

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 07-8025

NILDA GUTIERREZ, et al,
Plaintiffs/Appellants

v.

JOHNSON & JOHNSON,
Defendant/Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**BRIEF OF *AMICI CURIAE*
THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA,
THE IMPACT FUND,
THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
IN SUPPORT OF
PLAINTIFF-APPELLANTS' BRIEF ON THE MERITS OF 23(F) APPEAL**

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STATEMENT OF INTEREST OF THE AMICI CURIAE
AND SOURCE OF AUTHORITY TO FILE

Amici the Public Interest Law Center of Philadelphia, the Impact Fund, the National Employment Lawyers Association, and the Lawyers' Committee for Civil Rights Under Law respectfully submit this brief in support of Plaintiff-Appellants' Rule 23(f) appeal.

The Public Interest Law Center of Philadelphia is a not for profit law firm established by the leaders of the Philadelphia Bar Association in 1974 as a successor to the Philadelphia Lawyers Committee for Civil Rights Under Law. It is dedicated to advancing the Constitutional promise of equal citizenship to all persons irrespective of race, ethnicity, national origin, disability, gender or poverty. In fighting discrimination on behalf of its clients the Law Center frequently utilizes disparate impact class actions, including challenges to subjective employment practices in *Dickerson v. U.S. Steel*, 472 F. Supp. 1304 (E.D. Pa. 1978) (written and subjective tests), and *Green v. U.S. Steel Corp.*, 570 F. Supp 254 (E.D. Pa. 1983) , *aff'd in part sub nom. Green v. USX Corp.*, 843 F.2d 1511 (3d Cir. 1988) ("*Green I*"), *vacated and remanded*, 490 U.S. 1103 (1989), *reaff'd in part*, 896 F.2d 801 (3d Cir. 1990) ("*Green II*") (subjective hiring practices).

The Impact Fund is a nonprofit foundation that provides funding, training, advice, and co-counsel to public interest litigators across the country, assisting in employment discrimination and other cases. It is currently lead

counsel in certified nation-wide gender discrimination class actions against Wal-Mart and Costco.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprising lawyers who represent employees. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys.

The Lawyers' Committee for Civil Rights Under Law ("LCCRUL") is a nonprofit, civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and other leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. LCCRUL has long recognized Rule 23 as an essential tool for civil rights enforcement efforts, including combating the discrimination that often results from subjective decisionmaking. LCCRUL has contributed to the development of the law under Rule 23, expressed through amicus participation in class cases during the past several years in several circuits, along with comments to the proposed amendments to Rule 23.

Counsel for Plaintiff-Appellants have consented to the filing of this brief. Fed. R. App. P. 29(a). Counsel for Defendant-Appellee have not consented to the filing of this brief at this time.

SUMMARY OF ARGUMENT

Employee challenges to excessively subjective employment practices and policies constitute a critical component of Title VII enforcement. Unchecked subjectivity allows decisionmakers' biases and stereotypes to infect decisions – including decisions about salaries, bonuses, and promotions. While there is an emerging consensus that overt, explicit discrimination is unacceptable, unconscious bias is “today’s most prevalent type of discrimination.” Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1164 (1995). Although openly prejudiced individuals may be counseled out of corporations or learn not to advertise their biases, subtler forms of discrimination remain. Such discrimination, if unchecked, can result in statistically significant disparities in compensation, promotions, and hiring across similarly-situated employee groups.

However, companies can implement ready solutions. Rather than instructing decisionmakers to use subjective practices that permit invidious bias to affect decisions, companies can cabin that subjectivity and instead implement best practices that focus decisionmakers on job-related criteria. This approach not only

encourages decisionmakers to hire and reward employees based on their relevant skills and accomplishments, but also brings companies in line with modern social psychological understanding of human behavior. And, it ensures compliance with Title VII's mandate against discriminatory outcomes.

In this case, Plaintiffs have shown statistical shortfalls in minority pay and promotion that are highly significant, and they have outlined Johnson & Johnson's ("J&J") common practices and policies that have caused those shortfalls. Plaintiffs allege that these clear, quantifiable disparities (amounting to tens of millions of dollars of lost economic opportunity each year) have resulted from the unrestrained use of subjective factors in hiring, evaluation, and promotion decisions which have allowed the company decisionmakers' prejudices to influence results against minority employees. The challenged practice here is J&J's uniform delegation to its managers of compensation and promotion decisions based on unchecked subjective criteria. Put another way, J&J has failed to employ reasonable procedures to guard against the operation of unconscious or hidden biases. Plaintiffs' position is grounded in well-established social science literature and Supreme Court and Third Circuit precedent, and is supported by case law in other courts nationally.

