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The Quintessential Employer's Dilemma: Combating Title VII Litigation by Meeting the Elusive Strong Basis in Evidence Standard

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THE QUINTESSENTIAL EMPLOYER'S DILEMMA: COMBATING TITLE VII LITIGATION BY MEETING THE ELUSIVE STRONG BASIS IN EVIDENCE STANDARD

I. INTRODUCTION

Suppose that Publicus Corporation issues an objective assessment to determine qualified candidates for a promotion and plans to promote the top ten highest scoring candidates.[1] To the corporation's dismay, the test results reveal that the top ten scoring candidates were all white males, although nearly half of the test takers were minorities. Publicus Corporation now faces a dilemma. Should Publicus promote the candidates who scored the highest or should Publicus discard the test? If Publicus Corporation keeps the test, it will likely face disparate impact litigation by minority candidates who will argue that, although neutral on its face, the test was discriminatory in effect under Title VII. If the corporation discards the test, the white employees will argue that Publicus engaged in disparate treatment against them, subjecting the corporation to litigation under Title VII. This is the dilemma that employers frequently face today if promotional and hiring tests result in a disproportionate number of minority candidates failing the tests. Most recently, the Supreme Court held that fear of litigation alone cannot justify an employer's use of race-based measures.[2] Instead, the employer must have a strong basis in evidence for believing that it would have been liable under the disparate impact statute had it not taken remedial race-based measures.[3] It is exceptionally difficult, however, for an employer to satisfy the "strong basis in evidence" standard.[4]

This Note will discuss the history of Title VII and the "strong basis in evidence" standard in cases of disparate impact litigation and will provide recommendations to ameliorate any current inconsistencies.[5] Recently, the Supreme Court amplified the uncertainty surrounding the "strong basis in evidence" standard by finding that statistics are not

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1 This hypothetical scenario was created by the author to illustrate the potential impact of Title VII on employers who use testing to determine candidates for promotion.

2 Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

3 *Id.* at 2662.

4 *See infra* Part III.B (analyzing the strong basis in evidence standard).

5 *See infra* Part III.B (providing model judicial reasoning to ascertain the likely requirements of the strong basis in evidence standard).

enough to establish a prima facie case of discrimination.[6] The purpose of this Note is to advocate amending Title VII to clearly establish what constitutes disparate impact and what remedial action employers should implement when faced with the likelihood of disparate impact litigation.[7] Part II of this Note focuses on the history of Title VII and the Equal Employment Opportunity Commission.[8] Part III identifies problems associated with the statutory provisions of Title VII and the difficulty for courts to achieve a uniform standard of analysis under the "strong basis in evidence" standard—a constitutional standard borrowed from Equal Protection analysis.[9] Finally, Part IV proposes a modified standard of analysis, as well as amendments to both the Equal Employment Opportunity Commission regulations and to Title VII of the Civil Rights Act of 1964.[10]

II. BACKGROUND

After the enactment of Title VII of the Civil Rights Act of 1964, employers were no longer allowed to engage in intentional discriminatory employment practices based on an individual's race, color, religion, sex, or national origin.[11] The Equal Employment Opportunity Commission ("EEOC") was created under Title VII to prevent such unlawful employment practices and has the authority to file lawsuits on behalf of aggrieved employees.[12] In response to several unfavorable employment discrimination decisions, Congress amended Title VII in 1991 to include a disparate impact provision.[13] The provision makes it unlawful for an employer to engage in any employment practice that has a disparate impact based on race, color, religion, sex, or national origin unless the employer could validate its test as job-related and consistent with business necessity.[14]

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6 *See Ricci*, 129 S. Ct. at 2662.

7 *See infra* Part IV (proposing amendments to Title VII and the Uniform Guidelines on Employee Selection Procedures).

8 *See infra* Part II (presenting the history of Title VII and discussing the impact equal protection has had on Title VII litigation).

9 *See infra* Part III (analyzing the Uniform Guidelines on Employment Selection Procedures, the strong basis in evidence standard, and the disparate impact and disparate treatment provisions of Title VII).

10 *See infra* Part IV (discussing the need to reform the strong basis in evidence standard and revise Title VII).

11 *See* 42 U.S.C. § 2000e-2 (2006) (defining unlawful employment practices).

12 *See id*. (stating that the Commission has the power to prevent any person from engaging in unlawful employment practices).

13 *See id*. § 2000e-2(k) (containing the disparate impact provision).

14 *See id*. (providing the disparate impact provision created under Title VII). *See generally* Michael T. Kirkpatrick, *Class and Collective Actions in Employment Law: Symposium Editors:*

Part II discusses the background of Title VII, the problems that have arisen since its enactment, and the standard that employers must meet to justify their employment practices.[15] Specifically, Part II.A discusses the rationale for Title VII and the protection it provides for minorities.[16] Part II.B outlines the history of the EEOC and discusses the purpose behind the Uniform Guidelines on Employee Selection Procedures.[17] Part II.C discusses the development of the "strong basis in evidence" standard, the burden it creates for employers, and the attempt by circuit courts to define and apply the standard.[18]

A. Title VII of the Civil Rights Act of 1964

The initial purpose behind Title VII was to prevent disparate treatment.[19] A growing concern that employee testing and other employment practices were having a discriminatory effect on minority candidates led to the passage of the Civil Rights Act of 1991, which made the use of a non-validated test that resulted in disparate impact unlawful.[20] Employers who feared disparate impact litigation would

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Douglas D. Scherer and Robert Belton: Employment Testing: Trends and Tactics, 10 EMP. RTS. & EMP. POL'Y J. 623, 626 (2006) (discussing that disparate impact occurs when employers use a facially neutral employment practice that disproportionately affects protected class members); James M. Conway, Note, *Title VII and Competitive Testing*, 15 HOFSTRA L. REV. 299, 302 (1987) (explaining that intent to discriminate is not required to establish disparate impact).

15 *See infra* Part II (discussing why Title VII was enacted, the history and purpose of the EEOC, and the establishment of the strong basis in evidence standard—a standard that an employer must meet to prove that a remedial action undertaken was necessary to avoid litigation).

16 *See infra* Part II.A (explaining why Title VII was enacted and the protection it provides).

17 *See infra* Part II.B (describing the EEOC and the Uniform Guidelines on Employee Selection Procedures).

18 *See infra* Part II.C (presenting the history of the strong basis in evidence standard and the approaches the circuit courts have taken in applying the standard in cases of disparate impact).

19 *See infra* notes 24–27 and accompanying text (explaining the purpose behind Title VII was to prevent disparate treatment, which occurs when minorities are overtly discriminated against in the workforce); *see also* Janice C. Whiteside, Note, *Title VII and Reverse Discrimination: The Prima Facie Case*, 31 IND. L. REV. 413, 415 n.18 (1998) (quoting 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler) ("Title VII was intended to cover 'white men and white women and all Americans.'"); 110 CONG. REC. 7218 (1964) (memorandum of Sen. Clark) ("Title VII creates an 'obligation not to discriminate against whites.'")) (explaining that the legislative history of Title VII shows Congress intended it to cover all employees, not just minorities).

20 *See infra* note 54 (defining disparate impact as a form of unintentional discrimination that occurs when employment tests and practices yield a lower than expected number of minority candidates).

often institute remedial measures to avoid litigation.[21] However, they faced the possibility that this might subject them to reverse discrimination claims.[22] Employers continue to struggle with the predicament of avoiding disparate impact litigation without facing liability for reverse discrimination.[23]

1. The Initial Purpose of Title VII: Preventing Disparate Treatment

Title VII of the Civil Rights Act of 1964 made it unlawful for an employer to deliberately refuse to hire or otherwise discriminate against an individual based on the individual's race, color, religion, sex, or national origin.[24] The enactment of Title VII by Congress purported to mandate equal employment opportunities by prohibiting barriers that operated to favor the selection of white employees over minorities. [25] However, Congress did not intend to guarantee a job to every person regardless of his or her qualifications merely because he or she had minority status.[26] Disparate treatment situations occur when an

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[21] *See infra* notes 49–53 and accompanying text (explaining how fear of disparate impact litigation led many employers to engage in banding of test scores, granting preferences to minorities, and race norming).

[22] *See infra* notes 49–53 and accompanying text (discussing that the use of preferences and race norming as remedial measures often led to reverse discrimination claims).

[23] *See infra* Part II.C (introducing the strong basis in evidence standard and its effect on employers).

[24] *See* 42 U.S.C. § 2000e-2 (2006) (stating what constitutes unlawful employment practices). Unlawful employment practices are defined as follows:

> It shall be an unlawful employment practice for an employer—
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> (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.

Id.; *see also* Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 305 (1996) (providing an overview of Title VII). *But see* Stephen Plass, *Reinforcing Title VII with Zero Tolerance Rules*, 39 SUFFOLK U. L. REV. 127, 130 (2005) (arguing that Title VII fails to combat employment discrimination and fosters resentment and opposition from white workers).

[25] Conway, *supra* note 14, at 300 (explaining the goal behind Title VII was to eliminate discriminatory employment preferences and establish fair employment practices).

[26] Anna S. Rominger & Pamela Sandoval, *Employee Testing: Reconciling the Twin Goals of Productivity and Fairness*, 10 DEPAUL BUS. L.J. 299, 307 (1998) (discussing Title VII and employment testing). By enacting Title VII, Congress sought to "remove artificial, arbitrary, and unnecessary barriers to employment that served to discriminate on the basis of race or other impermissible classifications." *Id.*

employee is intentionally treated less favorably than other employees in areas such as compensation, contract terms, conditions, promotions, or privileges because of his or her minority status.[27]

In addition to disparate treatment claims, employees may also seek redress for disparate impact under Title VII.[28] Disparate impact discrimination is the use of a facially neutral employment practice that has a disproportional effect on minorities and that cannot be justified by business necessity.[29] By codifying disparate impact, Congress intended to eliminate specific practices such as employment tests that perpetuated past intentional discrimination.[30]

2. Employee Testing and Disparate Impact

In the 1950's, employers began using standardized tests to gather data about prospective employees and potential candidates for promotions.[31] Employers preferred standardized tests because they

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[27] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973) (examining a case where a black civil rights activist claimed that his discharge had been racially motivated, and he sued under Title VII of the Civil Rights Act of 1964); *see also* Brian H. Alligood, *Proof of Racial Discrimination in Employment Promotion Decisions Under Title VII of the Civil Rights Act of 1964,* 48 AM. JUR. PROOF OF FACTS 3d 75 § 5 (1988) (stating that Title VII applies to employers that "employ at least fifteen employees for a twenty or more week period in the present or preceding calendar year").

[28] *See* Alligood, *supra* note 27 (explaining that disparate impact and disparate treatment are the two main types of discrimination classifications under Title VII).

[29] *See, e.g.*, Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 325 n.15 (1977) (explaining that disparate impact involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity"); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (emphasizing that discriminatory employment tests cannot be maintained under Title VII, even if the tests are facially neutral); *see also* Charles A. Sullivan, Ricci v. DeStefano: *End of the Line or Just Another Turn on the Disparate Impact Road?* 104 NW. U. L. REV. COLLOQUY 201, 201 (2009) (explaining that disparate impact discrimination is the use of facially neutral employment practices that have a discriminatory effect on protected class members).

[30] *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake*? 53 UCLA L. REV. 701, 705 (2006) (explaining the disparate impact theory initially arose to deal with employment practices that were perpetuating past intentional discrimination). Selmi asserts that "[g]iven the vast inequities in school education systems among white and black schoolchildren, imposing written tests as a condition of employment predictably would have the effect of perpetuating segregated job classifications." *Id.* at 714.

[31] *See* Rominger & Sandoval, *supra* note 26, at 301 (discussing the initial employee screening techniques used by employers). Traditionally, employers relied primarily on reference checks and job interviews to gain information about applicants for job and promotion slots. *Id.* However, these techniques failed to provide adequate information regarding employee productivity. *Id.*; *see also* David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Opportunity Law Enforcement?* 42 VAND. L. REV. 1121, 1177 (1989)

provided better information about employees and because they produced greater efficiency in selection methods.[32] Employers' use of such tests increased for two reasons.[33] First, they believed the tests were an objective measure that could efficiently rank test-takers based on their level of performance.[34] Second, employers found that standardized employment tests more reliably predicted job performance than traditional methods of gathering data.[35] In many cases, employers relied exclusively on test scores for employee selection.[36] Unfortunately, this disproportionately excluded women and minority candidates from being hired and promoted, which increased the likelihood that a disparate impact claim would be raised.[37]

3. The Foundational Case for Disparate Impact: *Griggs v. Duke Power Co.*

The Court established the theory of disparate impact in *Griggs v. Duke Power Co.*[38] In *Griggs,* a company implemented a policy requiring a high school education for initial assignment into any department other

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(explaining that standardized ability tests are commonly used for education and hiring decisions).

[32] *See* Michael Selmi, *Testing for Equality: Merits, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. Rev. 1251, 1256–57 (1995) (analyzing the relationship between employment testing and affirmative action in employment). Efficiency concerns typically emerge when there are too many applicants for a limited number of positions, which makes screening of individual applicants impractical. *Id.* at 1256. To resolve efficiency concerns, employers use employment tests to differentiate among the available candidates. *Id.* Employment tests are useful to the extent that they measure productivity and provide reliable differentiating information. *Id.* at 1257.

[33] *See* Rominger & Sandoval, *supra* note 26, at 303 (examining the increasing use of employment testing procedures).

[34] *Id.*

[35] *Id.*

[36] *See* Selmi, *supra* note 32, at 1258 (discussing employer reliance on employment testing to determine candidates for hire and promotion).

