No. 18-35791

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATHERINE MOUSSOURIS, HOLLY MUENCHOW, and DANA PIERMARINI, on behalf of themselves and a class of those similarly situated,

Plaintiffs-Appellants,

v.

MICROSOFT CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Civil Action No. 2:15-cv-01483-JLR

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF DEFENDANT-APPELLEE AND OF AFFIRMANCE

Rae T. Vann
John R. Annand
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace Compliance

April 8, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *Amicus Curiae* Center for Workplace Compliance makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

s/ John R. Annand
Rae T. Vann
John R. Annand
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace Compliance

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FEDERAL RULE 29(a)(4)(E) STATEMENT

No counsel for a party authored this brief in whole or in part.

No counsel or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

s/ John R. Annand
Rae T. Vann
John R. Annand
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace Compliance

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The Center for Workplace Compliance respectfully submits this brief *amicus curiae* with the consent of the parties.

INTEREST OF THE *AMICUS CURIAE*

The Center for Workplace Compliance (CWC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes 228 major U.S. corporations providing employment to over 10 million workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. CWC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of CWC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended. In addition, many are federal contractors subject to Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, and other federal employment-related laws and regulations. Collectively, CWC's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment

actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comport with Title VII and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. As large employers, CWC's members are particularly likely targets for the sort of broad-based class action at issue here. Consequently, CWC has an ongoing, substantial interest in the issues presented in this matter regarding the proper application of Rule 23 of the Federal Rules of Civil Procedure to class actions brought under Title VII that seek substantial monetary damages, in addition to injunctive relief.

Accordingly, the issues presented in this matter are extremely important to the nationwide constituency that CWC represents. Since 1976, CWC has participated in numerous cases raising substantive and procedural issues related to litigation of employment discrimination claims, including those involving the proper interpretation of Rule 23.[1] Because of its experience in these matters, CWC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

[1] *See, e.g., East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011).

STATEMENT OF THE CASE

Plaintiff Katherine Moussouris was employed, and plaintiff Holly Muenchow is employed, by defendant Microsoft Corporation. *Moussouris v. Microsoft Corp.*, 2018 WL 3328418, at *1 (W.D. Wash. June 25, 2018). In 2015, they filed suit on behalf of a class of more than 8,600 women in the Engineering and I/T Operations Professions claiming that Microsoft's approach to pay and promotions caused an unlawful disparate impact on women, and that the company's practices amounted to a pattern or practice of unlawful disparate treatment sex discrimination, both in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C §§ 2000e *et seq.*, as amended. *Id.* at *19.

Pay and promotion decisions at Microsoft flowed from discretion granted to lower-level managers through two distinct frameworks. *Id.* From 2011 to 2013, Microsoft's employee performance review system – called the "Calibration Process" – organized similar employees into peer groups, and gave their managers the opportunity, using general guidelines, to standardize their performance ratings, with results undergoing only cursory review by higher-level officials. *Id.* at *3-*5. Managers retained the ultimate discretion under the Calibration Process to determine how to distribute ratings and make pay and promotion decisions. *Id.* Microsoft discontinued the Calibration Process in 2014, implementing in its place a "people discussions" model that grants managers even more discretion to

recommend rewards based on individual employee performance. *Id.* Those recommendations are then considered in "people discussions," where groups of managers again focus on tailoring rewards to individual employee performance. *Id.* According to the plaintiffs, the discretion accorded to managers under Microsoft's performance evaluation processes caused and/or perpetuated sex discrimination with regard to pay and promotions. *Id.* at *5.

The plaintiffs moved to certify the class, and the district court denied the motion, rejecting their nationwide statistical evidence as insufficient to establish commonality under Rule 23 of the Federal Rules of Civil Procedure under either a disparate impact or disparate treatment discrimination theory. *Id.* at *1, *13-*26. As to the disparate impact claims, the district court found that the plaintiffs "have not identified a common mode of exercising discretion that pervades the entire company," *id.* at *23, as required by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As to their disparate treatment claims, it found that the plaintiffs had failed to provide the requisite "significant proof" that Microsoft was operating under a general policy of discrimination. *Id.* at *23, *26 (citation and footnotes omitted).