ARGUMENT

I. A Well-Established Body Of Research Shows How Subjectivity Can Lead To Discriminatory Outcomes And How Proper Safeguards Can Prevent Discrimination

Since the 1970s, psychologists have researched the mechanisms by which discrimination can occur – consciously and unconsciously, deliberately and inadvertently. Scientists have discovered which types of human interactions predictably lead to statistically significant discriminatory outcomes. As this body of research has coalesced into broad consensus, the law has incorporated it. Many legal scholars have thus urged the legal system to take better account of implicit bias. *See, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. Rev. 1241 (2002); Krieger at 1186-1209; Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317 (1987); Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 Cornell J.L. & Pub. Pol’y 415 (2000); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. Pa. L. Rev. 899 (1993); Rebecca Haner White, *De Minimis Discrimination*, 47 Emory L.J. 1121 (1998). It is also a key topic in business schools. *See, e.g.*, Max Bazerman, *Judgment And Managerial Decision Making* 7 (4th ed. 1997) (“[Managers] predict a person’s performance based on the category of persons that the focal individual represents from their pasts.... In some cases, the use of the heuristic is a good first-cut approximation. In other cases, it leads to behavior that

many of us find irrational and morally reprehensible – like discrimination.”).

A. Despite Title VII, Discrimination Still Exists

Unfortunately, discrimination persists. Traditional “first generation” overt discrimination took the form of name-calling, threats, overt exclusion proudly confessed by violators, and segregation. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 478 (2001). As first generation discrimination has waned, subtler and more complex forms of discrimination (the “second generation”) remain. Sturm at 468; Krieger at 1164; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 746-48 (2005); McGinley at 418. Cognitive bias can permeate decisions without decisionmakers even consciously intending to discriminate. Bazerman at 6 (“[I]ndividuals frequently adopt these heuristics without being aware of them.”). In companies, tainted employment decisionmaking structures provide a mechanism for bias to systematically infect hiring, compensation, promotion, and termination decisions. Sturm at 460.

Second generation bias often takes the form of favoritism or subtle racial aversion. Research has shown that people remember more positive information about and behave more helpfully to in-group members. Samuel L. Gaertner, et al., *Aversive Racism: Bias without Intention*, in *Handbook of Employment Discrimination Research* 377, 386 (L. B. Nielsen and R.L. Nelson eds., 2005) (internal citations omitted); Alexandra Kalev et al., *Best Practices or*

Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies, 71 Am. Soc. Rev. 593 (2006) (in group preference may contaminate managerial judgment). Moreover, implicit attitudes and beliefs affect people's judgments and behavior in ways that can intensify discriminatory effects. "[E]ven before having any interaction with a particular individual, background assumptions will influence how a decisionmaker perceives a job candidate. A white candidate may be viewed as more charismatic, thoughtful, collegial, or articulate than a black candidate, not because the white candidate in fact possesses those higher qualifications, but because of the decisionmaker's preexisting assumptions." Hart at 746; *see also* Lawrence at 322-25; McGinley at 432-434.

Empirical psychological data have also demonstrated that unconscious bias is quite prevalent, often even to the surprise of individuals harboring such biases. A meta-analysis of 88 studies involving almost 20,000 data points showed that whites assign significantly higher evaluation ratings to whites than to blacks. Kraiger & Ford, *A Meta-analysis of Rater Race Effects in Performance Ratings*, 69 J. Applied Psychology 56 (1985); J.M. Stauffer & M.R. Buckley, *The Existence And Nature Of Racial Bias In Supervisory Ratings*, 90 J. App. Pysch. 586-91 (2005); *see also* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817, 830 (1991) (finding that car dealers' opening sale price offers to black males were significantly higher than to white males). Importantly, these effects can be controlled, preventing disparate

impact from occurring. For example, one study found no such discrepancy where the participants had been exposed to human relations training and were highly integrated. Schmidt & Johnson, *Effect of Race on Peer Ratings in an Industrial Setting*, 57 J. App. Psych. 237 (1973). Such training is effective on a classwide basis when monitored and part of a job-related requirement. The well-developed body of knowledge regarding proper controls for subjective processes is discussed in § I.C, below.

B. Social Psychologists Have Demonstrated How Subjective Decisionmaking Structures Predictably Result In Discrimination

Subjectivity in employment practices can be described as the exercise of discretion by individuals in assessing qualities. Objectivity, in contrast, is marked by the tallying of unambiguous factual data that are not open to interpretation. Subjectivity itself is not necessarily discriminatory, of course. However, social psychologists have empirically demonstrated that *unchecked* subjectivity allows decisionmakers' unconscious biases to tilt decisions against unpopular classes of people. Unchecked subjectivity includes subjectivity that is inadequately safeguarded or poorly monitored. For example, an evaluation system with objective criteria may still be "subjective" if supervisory discretion is a lynchpin of the system, and if such discretion is not effectively monitored. The hallmark of unlawfully unchecked subjectivity is its allowance of unconscious bias to infect decisionmaking, resulting in discriminatory outcomes. Such

discriminatory outcomes can be demonstrated statistically.