[37] *Id.* Disparate impact occurs when:

> [M]embers of a protected group—whether they be African-American, Hispanic, women, or the aged—perform significantly less well on an examination than the majority group, which is typically white men. Adverse impact can be demonstrated in a number of ways, such as by comparing pass rates to determine whether whites pass the test at a higher rate than African-Americans, or by looking to the actual hiring (or promotion) rates of employees. In any event, when employment tests have significant adverse impact, employers may face costly and protracted legal challenges, and their efforts toward workplace diversity may be frustrated.

Id. (footnotes omitted).

[38] 401 U.S. 424, 430 (1971).

than the Department of Labor.[39] The company subsequently mandated that new employees achieve satisfactory scores on two professionally prepared aptitude tests to qualify for placement into a department other than Labor.[40] African American employees at the company brought an action under Title VII, alleging that the company's promotional and hiring requirements of a high school diploma and a passing score on two professionally prepared aptitude tests had a discriminatory effect on them.[41] The Court found that under Title VII of the Civil Rights Act of 1964, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[42] The Court held that employers are prohibited from using employment tests that, even though neutral on their face, act to disqualify minorities at a substantially higher rate than non-minorities where such tests are not shown to be significantly related to job performance and consistent with

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[39] *Id.* at 427.

[40] *Id.* The Labor Department was the lowest paying department, making it the least desirable. *Id.*

[41] *Id.* at 425; *see* Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 260 (1993) (describing the case of *Griggs*). *Griggs* was decided during a time when employment requirements were covertly serving to inhibit diversity in the workforce:

> The consequence of these requirements was predictable given the social reality at the time. African-Americans graduated from high school far less often than whites. Suffering from the lingering effects of an inferior segregated educational system, their performance on the tests was comparatively even worse. Duke Power's use of the educational and testing criteria thus served to continue to confine African-Americans to the same dead-end jobs to which the company had always relegated them.

Id. (footnotes omitted); *see also* Selmi, *supra* note 30, at 755–56 (discussing the impact of written examinations). Selmi explains:

> Most written examinations today continue to have substantial disparate impact; what has changed is that the tests are better constructed, in the sense that they are harder to challenge in court because they have been properly validated, but not better in the more important sense of being better predictors of performance. The ability to predict success in employment, or academic potential, has not improved much in the last thirty years as most written tests have the same modest ability to predict performance today as they did at the time of the *Griggs* case. And despite the many challenges to written tests, testing is more prevalent today, not less.

Id. (footnotes omitted).

[42] *Griggs*, 401 U.S. at 430. *See generally* David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 672 (2000) (providing, in part, an analysis of *Griggs* and its effect on employers).

business necessity.[43] *Wards Cove Packing Co. v. Atonio* weakened the *Griggs* decision: by holding that the plaintiff has the burden of proving a lack of business justification, *Wards Cove* made it more difficult for employees to establish a prima facie case of disparate impact.[44] In addition to disparate impact litigation, employers also encountered reverse discrimination suits.[45]

4. Reverse Discrimination

Reverse discrimination, generally regarded as discrimination against dominant class members (white males) in favor of historically disadvantaged groups, can occur when an employer undertakes a voluntary affirmative action plan to remedy an employment practice that has a disproportionate effect on minority candidates.[46] If employers take action to remedy these disparities at the expense of dominant class members, they are engaging in reverse discrimination.[47] Employers primarily use three different race-conscious methods to increase minority employment in their workforce: banding of test scores, granting preferences to minorities, and race norming.[48] Consolidating

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43 *Griggs*, 401 U.S. at 436.

44 460 U.S. 642, 659 (1989); *see* 3 BODENSTEINER & LEVINSON, STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 5:35 (2009) (discussing the impact of *Wards* on plaintiffs, which imposes on the plaintiffs the responsibility for identifying specific employment practices that allegedly are responsible for the disparate impact). The Court reasoned it would not be difficult for plaintiffs to identify potentially discriminatory employment practices because the EEOC Uniform Guidelines required employers to keep records regarding the selection process they used. *Id.*

45 *See* Rominger & Sandoval, *supra* note 26, at 322 (explaining how disparate impact affected employment testing and led to an increase in the number of reverse discrimination suits being filed against employers by disgruntled white employees). The discovery that even professionally constructed employment tests could have an adverse impact on minorities led some employers to compensate by adjusting minority scores. *Id.* Ultimately, Congress responded to the increase in reverse discrimination suits by enacting Title I of the Civil Rights Act of 1991, which outlawed racial preferences such as favorably adjusting test scores of minorities or using different test cutoffs for different races. *Id.* at 327–28.

46 *See* Selmi, *supra* note 32, at 1259 (explaining disparate impact affected employment testing and led to an increase in the number of reverse discrimination suits being filed against employers by white employees).

47 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 780, 861 (2007) (Roberts, C.J., embracing the "colorblind" mentality that discrimination against both protected and dominant class members is unlawful); *see also* Selmi, *supra* note 32, at 1259 (defining reverse discrimination). Employers who take affirmative action in order to address a test's adverse impact might do so to avoid the costs of potential litigation, or an employer might be motivated by political or social pressure. Selmi, *supra* note 32, at 1259.

48 *See* Rominger & Sandoval, *supra* note 26, at 322 (discussing the different race-conscious measures used by employers who seek to increase the number of minorities in their labor pool).

test scores into bands or ranges allows employers to group a certain range of scores together and treats differences between scores within the band as statistically insignificant.[49] Race preferential test scoring adjusts test results or gives outright preference to minorities.[50] Such a practice is reverse discrimination unless the employer can demonstrate that the plan corrects a "manifest imbalance" in the employer's workforce.[51] Race norming is "the practice of adjusting minority employment test scores so that a minority test-taker's score is based on a comparison with other test-takers of the same race instead of with the general population of test-takers."[52] Although banding is still permissible, "[t]he Civil Rights Act of 1991 directly prohibit[s] employers from favorably adjusting test scores of minorities or using differential test cutoffs by race."[53]

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[49] *See* Bos. Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 24 (1st Cir. 1998) (upholding banding as a valid affirmative action practice); Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 728 (9th Cir. 1992) (same); Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1148 (2d Cir. 1991) (same). *See generally* Rominger & Sandoval, *supra* note 26, at 322 (describing the effects of banding and discussing circuit court cases where banding was used).

[50] *See* United States v. City of Chicago, 870 F.2d 1256, 1258 (7th Cir. 1989). The City, not satisfied with the results of a police promotional exam, altered the scores so that black and Hispanic test takers scored higher. *Id.* Female police officers filed a reverse discrimination case alleging that the City had altered the test scores to give African American candidates preference. *Id.* The Seventh Circuit allowed the female officers to proceed with the suit. *Id.* at 1264.

[51] *See* Rominger & Sandoval, *supra* note 26, at 324 (discussing race preferential test scoring); *see also* Linda M. Braye, Note, Local No. 93, International Association of Firefighters v. City of Cleveland: *Does Voluntary Compliance with the Civil Rights Act of 1964 Necessarily Entail Reverse Discrimination?* 30 HOW. L.J. 875, 875–76 (1987) (noting that some voluntary affirmative action plans have resulted in reverse discrimination suits against employers). Compliance with Title VII remains a problem for employers because of the uncertainty surrounding what constitutes a proper condition for voluntary, race-conscious affirmative action. *Braye*, *supra* at 885.

[52] Emily Prescott, *The General Aptitude Test Battery and the Debate Over Race Norming, Racial Preference, and Affirmative Action*, 20 HASTINGS CONST. L.Q. 877, 878 (1993) (footnotes omitted). The mechanics of race norming involves converting the raw scores of the General Aptitude Test Battery (a federal employment test that measures basic skills) into percentile scores within the categories of black, Hispanic, and other. *Id.* at 881. The percentile scores were then forwarded to both public and private employers. *Id.*

[53] *See* Rominger & Sandoval, *supra* note 26, at 327. The Civil Rights Act of 1991 has not outlawed all affirmative action programs or race-conscious selection methods. *Id.* Banding is one of the few legitimate race-conscious devices that employers are allowed to use to amend the adverse effect of employment testing. *Id. But see* Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1198 (1991) (arguing that general ability tests are not highly predictive of job performance and such tests continue to burden members of historically oppressed groups). Kelmin argues that "race-norming of tests should be an adequate solution for individualists seeking reparations, because it enables minority workers to be hired in proportion to their application rates." *Id.*

5. Disparate Impact Codified Under the Civil Rights Act of 1991

Congress codified disparate impact liability by passing the Civil Rights Act of 1991.[54] The Act overruled several Supreme Court decisions that Congress regarded as negatively affecting disparate impact law.[55] Clarifying disparate impact as an unlawful employment practice, the Civil Rights Act of 1991 amended Title VII.[56] To avoid disparate-impact litigation, employers attempted to use race-conscious remedies; however, implementation of such remedies negatively affected non-minority candidates who brought reverse discrimination and disparate treatment suits.[57] Since the protection of Title VII extends to both

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[54] *See* 42 U.S.C § 2000e-2(k)(1) (2006) (codifying disparate impact). The burden of proof for disparate impact is stated as follows:

> (k) Burden of proof in disparate impact cases.
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> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
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> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
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> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Id.; *see also* Peter Siegelman, *Contributory Disparate Impacts in Employment Discrimination Law*, 49 WM. & MARY L. REV. 515, 527 (2007) ("Section 703(k) of Title VII was added by the 1991 Civil Rights Act, and embodies congressional recognition of both the existence of disparate impact liability and the defense an employer has to a plaintiff's prima facie case of disparate impact."); Laya Sleiman, Note, *A Duty to Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine in Employment Discrimination Law*, 72 FORDHAM L. REV. 2677, 2687 (2004) (explaining that under Title VII, a plaintiff may prove disparate impact if he or she can demonstrate that an impermissible classification was used that the defendant cannot justify as being job-related and consistent with business necessity).

[55] *The Civil Rights Act of 1991*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://eeoc.gov/eeoc/history/35th/1990s/civilrights.html (last visited Sept. 25, 2010) (explaining that Congress enacted the Civil Rights Act of 1991 to overrule Supreme Court cases such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which negatively changed the existing precedent on employment discrimination law established by *Griggs*). Arguably, the passage of the Act served to restore *Griggs*, which reinstated that employers have the burden of demonstrating both job-relatedness and business necessity in disparate impact claims. *The Civil Rights Act of 1991*, *supra*; *see also* BODENSTEINER & LEVINSON, *supra* note 44, § 5:35 (explaining that the Civil Rights Act of 1991 mitigates the "harshness" of the holding in *Atonio*).

[56] *See* 42 U.S.C. § 2000e-2(k)(1) (2006) (codifying disparate impact and the burden of proof in disparate impact cases).

[57] *See id.* (codifying disparate treatment). Providing that unlawful employment practices include the following:

minorities and white class members, employers now face the dilemma of how to rectify an employment practice that results in a disparate impact without inadvertently engaging in disparate treatment or reverse discrimination.[58]

> 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.

Id. § 2000e-2(a); *see also* Whiteside, *supra* note 19, at 415 (discussing that a considerable number of claims filed under Title VII have involved reverse discrimination); Schwartz, *supra* note 42, at 661 (discussing that the hardest cases for courts to decide are those of reverse discrimination in which "the rights of 'innocent whites'—those who have not themselves been found to have discriminated—may be unduly 'trammeled' by a remedy for minority victims of discrimination"). Schwartz explains that:

> Reverse discrimination cases have arisen in three situations. First, a white (or male) employee or applicant complains that a minority (or female) employee or applicant received preferential treatment on the basis of race or gender pursuant to a voluntary affirmative action plan. In a second setting, typically in employment, a white/male employee challenges *in*voluntary affirmative action: a court-ordered remedy that results in some preferential treatment to compensate minority/female employees for judicially proven discrimination. . . . In a third setting, the complaining white/male employee alleges only that the minority/female employee was treated more favorably; there is not necessarily an affirmative action plan or even a "benign" motivation.

Id. at 662 (footnote omitted).

[58] *See* Patricia L. Donze, *The Supreme Court's Denial of Certiorari in* Dallas Fire Fighters *Leaves Unsettled the Standard for Compelling Remedial Interests*, 50 CASE W. RES. L. REV. 759, 776–79 (2000) (explaining the typical legal problem faced by employers who engage in affirmative action programs):

> On one hand, they have the possibility that minority plaintiffs will sue for racial discrimination in hiring, promotions, curriculum, etc. On the other hand, they have the possibility that non-minority plaintiffs will sue for a job, promotion, or benefit they expected but did not receive because of a remedial program.

Id. at 779. *But see* Whiteside, *supra* note 19, at 440 (arguing that it would be illogical to impose different requirements on dominant class members who were historically favored because the Court no longer views the history of discrimination to be the underlying rationale of Title VII). *See generally* Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009) (holding that fear of disparate impact litigation alone cannot justify an employer's decision to engage in disparate treatment); Rutherford v. City of Cleveland, 179 Fed. Appx. 366, 377 (6th Cir. 2006) (holding that the City had a strong basis in evidence for its remedial actions, thereby defeating reverse discrimination and disparate treatment claims by white police officers).

The Civil Rights Act of 1991 codified the concepts of "business necessity" and "job-relatedness" that *Griggs* introduced.[59] To establish a prima facie case of discrimination under the Act, the plaintiff must demonstrate that the employer used a particular employment practice that results in a disparate impact based on race, color, religion, sex, or national origin.[60] A plaintiff showing a statistical disparate impact can establish a prima facie case.[61] Once a plaintiff establishes a prima facie

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[59] *See* Kirkpatrick, *supra* note 14, at 625 (providing a background and analysis of the disparate impact theory). *See also* Conway, *supra* note 14, at 308 (explaining employer defenses when faced with disparate impact liability). An employer may justify his or her business practice by showing that such practice was job related-related and a business necessity. *Id.* There are three elements to the business necessity defense: "(1) the business necessity must override the social harm which results from the discrimination; (2) the employment practice must fulfill the necessary purpose it is alleged to serve; and (3) there must be no alternative practice which would better fulfill this need." *Id.* The job-related defense is typically reserved for cases involving employment tests and requires that the employer establish that the tasks being tested are essential for actual job performance. *Id.* at 309. Therefore, as a matter of policy, an employer can use an employment test, but only if it can adequately measure job performance. *Id. See generally* Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1158 (1993) (focusing on the burden that an employer bears in responding to a disparate impact claim).