On July 10, 2018, the plaintiffs filed an interlocutory appeal, which this Court granted on September 20, 2018.

SUMMARY OF ARGUMENT

Class certification requires plaintiffs to satisfy rigorous procedural requirements, including providing "significant proof" that the class members' claims are capable of being resolved in "one stroke" on behalf of the entire class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 354-55 (2011). The Supreme Court has made abundantly clear that doing so requires more than simply pointing to a policy that provides managers with discretion to make their own, subjective decisions otherwise free of guidance. *Id*. at 355. Here, the plaintiffs point only to Microsoft's "Calibration Process" and "people discussions," broad frameworks consisting merely of suggested steps to follow when making decisions on employee performance ratings, pay, and promotions, as the basis for establishing commonality and certifying the proposed class. Such a policy, which grants discretion to managers but does nothing to guide or restrict that discretion, does not satisfy the strict requirements for class certification outlined in *Dukes*. The district court thus correctly ruled that class certification was improper.

Employers regularly use general boundary-setting guideposts or frameworks, similar to Microsoft's Calibration Process and people discussions, to communicate shared values and ensure process consistency. In doing so, these frameworks represent a valuable business practice that helps support implementation of equal employment opportunity (EEO) and nondiscrimination

policies. Indeed, they provide corporate EEO staff with a starting point for analyzing individual employment decisions for possible discrimination while according managers the flexibility needed to achieve legitimate business outcomes. Treating manager discretion – even that which is exercised within an overarching framework designed to coordinate process consistency and communicate shared values – as the type of employment policy adequate to trigger class treatment is plainly inconsistent with the principles established by the Supreme Court in *Dukes*, and is anathema to proactive discrimination prevention efforts and other sound business practices.

ARGUMENT

I. THE DISTRICT COURT BELOW PROPERLY APPLIED THE PRINCIPLES ELUCIDATED BY THE SUPREME COURT IN *DUKES* TO DENY CLASS CERTIFICATION FOR LACK OF COMMONALITY

The district court below properly refused to certify a class of over 8,600 individuals claiming that Microsoft's "policy" of according discretion to managers in making pay and promotion decisions raised common questions suitable for class treatment under Rule 23 of the Federal Rules of Civil Procedure. In fact, its ruling aligns squarely with the Supreme Court's admonition in *Wal-Mart Stores, Inc. v. Dukes* that plaintiffs seeking Rule 23 class certification must present at least one question common to the class that "*is capable of classwide resolution* … mean[ing] that determination of its truth or falsity will resolve an issue that is

central to the validity of each one of the claims in one stroke." 564 U.S. at 350 (emphasis added).

Because alleged discrimination stemming from a "policy" of individual manager discretion fails to establish a "common contention … of such a nature that it is capable of classwide resolution," *id.*, class certification plainly is improper. Accordingly, the district court's decision is correct and should be affirmed.

To maintain a class action in federal court, plaintiffs generally must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure. "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Dukes*, 564 U.S. at 350-51 (citations omitted).

In *Dukes,* the Supreme Court clarified that Rule 23(a) commonality requires that all class members must have suffered the same injury – not simply a violation of the same statute. Rather, in order for Rule 23(a)'s commonality requirement to be met, the individual class members' claims must rely on a common assertion, such as that they all were subjected to discrimination by the same biased supervisor. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution." *Id*. at 350. The Court reasoned:

> What matters to class certification … is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of

> the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (citation omitted). The Supreme Court reinforced those principles in *Comcast Corp. v. Behrend*, a 23(b)(3) case, warning against certifying classes in which "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 569 U.S. 27, 34 (2013).

Thus, both *Dukes* and *Comcast* confirm that to justify certifying a class, the trial court must be satisfied that the answers to common questions will produce a result that applies to the class as a whole. As one commentator observed:

> In proposing the course correction in *Dukes,* the Court tightened the evidentiary rules for commonality under Rule 23. In moving away from the long held practice of evaluating common questions to address commonality, the Court fashioned procedural rules indexed upon evaluating common answers. This contraction is neither an abrogation of rights nor an attempt to impose hurdles on the path toward justice. Rather, the Supreme Court acted as referee to correct asymmetric influences in class actions.