Permitting unstructured subjective judgment tends to produce biased outcomes. Sturm at 485. Psychologists have shown that people naturally process incoming information by relying on cognitive shortcuts – *e.g.*, stereotypes. Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination*, 40 Harv. C.R.-C.L. L. Rev. 481, 482 (2005); Krieger at 1186-1209; Bazerman at 7. People’s brains form these shortcuts from the moment of first meeting. Krieger at 1199. The natural human process of categorizing like objects together can reinforce implicit reliance on stereotypes. Via these stereotypes, people hold “implicit expectancies” about unknown people, which “influence how incoming information is interpreted” and remembered. *Id.* Incoming information is easily accepted and strongly retained if consistent with the stereotype. Otherwise it is grudgingly accepted, even rejected, and/or readily forgotten. The stereotype acts as a mold that new facts are measured against and pressed into, distorting facts into memories that are more consistent with stereotypes than the actual facts were. *Id.* at 1202-04. This cognitive mechanism is so powerful that people “remember” stereotype-consistent behavior that did not actually occur, and discount or forget stereotype-inconsistent behavior that did occur. *Id.* at 1209. Thus, people’s natural modes of processing and recalling information can cause them to discriminate. *Id.*

Psychologists have identified particular conditions that facilitate stereotyping. First, stereotyping is likely (a) when the target individual is unusual

(such as a rare minority worker among more numerous white workers), (b) when the target's category (*e.g.*, African American) does not fit neatly with his or her occupation (*e.g.*, research scientist), and (c) when the target is evaluated based on ambiguous criteria (*e.g.*, using subjective factors). Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 Am. Psychologist 1049, 1050-51 (1991); *see also Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (noting “the tendency of unique employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process”).

Research provides concrete examples of how stereotyping or unconscious bias can result in employment disparities. For example, one study revealed that responses to thousands of resumes listing stereotypically white-sounding names, such as Emily, were substantially more positive (50% more callbacks) than to resumes with identical qualifications listing stereotypically African American names, such as Lakisha. Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than Latoya and Tyrone? Evidence on Racial Discrimination in the Labor Market from a Large Randomized Experiment*, 94 Am. Econ. Rev. 991 (2004). In a study of orchestra auditions, female success rates increased by 48% when decisionmakers did not know the applicants' gender. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality:*

The Impact of “Blind” Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 716 (2000).

The orchestra study provides one example of how focusing decisionmakers’ attention on relevant factors – which correlatively distracts them from irrelevant factors such as race or gender – can lead to superior outcomes for the employer and fairer outcomes for the applicant. Allowing substantial discretion in assessing evaluative criteria invites bias. White evaluators exercising unguided discretion tend to selectively favor white applicants. G. Hodson, et al., *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 Personality & Soc. Psych. Bull. 460-71 (2002); *Stender v. Lucky Stores*, 803 F. Supp. 259, 302 (N.D. Cal. 1992) (“Stereotypes are most consequential in situations where evaluative criteria are ambiguous.... [W]hen evaluative criteria are clear and the decision making process is public, race and sex were less likely to factor into choices.”).

Thus, existing research explains that when decisionmaking processes include subjective criteria and excessive discretionary authority, bias can infect employment decisions. This research is consistent with the plaintiffs’ theory that J&J’s policies and practices serve as a “conduit” for discrimination. *Accord Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004), *aff’d*, 474 F.3d 1214 (9th Cir. 2007). For example, J&J’s use of subjective evaluations of employees’ “expected contribution” to determine salaries and the highly

discretionary authority of its managers to increase salary or depart from set salary ranges invite bias. Likewise, broad discretion in determining promotions, failing to post job postings (“tap on the shoulder” advancement), and highly subjective managerial assessments without set parameters allow managers to rely on stereotypes and biases. Veres Report at 7.

Statistical analysis will reveal the existence of disparate outcomes (though at the merits stage the parties may interpret statistics differently). If the data do not show a disparate impact, there is not significant discrimination and the system is likely working properly. However, data showing a clear disparate impact indicate excessive subjectivity is allowing bias to permeate outcomes.