[60] Kirkpatrick, *supra* note 14, at 626; *see also* Sleiman, *supra* note 54, at 2683 (recalling that *Griggs v. Duke Power Co.* was the landmark case where the Supreme Court developed the theory of disparate impact, which provided that a plaintiff could prove employment discrimination using statistical evidence of disparate effects without demonstrating that there was an intent to discriminate). In *Griggs*, the Court laid out the framework for disparate impact liability. *Id.* at 2684. This framework consists of two stages—the first stage being the plaintiffs' prima facie case, where plaintiff must show that a hiring or promotion requirement has a discriminatory effect on the basis of race or some other impermissible classification. *Id.* If plaintiff is successful in showing a prima facie case, then the burden shifts to the defendant employer to prove that the employment practice was job-related for the position in question and is consistent with business necessity. *Id.* However, even if the employer satisfies this burden, the plaintiff may win by proving that there is another employment practice available that does not have a discriminatory effect and that the employer failed to adopt it. *Id.* at 2688. *But see* Nelson Lund, *The Law of Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87, 100 (1997) (noting the more immediate effect of *Griggs* was to set up a kind of Catch-22 for employers in that the only way for employers to protect themselves from disparate impact liability was to ensure that their workforce was racially balanced; however, if employers took steps to get their numbers "right," they exposed themselves to lawsuits for intentional discrimination by white employees).

[61] *See* Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 774 (2009) (explaining that statistics are the plaintiffs' key evidence in establishing a prima facie case of disparate impact). The two primary statistical methods used by plaintiffs are the statistical significance and the four-fifths rule. *Id.* Under the four-fifths rule, a disparity is actionable if one group's pass rate is less than four-fifths of another group's pass rate. *Id.* "Under statistical significance tests, a disparity is actionable when we can be confident at a specified level—generally ninety-five percent—that the observed disparity is not due to random chance." *Id.* "The Supreme Court has rejected a 'rigid mathematical formula' for disparate impact**,** providing instead the ambiguous guidance to

case, the burden then shifts to the employer to show, as an affirmative defense, that its employment practice is job-related and consistent with business necessity.[62] When faced with disparate impact litigation, the employer has both the burden of production and the burden of persuasion in establishing business necessity.[63] The most practical way for plaintiffs and employers to gauge whether disparate impact has occurred is to consult the EEOC's Uniform Guidelines on Employee Selection Procedures.[64]

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lower courts that 'statistical disparities must be sufficiently substantial that they raise . . . an inference of causation.'" *Id.* at 778. *See generally* Kirkpatrick, *supra* note 14, at 627 ("If a disparity in the outcome of a test for one group as compared to another is statistically significant, one can conclude . . . the observed disparity is not due to chance, but is associated with race, sex, national origin, or some other prohibited factor."); Sleiman, *supra* note 54, at 2689 (providing a brief history of the disparate impact doctrine and its development).

62 Kirkpatrick, *supra* note 14, at 626 (describing the prima facie case of disparate impact); *see also* Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 317 (1998) ("Unlike disparate treatment defendants, disparate impact defendants cannot defend by disavowing discriminatory intent. Instead, a disparate impact defendant must establish that a challenged practice is justified by a business necessity—i.e., that it constitutes a 'demonstrably . . . reasonable measure of job performance.'"). Furthermore, a disparate impact defendant must show that his or her employment practice is job related in the sense that the practice predicts an individual's ability to perform the job in question. *Id.* at 355.

63 *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (2009) (stating the burdens of proof); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."); *see also* Kirkpatrick, *supra* note 14, at 626 (explaining that the Civil Rights Act of 1991 codified *Griggs* by making it clear that the employer has both the burden of production and the burden of persuasion in establishing business necessity). *See generally* Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621, 1623 (describing the basic burden-shifting steps in a disparate impact claim). Explaining the process:

> First, the plaintiff needed to make a prima facie showing of disparate impact by presenting statistical evidence that a particular employment practice of the defendant had an adverse impact on an identifiable group. Such evidence created a presumption of discrimination that the defendant could rebut by proving that the practice in question was job-related and served a necessary business purpose. Finally, if the defendant [were] successful, the plaintiff could overcome the defendant's proof of business necessity by presenting a less discriminatory alternative ("LDA") that would "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest."

Id. (footnotes omitted).

64 *See generally* 29 C.F.R. § 1607.1 (discussing the purpose of the Guidelines); Kirkpatrick, *supra* note 14, at 627 (discussing how employees and employers can consult the Uniform Guidelines on Employee Selection Procedures to calculate if a disparity is statistically significant so as to constitute a prima facie showing of disparate impact liability).

B. The Equal Employment Opportunity Commission

The EEOC, established under Title VII, investigates complaints of alleged disparate impact, disparate treatment, and discrimination in business establishments, labor unions, and employment agencies.[65] Title VII creates a statutory defense to discrimination claims for employers who rely on a written opinion or interpretation of the EEOC.[66] The EEOC's Uniform Guidelines on Employee Selection Procedures ("Guidelines") are intended to serve as a guide for employers.[67] They provide standards for determining the lawfulness of tests administered in a nondiscriminatory manner.[68] They require employers to validate

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[65] *See* Braye, *supra* note 51, at 584 (providing a background of Title VII of the Civil Rights Act of 1964 in addition to a history of the Equal Employment Opportunity Commission); *see also* Jane Howard-Martin, *A Critical Analysis of Judicial Opinions in Professional Employment Discrimination Cases*, 26 HOW. L.J. 723, 730 (1983) (discussing the EEOC and the applicability of the Uniform Guidelines). The EEOC was established with the passage of Title VII and is the administrative agency responsible for interpreting and implementing provisions of Title VII of the Civil Rights Act of 1964. Howard-Martin, *supra*, at 730. The EEOC has promulgated a series of regulations, definitions, and guidelines to encourage compliance with, and enable uniform application of, the requirements of Title VII. *Id.* In *Griggs*, the Court held that the interpretations of the EEOC were entitled to considerable deference. *Id.*

[66] *See* 42 U.S.C. § 713(b) (2006) (providing affirmative defenses to discrimination claims under Title VII); *see also* BODENSTEINER & LEVINSON, *supra* note 44, § 5:47 (explaining reliance on EEOC interpretation or opinion provides a statutory defense for employers "even where the interpretation is subsequently modified or rescinded or determined by judicial authority to be invalid or not in conformity with the requirements of the Act").

[67] *See* 29 C.F.R. § 1607.1. The intent of the Guidelines is as follows:

> [t]hese guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

Id. *See generally* Sleiman, *supra* note 54, at 2689 (explaining how the EEOC Guidelines regard cases of disparate impact).

[68] *See* 21 AM. JUR. TRIALS § 49 (1974). Under the Guidelines codified at 29 C.F.R. § 1607.3:

> a test is unlawful if it 'adversely affects hiring, promotion, transfer or any other employment opportunity of classes protected by title VII,' unless it can be shown that the test has been validated in accordance with procedures set forth in the guidelines and the employer 'can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.' As the 'Guidelines' are worded and have been interpreted by the Courts, a showing that

any selection procedure that has an adverse impact on the hiring or promotion of minorities; moreover, the Guidelines recommend that all employers validate their employment tests in accordance with Guideline procedures.[69] Although the Guidelines do not define a precise method for calculating disparities between minority and dominant class members, they imply an adverse impact if the selection rate for any minority group is less than "four-fifths" (eighty percent) of the rate for the group with the highest rate (typically white candidates).[70] Validation under the Guidelines requires a test to demonstrate a significant correlation to important elements of work behavior, which should reveal a relationship between test performance and job performance.[71] The

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> members of a protected class are adversely affected by the use of the test [establishes] a prima facie case that the test is unlawful.

Id.; *see also* Mark J. Simeon, Symposium, *Title VII Defenses: An Overview*, 27 HOW. L.J. 479, 486–87 (1984) (explaining that the Uniform Guidelines, which were developed by the American Psychological Association, provide three legally sufficient methods by which the job-relatedness of a test may be established: construct validity, content validity, and criterion-related validity).

[69] *See* Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970), withdrawn, 43 Fed. Reg. 38,312 (1978) (providing employers with procedures for determining whether an employment test was job-related).

[70] *See* 29 C.F.R. 1607.4(D) (discussing adverse impact and the "four-fifths rule"); *see* Sleiman, *supra* note 54, at 2689 ("Under the four-fifths rule, if the pass rate for a particular group is less than eighty percent of the pass rate for others, this difference in pass rates presents evidence of a disparate impact."). For example:

> If one hundred men took the running test and seventy-five of these men passed the test, the men would have a pass rate of seventy-five percent. If 100 women took the running test and fifty of them passed the test, the pass rate for these women would be fifty percent. The pass rate of women (fifty percent) would therefore be sixty-six percent of the pass rate for men (seventy-five percent). The pass rate of women is less than four-fifths (or eighty percent) of the pass rate for men. Therefore, these statistics show evidence of a disparate impact under the EEOC's four-fifths rule.

Sleiman, *supra* note 54, at 2689–90; *see also* Doreen Canton, Comment, *Adverse Impact Analysis of Public Sector Employment Tests: Can a City Devise a Valid Test?*, 56 U. CIN. L. REV. 683, 688 (1987) (explaining that proof of a prima facie case of adverse impact by plaintiffs is most frequently employed using the four-fifths rule set out in the EEOC Uniform Guidelines on Employee Selection Procedures).

[71] *See* 29 C.F.R. § 1607.4(C) (evaluating use of selection rates). Stating that:

> If the information . . . shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will

Guidelines provide three methods employers can use to demonstrate the validity of a testing program: criterion-related, content-related, and construct-related validity studies.[72] The Guidelines provide insight on employment procedures and test validation, but they do not define the "strong basis in evidence" standard—the new burden of proof imposed by the 2009 *Ricci* case, which requires employers to demonstrate a strong basis that the remedial action undertaken was necessary.[73]

> not take enforcement action based upon adverse impact of any component of that process . . . .

Id.

[72] *See* 29 C.F.R. § 1607.5(B) (discussing the general standards for validity studies). This regulation states the following:

> Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

Id. (citations omitted); *see also* Simeon, *supra* note 68, at 486–87 (discussing the three types of validity studies). Simeon explains that:

> Construct validity, the most difficult and least used validation method, attempts to identify a psychological trait or characteristic (a construct) which is the basis for successful job performance and then devises a selection procedure that measures the presence and degree of that characteristic. Content validity, as the name implies, isolates representative samples of important parts of the job itself and utilizes tests that measure actual performance of those job components. Criterion-related validity is the most popular measure of the job-relatedness of a test.
>
> Criterion-related validity is the statistical relationship between scores on a test and the objective measures or criteria of job performance.

Simeon, *supra* note 68, at 486–87 (footnotes omitted).

[73] Ricci v. DeStafano, 129 S. Ct. 2658, 2662 (2009); *see also* City of Richmond v. J.A. Croson, 488 U.S. 469, 500 (1989) (mandating that the strong basis in evidence standard be met in employment cases of disparate impact). In order to uphold an affirmative program under strict scrutiny, there must be a "strong basis in evidence" of past discrimination by the employer to support the conclusion that remedial action is necessary. *Croson*, 488 U.S. at 500.

C. The "Strong Basis in Evidence" Standard

The Supreme Court first introduced the "strong basis in evidence" standard in *City of Richmond v. J.A. Croson*—a voluntary affirmative action case that was challenged on equal protection grounds.[74] The "strong basis in evidence" standard is a condition of proof that an employer must demonstrate to validate voluntary affirmative action.[75] Since *Croson,* courts have grappled with defining the standard and applying it to disparate impact claims under Title VII.[76] In 2009, the Supreme Court had the opportunity to clarify what an employer must demonstrate in order to meet the "strong basis in evidence" standard; however, the Court did not elaborate on what the standard requires.[77]

1. The Foundational Case: *City of Richmond v. J.A. Croson*

In *Croson*, the city adopted a Minority Business Utilization Plan, which required "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises."[78] According to the city's data, minorities received only 0.67 percent of city contract dollars despite comprising fifty percent of the local population.[79] The city believed the affirmative action program was a valid remedial plan intended to combat the lingering effects of past discrimination.[80] Challenging the plan as violating the Equal Protection Clause, other

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74 *Id.* at 469.

75 *Id.* at 500.

76 *See infra* notes 77–101 and accompanying text (discussing different approaches courts have taken toward the strong basis in evidence standard); *see also* Dereck M. Alphran, *Proving Discrimination After* Croson *and* Adarand*: If It Walks Like a Duck*, 37 U.S.F. L. REV. 887, 889–90 (2003) (providing a comprehensive analysis of the effects of *Croson* on subsequent discrimination cases and explaining that the application of the strong basis in evidence standard is strict in theory and fatal in fact). *But see* Schwartz, *supra* note 42, at 682–83 ("Throughout the 1980s and 1990s, the Supreme Court's affirmative action decisions have resembled the 'push-me-pull-you' of the Doctor Doolittle stories, the donkey with a head at both ends and no tail. Case after case yielded only plurality opinions and judgments without a unified rationale.").

77 *Ricci*, 129 S. Ct. at 2662 (internal quotations omitted).

78 *Croson*, 488 U.S. at 477. The plan defined a minority business enterprise as a business owned and controlled by at least fifty-one percent minority group members. *Id.* at 478. The plan was remedial in nature and implemented for the purpose of promoting greater minority business participation in public construction projects. *Id.*

79 *Id.* at 480.

