *See also Guardians Association v. Civil Service Commission of the City of New York,* 463 U.S. 582, 612 (1983) (O'Connor, concurring) (constrained to follow Court's prior interpretation of Title VI). Here, overruling *Griggs,* or any of its essential elements, particularly the business necessity requirement, would plainly be ***61** "inconsistent" with "expressions of Congressional intent."

Congress is, of course, free to reverse a statutory construction by this Court that is inconsistent with its intent, and it has done so on several occasions, notably when the Court has narrowed the scope of civil rights laws.[36]

In some of these prior instances, arguably the intent of Congress had not been as clear as it is here. Congress could hardly have made plainer its intent to adopt the entire constellation of ***62** holdings for which *Griggs* stands. Under these circumstances, adherence to *stare decisis* will not only preserve the integrity of the judicial process, by reinforcing judicial reliability and predictability, it will also ensure that Congressional action endorsing *Griggs* will be respected.

*63 *CONCLUSION*

For the foregoing reasons, *amici* respectfully submit that the judgment of the Ninth Circuit in favor of respondents should be affirmed.

APPENDIX

Statement of Interest of *Amici Curiae*

The American Civil Liberties Union ("ACLU") is a nationwide union, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender-based discrimination. It has participated, both directly and as *amicus curiae,* in the litigation of many cases before the Supreme Court and other courts challenging sex discriminatory practices.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for long standing discrimination against women and minorities.

The NOW Legal Defense and education Fund ("NOW LDEF") was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counseling program, and advocacy before the Equal Employment Opportunity

Commission and other federal agencies charged with enforcement of the equal opportunity laws.

Footnotes

1 The parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

2 The interest of each individual *amicus curiae* is set forth in the Appendix to this brief.

3 For example, recruiters at Alaskan villages in the remote areas near the canneries were not authorized to accept applications for non-cannery work, Joint Appendix (hereafter "JA") at 163; and non-whites were actively discouraged from applying. JA 38-42; 52; 56-60; 63-67; 71-73; 75-77; 85-86; 125-126.

4 Alaskan Fisheries Hearings: Hearings Before the Subcommittee on Alaskan Fisheries, Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess. 58 (1939) (hereafter "Hearings").

5 By this practice, if the employers' argument is accepted, an employer may insulate itself from liability for discrimination by manipulating the labor pool: the comparative base used to measure discriminatory impact is the very labor force selected by the employer that has already produced the challenged result.

6 Young inexperienced whites were commonly given jobs that petitioners now claim are "skilled." *See, e.g.,* JA 19-24, 25-29, 35-37, 60-62, 78-79, 110-11, 114-22, 123-24, 131-36.

7 Sue Liljeblad, Filipino Alaska: A Heritage (1980) (Alaska Historical Commission Studies in History No. 9) (hereafter "Historical Report"). Race labeling and stereotyping dominated industry practices. Chinese were valued as "willing to work excessively long hours without grumbling, and are content to live in miserable quarters and the cheapest food." *Id.* at 100. A representative from the Territory of Alaska testified in Congress in 1939: "The oriental is not able physically to do the work of a white man, and I am sure it is the desire of the packer now to get rid of the Filipino.... If he has to pay a wage like that the packer feels he can get more work out of a white man and perhaps with less trouble...." Hearings, *supra* n.4, at 29. At the same time the white man was viewed as too good for the dirtiest work. "Some of the operators are of the opinion that white people would not generally prove satisfactory in the butchering crews. That is, the men who feed the iron chinks and slime the fish .... Some of them believe it would be necessary to use oriental labor in the butcher room, even if white labor were available and there was no restriction on employment." *Id.* at 346-47. Living accommodations were distributed on the basis of race or ethnicity with whites receiving the newest bunkhouses with the best lighting and conditions. *Id.* at 115-16.

8 For example, the rehire preference clearly serves to perpetuate current staffing patterns, *Craig v. Alabama State Univ.,* 804 F.2d 682, 687 n.7 (11th Cir. 1986), and whites benefitted overwhelmingly from the nepotistic practices. ER 57-101.