C. **Organizations Like J&J Can Avoid Discriminating By Providing System-Wide Controls To Check Subjectivity**

1. **Social Science Shows How To Build Safeguards**

Though social science research shows that unchecked subjectivity creates a substantial risk of discrimination, that same research reveals prophylactic solutions to these problems. For example, decisionmakers can be instructed in uniform ways that enable them to overcome “automatic reliance on stereotypes.” Susan T. Fiske, *Power Can Bias Impression Processes: Stereotyping Subordinates by Default and by Design*, 3 *Group Processes & Intergroup Rel.* 227, 228 (2000). Furthermore, exposure to counter-stereotypes helps avoid stereotypical thinking. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6

Personality & Soc. Psychol. Rev. 242 (2002).

As the mechanisms and nature of discrimination have shifted from first generation (overt) to second generation (subtle), responsible corporations have developed appropriate safeguards to avoid discriminatory outcomes, and courts have adapted their analyses to remedy discrimination that persists. First generation discrimination is traditionally remedied by eliminating exclusionary rules or tests, prohibiting unequal treatment, and recruiting applicants from those previously excluded. Combating second generation discrimination, however, requires changing decision processes that facilitate expression of bias and stereotyping as well as organizational culture. Sturm at 464, 467-68.

In light of the persistence of second generation discrimination, social scientists have recommended additional safeguards to decrease the likelihood of stereotyping and discrimination, including (a) structured appraisals, (b) heterogeneous work and decisionmaking groups, (c) interdependent in-group and out-group members, and (d) decisionmaker accountability for decisions. Barbara Reskin, *The Proximate Causes of Employment Discrimination*, 29 Contemp. Soc. 319 (2000). To ameliorate the effects of subjective decision processes, employers such as J&J should regularly monitor these decisions to reduce the expression of bias. Sturm at 472. Failure to do so, as Plaintiffs allege, is readily susceptible to classwide resolution because the analysis of structural employment policies and their implementation is a common question.

2. **Title VII Adopts These Concepts By Requiring Validation And Treating Objective And Subjective Practices Equally**

In fact, Congress built into Title VII incentives for companies to adopt these kinds of solutions, to ensure that employment practices rely on job-related criteria rather than highly discretionary assessments that permit invidious bias to affect decisions. Validation of employment practices provides a safe harbor for practices using validated “tests.” 42 U.S.C. § 2000e-2(h) (“[I]t shall not be an unlawful employment practice for an employer ... to give and to act upon the results of any professionally developed ability test”); *Lanning v. Southeastern Penn. Transp. Auth. (SEPTA)*, 181 F.3d 478, 486 (3rd Cir. 1999) (quoting discussion in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975), regarding study of relationship between a test and “important elements of work behavior,” using “professionally acceptable methods”). Validation is simply the process by which professionals (usually industrial psychologists) analyze employment practices to ensure that they focus on job relatedness.

Psychologists agree that because “test” includes any employment practice used to collect information to be “used as a basis for making an employment decision,” it embraces both objective and subjective forms alike. B. Schneider & N. Schmitt, *Staffing Organizations 14* (2d ed. 1986) (quoted in Brief for Amicus Curiae American Psychological Association, 1987 WL 881423 (“APA Brief”), at *9) (“So, interviews are tests, as are ... performance appraisals used as a

basis for making promotions . . . , and any other kind of information used for making employment decisions.”); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1007 n.5 (1988) (citing APA Brief for the principle that “subjective-assessment devices are, in fact, amenable to the same ‘psychometric scrutiny’ as more objective screening devices, such as written tests”) (Blackmun, J., concurring). Therefore, “[s]ubjective selection devices *can* be scientifically validated for the assessment of individuals for hiring, promotion, or other selection decisions in the employment context.” APA Brief, at *2. Here, evidence that J&J uniformly failed to validate the evaluation process supports commonality.

Relatedly, it is important to bear in mind that courts do not require plaintiffs to identify with minute specificity the precise aspect of an employment practice – whether objective or subjective – that has discriminatory impact. For example, when plaintiffs challenge a written test (an objective employment practice) as having a discriminatory impact against minorities, proof of a statistically significant disparate impact is sufficient to make a *prima facie* showing. Courts do not inquire into which exact question was discriminatory. Rather, the onus passes to the defendant to show that the test as a whole (a system of individual questions) has been validated – i.e., that *as a whole*, it accurately measures the qualities necessary for the job.

Simply put, courts should – and typically do – treat subjective systems as they treat objective systems. Corporations implementing subjective systems that

have discriminatory impact must show that those systems, as a whole, measure the qualities necessary for the job. Here, Plaintiffs have proffered substantial evidence that J&J implements a host of subjective practices uniformly, as dictated by corporate and consistently carried out by business units. Likewise, Plaintiffs have shown that J&J has uniformly failed to validate these subjective practices.

Because each class member would have to prove both of these assertions to prevail, both constitute common questions of fact supporting class certification.