80 *Id.* The Court reasoned that a generalized assertion of past discrimination in an entire industry is not a sufficient justification because it is not specific enough to identify the scope of the injury incurred and has no logical stopping point. *Id.* at 498.

construction bidders brought suit.[81] The Court struck down the city's plan, holding that state or local governments that set aside a portion of public contract dollars exclusively for minority-owned firms must show a "strong basis in evidence" for concluding that such remedial action was necessary.[82] Because the city could not ascertain how many minority enterprises were present in the local construction market and could not establish the level of minority participation in city construction projects, the Court found that the city did not demonstrate a strong basis in evidence that necessitated remedial action.[83]

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[81] *Id.* at 481. The Court found that the plan violated the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." *Id.* at 493. The Court struck down the City's affirmative action plan, reasoning that it "denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race." *Id. But see* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 642 (1987) (holding that a voluntary affirmative action program that promoted a female candidate to road dispatcher did not violate Title VII because it was undertaken to remedy work force imbalances in a traditionally segregated job category and it did not unnecessarily trammel the rights of male employees); United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979) (upholding an employer's voluntary quota system under Title VII as a reasonable measure to abolish traditional patterns of racial segregation and hierarchy). *See* BODENSTEINER & LEVINSON, *supra* note 44, § 5:25 (discussing what the Supreme Court considered sufficient to demonstrate a remedial purpose in the cases of *Weber* and *Johnson*). Bodensteiner and Levinson explain:

> Weber established that in order to withstand a Title VII challenge, a voluntary affirmative action program: (1) should be enacted for a remedial purpose, i.e., to eliminate traditional race discrimination in a particular industry; and (2) should be flexible, temporary, and not unnecessarily destructive of nonminority rights. . . . The Supreme Court's position, as reflected in *Johnson,* would appear to mandate statistics regarding the specific labor force if the job requires special expertise but to allow general population or area labor market statistics for other jobs.

Id. at 499.

[82] *Croson*, 488 U.S. at 500. The Court noted that none of the following were sufficient to establish a strong basis in evidence standard that a thirty-percent quota was necessary:

> (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

Id.

[83] *Id.* at 510. The Court reasoned that it is misplaced to rely on the disparity between the number of prime contracts awarded to minority firms and the minority population of Richmond. *Id.* at 501. The Court explains, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be

As noted in *Croson*, evidence of past societal discrimination does not satisfy the "strong basis in evidence" standard.[84] Instead, an employer must present statistical evidence of an under-representation of minority candidates, which is based on comparison with the percentage of qualified minorities in the relevant labor pool comprised of all persons qualified for the position at issue.[85] Employers may also introduce

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the number of minorities qualified to undertake the particular task." *Id.* at 501–02. However, the Court acknowledges that evidence of gross statistical disparities alone may constitute a prima facie showing of a discriminatory practice under Title VII in the appropriate case. *Id.*; *see also* Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms,* 16 YALE L. & POL'Y REV. 59, 64 (1997) (explaining the logic behind the remedial purpose requirement for affirmative action programs such as those discussed in *Croson*). Chang explains that

> [t]he *Croson* plurality ultimately endorsed a remedial purpose requirement neither so broad as to encompass societal discrimination, nor so narrow as to require the identification of specific victims of specific instances of discrimination; it endorsed a view of remedial purpose requiring a "strong basis in evidence" of "identified discrimination."

Chang, *supra*, at 64.

[84] *Croson*, 488 U.S. at 498; *see also* H. Lee Sarokin, Jane K. Babin & Allison H. Goddard, *Has Affirmative Action Been Negated? A Closer Look at Public Employment*, 37 SAN DIEGO L. REV 575, 608–09 (2000) (explaining the strong basis in evidence standard typically requires statistical evidence, anecdotal evidence, or prior judicial findings).

[85] *See* United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999, 1011 (6th Cir. 1992) ("Where a gross disparity exists between the expected percentage of minorities selected and the actual percentage of minorities selected, then prima facie proof exists to demonstrate intentional discrimination in the selection of minorities to those particular positions."); Long v. City of Saginaw, 911 F.2d 1192, 1199 (6th Cir. 1990) (discussing the importance of using the relevant statistical pool to determine whether a prima facie case of employment discrimination exists). *But see* Maryland Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1077–78 (4th Cir. 1993) (holding that the State of Maryland did not meet the strong basis in evidence standard because the statistics did not amount to a gross statistical disparity); Brunet v. City of Columbus, 1 F.3d 390, 409 (6th Cir. 1993) (finding that remote and outdated evidence cannot satisfy the strong basis in evidence standard). *See* Sarokin, *supra* note 84, at 609 (explaining that an appropriate statistical analysis compares the percentage of minorities working for the public employer with the percentage of minorities in the applicable geographic area who possess the skills necessary for the particular job or promotion); *see also* John Cocchi Day, Comment, *Retelling the Story of Affirmative Action: Reflections on a Decade of Federal Jurisprudence in the Public Workplace*, 89 CALIF. L. REV. 59, 90–91 (2001) (discussing the different approaches courts have taken toward defining the strong basis in evidence standard). The courts have taken three approaches toward defining the strong basis in evidence standard. Day, *supra* note 85, at 90. First, "most courts fail to engage the task at all." *Id.* Second, "some courts adopt an explicitly deferential standard." This is discernible either in very general terms, or by explicitly adopting the 'approaching a prima facie . . . statutory violation' standard. *Id.* Third, "some courts isolate a prima facie statutory violation as the benchmark of a 'strong basis in evidence.'" *Id.* Although there is no clear standard for a strong basis in evidence, most successful claims of discrimination involve a statistical showing of disparity, which is calculated by comparing the employer's work force with the composition of the "relevant"

anecdotal evidence and prior judicial findings to demonstrate a strong basis in evidence for their remedial measures.[86] The circuit courts have primarily relied on statistics, anecdotal evidence, and prior judicial findings when analyzing disparate impact cases.[87]

2. The Circuit Court of Appeals' Application of the "Strong Basis in Evidence" Standard

Following *Croson*, circuit courts have differed on the type and the amount of proof the "strong basis in evidence" standard mandates.[88] In *Vogel v. City of Cincinnati*, the Sixth Circuit held that the City police

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local population. *Id.* at 92. However, a general disparity between the percentage of protected class employees in a particular profession and the raw percentage of class members in a regional labor pool cannot be a strong basis in evidence. *Id.* at 97. Several jurisdictions have accepted the two or three standard deviations rule as an adequate measure of statistical disparity, typically finding a strong basis for remedial action existing where the disparity is greater than two or three standard deviations. *Id.* at 94.

[86] *See* Sarokin, *supra* note 84, at 609 (describing the potential evidentiary requirements under the strong basis in evidence standard); *see, e.g.*, Bos. Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 20 (1st Cir. 1998) (upholding city's affirmative action plan based on a finding of compelling interest where the history of racial discrimination by the Boston Police Department was documented in several First Circuit opinions).

[87] *See* cases cited *supra* note 85.

[88] *See* Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000) (holding that a section of the Ohio Minority Business Enterprise Act ("MBEA") providing for racial and ethnic preferences in state construction contracts could not be upheld by the strong basis in evidence standard because the statistics used did not distinguish minority construction contractors from minority businesses generally); Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993) (holding that that statistical evidence showing disparity between minority percentages in state police and minorities among state residents who were minimally qualified to be state troopers did not warrant a race-conscious remedy); Long v. City of Saginaw, 911 F.2d 1192, 1199 (6th Cir. 1990) (holding that statistics offered by the City to justify its affirmative action plan failed to satisfy the strong basis in evidence standard by failing to define the relevant statistical pool); *see also* Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 735 (6th Cir. 2000) (commenting that "the linchpin of the *Croson* analysis . . . [is] that governments must 'identify discrimination with some specificity before they may use race-conscious relief,' explicit 'findings of a constitutional or statutory violation must be made'"); Carvin, *supra* note 59, at 1155 (describing the difficult burdens employers must meet when defending an employment practice as being job related and consistent with business necessity); Donze, *supra* note 58, at 785 (detailing the different approaches circuit courts have taken toward the strong basis in evidence standard). *See generally* Karen M. Winter, Comment, *Adarand Constructors, Inc. v. Slater and Concrete Works of Colorado, Inc. v. City of Denver: Breathing Life Into Croson's Passive Participant Model*, 27 U. HAW. L. REV. 469, 478–79 (2005) (discussing that *Croson* established that a "governmental actor must provide a strong basis in evidence for its conclusion that remedial action is necessary"). However, "the application of the rule has produced conflicting results." *Id.* at 478. "Unfortunately, *Croson* did not offer guidance as to what amount and type of factual showing would provide a strong basis in evidence that discrimination existed in a particular industry." *Id.* at 478–79.

division met the "strong basis in evidence" standard where the disparity in black policemen expected to be hired and those actually hired was substantial enough to create an inference of discrimination.[89] The court's analysis explained that a claim of past discrimination in a particular industry would not suffice.[90] The court next explained that the proper statistical comparison was between the race and gender of the Cincinnati Police Division and the race and gender of the relevant qualified labor market.[91] The City presented statistical evidence using the standard deviation model,[92] which measures the probability that a result is a

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[89] 959 F.2d 594, 600 (6th Cir. 1992) ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."); *see also* Rutherford v. City of Cleveland, 179 Fed. Appx. 366, 368 (6th Cir. 2006) (ruling on a Title VII case brought by non-minority applicants who claimed they had been denied the position of police patrol officer and consequently filed claims of reverse discrimination and disparate treatment against the City of Cleveland, which had implemented a consent decree allowing for a race-based plan to advance the hiring and promotion of minority police patrol officers). In *Rutherford*, the court held that the police department had neither engaged in reverse discrimination nor violated the disparate treatment provision of Title VII. *Rutherford*, 179 Fed. Appx. at 384. The court started its analysis by acknowledging that the party defending a race-based remedy bears the initial burden of demonstrating that there was a strong basis in evidence justifying the remedy. *Id.* at 373. The court acknowledged that establishing a strong basis in evidence is not an easy burden to meet—the only cases found to justify a narrowly tailored race-based remedy are those that expose discriminatory conduct that is persistent, obstinate, and routine. *Id.* at 374. The court reasoned that the City's own admission of its history of discriminating against minorities in hiring—a position it fought against in litigation for a number of years—is persuasive evidence of pervasive, systematic, and obstinate discriminatory conduct. *Id.* Moreover, a party can demonstrate a strong basis in evidence by showing a prior court finding of past discrimination. *Id.* at 375. Additionally, there may also be a strong basis in evidence demonstrated where gross statistical disparity exists between the percent of minorities hired compared with the relevant labor pool of minorities. *Id.* at 376. The Court concluded the admission by the City of past racial discrimination, supported by the findings of the district court and a review of the statistical evidence, that the City had demonstrated a strong basis in evidence that their remedial action was necessary. *Id.* at 377; *see also* Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County, 122 F.3d 895, 907 (11th Cir. 1997) ("A 'strong basis in evidence' *cannot* rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'"). The court acknowledged that a governmental entity can justify affirmative action by demonstrating gross statistical disparities between the proportion of minorities hired and the proportion of minorities willing and able to do the work. *Eng'g Contractors Ass'n of S. Fla. Inc.*, 122 F.3d at 907. Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence. *Id. But see Long*, 911 F.2d at 1199–1201 (6th Cir. 1990) (holding that the statistical evidence offered by the City was insufficient to justify the City's affirmative action plan because the City failed to define the available relevant statistical pool).

[90] *Vogel*, 959 F.2d at 599.

[91] *Id.*

[92] *Id.* at 600.

random deviation from the predicted result (where two or three standard deviations would allow an inference that race played a role in the City's hiring policies because the greater the number of standard deviations, the lower the probability that the result is random).[93] In *Vogel*, the disparity between the expected rate of black appointments and the actual rate was 4.7 standard deviations.[94] Ultimately, the court reasoned "[i]t is only when the statistics disclose the availability of minorities in the relevant labor pool substantially exceeded those hired, that an inference of deliberate discrimination in employment may be drawn."[95]

Courts have held that a strong basis in evidence is satisfied where evidence approaches a prima facie case of a constitutional or statutory violation or where there is a documented history of past discrimination in the courts.[96] In the First Circuit case *Boston Police Superior Officers Federation v. City of Boston*, white police officers brought suit, alleging that the promotion of a black officer to lieutenant over white officers who scored one point higher on the lieutenant exam violated the Equal Protection Clause.[97] The court held that the black officer's promotion served a proper remedial purpose under the "strong basis in evidence"

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[93] *Id.* The standard deviation model involves a calculation of the standard deviation "as a measure of predicted fluctuations from the expected value of a sample[,] . . . [a] 'difference between the expected value and the observed number [that] is greater than two or three standard deviations,' would allow an inference that race had played a role in the City's hiring policies." *Id.* The standard deviation that existed between the black appointments and the actual rate was 4.7 standard deviations. *Id.*

[94] *Id.*

[95] *Id.* (internal quotations omitted) (emphasis omitted).