9 *E.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) ("racial identifiability" of lines of progression; blacks in worst jobs); *United States v. County of Fairfax, Va.,* 629 F.2d 932, 937-38 (4th Cir. 1980) (women clustered in clerical jobs, minorities in maintenance); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678 (5th Cir. 1975) (blacks confined to switchman position); *Marsh v. Eaton Corp.,* 639 F.2d 328 (6th Cir. 1981) (women channeled into specific jobs).

10 There can be no doubt in this case that the "racial identifiability" of jobs, *Albemarle,* 422 U.S. at 409, did not arise from a "myriad of innocent causes," *Watson v. Fort Worth Bank & Trust Co.,* 487 U.S. 977, 108 S.Ct. 2777 (1988), but from an extended history of specific discriminatory practices.

11 Several blind people stationed at various points around an elephant are each separately asked to describe the beast. The one at the trunk reports that an elephant is a large hose; the one at the tusk describes a curved spike; another at the ear says the elephant resembles a sail; the one feeling the body says an elephant is a large hairy wall, and according to the one at the tail an elephant seems to be a sort of rope with a tassel at the end. Here, the employers and their *amici* are all feeling the tail; they perceive no elephant, only a rope.

12 *E.g., Gamble v. Birmingham So.R. Co.,* 514 F.2d 678 (5th Cir. 1978); *Muller v. U.S. Steel Corp.,* 509 F.2d 923 (10th Cir.), *cert. denied,* 423 U.S. 825 (1975). *See also Albemarle,* 422 U.S. 405 and *Griggs,* 401 U.S. 424.

13 The failure to articulate objective criteria, and the reliance on unguided subjective decisions, has often been identified as a ready mechanism for discrimination. *Knight v. Nassau County Civil Service Commission,* 649 F.2d 157, 161 (2d Cir.), *cert. denied,* 454 U.S. 818 (1981); *Williams v. Colorado Springs School District,* 641 F.2d 835, 842 (10th Cir. 1981); *Fisher v. Procter and Gamble*

Manufacturing Co., 613 F.2d 527, 546 (5th Cir. 1980), *cert. denied,* 449 U.S. 1115 (1981); *Parson v. Kaiser Aluminum and Chemical Corporation,* 575 F.2d 1374, 1385 (5th Cir. 1978), *cert. denied sub. nom. Local 13000, U.S. Steelworkers of America v. Parson,* 441 U.S. 968 (1979); *Rowe v. General Motors Corporation,* 457 F.2d 348, 359 (5th Cir. 1972).

14 In *Spurlock,* the court held that a *prima facie* case was established through evidence of the "minuscule" number of blacks employed, and that the employer bore the burden to justify the job qualifications.

15 The skill level, to the extent it exists, is of the experiential sort, commonly available to all groups. Unlike brain surgeons and rocket scientists, societal discrimination does not operate against non-whites in these categories, but rather fosters their participation.

16 Indeed, some plaintiffs and class members had college educations, JA 52, 56-60, 63-67, 71-73, 75-77, 85-86, but were apparently not deemed sufficiently qualified to work in the Beach gang, quality control, clerical, or other jobs.

17 The court may well have considered this evidence in the context of other evidence in the record, since nothing in the opinions below suggests that the court relied *solely* on that evidence. Whether or not the Court of Appeals considered the totality of the evidence, respondents are, of course, entitled to assert any ground for affirmance of the judgment in their favor. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 119 n.14 (1985). The totality of the evidence is clearly the appropriate standard to determine the existence of a prima facie case. *Bazemore v. Friday,* 478 U.S. at 400-01.

18 This fact distinguishes this case from *General Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375 (1982), in which the union was the exclusive referral source and the sole agent found liable for intentional discrimination under 42 U.S.C. §1981. *Compare Arizona Governing Comm. v. Norris,* 463 U.S. 1073, 1089 & n.21 (1983) (employers gain no immunity by delegating tasks to third parties where "employers are ultimately responsible").

19 This contention has already been rejected by this Court. *Connecticut v. Teal,* 457 U.S. 440 (1982).

20 The district court noted that census data is "dominated by people who prefer full-year, fixed-location employment," but nonetheless found that "such data is nevertheless appropriate in defining the labor supplies for migrant seasonal work." Fdg.120, 34 CCH Empl. Prac. Digest ¶34,437, p.33,829. Why such data is "appropriate" is not explained.