Saby Ghoshray, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes*: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 509 (2012).

A. Plaintiffs Failed To Establish A Common Claim That Is Capable Of "One Stroke" Resolution On Behalf Of The Class As A Whole

The plaintiffs have alleged that Microsoft's application of its performance review processes resulted in unlawful disparate impact discrimination, and that its delegation of managerial authority under that framework to make pay and

promotion decisions amounted to a pattern or practice of intentional discrimination – both in violation of Title VII. Because neither claim is capable of classwide resolution in "one stroke," *Dukes*, 564 U.S. at 350, class certification is improper.

In *Dukes,* the Supreme Court made clear that the "mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once." *Id*. Rather, such a claim "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor." *Id*. That contention also must be capable of a single resolution on behalf of the class as a whole. *Id*.

The plaintiffs in *Dukes* claimed that Wal-Mart maintained company-wide practices and policies that were applied subjectively, were prone to "gender stereotypes," *id.* at 373, and which resulted in unlawful sex discrimination. They sought to maintain their claims as a Rule 23 class, in support of which they offered, and the district court credited, statistical evidence of gender-based disparities, expert testimony, and anecdotal evidence consisting of statements from a relative handful of individual class members. *Id.* at 346.

Here, the plaintiffs similarly attempt to show that Microsoft's subjective practices resulted in discrimination common to the class as a whole through a combination of statistical and anecdotal evidence, as well as expert testimony.

Their chief contention is that Microsoft allowed individual managers to use subjective criteria in making pay and promotion decisions, thereby providing them with the means by which to discriminate against women because of sex. According to the plaintiffs, the subjective decision-making discretion accorded to managers through the Calibration Process and people discussions enabled them to "systematically undervalue[] female technical employees," *Moussouris v. Microsoft Corp.*, 2018 WL 3328418, at *9 (W.D. Wash. June 25, 2018), by giving them lower average rankings "despite equal or better performance." *Id.* To the extent the plaintiffs' theory is materially indistinguishable from the one rejected in *Dukes*, the district court was correct to deny certification of the class.

As the Court noted in *Dukes*:

> [L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements…. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

564 U.S. at 355-56. Here, as in *Dukes*, numerous supervisors made individual pay and promotion decisions for different reasons and in ways that impacted individual

class members in vastly different ways. The plaintiffs thus have fallen short of presenting significant proof that is capable of a one-stroke resolution on behalf of the class as a whole.

B. *Dukes* Firmly Establishes That Managerial Discretion Alone Is Insufficient To Establish Commonality

As noted, the plaintiffs argue that Microsoft's use of subjective decision-making in pay and promotion decisions was sufficient to satisfy Rule 23(a)'s commonality requirement. The fatal flaw in their argument is that a policy that gives local supervisors discretion to make pay and promotion decisions not only is antithetical to the type of uniform policy required to establish commonality under Rule 23(a), but also is "a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct.'" *Dukes*, 564 U.S. at 355 (citation omitted). Thus, a practice that provides local supervisors with discretion to make pay and promotion decisions simply is not the type of uniform policy required to establish commonality under Rule 23(a).

1. Allowing discretion in pay and promotion decisions is not a "specific employment practice" that supports class certification under a disparate impact discrimination theory

In order to make out a prima facie case, Title VII disparate impact plaintiffs must be able to point to a specific employment policy or practice that while facially non-discriminatory, as applied, produces a statistically significant adverse

impact on a protected group. "[T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988).

In support of their disparate impact claim, the plaintiffs allege that Microsoft's use of the Calibration Process and people discussions, and the manager discretion inherent in those processes, constitute a "specific employment policy" for disparate impact purposes, and that application of these processes resulted in a statistically significant adverse impact on class members. Those contentions are unavailing for several reasons.