[96] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (reasoning a strong basis can be established by a constitutional or statutory violation); Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 20 (1st Cir. 1998) (finding that a "'strong basis' may consist of either 'a contemporaneous or antecedent finding of past discrimination by a court or other competent body,' or evidence 'approaching a prima facie case of a constitutional or statutory violation'") (citation omitted). *See generally* Cotter v. City of Boston, 323 F.3d 160, 170 (1st Cir. 2003) (holding that the City's evidence of disparity in the promotion of black officers to sergeant, coupled with current racial tensions and a documented history of past discrimination within the department, created the strong basis required for the City to determine that race-conscious action was necessary); Middleton v. City of Flint, Mich., 92 F.3d 396, 407 (6th Cir. 1996) (reasoning that gross statistical disparities may constitute a prima facie case of discrimination under Title VII, but comparisons to the general population will not suffice when special qualifications are required for the position at issue**);** Cone Corp. v. Hillsborough County, 908 F.2d 908, 915–16 (11th Cir. 1990) (holding that a gross statistical disparity existed in the number of contracts awarded to minorities compared to the number of minorities in the relevant labor pool, therefore establishing a prima facie case of discrimination)**.**

[97] Bos. Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 17 (1st Cir. 1998).

standard.[98] The court noted that a "strong basis [in evidence] may consist of either a contemporaneous or antecedent finding of past discrimination by a court or other competent body, or evidence approaching a prima facie case of a constitutional or statutory violation."[99] The court relied on statistical evidence of present racial disparities among lieutenants and the documented history of racial discrimination in the Boston Police Department.[100]

In other cases, the courts have found a strong basis where cities entered into consent decrees to ensure that minorities were not being underutilized.[101] In *Edwards v. City of Houston*, the Fifth Circuit considered whether a consent decree that allowed remedial promotions for African American and Hispanic American police officers could be upheld under the "strong basis in evidence" standard.[102] The City of Houston enacted a consent decree in response to claims by African Americans and Hispanic Americans that the promotional sergeant and lieutenant examinations had the effect of disproportionately excluding them and that the examinations were neither job-related nor consistent

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98 *Id.* at 20. The court reasoned that the Boston Police Department's documented history of racial discrimination and the gross racial disparity among ranks between black officers and the majority was enough to demonstrate that race-conscious remedial action was necessary. *Id.*

99 *Id.* (internal quotations omitted) (citation omitted).

100 *Id.* at 22.

101 *See* Stuart v. Roache, 951 F.2d 446, 455 (1st Cir. 1991). The Boston Police Department entered a consent decree in which the Department promised to use only validated promotional tests and that the police commissioner shall make appointments to overcome any underutilization of minorities. *Id.* at 448. Subsequently, thirty-four white police officers filed action against the police department alleging that the commissioner did not appoint them to the rank of sergeant despite their higher test scores. *Id.* at 449. The Court upheld the consent decree, finding a strong basis in evidence based on a comparison of the relevant labor market, which revealed a significant racial disparity between test-takers. *Id.* at 455. If special qualifications are necessary, then the relevant statistical pool must be comprised of minorities qualified to undertake the particular task. *Id.* at 451. The court reasoned that "[t]he Decree compare[d] the number of black sergeants, not with the Boston population in general, but with those police officers with the minimal qualifications needed to become sergeants," which revealed great enough statistical disparities to demonstrate that remedial action was necessary. *Id.*; *see also* Edwards v. City of Houston, 37 F.3d 1097, 1113 (5th Cir. 1994) (upholding the City's consent decree by finding that remedial action was necessary); Donaghy v. City of Omaha, 933 F.2d 1448, 1459 (8th Cir. 1991) (upholding the City's affirmative action consent decree because the decree's purpose was remedial and a response to a racial imbalance, and the plan was narrowly tailored); Davis v. City & Cnty. of S.F., 890 F.2d 1438, 1447 (9th Cir. 1989) (upholding the City's affirmative action-based consent decree, reasoning that the decree granting preference to women and minorities for entry level fire department positions was justified because "gross statistical disparities may constitute *prima facie* proof of pattern or practice of discrimination under Title VII, and are probative of pattern[s] of discrimination where no special qualification [is] necessary").

102 *Edwards*, 37 F.3d at 1101, 1108.

with business necessity.[103] Organizations representing different members of the Houston Police Department attacked the consent decree's validity under Title VII.[104] The court used a two-pronged test to determine whether the race-conscious affirmative action plan satisfied the "strong basis in evidence" standard imposed under Title VII.[105] First, the court considered whether the race-based measure was justified by the existence of a manifest underrepresentation of women or minorities in a traditionally segregated job category.[106] Second, the court assessed whether the race-based remedy "unnecessarily trammel[ed] the rights of nonminorities or create[d] an absolute bar to their advancement."[107] The court upheld the consent decree, finding that it neither trammeled the rights of non-minorities nor created an absolute bar to their advancement.[108] Furthermore, the court reasoned that the decree was temporary, that it would not provide any remedy for minorities who failed the promotional tests, that the remedial promotions were granted on a one-time only basis, and that the elimination of future test questions that are racially biased will provide benefits to both minority and non-minority police officers.[109] Therefore, the court found that the remedial measure—the consent decree—was valid under Title VII.[110]

In sum, the "strong basis in evidence" standard is likely to be met when the employer demonstrates that the affirmative action program was necessary based on a prima facie statutory or constitutional

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103 *Id.* at 1101.

104 *Id.* The consent decree provided in part that African Americans and Hispanic Americans who took the sergeant exam and passed would receive a total of ninety-six remedial promotions and that African Americans who took the lieutenant exam would receive a total of five remedial promotions. *Id.* at 1102.

105 *Id.* at 1110, 1113.

106 *Id.* at 1111. The court found that a manifest imbalance in promotion rates for black and Hispanic officers was demonstrated and that the disparities were discovered using a relevant labor market, which included the number of minority police officers who took the promotional examinations with the numbers that were promoted. *Id.*

107 *Id.* at 1111. The court found that the consent decree did not provide any remedy for blacks or Hispanics who failed the promotional test—those that failed were not eligible for remedial promotions. *Id.* Additionally, the remedial promotions were granted on a one time only basis and did not require the discharge of nonminority officers. *Id.* at 1112. Moreover, the decree did not create an absolute bar to the advancement of nonminority officers, although they may not be promoted at the same rate as before, they would still continue to be promoted in substantial excess of their representation among test takers. *Id.* Finally, the court noted that the decree was only temporary in nature. *Id.*

108 *Id.* at 1111. The court also noted that the consent decree was narrowly tailored to the relevant labor market—the number of minorities in the police department. *Id.*

109 *Id.* at 1112.

110 *Id.*

violation evidenced by statistical comparisons.[111] However, in a Title VII reverse-discrimination claim, the Supreme Court in *Ricci v. DeStefano* controversially held that a prima facie case of a statutory violation is not enough to satisfy the "strong basis in evidence" standard, which superseded prior court interpretations.[112]

3. The Supreme Court's Application of the "Strong Basis in Evidence" Standard

In *Ricci,* white candidates substantially outperformed minority candidates on a promotional exam taken by firefighters in the City of New Haven.[113] To avoid disparate impact litigation, the City discarded the examination.[114] After the City discarded the exam, certain white and Hispanic firefighters who would have been promoted brought suit under Title VII, alleging the City discriminated against them by discarding the test results.[115] In a 5-4 decision written by Justice

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[111] *See supra* notes 74–109 and accompanying text (discussing the circuit and Supreme Court's approach toward the strong basis in evidence standard).

[112] 129 S. Ct. 2658, 2663 (2009) (holding that the City failed to meet the strong basis in evidence burden); *see also* Howard-Martin, *supra* note 65, at 756–57 (discussing the responses the judiciary has made in employment discrimination cases). Howard-Martin explains:

> A few judges may make the conscious, although unarticulated, decision not to rectify a discriminatory employment practice. Other members of the judiciary abdicate their responsibilities under Title VII because they are unable to perceive the existence of discrimination in the case before then. This myopia may be the natural consequence of majority status. The plaintiffs may appear not to fit the mold or judges may be reluctant to disturb employment process that are facially neutral.
>
> Institutional considerations may also play a role. Judges may feel incompetent to make professional employment decisions or suggest alternative procedures. They may be reluctant to intervene in an employment processes they intuitively feel are valid or feel that inter-meddling in the decision-making process is below the dignity of the office.

Howard-Martin, *supra* note 65, at 756–57 (citations omitted). *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (holding that the race-based measures adopted by the City failed to meet the strong basis in evidence standard, but failing to explain what the standard requires); Rothe Dev. Corp. v. United States Dep't of Def., 262 F.3d 1306, 1324 (Fed. Cir. 2001) (explaining that affirmative action by an employer, if challenged by litigation, can only be upheld if the employer has a strong basis in evidence that the remedial action was necessary; the court failed to elaborate on what the standard requires).

[113] *Ricci*, 129 S. Ct. at 2664. The City had hired a company that specialized in designing promotional examinations for fire and police departments to develop and administer the exam. *Id*. at 2665.

[114] *Id.*

[115] *Id.*

Kennedy, the Court held that the City failed to meet the "strong basis in evidence" standard and that fear of litigation alone does not justify discarding an examination.[116]

In her dissenting opinion, Justice Ginsburg predicted that the Court's holding would not have staying power.[117] Justice Ginsburg reasoned that the substantial racial disparities present in the examination results sufficed to state a prima facie case under Title VII's disparate impact provision because the pass rates of minorities fell well below the eighty-percent standard set by the EEOC.[118] Justice Ginsburg also criticized the Court for failing to elaborate on what the "strong basis in evidence" standard required.[119]

Since its inception in *Croson*, the "strong basis in evidence" standard has not been uniformly interpreted by the courts.[120] The lack of uniformity by the circuit courts, coupled with imprecise language in the EEOC Guidelines, makes it difficult for employers to comply with the standard.[121] Recently, in *Ricci*, the Supreme Court had the chance to define the standard; however, as Justice Ginsburg noted, it failed to do so.[122]

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116 *Id.* at 2677. The Court reasoned that under Title VII:

> [B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe that it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

Id. Although the Court did not elaborate on what the strong basis in evidence would require, it did reason that a threshold showing of a significant statistical disparity, without more, is not enough to show a strong basis in evidence that remedial action is necessary. *Id.* at 2678. Furthermore, the Court reasoned that the City could only be liable for disparate-impact discrimination if the examinations were not job related and consistent with business necessity, or if an equally valid but less discriminatory alternative existed that the City refused to adopt. *Id.*; *see* Sullivan, *supra* note 29, at 204 (emphasizing that to a have a strong basis, an employer must show that it does not have a business necessity and job relation defense).

117 *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting).

118 *Id.* at 2692.

119 *Id.* at 2700.

120 *See supra* Part II.C (explaining that the Court in *Croson* first established the strong basis in evidence standard and discussing different circuit approaches).

121 *See supra* Part II.B and Part II.C (describing the Guidelines and the different approaches the courts have taken toward defining the strong basis in evidence standard).

122 *Ricci,* 129 S. Ct. at 2690 (Ginsburg, J., dissenting). Justice Ginsburg and the other dissenters would have taken a different approach from Justice Kennedy, applying a looser standard. *Id.* "[A]n employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: [t]he employer must have good cause to believe the device would not withstand examination for business necessity." *Id.* at 2699. The dissent's standard would require more than subjective good faith but not as much as

III. ANALYSIS

The EEOC Guidelines serve as a reference point for employers when they face potential employment discrimination suits.[123] However, the Guidelines do not provide employers with a uniform standard to follow when their employment practices adversely affect minority employees for promotion or minority employees for hire.[124] Nowhere do the Guidelines mention the "strong basis in evidence" standard, the evidentiary standard adopted by the Supreme Court in *Croson* in the context of a constitutional claim and the standard that continues to baffle the circuit courts—although some circuits have been more successful than others in applying the elusive standard.[125] The "strong basis in

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the majority's "strong basis in evidence" test. *Id.* Justice Ginsburg was critical of the majorities balancing: "It is hard to see how [the majority's] requirements differ from demanding that an employer establish 'a provable, actual violation' *against itself*." *Id.* at 2701; *see also* Sullivan, *supra* note 29, at 212 (discussing the Court's approach in *Ricci* toward the strong basis in evidence standard).

123 *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2009), stating that the "four-fifths rule" typically requires:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Id.; *see also* BODENSTEINER & LEVINSON, *supra* note 44, § 5:46 ("Public employers should note that compliance with the guidelines will not insulate their affirmative action program from constitutional challenges but only from a Title VII claim. The Constitution imposes a heavier burden of justification on affirmative action programs enacted by public employers.").

124 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) (reasoning that in the proper context, gross statistical disparities may constitute prima facie proof of a practice of discrimination under Title VII). But it is equally clear that when special qualifications are necessary, comparisons to the general population may have little probative value. *Id. But see* Long v. City of Saginaw, 911 F.2d 1192, 1199 (6th Cir. 1990) (asserting that statistical "[e]vidence of long-lasting 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"); *see also* Sleiman, *supra* note 54, at 2689 (discussing the Civil Rights Act of 1991). The Civil Rights Act of 1991 established that a plaintiff must show a statistical disparate impact in order to establish a prima facie case of disparate impact. Sleiman, *supra* note 54, at 2689. Although there are no bright line rules to guide courts on whether plaintiffs' statistics demonstrate discrimination, the courts have predominantly applied the four-fifths rule, which was established under the EEOC Uniform Guidelines on Employee Selection Procedures. *Id.*

125 *Croson*, 488 U.S. at 510. The Court emphasized "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 501–02; *see* Vogel v. City of Cincinnati, 959 F.2d 594, 600 (6th Cir. 1992) (holding that the

evidence" standard has become a problem because employers have not received clarification regarding how to satisfy this evidentiary burden, yet the Supreme Court continues to use it.[126]

This Part progressively analyzes each piece of the "strong basis in evidence" puzzle, starting with the shortcomings of the EEOC Guidelines.[127] Part III.A discusses inherent ambiguities in a literal interpretation of the Guidelines' "four-fifths" and validation provisions and the need for revisions that define uniform, mandatory requirements on which an employer can rely when faced with potential Title VII litigation.[128] Part III.B examines the positive and negative attributes of the circuit court's application of the standard in cases of disparate impact.[129] Finally, Part III.C illustrates why the conflicting disparate-impact and disparate-treatment provisions of Title VII make it nearly impossible for employers to undertake any remedial action without violating Title VII.[130]

City had met the strong basis in evidence standard for showing that remedial actions were necessary because the statistics disclosed the availability of minorities in the relevant labor pool substantially exceeded the number of those hired); *see also* Middleton v. City of Flint, Mich., 92 F.3d 396, 406 (6th Cir. 1996) (holding "a disparity between the percentage of a protected class employed in a particular workforce or occupation and the raw percentage of class members in a regional labor pool, standing alone, cannot be 'a strong basis in evidence' sufficient to justify hiring or promotion quotas"); Edwards v. City of Houston, 37 F.3d 1097, 1113 (5th Cir. 1994) (holding that the City had demonstrated a strong basis in evidence that remedial action was necessary, but the court failed to elaborate what the standard requires). *See generally* Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty., 122 F.3d 895, 906 (11th Cir. 1997) (holding that in order for race-conscious affirmative action to be upheld, there must be a strong basis in evidence to support the conclusion that remedial action is necessary). Moreover, "[a] 'strong basis in evidence' *cannot* rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" *Id.* at 907. However, a governmental entity can justify an affirmative action practice by showing a gross statistical disparity between the proportion of minorities hired and those qualified and willing to do the work. *Id.*

126 *See Ricci*, 129 S. Ct. at 2663 (holding without elaboration that the strong basis in evidence standard had not been met); *see also Croson*, 488 U.S. at 500 (holding that evidence of past discrimination in an industry is not enough to meet the strong basis in evidence standard, but omitting what the standard requires).