Thus, organizations face a choice. They can instruct decisionmakers to rely on relevant, objective factors, or on subjective factors. The latter may result in discrimination if left unchecked. All delegations of personnel decisions involve these choices. Employers should take steps to minimize the likelihood that subjective decisionmaking processes will produce bias, and engage in processes of self-evaluation to establish fairness and accountability. Sturm at 489.

II. Title VII Provides A Remedy For Excessively Subjective Employment Practices That Result In Discrimination

A. Title VII Forbids Employment Practices that Cause Unlawful Discrimination, Whatever Their Form Or Mechanism

Employment discrimination can result from objective sources, such as biased, unvalidated tests, or from subjective sources, such as the unrestrained application of negative stereotypes. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (“[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.... [G]ood intent or absence of

discriminatory intent does not redeem employment procedures ... that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”). Regardless of whether the source is objective or subjective, its application to a large number of members of a protected class by the same mechanism – *e.g.*, a policy requiring people to take a particular test, or a policy allowing managers to evaluate people by a particular set of factors without using techniques to restrict negative stereotypes – violates Title VII and is appropriate for classwide resolution. In such instances, the class action is the most efficient, fairest, and often the only feasible procedural mechanism for vindication of Title VII rights.

B. The Supreme Court Has Recognized The Viability Of Title VII Challenges To Excessive Subjectivity In Class Cases

For thirty years, the Supreme Court has acknowledged that Title VII provides a remedy for subjective decisionmaking. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 302 (1977) (recognizing that highly subjective hiring process in which decisionmakers were told to consider “personality, disposition, appearance, poise, voice, articulation, and ability to deal with people,” was conducive to subtle discrimination); *General Tele. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). In *Falcon*, the plaintiff asserted that “the subjective rather than objective manner in which recommendations for raises and transfers and promotions are handled” constituted common facts. *Id.* at 152 n.4. The Court

noted two types of common proof that would satisfy commonality and typicality: an objective biased testing procedure and subjective decisionmaking processes. *Id.* at 157 n.15. These two “demonstrative examples” showed the Court’s willingness to find subjective practices, like objective practices, susceptible to class treatment. *Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003).

The Court reinforced the viability of classwide subjectivity challenges in *Watson*. There, the defendant “had not developed precise and formal criteria for evaluating candidates for the [relevant] positions,” but “relied instead on the subjective judgment of supervisors.” 487 U.S. at 982. *Watson* firmly held that “[h]owever one might distinguish ‘subjective’ from ‘objective’ criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature.” *Id.* at 989. Thus, Title VII applies to practices “based on the exercise of personal judgment or the application of inherently subjective criteria, including “an employer’s undisciplined system of subjective decisionmaking.” *Id.* at 988, 990.

In *Watson*, a class case, the Court held that “disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests.” *Id.* at 990. The Court sought to ensure that Title VII could remedy “the problem of subconscious stereotypes and prejudices” given effect through a “facially neutral practice, adopted without discriminatory intent.” *Id.* “If an employer’s undisciplined system of subjective decisionmaking has

precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.” *Id.* at 990-91.¹

C. **The Third Circuit, Other Circuits, And Many District Courts Have Consistently Allowed Classwide Title VII Challenges To Subjective Employment Practices**

Circuit and district courts uniformly echo *Watson*’s binding precedent and elucidate the precise factual scenarios under which a subjective employment practice presents a common issue of fact mandating class certification of Title VII claims. In fact, the seminal Third Circuit case on the subject, *Green I*, anticipated the Supreme Court’s holding in *Watson*. Amici urge this Court to reaffirm the core holding of *Green I*, that challenges to subjective practices can be appropriate and can address an entire “system.” This approach would be consistent with the weight of authority in other Circuits and among the myriad lower courts that have addressed the question.

1. **This Circuit In *Green* Upheld Class Certification For Plaintiffs Who Suffered Discrimination As A Result Of Varied And Subjective Criteria**

In *Green I*, this Circuit affirmed class certification over the defendant’s objection that its hiring supervisors’ varied and distinct use of

¹ The next year, the Court reaffirmed this principle. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-36 (1989) (allowing social psychologist’s testimony that defendant was “likely influenced by sex stereotyping,” even though expert “admitted that she could not say with certainty whether any particular comment was the result of stereotyping”).

subjective criteria precluded typicality. 843 F.2d at 1533. This Court rejected the defendant's contention that each instance of discrimination must be evaluated independently, holding that the defendant's subjective practices presented common issues justifying certification. *Id.* at 1533 (“[T]ypical is not identical.”) (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985)).

Green I presaged the Supreme Court's recognition in *Watson* that discretionary decisionmaking can have a consistent disparate impact on a class. That individuals are harmed discretely is irrelevant; otherwise, employment class actions could barely exist. The Court merely reasserted the basic principle that Rule 23 analysis is solely procedural, requiring courts to ask whether the policy or practice is meaningfully distinct in a particular part of the company, not whether that policy or practice is objective or subjective in form.