First, the manager discretion built into Microsoft's approach to pay and promotions, which resulted in many different pay and promotions decisions being made by many different managers, is not the type of specific employment practice contemplated by the Supreme Court as sufficient to give rise to a disparate impact claim. *Watson*, 487 U.S. at 994. Second, the methodology used by the plaintiffs to assert statistical significance failed to include key factors – such as the role played by individual managers, for instance – and thus cannot be used to establish classwide adverse impact. Accordingly, it too falls far short of satisfying Rule 23's commonality requirements. *See, e.g., Bolden v. Walsh Constr. Co.*, 688 F.3d 893,

896 (7th Cir. 2012) ("The sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in *Wal-Mart*: it begs the question. Plaintiffs' expert … assumed that the appropriate unit of analysis is all of [the employer's work] sites. He did not try to demonstrate that proposition").

Employment discrimination plaintiffs often rely on statistical evidence to establish harm. Indeed, statistics are critical components of both a successful disparate impact, and an intentional pattern-or-practice, discrimination claim. However:

> The elegance of statistical modeling may have generated a false sense of precision, while in the process losing the substantive concept of due process. For too long, class certifications mushroomed under the simplified methodology, failing to realize that interpreting statistics to generate a desired outcome is neither legally permissible nor ethically desired.

Ghoshray, 44 Loy. U. Chi. L.J. at 509.

Because they can be misleading, statistics must be used with great precision and care, especially in the class certification context. Even the Supreme Court, in approving the use of statistics to prove hiring discrimination, cautioned that "statistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). Here, the plaintiffs make no effort whatsoever to assess Microsoft's performance review processes as they operated in practice by, for example, accounting for decisions made at the level of individual managers or peer

groups. Because their analysis relied on a statistically suspect methodology, *see infra* Section I.B.2, which failed to account for factors that were relevant to Microsoft's performance review processes, its results must be discounted entirely.

Thus, the plaintiffs have failed to demonstrate – through reliable statistics or otherwise – that the exercise of discretion by hundreds Microsoft's supervisors in different locations throughout the nation and over several years resulted in alleged discrimination against more than 8,600 female employees that is capable of redress in one common stroke. They cannot show, for instance, that the discretion exercised by individual supervisors in making pay and promotion decisions was directed or constrained by a particular corporate policy or practice or was closely overseen by top management. *See, e.g., Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (denying class certification motion for lack of commonality, where employer granted "broad discretion" to supervisors in making promotion decisions, resulting in "highly individualized facts and circumstances raised in each employment decision"); *Jones v. Nat'l Council of YMCAs*, 34 F. Supp. 3d 896, 904 (N.D. Ill. 2014) (denying class certification for lack of commonality in light of "the myriad permutations that characterized the [employer's] procedures and practices"); *cf. Ellis v. Costco Wholesale Corp.,* 285 F.R.D. 492, 533 (N.D. Cal. 2012) (granting plaintiffs the go-ahead to pursue disparate impact claims specifically because plaintiffs had succeeded at providing evidence that

supervisors' "discretion was guided and influenced by *discrete* policies, practices, and culture") (emphasis added).

Rather, the plaintiffs concede that Microsoft managers were given wide discretion to assess entirely subjective factors such as "employee readiness" and "proven capability" in making pay and promotion decisions, and were directed only to "refrain from making 'artificial distinctions ... simply to meet an approximate distribution.'" *Moussouris*, at *3. Such "[s]ubjective criteria, prone to different interpretations, generally do not provide common direction." *Kassman v. KPMG LLP*, 2018 WL 6264835, at *19 (S.D.N.Y. Nov. 30, 2018). Indeed, "the whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard." *Bolden*, 688 F.3d at 897 (citation omitted).

The plaintiffs' chief complaints include that there was a "'lack of standardization' in the performance review systems, [that] 'evaluators were free to weight criteria for pay and promotions' in ways that were unconstrained by Microsoft's job requirements, and [that] Microsoft [failed to] exercise sufficient oversight to ensure that managers applied 'the same standards consistently with each other.'" *Moussouris*, at *18 (citations omitted). In other words, the plaintiffs assert commonality on the ground that Microsoft has "a policy *against having* uniform employment practices," *Dukes*, 564 U.S. at 355, which the Supreme Court in *Dukes* found plainly insufficient to satisfy Rule 23.