127 *See infra* Part III.A (analyzing the shortcomings of the EEOC Guidelines).

128 *See infra* Part III.A (examining the Guidelines four-fifths and validation provisions, and explaining why the language in the Guidelines needs to be precise instead of suggestive in nature).

129 *See infra* Part III.B (clarifying the requirements of the strong basis in evidence standard).

130 *See infra* Part III.C (arguing that the disparate impact and disparate treatment provisions are conflicting provisions that make it nearly impossible for employers to undertake remedial actions without violating Title VII).

A. The Uniform Guidelines on Employee Selection Procedures

Although the Guidelines are intended to be applied by the EEOC to enforce Title VII of the Civil Rights Act of 1964, the four-fifths rule and test validation requirements are frequently used by courts and pose the greatest obstacle for employers dealing with disparate impact disputes.[131] The basic premise of the four-fifths rule is that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact."[132] The term "generally" allows agencies and courts to apply and use the rule at their discretion, which results in an immediate disadvantage for employers.[133] The language of the rule implies that the rule is not legally binding, but instead serves as a suggestion; therefore, employers and agencies are left uncertain about whether employment practices that yield more or less than a four-fifths ratio will insulate them from disparate impact litigation.[134]

The Guidelines also fail to define what qualifies as a statistically significant percentage to constitute disparate impact where the difference in selection rates is less than four-fifths, leaving employers again to wonder whether they may face disparate-impact litigation.[135] Even if the impact is more than four-fifths, the employer may still be sued under the Guidelines, which provide that:

> Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's

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131 *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 (2009) (providing uniform guidelines on employee selection procedures).

132 *See id*. § 1607.4(D) (discussing the four-fifths rule in detail); *see also* Canton, *supra* note 70, at 687 (explaining that the four-fifths rule is most often used by plaintiffs to establish a prima facie case of disparate impact).

133 Canton, *supra* note 70, at 688 (explaining that some courts have accepted using the four-fifths rule to demonstrate adverse impact, while other courts mandate the use of the four-fifths rule and apply it strictly).

134 *See* Bos. Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 21 (1st Cir. 1998) (stating that the four-fifths rule, standing alone, is not conclusive evidence of discrimination). *See generally* Greenberger, *supra* note 41, at 283 (suggesting that the Guidelines indicate that a disparate impact will be presumed where the selection rate of minorities is less than four-fifths of the rate at which the dominant group selected); Sleiman, *supra* note 54, at 2689 (examining the four-fifths rule and determining that the rule does not foreclose the possibility that a disparity of a lesser value could still constitute evidence of disparate impact).

135 *See* Peresie, *supra* note 61, at 781–83 (explaining that the court can, but is not required to find a prima facie case of disparate impact when a ratio is lower than four-fifths).

> actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.[136]

This provision creates a problem for smaller employers who are affected more harshly by the four-fifths rule "because the addition or subtraction of as few as one employee will have a larger impact on the selection ratio and expose a small employer to liability but will have no noticeable effect on a large employer."[137] Although some courts have allowed the four-fifths rule to establish a prima facie case of discrimination, neither the Supreme Court nor any federal circuit court has officially adopted the rule; therefore, employers do not have a uniform standard to follow.[138]

Despite this imprecise rule, employers are expected to conduct validation studies of selection procedures where adverse impact results.[139] However, the Guidelines do not require employers to conduct

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136 29 C.F.R. § 1607.4(D).

137 *See* Peresie, *supra* note 61, at 783. Additionally, "[t]he problem with the four-fifths rule is that a small employer with a small absolute disparity between male and female applicants might face liability under the rule, while a large employer can have a much greater disparity and still comply with the four-fifths rule." *Id.* at 784.

138 *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2678 (2009) (arguing in dissent that the City was faced with a prima facie case of disparate impact where the pass rates for minorities on a promotional exam was approximately one half the pass rate for white candidates, which fell well below the four-fifths standard set by the EEOC); Cotter v. City of Boston, 323 F.3d 160, 165 (1st Cir. 2003) (referencing the EEOC's "four-fifths" provision); Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty., 122 F.3d 895, 914 (11th Cir. 1997) (rationalizing that courts generally adhere to the notion that disparity indices of eighty percent or greater are not probative of discrimination); Stuart v. Roache, 951 F.2d 446, 451 (1st Cir. 1991) (reasoning that a comparison of the "relevant percentages—0.45 percent black sergeants in a Department with 4.5 percent eligible black police officers—would seem to make out a prima facie case of discrimination under 'disparate impact' analysis as applied by many courts"); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (explaining statistics may establish a prima facie case of employment discrimination; however, statistics must be assessed based on all of the surrounding facts and circumstances). *See generally* Rominger & Sandoval, *supra* note 26, at 315 (explaining that the four-fifths rule is not mandatory, but is merely a "rule of thumb").

139 *See* 29 C.F.R. § 1607.3(A) (discussing the relationship between use of selection procedures and discrimination). The regulation states that using

> any selection procedure which has an adverse impact on hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be

validation studies of selection procedures where no adverse impact results.[140] A major shortcoming of the validation provisions of the Guidelines is their failure to consider the extremely high cost of validation studies on employers.[141]

Demonstrating the validity of an employment practice is very difficult under the Guidelines, not to mention exceptionally costly.[142] The difficulty and the expense associated with validating employment

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> discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines.

Id.; *see also id.* § 1607.5 (2009) (providing general standards for validity studies); Rominger & Sandoval, *supra* note 26, at 315 (defining validity as the ability of an employment test to accurately predict job performance). Tests are used by employers to predict a candidate's future job performance. Rominger & Sandoval, *supra* note 26, at 315. Test scores are valid indicia of performance if the exam correlates positively with other indicia of job productivity, such as past performance reflected in a supervisor's evaluation. *Id.* "A test is said to be validated to the extent that other reliable evidence supports inferences that are derived from the test scores." *Id.* Rominger and Sandoval explain:

> The courts, in enforcing fair employment policy, act to protect applicants and employees from an employer who uses a test: (1) to intentionally discriminate on the basis of race or gender, or (2) in a way that produces an adverse impact when other alternatives with less of an adverse impact are available. An employer utilizing a testing program must be prepared to produce evidence to document the four prongs of a valid testing policy. At the very least, an employer must be prepared to produce evidence as follows: (1) the tests are job-related, i.e., predictive of future job performance, (2) the tests serve a legitimate business purpose, such as enhancing the efficiency of the selection decision, (3) the tests have been developed to meet professional standards, and (4) the tests actually meet the professional standards. The 1978 Guidelines are an excellent source of information about the proof of the validity or job-relatedness of a test.

Id. at 332.

140 *See* 29 C.F.R. § 1607.1(B) (explaining that the Guidelines do not require a user to conduct validity studies where no adverse impact results; however, all users are encouraged to use selection procedures that have been validated).

141 *See* Siegelman, *supra* note 54, at 523 (providing an economic analysis of disparate impact liability). Siegelman suggests, based on anecdotal evidence, that the cost of conducting a sufficient validation study to establish business necessity is in the range of several hundred thousand dollars. *Id.*; *see also* Kelman, *supra* note 53, at 1169 n.31 (arguing that validating tests locally are expensive, often costing many hundreds of thousands of dollars).

142 *See* Conway, *supra* note 14, at 319 (discussing test validation). Validating tests is difficult because of the rigorous, technical standards of the Guidelines and can be expensive because of continued court appearances. *Id.* Furthermore, in the event that a test gets invalidated, the costs of litigation, appeals, and attorney fees are extremely high. *Id.* Because validating a test is so expensive, municipalities may rely less on accurate methods of ascertaining the most qualified candidates for employment and instead be reduced to using quota systems. *Id.* Moreover, using quotas instead of tests "may curtail the quality of emergency services provided by police and fire departments, thus creating a hazard to the community and a danger to fellow workers." *Id.*

practices cause employers to seek alternatives to standardized testing.[143] These alternatives include assessment centers and the use of pass/fail employment tests.[144] Unfortunately, the availability of alternatives has not alleviated the burden on employers to validate any employment test that results in an adverse impact.[145] The failure of the Guidelines to inform employers how to determine whether adverse impact exists or if validation is needed is not the only difficulty employers face.[146] Additionally, if an employer undertakes remedial action to avoid potential disparate-impact litigation, he or she now must demonstrate a strong basis in evidence to show that such action was necessary.[147]

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143 *Id.* at 320 (explaining that the high cost of validation has led some employers to seek alternatives); *see also* Canton, *supra* note 70, at 706 ("Very few police or firefighter tests that result in adverse impact on a protected group have been found valid . . . often, courts that have concluded that a test is valid have not given detailed reasoning for their findings."). A city is more likely to have an employment test upheld if (1) its test is based on a thorough job analysis, (2) the test is validated in strict conformance with the Uniform Guidelines, and (3) there is a statistically significant correlation between test scores and job performance. *Id.* at 706.

144 *See* Conway, *supra* note 14, at 320 (discussing the use of assessment centers as an alternative to traditional employment testing procedures). Assessment centers place applicants in real life situations and assess their responses. *Id.* Typically, assessment centers are reserved for use in later stages of the selection process when the applicant pool has been considerably reduced because of their cost. *Id.* The validity of an assessment center "is dependent upon the duration of a candidate's examination and the quality of the assessors, which is contingent on the extent of the assessors' training and experience." *Id.* The other alternative for employers is to "utilize a pass/fail employment test, and include a random selection process to differentiate among the large number of candidates who will pass an unchallenged test." *Id.* at 321. However, this alternative does not adhere to the commitment to merit tests and may ultimately increase the risk of hiring unqualified candidates. *Id. See generally* Selmi, *supra* note 30, at 782 (arguing that if Congress had the will, it could enact legislation dictating the kinds of examinations that are permissible, or the types of justifications that are acceptable).

145 *See* Greenberger, *supra* note 41, at 319 (explaining that the "guidelines are very exacting, requiring employers to show high correlations between test performance and job performance"). The preferred course of events would be for the EEOC to endorse specific tests or practices for certain categories of jobs instead of issuing complex validation requirements which create too much subjectivity for employers. *Id.* at 320. Additionally, if the courts adhered to the EEOC-endorsed tests, most of the costs of validation could be eliminated. *Id.* Although there is a danger that formal approval would stifle innovation in testing, it is not clear that a nationally sanctioned exam would stifle any advances in testing more than the law almost does presently. *Id. But see* Conway, *supra* note 14, at 311 (arguing that very few validation studies even satisfy the EEOC standard and that compliance with validation standards may not shield an employer from litigation if better alternative testing procedures exist).

146 *See infra* Part III.B (providing an overview of the strong basis in evidence standard).

147 *See infra* Part III.B (discussing the strong basis in evidence standard and the attempts, or lack thereof, of different courts to define it).