More recently, this Court has held in non-employment contexts that “multifarious practices” can give rise to common issues of fact sufficient to support a class certification decision. *Chiang v. Veneman*, 385 F.3d 256, 265-66 (3d Cir. 2004). In *Chiang*, the plaintiffs alleged that the defendant engaged in a multitude of allegedly discriminatory practices that effectively prevented class members' credit applications from being processed. The Third Circuit held that the diverse practices (including a “phony, illegal ‘waiting list’” and an “‘impossible yes’ scheme”) amounted to “a uniform course of conduct common to all class members subject to common proof in a single trial.” *Id.* at 263, 267

(citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)).

2. **Other Circuits And District Courts Have Similarly Permitted Classwide Challenges To Systems Allowing Excessive Unchecked Subjectivity**

Concurring with the Third Circuit, the First, Second, Fifth, Ninth and Eleventh Circuits have held that class certification is appropriate where: (1) the defendant maintains a common practice permitting subjective or discretionary decisionmaking in roughly the same manner across the class, and (2) the plaintiffs have proffered statistical and/or anecdotal evidence to support a reasonable inference of classwide discrimination. *See, e.g., Dukes*, 474 F.3d at 1231; *Staton v. Boeing*, 327 F.3d 938, 954-56 (9th Cir. 2003); *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *Shipes v. Trinity Industries*, 987 F.2d 311, 316-17 (5th Cir. 1993); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986).²

In *Dukes*, the Ninth Circuit affirmed class certification of Title VII compensation and promotion claims premised on excessive unchecked subjectivity. The plaintiffs had “exceeded the permissive and minimal burden of

² The Eleventh Circuit in *Cooper v. Southern Co.*, 390 F.3d 695, 716 (11th Cir. 2004) held that commonality did not exist because the employment decisions at issue were made by different managers implementing different policies. To the extent that the Eleventh Circuit was suggesting that subjective practices inherently involve individual rather than class-wide decisions, that decision is contrary to its ruling in *Cox v. American Cast Iron Pipe Co.* and inconsistent with the Supreme Court in *Watson* and the Third Circuit in *Green I.*

establishing commonality” by presenting (1) facts and expert opinion regarding companywide corporate practices and policies (including excessive subjectivity and gender stereotyping within a strong corporate culture), (2) statistical evidence, and (3) anecdotal evidence. *Id.* at 1225. Integral was Dr. William Bielby’s “social framework analysis,” comparing the defendant’s policies and practices with “factors that create and sustain bias and those that minimize bias.” *Id.* at 1226. *Dukes* approved of the lower court’s reasoning “that Wal-Mart’s decision to permit its managers to utilize subjectivity in interpreting those [pay and promotion] policies” supported the commonality finding. *Id.* at 1231. The court concluded that “subjective decision-making is a ‘ready mechanism for discrimination’ and that courts should scrutinize it carefully.” *Id.* (internal citation omitted). While subjectivity by itself is insufficient to support commonality, subjectivity plus statistical evidence of a pattern of discriminatory pay and promotions provide an appropriate commonality nexus.

Similarly, in *Caridad*, the Second Circuit found that the district court’s refusal to certify a Title VII class based on the defendant’s delegation of decisionmaking authority to its supervisors was an abuse of discretion, and reversed. *Id.* at 291. The court held that this subjectivity, without sufficient oversight, was a policy that, in conjunction with statistical and anecdotal evidence presented by the plaintiffs, satisfied the plaintiffs’ burden of demonstrating commonality. *Id.* at 293.

In *Thomas*, the First Circuit held that disparate treatment includes “employer decisions that are based on stereotyped thinking or other forms of less conscious bias.” *Id.* at 42. There, the plaintiff alleged that her employer’s decision to terminate her, based in part on bad performance evaluations (despite a strong sales record), was influenced by unconscious bias and stereotypes. *Id.* at 42. “[I]f an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the disfavored employees have been subjected to ‘discriminat[ion] ... because of ... race.’” *Id.* at 58. The court appropriately focused on whether the employee had suffered disparate treatment “because of race,” regardless of whether the employer “consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.” *Id.* at 58 (noting that in *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984), the court had held that disparate treatment plaintiffs may challenge “subjective evaluations which could easily mask covert or unconscious race discrimination on the part of predominantly white managers”).