2. Managerial discretion in pay and promotion decisions also is insufficient to establish a "general policy of discrimination" under a pattern-or-practice theory

The plaintiffs' attempt to establish commonality with respect to their pattern-or-practice claim suffers from the same infirmity. A finding of a pattern or practice of intentional discrimination requires "[s]ignificant proof that an employer operated under a general policy of discrimination …." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982). Here, rather than present evidence that could support an inference of a general corporate policy or practice, the plaintiffs instead rely once again on manager discretion stemming from the Calibration Process and people discussion frameworks, as well as general statistical evidence, none of which speaks to the existence of any common practice such that a class proceeding would be appropriate.

As noted above, the plaintiffs' statistical evidence is over inclusive, analyzing disparities on a national level rather than on the appropriate level at which decisions were made. As one court observed:

> When decisions are made at the discretion of local decision makers, courts may find aggregated statistical evidence inadequate because it is 'derived from hundreds of employment decisions made by myriad decision makers, at different times, under mutable procedures and guidelines, in different departments, and in different office locations, concerning employees at varying levels of experience, responsibilities, and education.'

Kassman, 2018 WL 6264835, at *21 (citation omitted). Such certainly is the case here.

Indeed, statistical adverse impact can fluctuate widely based on a variety of factors, including for instance the specific group to which the statistics are being applied, the level of aggregation (i.e., five years vs. two years of hiring data), and/or the unit of aggregation (i.e., managers in New York vs. managers across the Northeast). In fact, minor differences in selection rates can appear to be statistically significant when large numbers of individuals are being compared. *See Dukes*, 564 U.S at 356-57.

Consider, for instance, one set of statistics showing that of 200 applicants, 99 out of 100 men and 98 out of 100 women were hired. The difference in selection rates between men (selected at a rate of 99%) and women (selected at a rate of 98%) is statistically insignificant. As the total number of applicants increases, however, this one-percentage-point difference in selection rates becomes increasingly significant from a statistical perspective. If the total number of applicants were 3,200 (1,600 men and 1,600 women), and again 99% of the men versus 98% of the women were hired, a statistical analysis using the most common test to measure differences in selection rates would yield a standard deviation of 2.3269, greater than the two-standard-deviation difference generally used by courts to establish statistical significance. *See, e.g., Hazelwood Sch. Dist. v. United*

States, 433 U.S. 299, 309 n.14 (1977); *Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991) (finding that a two-standard-deviation result "indicates that … the disparity is statistically significant"). If the total number of applicants was increased yet again to 6,400 (3,200 men and 3,200 women), the selection rate standard deviation would grow to 3.2908.

As the above example illustrates, the greater the number of observations, the higher the likelihood of a purely statistically significant result. This is the precise principle exploited by the plaintiffs in their aggregate statistical analysis, which relies on the sheer size of the proposed class to generate statistical significance. It makes no effort whatsoever to assess Microsoft's Calibration Process as it operated in practice by, for example, accounting for decisions made at the level of individual managers or peer groups. Because the analysis failed to account for factors that were relevant to Microsoft's Calibration Process, its results are not meaningful.

What is more, the plaintiffs have failed to produce "a common answer to the crucial question *why was I disfavored*." *Dukes*, 564 U.S. at 352. Satisfying the commonality standard – and achieving class certification – requires showing that there is a unifying explanation behind the class members' experiences: plaintiffs must show that there is some "glue holding the alleged *reasons* for all those decisions together." *Id*.

Proof of that "glue" entails something more unifying than simply pointing to a general grant of discretion to be exercised within a framework. Even though a corporate culture *could* lead managers to apply their discretion in a similarly discriminatory fashion, class certification demands more than mere plausibility; it demands proof of "a common mode of exercising discretion that pervades the entire company." *Id.* at 356.