B. The Supreme and Circuit Courts' Approaches to Defining the Elusive "Strong Basis in Evidence" Standard.

The "strong basis in evidence" standard has not been clearly defined by any federal court.[148] Likewise, the circuit courts have not provided a uniform standard of application, but the First and Sixth Circuits have identified situations where employers satisfied the standard with some specificity.[149] The Sixth Circuit has clearly identified that an employer may use either a prior court finding of past discrimination or the existence of gross statistical disparities calculated using the relevant

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[148] *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 500 (1989) (holding that the strong basis in evidence standard was not met). Instead of explaining what the standard required, the Court indicated that none of the trial court's findings met the strong basis in evidence standard. *Id.* at 499–500. The Court found that none of these facts justified the City's quota that minorities receive thirty percent of city construction contracts:

> (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

Id. at 499; *see also* Donze, *supra* note 58, at 776–77 (discussing that *Croson*'s lack of clarity regarding the strong basis in evidence standard has created a problem in affirmative action jurisprudence). In *Croson*, the Court did not require an evidentiary program, but found the City's affirmative action program inadequate based on the particular facts of the case. Donze, *supra* note 58, at 777. The City's reliance on "congressional findings regarding national discrimination in the construction industry, and the improper statistical comparisons of Richmond's minority population to minority contract awards amounted to insufficient evidence that Richmond itself had discriminated." *Id.* The Court did not address the significant issue of what affirmative action proponents must show to meet the strong basis in evidence requirement. *Id.*

[149] *See, e.g.*, Rutherford v. City of Cleveland, 179 Fed. Appx. 366, 374–75 (6th Cir. 2006) (finding the strong basis in evidence standard was met); Cotter v. City of Boston, 323 F.3d 160, 171 (1st Cir. 2003) (same); Bos. Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 20 (1st Cir. 1998) (same); Edwards v. City of Houston, 37 F.3d 1097, 1113 (5th Cir. 1994) (holding the City had met the strong basis in evidence standard); Vogel v. City of Cincinnati, 959 F.2d 594, 600–01 (6th Cir. 1992) (holding the strong basis in evidence standard was met by employers); Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir.1992) (same); Stuart v. Roache, 951 F.2d 446, 450–51 (1st Cir. 1991) (same); *see also* Donze, *supra* note 58, at 793 (articulating that in *Croson*, Justice O' Connors' lack of clarity makes the strong basis in evidence standard less than clear). *But see, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) (holding that the strong basis in evidence standard was not met); *Richmond*, 488 U.S. at 500 (same); Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1324 (Fed. Cir. 2001) (finding the strong basis in evidence standard was not satisfied); Middleton v. City of Flint, Mich., 92 F.3d 396, 413 (6th Cir. 1996) (same); Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1077 (4th Cir. 1993) (same); Long v. City of Saginaw, 911 F.2d 1192, 1202 (6th Cir. 1990) (same).

labor pool to demonstrate the strong basis in evidence.[150] By allowing a prima facie case to be established by statistics comparing the relevant labor pool, the Sixth Circuit appropriately adheres to the original constitutional standard, which allows a prima facie case to be established by statistical evidence.[151]

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[150] *See, e.g.*, *Rutherford*, 179 Fed. Appx. at 374–75 (holding the admission by the City of past racial discrimination, supported by the findings of the district court and a review of the statistical evidence, were enough to demonstrate that the remedial action undertaken was necessary; therefore, satisfying the strong basis in evidence standard); *Vogel*, 959 F.2d at 600–01 (holding that an affirmative action plan enacted pursuant to a consent decree was a necessary remedial action because the statistical comparisons between race and gender of police department and race and gender of relevant qualified labor market disclosed the availability of minorities in the relevant labor market substantially exceeding those hired, which constituted a strong basis in evidence that remedial action was necessary). *But see, e.g.*, Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000) (holding that the state's affirmative action program for minority construction companies failed to meet the strong basis in evidence standard because Ohio's statistical comparison was overly broad, failing to take into account the percentage of minority-owned businesses that were construction companies and how many were qualified to perform state construction contracts); *Middleton*, 92 F.3d at 406 (holding that a "disparity between the percentage of a protected class employed in a particular workforce or occupation and the raw percentage of class members in a regional labor pool, standing alone, cannot be 'a strong basis in evidence' sufficient to justify hiring or promotion quotas"); *Long*, 911 F.2d at 1199 (holding that the City failed to satisfy the strong basis in evidence standard by failing to define the relevant statistical pool).

[151] *See supra* note 81 and accompanying text (discussing the Supreme Court's position, as reflected in *Johnson,* which appears to allow employers to use statistics to refute Title VII challenges); *see also Rutherford*, 179 Fed. Appx. at 375–76. In *Rutherford*, the City police department enacted race-based hiring practices, pursuant to a consent decree reached in a prior race discrimination action, which required the department to hire a certain percentage of minority applicants as police officers. *Rutherford*, 179 Fed. Appx. at 368. The court held that a party can demonstrate a strong basis in evidence by showing that a court made a finding of past discrimination—as was the case here. *Id.* at 375. The court also found that statistical evidence supported the City undertaking remedial action to diversify the Cleveland Police Department because the record was replete with gross statistical disparities between the treatment of minorities and non-minorities. *Id.* at 376. The court referenced the following statistics:

> For example, the district court found that in the 1970s, minorities constituted 23% of those taking the entrance examination, but represented 64% of those who failed. Minorities had a failure rate of 26.3% compared to a rate of 4.5% for non-minorities. Throughout the 1970s, 1980s, and early 1990s, the percentage of minorities in the CPD officer force tracked below—often quite significantly—the level of minorities in the general population, the percentage of examination takers who were minorities, and the percentage of examination passers who were minorities. This court has found that similar disparities supported a finding of racial discrimination.

Id. (citations omitted); *see also, e.g.*, *Vogel*, 959 F.2d at 599–601 (holding that the City had a strong basis in evidence for its conclusion that remedial action was necessary based on statistics). The court reasoned that evidence of wide statistical disparities may justify an

It is imperative that the employer properly calculates the relevant labor pool when compiling statistical data, as failure to do so will likely result in the court holding that the strong basis in evidence standard has not been met, as illustrated in *Long v. City of Saginaw*.[152] This Sixth Circuit case demonstrates that the relevant statistical pool must be identified accurately.[153] Compositional elements must be known—educational background, members' capabilities, and other material factors—to conduct a meaningful comparison.[154] The key for employers attempting to prove they meet the requisite "strong basis in evidence" standard is to present statistical evidence of an under-representation of minority candidates compared with the representation of qualified minorities in the relevant labor pool, which comprises all persons qualified for the position at issue.[155]

The First Circuit has also logically determined the requirements of the strong basis in evidence standard by using the same assessment as the Sixth Circuit, finding a strong basis in evidence may exist when there has been a documented history of discrimination and when gross

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affirmative action policy adopted by a public employer. *Vogel*, 959 F.2d at 599. Here, the City made the proper statistical comparison "between the race and gender of the Cincinnati Police Division and the race and gender of the relevant qualified labor market." *Id.* at 600. The court found "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake a particular task." *Id.* (internal quotations omitted).

[152] *Long*, 911 F.2d at 1202.

[153] *Id.* at 1199. The statistics the City offered were insufficient to justify the City's affirmative action plan of promoting black police officers because the City erroneously viewed the relevant comparison as being between the total number of minorities employed in the police department and the total number of persons employed in the "protective services." *Id.* (internal quotations omitted). The "protective services" statistical pool was erroneous because the composition of the relevant statistical pool was unknown. *Id.*

[154] *Id.*; *see also* Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000) (holding that Ohio failed to meet the strong basis in evidence standard because it failed to properly identify the relevant statistical pool). The court reasoned:

> [A]lthough Ohio's most "compelling" statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio—thus marshaling stronger statistics than the statistics in *Croson*—it is still insufficient. The problem with Ohio's statistical comparison is that the percentage of minority-owned businesses in Ohio (7% as of 1978) did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.

Drabik, 214 F.3d at 736 (citations omitted).

[155] *See supra* notes 148–54 and accompanying text (discussing the importance of defining the relevant labor pool for statistical comparisons to show that a prima facie case of discrimination exists to demonstrate that remedial actions undertaken are in fact necessary).

statistical disparities approach a prima facie case of a constitutional or statutory violation.[156] Despite clarifying when the strong basis in evidence likely exists, the courts have failed to delineate how an employer should assemble such statistical data, and more importantly, when an employer may undertake remedial action to avoid litigation under Title VII.[157]

Prior to *Ricci*, an employer who provided a documented history of discrimination, gross statistical disparities approaching a prima facie case, or statistical disparities compared to the qualified labor market would, in some instances, satisfy the "strong basis in evidence" standard.[158] However, these methods of analysis were undermined in 2009 in *Ricci v. DeStefano*, which completely convoluted the "strong basis

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[156] *See, e.g.*, Cotter v. City of Boston, 323 F.3d 160, 170 (1st Cir. 2003) (holding that the City's evidence of disparity in the promotion of black officers to sergeant, coupled with current racial tensions and a documented history of past discrimination within the department, created the strong basis required for the City to determine that race-conscious action was necessary). The court also reasoned that evidence approaching a prima facie case of constitutional or statutory violation may constitute a strong basis in evidence. *Id.* at 169; *see also* Bos. Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 20 (1st Cir. 1998) (holding that the Boston Police Department demonstrated a strong basis in evidence for promoting a black candidate who scored one point lower on the lieutenant's exam based on the Department's documented history of discrimination and the gross statistical disparities among department ranks); Stuart v. Roache, 951 F.2d 446, 451 (1st Cir. 1991) (holding the strong basis in evidence standard was satisfied where the "comparison" figures for purposes of demonstrating discriminatory exclusion included the number of minorities *qualified* to undertake the particular task). Additionally, the court reasoned that societal discrimination alone is not a sufficient basis to justify remedial action. *Stuart*, 951 F.2d at 451.

[157] *See supra* note 61 and accompanying text (explaining that compliance with Title VII remains a problem for employers because of the uncertainty surrounding what creates a proper condition for voluntary, race-conscious affirmative action in cases of disparate impact).

[158] *See supra* notes 148–54 and accompanying text (examining circumstances when the circuit courts have held that the strong basis in evidence standard was met). *See generally* Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1323–24 (Fed. Cir. 2001) ("Statistical evidence is particularly important to justify race-based legislation. . . . [N]early every court of appeals upholding the constitutionality of a race-based classification has relied in whole or in part on statistical evidence."); Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1077 (4th Cir. 1993) ("[O]nly where there are 'gross statistical disparities' between the racial composition of the employer's workforce and the racial composition of the relevant qualified labor pool may a court infer that the employer has racially discriminated."). Additionally, "when the Supreme Court has approved a race-conscious remedy on the basis of such comparisons, the statistics have been corroborated by significant anecdotal evidence of racial discrimination." *Md. Troopers Ass'n, Inc.*, 993 F.2d at 1077; *see also* Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992) ("Statistical evidence of disparity sufficient to support a prima facie case under Title VII may, in some cases, constitute a strong basis in evidence for believing that a voluntary affirmative action program was required by, and consistent with, the Constitution.").

in evidence" standard.[159] The Supreme Court had the opportunity to elaborate on the strong basis in evidence standard in *Ricci*; however, instead of clarifying the standard, the Court merely asserted that "the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results."[160] Moreover, the Court disregarded the statistical approaches used by the circuit courts in its problematic ruling:

> The racial adverse impact in this litigation was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. The problem for respondents is that such a prima facie case—essentially, a threshold showing of a significant statistical disparity and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the test results.[161]

Justice Ginsburg appropriately acknowledged that New Haven had a cause for concern about the prospect of Title VII litigation because the pass rates for minorities fell well below the eighty percent standard set by the EEOC to implement the disparate-impact provision of Title VII.[162]

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159 129 S. Ct. 2658, 2662 (2009).

160 *Id.* at 2681. In *Ricci*, white and Hispanic firefighters sued the City of New Haven, alleging that the City had discriminated against them by refusing to certify the results of a promotional exam under Title VII. *Id.* at 2664. The City discarded the test results based on its belief that the results could have a disparate impact on minority firefighters who performed at a substantially lower rate than their white counterparts. *Id.* The Supreme Court provided that under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the race-conscious discriminatory action. *Id.* The Court held that the City lacked a strong basis in evidence for proving it would face disparate impact liability if it certified the examination results. *Id.* at 2681. Essentially, the City failed to present any evidence that the tests were flawed because they were not job-related or because there were other equally valid and less discriminatory tests available. *Id.* The Court established that fear of litigation alone does not justify an employer discarding promotional tests. *Id.*

161 *Id.* at 2662 (citations omitted).

162 *Id.* at 2690–92 (Ginsburg, J., dissenting). Justice Ginsburg criticized the Court for not elaborating on the strong basis in evidence standard. *Id.* at 2700. In her reasoning, "[the] Court has repeatedly emphasized that Title VII 'should not be read to thwart' efforts at voluntary compliance." *Id.* at 2701. However, the strong basis in evidence standard, "as barely described in general, and cavalierly applied in this case, makes voluntary compliance a hazardous venture." *Id.* Furthermore, Justice Ginsburg asserts that prior decisions applying a strong basis in evidence standard have not imposed a burden as heavy as the Court has done in *Ricci*. *Id.* at 2702. For example, in *Croson*, the Court held the

The majority's reasoning that statistics alone are not enough to satisfy the "strong basis in evidence" standard will only serve to increase confusion because the circuit courts have relied primarily on statistics in proving a prima facie case.[163] Furthermore, the "strong basis in evidence" standard will continue to be an issue until Congress or the courts address the root of the problem: irreconcilable provisions of disparate impact and disparate treatment under Title VII.[164]

C. *The Conflicting Disparate Impact and Disparate Treatment Provisions of Title VII*

The difficult burden placed on employers to devise fair employment practices without violating both disparate impact and disparate treatment or engaging in reverse discrimination has created a dilemma for employers.[165] This no-win situation could be resolved by eradicating the disparate impact provision of Title VII in favor of a more expansive

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strong basis in evidence test was not met because the City failed to offer sufficient evidence to constitute a prima facie case; however, the Court did not suggest that anything beyond a prima facie case would have been required. *Id.* at 2702 n.7. As a result of *Ricci's* holding, according to Ginsburg,

> an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic. Concern about exposure to disparate-impact liability, however well grounded, is insufficient to insulate an employer from attack. Instead, the employer must make a strong showing that (1) its selection method was not job related and consistent with business necessity, or (2) that it refused to adopt an equally valid, less-discriminatory alternative. It is hard to see how these requirements differ from demanding that an employer establish a provable, actual violation *against itself*.

Id. at 2701 (citations omitted) (internal quotations omitted).

[163] *See supra* notes 148–61 and accompanying text (discussing what is likely required under the strong basis in evidence standard and the failure of the Supreme Court to provide clarification as to what the standard requires); *see also* Donze, *supra* note 58, at 796 (discussing the need for the Supreme Court to define the strong basis in evidence standard). Given the overwhelming similarity of the problems many affirmative action programs have, it could save the lower courts, cities, and county governments an abundance of time and energy if the Supreme Court could provide some guidance on the strong basis in evidence standard. *Id.* Affirmative action in hiring and promotions is still used today; if the Court could highlight what the strong basis in evidence were supposed to show, and what evidence is sufficient to satisfy the requirement, this would tremendously aid the lower courts. *Id.* Moreover, what is needed is an explanation of what kinds of statistical and other data satisfy the strong basis in evidence inquiry. *Id.*

[164] *See infra* Part III.C (analyzing the conflicting disparate impact and disparate treatment provisions under Title VII).