Many district courts have agreed that subjective practices are amenable to class certification. *See, e.g.*, Plaintiff-Appellants’ Brief on the Merits of 23(f) Appeal at 35 n.38 (citing ten cases); *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 638-40 (N.D. Cal. 2007) (on appeal); *Nelson v. Wal-Mart Stores, Inc.*, -- F.R.D. --, 2007 WL 1443114, at *6-*9 (E.D. Ark. May 16, 2007); *Velez v.*

Novartis Pharms. Corp., 244 F.R.D. 243, 256-57 (S.D.N.Y. 2007); *Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476, 482-83 (S.D.N.Y. 2005), *upheld on reconsideration*, 241 F.R.D. 204, 210-11 (S.D.N.Y. 2007); *Warren v. Xerox Corp.*, 01-CV-2909, 2004 WL 1562884, at *11 (E.D.N.Y. Jan. 26, 2004); *Bates v. UPS*, 204 F.R.D. 440, 446 (N.D. Cal. 2001); *Orlowski v. Dominick's Finer Foods*, 172 F.R.D. 370, 373 (N.D. Ill. 1997); *Stender v. Lucky Stores*, 803 F. Supp. 259, 331 (N.D. Cal. 1992).³ Larger still is the list of cases finding defendants ultimately liable for subjective employment practices. *See, e.g., Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (subjective assessments by white supervisors provide a “ready mechanism” for discrimination); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978) (class action); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1010-11 (2d Cir. 1980) (class action); *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (class action).

The Sixth Circuit's criticism of certification of subjective practices

³ Even courts denying class certification consistently follow these principles, explicitly recognizing that class certification of subjectivity claims can be appropriate. *See, e.g., Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 677 (N.D. Ga. 2001) (acknowledging correctness of ruling granting certification in *Morgan v. United Parcel Service of America, Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996), where challenged excessive subjectivity was delegated in common written policy followed in each of the different districts, unlike in *Reid*); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, No. 99 Civ. 217, 2002 WL 32058462, at *57 & n.75 (N.D. Ga. Dec. 31, 2002) (acknowledging *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) and other cases certifying class actions challenging excessive subjectivity, but distinguishing the facts of *Cracker Barrel* from those in *Caridad*), *report and recommendation adopted by* 213 F.R.D. 619, 680 (N.D. Ga. 2003).

cases has inappropriately suggested that a higher standard applies to certification decisions involving subjective practices. *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 570-71 (6th Cir. 2004). The Sixth Circuit placed significant emphasis on factual variations among proposed class members leading it to view the plaintiffs' claims "with skepticism." *Bacon*, 370 F.3d at 571. Against that backdrop, the court required those plaintiffs "to demonstrate that [the defendant] operated in a discriminatory fashion against all workers in the class through an *entirely* subjective decision-making process." *Id.* at 571 (emphasis in original). As discussed above, this cramped reading of one phrase in *Falcon* is inconsistent with logic and the full text of *Falcon* and *Watson*.

D. The District Court Abused Its Discretion By Imposing An Incorrect Legal Standard

The district court misconstrued the standard for a showing of commonality in a subjective practices case in two ways.

First, the lower court incorrectly required the plaintiffs to identify a particular "excessively subjective" policy implemented on the individual level, as opposed to showing that J&J's promotion and pay decisionmaking practices were themselves excessively subjective. *Gutierrez v. Johnson & Johnson*, 467 F. Supp. 2d 403, 410 (D.N.J. 2006). That is, the policy of allowing overly subjective decisionmaking is itself the policy at issue—rather than some particular manifestation of that policy. As described above, several decades of scientific

research, summarized by commentators and applied by countless courts, shows that decisionmaking systems containing *any* elements of unvalidated subjective decisionmaking can yield predictable discriminatory results.

Second, the court imposed a vague requirement that plaintiffs establish “the required nexus between their statistical analyses and a policy or practice.” *Id.* at 412. However, to win class certification and move to the merits determination, plaintiffs need only (1) show that the defendant employs subjective or discretionary decisionmaking through a policy or practice applicable to the entire class, and (2) proffer statistical evidence (buttressed by anecdote) to support a reasonable inference of discrimination on a classwide basis. While such a showing by no means resolves the ultimate question of liability, it is sufficient to establish common questions to support a finding of commonality.

III. Class Actions Challenging Excessively Subjective Employment Practices Vindicate Title VII’s Remedial Purposes As Reflected In Its Text, History, And Application Through The Decades

Title VII is expressly and intentionally broad. The Supreme Court has noted that Title VII was enacted with the stated intention of removing “artificial, arbitrary and unnecessary barriers to employment.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). To that end, the statute seeks to address any “*limitations and classifications* that would deprive any individual of employment *opportunities.*” *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (emphasis in original). In deciding liability, the Third Circuit has clearly stated that an approach

that ignores statistical disparities and focuses instead on identifying the particular discriminatory component at issue is at odds with Title VII's purpose. In *Green I*, this Court stated: “[W]e cannot believe that it was the intent of Congress to allow unarticulated biases or unconscious prejudices to result in discriminatory hiring practices merely because they appear in the form of an unsupervised interview.”