The plaintiffs have failed to offer the requisite significant proof of a general policy of discrimination. They merely have shown that Microsoft provided supervisors with general frameworks to follow when using their discretion to conduct employee evaluations. Nevertheless, supervisors remained free to, and did, apply subjective criteria they deemed relevant to rating employees' performance. Mere evidence that Microsoft provided a framework for supervisors to follow does not constitute "significant proof" of commonality, given that the underlying decisions themselves were discretionary. *See Jones*, 34 F. Supp. 3d at 906 ("The fact that there was some structure to the evaluation, compensation, and promotion process does not change the fact that the structure reinforced the discretionary nature of the decisionmaking in this area").

C. According Managers Measured Discretion In Making Pay And Promotion Decisions Minimizes, Rather Than Exacerbates, The Risk Of Systemic Discrimination

Certifying a Rule 23 class consisting of more than 8,600 individuals in different jobs and locations, and with different supervisors who made different decisions for different reasons – in the absence of a common answer to the question of "why" – does nothing to advance the aims of Title VII. Microsoft and other employers invest untold time, energy, and financial resources into developing fair and equitable employment policies and practices, including by developing process frameworks designed to generate enterprise-wide consistency as well as monitor for potential problems.

Indeed, Microsoft and employers like it employ entire departments devoted to implementing equal employment opportunity and affirmative action programs. Those efforts often include performing succession planning and talent development for historically underrepresented groups, carrying out regular self-critical analyses of pay and other employment practices to ensure equitable treatment of valued employees regardless of sex or race, and engaging in outreach to qualified members of groups with lower-than-expected representation.

Microsoft's performance review processes were designed "to 'ensure there was consistency to how performance was evaluated and rated vis-à-vis the performance of [an employee's] peers.'" *Moussouris*, at *3. It is not unlike

general principles put in place to guide other types of personnel decisions. For example, employers routinely establish ground rules designed to ensure overall fairness and consistency and provide structure to their talent acquisition processes, while allowing enough autonomy and flexibility to ensure successful outcomes, i.e., the recruitment and selection of qualified candidates for employment. Management tools like Microsoft's Calibration Process and people discussions serve an important role in helping employers effectively monitor and uncover potential problem areas.

II. IMPROPER CLASS CERTIFICATION UNDERMINES SOUND, NONDISCRIMINATORY BUSINESS PRACTICES

A. Permitting Plaintiffs To Attack Frameworks Like Those At Issue Here Would Place At Risk Any Coordinated Effort To Ensure Process Consistency

As noted above, a "'policy' of *allowing discretion* by local supervisors over employment matters [is] a very common and presumptively reasonable way of doing business," *Dukes*, 564 U.S. at 355, and "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson*, 487 U.S. at 990. This is because "it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs." *Id*. Achieving efficiencies in employment decision-making thus requires some element of subjectivity:

> Some qualities – for example, common sense, good judgment, originality, ambition, loyalty, and tact – cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling."

Id. at 991-92.

Frameworks within which local managers have the discretion to make individual hiring, pay and/or promotion decisions are common among the nation's largest employers. They allow businesses to remain nimble and adaptive by situating decision-making authority in local officials who have awareness of on-the-ground realities that may not be apparent to C-suite executives, without controlling or dictating a particular result. Such frameworks often guide a wide variety of decisions and outcomes and thus cannot reasonably be considered specific employment practices capable of one all-encompassing analysis, statistical or otherwise.

Process frameworks are important to the implementation of sound EEO policies, in contexts ranging from hiring and promotion, to pay and termination decisions. Microsoft's performance review systems – which were designed "to ensure there was consistency to how performance was evaluated and rated vis-à-vis

the performance of [an employee's] peers," *Moussouris*, at *3 – are but one example.

Under many talent acquisition frameworks, for instance, company recruiters and hiring managers proceed through the same stages – such as screening, followed by telephone interview, and then an in-person interview – whether they are hiring for a nuclear physicist or an assembly line worker. Such processes, like Microsoft's Calibration Process and people discussions, merely provide guidelines for making any number of subjective decisions. When corporate EEO staff analyze any given employment decision-making process for a specific job or job group, a process framework provides immediate context, saving them from needing to piece together the process underlying the given decision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) direct covered employers to regularly analyze their employee selection practices for evidence of adverse impact on the basis of race and sex. They are incorporated in regulations promulgated by among others the Office of Federal Contract Compliance Programs (OFCCP), 41 C.F.R. pt. 60-3, which regulates the many employers who do business with the federal government.[2] *See* Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended; Section 503 of the

[2] *See also* 29 C.F.R. pt. 1607.