21 In its brief, at p.22, the government concedes that "if [multiple] 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."

22 Indeed, the employer and United States characterize the defendant's burden as one of production despite decisions by this Court stating that the burden is one of proof. *Albemarle,* 422 U.S. at 425 ("the company must meet the burden of proving that its tests (were) job related"); *Dothard v. Rawlinson,* 433 U.S. at 329 (the defendants failed "to prove that the challenged requirements are job-related"). *See also Connecticut v. Teal,* 457 U.S. at 451 (employers must "demonstrate that the examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance....")

23 *See, e.g.,* H.R. 92-238, 92d Cong. 1st Sess. 8, 21 (1971) (specific reference to "business necessity" as "touchstone").

24 Congress further incorporated *Griggs* by providing that: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated... present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166, 7564 (1972).

25 For example, the concentration of minorities and women in the lowest paying and least desirable jobs was particularly noted: H.R. 92-238, 92d Cong., 1st Sess. 23 (1971). 117 Cong. Rec. 31960 (9/15/71) (remarks of Rep. Perkins); 117 Cong. Rec. 32095 (9/16/71) (remarks of Rep. Faunteroy); 117 Cong. Rec. 32097 (9/16/71) (comments of Rep. Abzug); 117 Cong. Rec. 32101 (9/16/71) (comments of Rep. Badillo).

26 The legislative history of the Voting Rights Act Amendments of 1982, 97 P.L. 205, 96 Stat. 131 42 U.S.C. §1973 (1982), shows express reliance on *Griggs:* "the results test to be codified in Section 2 is a well defined standard, first enunciated by the Supreme Court and followed in numerous lower federal court decisions". S. Rep. No. 97-417, 97th Cong., 2d Sess. at 17, reprinted in 1982 U.S. Code Cong. and Admin.News 193-94. Section 504 of the Rehabilitation Act, 29 U.S.C. §794 (1982), has been similarly held to incorporate *Griggs* standards. *Alexander v. Choate,* 469 U.S. 287 (1984).

27 Lower courts have consistently required that a defendant provide professional or empirical validation for their discriminatory practices. *Boston Chapter, NAACP, Inc. v. Beecher,* 504 F.2d 1017, 1022 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975) (rejecting written test for firefighters); *Grant v. Bethlehem Steel,* 635 F.2d 1007, 1015 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981); *Geller v. Markham,* 635 F.2d 1027, 1032-1034 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981) (cost concerns rejected);

Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971); *Fisher v. Procter and Gamble Manufacturing Co.,* 613 F.2d 527, 544-45 (5th Cir. 1980), *cert. denied,* 449 U.S. 1115 (1981) (qualifying tests and experience); *Rowe v. General Motors Company,* 457 F.2d 348, 358 (5th Cir. 1972) (rejecting "ebb and flow" in production level); *Harless v. Duck,* 619 F.2d 611, 616-617 (6th Cir.), *cert. denied,* 449 U.S. 872 (1980) (physical ability test and oral interview); *Caviale v. State of Wisconsin Department of Health and Social Serv.* 744 F.2d 1289, 1294-95 (7th Cir. 1984) (requirement that applicants be members of Career Executive Program); *Firefighters Institute for Racial Equality v. City of St. Louis,* 549 F.2d 506, 511 (8th Cir.), *cert. denied,* 434 U.S. 819 (1977) (promotional exam); *Hawkins v. Bounds,* 752 F.2d 500 (10th Cir. 1985) (discriminatory detailing); *Walker v. Jefferson County Home,* 726 F.2d 1554, 1559 (11th Cir. 1984); *Hayes v. Shelby Memorial Hospital,* 726 F.2d 1543, 1553 n.15 (11th Cir. 1984) (potential litigation costs).

28 *See also Hawkins v. Bounds,* 752 F.2d 500 ("great importance"); *Grant v. Bethlehem Steel,* 635 F.2d 1007 ("genuine business need"); *Kirby v. Colony Furniture Co.,* 613 F.2d 696, 705 n.6 (8th Cir. 1980) ("compelling need"); *Walker v. Jefferson County Home,* 726 F.2d at 1559 ("rigorous standard"); *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 426 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976) ("heavy burden"); *Boston Chapter, NAACP v. Beecher,* 504 F.2d at 1024 ("substantially related" by "convincing facts"; *Robinson v. Lorillard,* 444 F.2d at 798 ("sufficiently compelling"); *Williams v. Colorado Springs School District,* 641 F.2d 835, 842 (10th Cir. 1981) ("the practice must be essential, the purpose compelling").