Id. at 1525.⁴

⁴ Indeed, courts have embraced an analysis that expressly accounts for subjective practices in part due to the realization that it can be the only way to counter discrimination. Several courts have emphasized the rareness of cases involving direct proof of discrimination, and the corresponding need to rely on inferential proof. *Hunt v. Cromartie*, 526 U.S. 541 (1999), a racial redistricting case, stated: “Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.” *Accord, Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) (“Because discrimination tends more and more to operate in subtle ways, direct evidence is relatively rare.”), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Thomas*, 183 F.3d at 58 n.12 (“This method of proving a Title VII claim is all the more important now than it was when *McDonnell Douglas* was written, since ‘smoking gun’ evidence is ‘rarely found in today’s sophisticated employment world.’” (citation omitted); *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 135 (2d Cir. 2000) (“Direct evidence of discrimination is not necessary ... because proof is seldom available with respect to an employer’s mental processes. Instead, plaintiffs in discrimination suits often must rely on the cumulative weight of circumstantial evidence ...”); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 448 (2d Cir. 1999) (“Moreover, as discrimination will seldom manifest itself overtly, courts must ‘be alert to the fact that [e]mployers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law.’” (citation omitted); *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999) (“The Supreme Court has recognized that an employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent.”); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 278 (3d Cir. 1998) (“In numerous cases the courts have recognized that an employee bringing such a suit faces difficulties amassing proof because discrimination is often subtle.”); *Rutherford v. Harris County*, 197 F.3d 173, 180

Other Circuits concur that subjectivity challenges are consistent with Title VII's longstanding statutory goal of combating the "entire spectrum" of discrimination. *Thomas*, 183 F.3d at 59 ("The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus.... Stereotypes or cognitive biases ... are ... incompatible with Title VII's mandate.... '[T]he entire spectrum of disparate treatment' is prohibited.").

J&J has paid and promoted its minority employees significantly less than their white counterparts. The Plaintiffs pursue a legitimate, time-tested theory of liability that is well documented by scientific evidence. Individual pursuit of this theory by each class member would require mind-numbingly repetitive presentation of the same evidence – the science of bias, the facts of the Defendant's uniform corporate policies and practices, and the explanation of how the former is implemented through the latter. These facts strongly support class certification.

J&J's defense that it should not be responsible because individual n.4 (5th Cir. 1999) (direct evidence "is rare in discrimination cases.") (citation omitted); *Scott v. University of Miss.*, 148 F.3d 493, 504 (5th Cir. 1998) (same), *abrogated on other grounds by Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000) ("Because employers usually are careful not to offer smoking gun remarks indicating intentional discrimination, the Supreme Court established the burden shifting approach as a means of evaluating indirect evidence of discrimination." (citation omitted); *Hasham v. California State Bd. of Equalization*, 200 F.3d 1035, 1044 (7th Cir. 2000) (same).

managers implement the corporate policy of subjective decisionmaking is a red herring. Only a purely objective mechanism of discrimination requires no individual managerial implementation, and the Supreme Court has clearly held that that is not the only mechanism that can be challenged on a classwide basis. J&J cannot escape class adjudication of its behavior simply “by minimizing the amount of control that [it] exercise[s] over individual managers,” and failing “to adopt antidiscrimination policies and to educate [it] personnel on Title VII’s prohibitions.” *McReynolds v. Sodexo Marriott*, 208 F.R.D. 428, 443 (D.D.C. 2002) (quoting *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 545 (1999)).

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court reverse the district court’s order and remand with instructions to review the certification decision in light of the appropriate standard.

Respectfully submitted,

Dated: October 31, 2007

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LAR 28.3 CERTIFICATION

Pursuant to LAR 28.3, *Amici Curiae* certify that at least one attorney, Kelly M. Dermody, counsel of record, is a member of the bar of this court.

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CERTIFICATE OF COMPLIANCE

Amici curiae certify that this brief meets the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(A)-(B), which limit the amicus brief to no more than one-half the maximum length authorized by the rules for the principal brief. This brief is allowed no more than 7,000 words of proportional spaced type. This brief contains 6,798 words, excluding the table of contents, table of authorities, and certifications of counsel.

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The undersigned hereby certifies that the original was electronically filed with the clerk and true and correct copies of the **BRIEF OF AMICI CURIAE THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA, THE IMPACT FUND, THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PLAINTIFF-APPELLANTS' BRIEF ON THE MERITS OF 23(F) APPEAL** have been duly sent to the Clerk by hand and served on opposing counsel via electronic mail to:

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