[165] *See supra* Part II.A (discussing disparate impact and reverse discrimination).

disparate treatment provision.[166] It has been argued that "[t]he central mistake behind the disparate impact theory was a belief that the law could do the work of social change when, in fact, much of the battle to remedy discrimination was lost when we moved away from the focus on intent."[167]

The argument for dissolving the disparate impact provision of Title VII in favor of a more expansive definition of disparate treatment is appealing, based on flaws inherent in the language of Title VII.[168] Under Title VII, "[a]n unlawful employment practice based on disparate impact is established . . . if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[169] The initial purpose behind the theory of disparate impact was to assure equality of employment opportunities and to eliminate discriminatory practices that disadvantaged minorities.[170] However, that purpose has been diminished in favor of the notion that discrimination against both minorities and majority class members is unlawful—the "colorblind"

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166 *See Ricci*, 129 S. Ct. at 2682–83 (Scalia, J., concurring) ("[A]rguably the disparate-impact provisions sweep too broadly . . . since they fail to provide an affirmative defense for good-faith (*i.e.,* nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable."); *see also* Selmi, *supra* note 30, at 705 (arguing that disparate impact theory is inadequate at uncovering subtle discrimination and that disparate treatment remains underdeveloped and could be expanded to include much of what disparate impact theory attempts to cover).

167 Selmi, *supra* note 30, at 767–68 (suggesting that instead of creating the theory of disparate impact, a more expansive definition of intent should have been established). Selmi argues that the theory of disparate impact was based on two critical mistakes—"that the theory would be easier to prove and that it was possible to redefine discrimination purely through legal doctrine." *Id.* at 782.

168 *See* Schwartz, *supra* note 42, at 683 (suggesting that "[t]he era of racial balancing has an uncertain future. As a jurisdictional approach, racial balancing—the attempt to graft a protected class exception onto a basic framework of colorblindness—provides an unstable equilibrium because colorblindness is inherently inconsistent with the exception").

169 *See* 42 U.S.C. § 2000e-2(k)(1) (2006) (stating what constitutes an unlawful employment practice).

170 *See* Schwartz, *supra* note 42, at 664 (comparing the "protected class" theory of discrimination with the "colorblind" idea of discrimination). The protected class theory of discrimination regards discrimination against minorities as far worse than discrimination against the dominant class, embraces affirmative action, and would exclude most reverse discrimination claims. *Id.* The colorblind idea of discrimination holds that Title VII was intended to prohibit an employer from considering race as a factor when making employment decisions. *Id.* The colorblind theory stems from the notion that discrimination against minorities and women is no worse than discrimination against white males; it prohibits affirmative action in any form and embraces reverse discrimination claims. *Id.*

idea.[171] The "colorblind" view of discrimination produces an unstable situation because colorblindness is intrinsically inconsistent with the protected class exception.[172] Considering that all raced-based disparity in treatment is discrimination, and "discrimination against whites is as bad as discrimination against minorities, then it becomes difficult to refute Justice Scalia's argument that two wrongs don't make a right: '[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination.'"[173] However, instead of eradicating the disparate impact provision, this conflict could be cohesively resolved by amending Title VII.[174]

IV. REMODELING TITLE VII

The Supreme Court has dismantled the primary approach taken by circuit courts by rendering the use of statistics unacceptable to establish a prima facie case, thereby making the "strong basis in evidence" standard an impracticable standard to satisfy.[175] Creating a barrier for employers attempting to remedy situations of disparate impact undermines the

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[171] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 780, 861 (2007) (embracing the "colorblind" mentality); *see also* Schwartz, *supra* note 42, at 684 (explaining the colorblind idea of discrimination adopted by the courts prohibits an employer from considering race when making an employment decision).

[172] *See* Schwartz, *supra* note 42, at 683 (discussing the difficulty with reconciling the notions of "protected class" discrimination with "colorblind" discrimination).

[173] *Id.* at 683–84; *see also* Selmi, *supra* note 30, at 768 (arguing that disparate impact is in conflict with the disparate treatment provisions of Title VII).

[174] *See infra* Part IV (suggesting that amendments to Title VII could resolve the conflicting disparate impact and disparate treatment provisions).

[175] *See supra* Part III.B (discussing the attempts by the circuit courts to define the strong basis in evidence standard set by the Supreme Court in *Croson*, and failure of the Supreme Court to elaborate on the requirements of the standard in *Ricci*); *see also* BODENSTEINER & LEVINSON, *supra* note 44, § 5:25 (discussing the impact of the *Ricci* decision). In *Ricci*:

> Borrowing from the constitutional analysis used to assess the validity of voluntary affirmative action programs, the Court held that employers must have a "strong basis in evidence" that remedial action is necessary in order to avoid Title VII disparate impact liability . . . . In short, the Court adopted the strong-basis-in-evidence standard as a matter of statutory construction in order to resolve any conflict between Title VII's disparate-treatment and disproportionate-impact provisions. It rejected the Second Circuit's position that establishing a prima facie disparate-impact case alone justified throwing out the test results. Thus, bare statistical evidence of racial disparity, even if the gap is "overwhelming," as was the case here, will not suffice. However, the Court also stated that conclusive evidence of a Title VII violation is not required. Questions remain as to how lower courts will apply the "strong basis in evidence" standard.

Id.

initial goal of Title VII: providing equal employment opportunities to all, including historically disadvantaged groups.[176] Furthermore, the conflicting disparate impact and disparate treatment provisions make it nearly impossible for employers to take any remedial actions to alleviate adverse impact without making themselves susceptible to disparate treatment or reverse discrimination litigation by white class members.[177] Accordingly, this Note suggests amendments to the Guidelines and Title VII in an attempt to clarify the burden of proof that the "strong basis in evidence" standard imposes on employers facing Title VII litigation.[178] More specifically, this Note suggests that using statistical evidence of racial disparity should suffice to establish a prima facie case of discrimination under the Guidelines and Title VII.[179]

The EEOC Guidelines' "four-fifths" and validation provisions provide employers some direction on how to handle disparate impact; however, to ensure a uniform standard to follow, the "four-fifths" provision needs to be mandated rather than recommended. Additionally, Title VII of the Civil Rights Act of 1964 needs to be amended to explicitly follow the Guidelines' "four-fifths" provision.[180]

A. The Proposed Amendment to 29 C.F.R. § 1607.4: Adverse Impact and the "Four-Fifths Rule"

> (D) A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate ~~will generally~~ *shall* be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate ~~will generally~~ *shall* not be regarded by Federal enforcement agencies as evidence of adverse impact.[181]

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176 *See supra* Part II.A (providing the history of Title VII).

177 *See supra* Part III.C (discussing how the disparate impact and disparate treatment provisions conflict under Title VII).

178 *See infra* Part IV.A and IV.B (suggesting that amendments to the Guidelines and Title VII would alleviate the uncertainties surrounding disparate impact litigation).

179 *See infra* Part IV (explaining the proposed amendments to Title VII).

180 *See supra* Part III.A (discussing the EEOC Guidelines and analyzing the four-fifths provision with specificity).

181 This proposal is the contribution of the author. Specifically, proposed additions are italicized, and proposed deletions are struck out. The language in regular font is taken from § 1607.4. *See generally* 29 C.F.R. § 1607.4(D) (2009).

Commentary

These revisions are necessary because the courts have previously had too much discretion in the implementation of the "four-fifths" rule, which should be mandated by the Guidelines.[182] Replacing "will generally" with "shall" provides uniformity in application and a clear methodology for employers to follow. The amended Guidelines proposed by this Note would clarify what is expected of employers by focusing on measurability. It would require employers to use the "four-fifths" provision of the Guidelines as a definitive rule to determine whether their employment practice resulted in a prima facie case of discrimination. In other words, if the selection rate for minorities is less than four-fifths of the rate for the group with the highest rate, the test evidences a prima facie case of disparate impact.

For example, if a promotion test results in a disproportionate number of minority candidates compared to the number of qualified applicants in the relevant labor pool, that result establishes a prima facie case of disparate impact; and the employer should be allowed to discard the exam.[183] Although it may be difficult for employers to identify the relevant labor market—those qualified for the position at issue—a good-faith approach could be taken to provide a safeguard for employers, as suggested by Justice Scalia in *Ricci*.[184] Overall, this amendment resolves the uncertainty the Court created in *Ricci* by providing that the "four-fifths" rule be the required method to gauge whether an employment practice has a disparate impact.[185]

B. The Proposed Amendment to 42 U.S.C. § 713: Affirmative Defenses

> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith *compliance with the Commission's Uniform Guidelines*, in conformity with, and in reliance on *the four-fifths provision or in*

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182 *See supra* notes 132–38 and accompanying text (discussing the application of the four-fifths rule by the courts).

183 *See supra* Part II.C (discussing that the strong basis in evidence has been met by statistical evidence, which was used to establish a prima facie case of a statutory violation).

184 *See supra* note 166 and accompanying text (suggesting that disparate impact provision fails to provide employers with an affirmative defense for good faith hiring standards).

185 *See supra* Part III.A (discussing the EEOC Guidelines, specifically the "four-fifths" rule).

> *reliance on* any written interpretation or opinion of the Commission . . . .[186]

Commentary

Once disparate impact has been identified, employers should be allowed to remedy the situation. The Guidelines interpret Title VII and authorize the use of § 713, which provides employers with affirmative defenses to Title VII liability.[187] This section of the Guidelines should also be amended to follow the newly mandated procedures.

This revision maintains one of the original purposes of Title VII: to encourage voluntary affirmative action.[188] Here, "good faith" is based on an employer's reasonable belief that affirmative or remedial action was necessary based on a prima facie showing of a statutory violation. Therefore, the amendment insulates an employer from litigation by allowing it to discard an examination if it reasonably believes that use of a test has an adverse impact on a protected group such as to create a prima facie case of statutory violation—i.e. a violation of the "four-fifths" provision. This approach further resolves the uncertainty created by the Court in *Ricci*.[189]

C. Restoring the "Strong Basis in Evidence" Standard

There are many problems with Title VII and the "strong basis in evidence standard," which *Ricci* only exacerbated.[190] The majority in *Ricci* took the "strong basis in evidence" standard from affirmative action law and applied it to a Title VII case. Instead of applying the standard as it existed, the Court altered the standard to require that an employer demonstrate that he or she would have faced liability had he or she not taken remedial action.[191] This application of the standard creates uncertainty for employers. Compounding the confusion, the

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[186] This proposal is the contribution of the author. Specifically, proposed additions are italicized, and proposed deletions are struck out. The language in regular font is taken from 42 U.S.C. § 713(b) (2006) (providing affirmative defenses to Title VII liability).

[187] *See supra* note 66 and accompanying text (discussing the statutory defenses for employers under Title VII).

[188] *See supra* Part II (explaining that employers engaged in voluntary affirmative action plans such as banding, race preferences, and race norming).

[189] *See supra* Part III.B (analyzing *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009)).

[190] *See supra* Part III.B (discussing the Court's decision in *Ricci*).

[191] *See supra* Part II (explaining that Title VII borrowed the "strong basis in evidence" standard from equal protection analysis); *supra* note 112 and accompanying text (examining the application of the strong basis in evidence standard by the Court in *Ricci*).

Supreme Court stated that statistics alone do not suffice to establish a prima facie case, superseding the practice of the lower courts.[192]

Despite *Ricci's* negative implications, the remnants of the decision may still be overturned by Congress because the Court's decision relied on Title VII rather than on equal protection grounds.[193] Title VII is a federal law and Congress may amend it if it chooses to do so.[194] The ideal solution would be for Congress to amend Title VII to follow the Guidelines as suggested in this Note and to restore the strong basis in evidence to its original constitutional standard by allowing a prima facie case to be established by statistics. Although public employers would still be susceptible to equal protection claims, amending Title VII would resolve the conflicting disparate impact and disparate treatment provisions by allowing employers to undertake remedial (affirmative) action without risking reverse-discrimination suits.

V. CONCLUSION

Initially, Title VII of the Civil Rights Act of 1964 was a simple prohibition against intentional discrimination in the workforce. Since its introduction, Title VII litigation has become extremely complicated in application, largely due to the Civil Rights Act of 1991, which, in part, outlawed neutral employment practices that discriminatorily affected minorities. The EEOC Guidelines recommend how to handle neutral employment practices that may negatively impact minorities; however, the Supreme Court's *Ricci* decision disregarded the "four-fifths" provision of the Guidelines, creating cause for concern among employers likely facing disparate-impact and reverse discrimination litigation. The Court's approach to the "strong basis in evidence" standard has proven inadequate to deal with conflicting disparate-impact and reverse discrimination cases. This difficulty demands amendments to Title VII.

The proposed amendments to Title VII would help resolve Publicus Corporation's testing dilemma. Publicus Corporation is concerned that minority employees' low test scores may result in disparate-impact litigation. Publicus Corporation understands that if it discards the test, it will face a situation that mirrors *Ricci*, and it will likely be charged with reverse discrimination by the white candidates who performed well on the exam. Amending Title VII resolves the corporation's dilemma. If test results show that the selection rate for minorities is less than four-fifths of the rate for white test-takers, this would establish a prima facie

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192 *See supra* Part III.B (analyzing cases where statistical evidence was used).

193 *See supra* Part III.C (discussing *Ricci v. DeStefano*).

194 *See supra* Part II.A (providing background of Title VII).

case of disparate impact and Publicus Corporation could discard the test. By effectively allowing employers to implement good-faith affirmative action practices, the proposed amendments to Title VII maintain the intent and integrity of the Civil Rights Act of 1964 and provide the necessary clarification of the strong basis in evidence standard.

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