29 On only one occasion has the Court even arguably excused the usual validation requirement. In *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979), the Court noted that plaintiffs' statistical data was "weak," possibly not even sufficient to establish a *prima facie* case. *Id.* at 587. Under these circumstances, the Court found the restriction of methadone users from "safety sensitive" positions was job-related. *Id.,* n.31. The ultimate holding was contained in a footnote: "Whether or not respondents' weak showing was sufficient to establish a *prima facie* case, it clearly fails to carry respondents' ultimate burden..." *Id.* This decision provides no basis for the conclusion that the Court has dispensed with the business necessity requirement in response to a prima facie case of discrimination.

30 Indeed, business related purposes have been advanced to justify even facially discriminatory practices, and the asserted non-invidious motives were most likely genuine. *E.g., Los Angeles Dep't of Water and Power v. Manhart,* 435 U.S. 702 (1978). Sex discrimination cases reveal the irrelevance of bigotry or animus to a finding of discrimination. Invidious discrimination against women has historically been characterized by benign motives. The Supreme Court has invalidated intentional discrimination even where the intent was" to favor [women], not to disfavor them." *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142, 150 (1980). *See also Orr v. Orr,* 440 U.S. 268 (1979) (alimony statute which benefitted only women invalidated as unconstitutional intentional discrimination).

31 "[H]ypotheses or conjecture will not suffice" to rebut statistical evidence of discrimination. *Cable v. Hot Springs school Dist.,* 682 F.2d 721, 730 (8th Cir. 1982) (citation omitted). *Catlett v. Mission Highway & Transp. Comm.,* 828 F.2d at 1266 (defendant may not rely on "mere conjecture or assertion" but must produce "direct evidence").

32 The job analysis prepared in this case is unavailing, since it is conceded that the qualifications had not been previously identified or required. Validation undertaken in preparation for litigation is always subject to particular scrutiny. *Albemarle,* 422 U.S. at 433 n.32. Moreover, the study was materially defective in that it did not attempt to correlate important elements of work behavior with the job qualifications identified. This is legally insufficient. *Id.* at 431-32.

33 The district court accepted these mere "articulations" but the court failed to apply disparate impact and these conclusions were thus governed by an incorrect legal standard.

34 To the extent that petitioners and the government rely on the opinion of four members of the Court in *Watson v. Fort Worth Bank & Trust Co.,* 487 U.S. ___, to support the conclusion that an "articulation" defense is appropriate in this case, that reliance is misplaced. *Watson* involved a single individual claimant who asserted that blacks were disproportionately affected by the bank's subjective promotion practices. The Court held that she could proceed on such a theory. It had no occasion to address the burden on a defendant in response to evidence of class-wide discrimination. This Court's decisions have always distinguished between individual and class disparate treatment cases with regard to both the *prima facie* case and the defense. *Compare Teamsters* with *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). When evidence of classwide discrimination is present, even in an individual case, the *Teamsters* model is the more relevant one.

35 *See also Robinson v. Lorillard,* 444 F.2d at 799-800 and n.8; *Hayes v. Shelby Mem. Hosp.,* 726 F.2d 1543, 1552 n.15 (11th Cir. 1984); *Smallwood v. United Airlines, Inc.,* 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied,* 456 U.S. 1007 (1982) *Gathercole v. Global Assocs.,* 545 F. Supp. 1280, 1282 (N.D. Cal. 1982).

36 *E.g., General Electric v. Gilbert,* 427 U.S. 125 (1976) led to the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (1982). *Grove City College v. Bell,* 456 U.S. 555 (1984) was overruled by the Civil Rights Restoration Act, Pub. L. 100-259 (1988). *Mobile v. Bolden,* 446 U.S. 55 (1980), was reversed by the Voting Rights Act Amendments of 1982, 42 U.S.C. §1973, *et seq.*

(1982). In *Mobile v. Bolden* a plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory purpose.