Rehab. Act of 1973, 29 U.S.C. § 793, as amended; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4212, as amended.

Under UGESP, employers must "maintain … records … which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group …." 41 C.F.R. § 60-3.4(A). Importantly, these adverse impact analyses – which must be made "at least annually" – are to be performed for the "total selection process" for *each job*. 41 C.F.R. § 60-3.15(2)(a). If the employer finds evidence of adverse impact in "*a* total selection process for *a job*," *id.*, it then must further search for adverse impact within "the individual components of the selection process" for that job. 41 C.F.R. § 60-3.15(2)(b) (emphasis added). In other words, under UGESP, employers are expected to perform tailored analyses of employment decisions according to how they are made, rather than in massive, artificial groupings that in no way reflect the actual decision-making process.

A similar analytical approach is endorsed by the OFCCP. Crucially, OFCCP's regulations require contractors to analyze employment transactions occurring within each affirmative action program (AAP), which generally correlates with *each physical establishment*. 41 C.F.R. § 60-2.1(d). Then, within each AAP, a contractor must annually review "its total employment process to determine whether and where impediments to equal employment opportunity

exist," 41 C.F.R. § 60-2.17(b), in part by analyzing "[p]ersonnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities." 41 C.F.R. § 60-2.17(b)(2).

In performing these analyses, OFCCP endorses the use of job title or slightly broader "job groups" consisting of very similar jobs. U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Fed. Contract Compliance Manual (FCCM) § 1O00 (Oct. 2014 & Supp. 2019).[3] *See also* OFCCP Scheduling Letter and Itemized Listing, Items 18(a)-(d) (U.S. Dep't of Labor June 29, 2016) (requiring contractors under audit to submit "[d]ata on your employment activity (applicants, hires, promotions, and terminations) … [f]or each job group or job title").[4] According to OFCCP regulations, a job group must consist of "jobs at the establishment with similar content, wage rates, and opportunities." Although a job group typically does consist of more than one job title, it is dramatically smaller than the extremely broad class that the plaintiffs propose: according to OFCCP guidance, "[j]ob titles in each job group must, as a general rule, be within the same EEO-1 job category," FCCM § 1F02 (footnote omitted), and a job group with "*[l]arge apparent differences in pay*, when associated with different job titles

[3] *Available at* https://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.
[4] *Available at* https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201602-1250-001&icID=13735.

within a job group *or different locations* within an organization, or both, suggest an unacceptable job grouping." *Id.* (emphasis added).

The upshot is that, as a grouping becomes more general and removed, analysis of it becomes less informative with regard to the group as a whole. Here, there is extraordinary variation in job functions even within job titles, with one job title alone accounting for "268 unique positions." *Moussouris*, at *2. This in fact suggests it may indeed be necessary to narrow the focus *beyond* job title in order to adequately analyze Microsoft's actual practices.

The practical application of these principles can be observed in OFCCP's conduct of compliance reviews. Indeed, the agency's enforcement guidance instructs compliance officers to analyze employers' processes according to how they operate in reality. Compliance officers "must determine how the contractor's selection process for *the job* or opportunity under examination works, including identifying all of the steps and decision points involved." FCCM § 2J00(a) (emphasis added). If analysis reveals statistically significant indicators, the compliance officer is directed to conduct further analyses, including "additional cohort analysis" at the employee level. FCCM § 2J. In short, the guiding principle of OFCCP compliance reviews should be to analyze contractors' actual practices, followed if necessary by an investigation of individual instances of potential discrimination. Regardless, and whatever the merits of OFCCP's application of its

guidelines to particular companies and in particular cases, the fact that its basic guidelines call for a dramatically narrower evaluation than that relied on by the plaintiffs suggests that their approach is invalid.

OFCCP regulations and enforcement guidance thus drive home the point – evident in UGESP as well – that employment decisions cannot be analyzed together simply because they occurred within the same process framework. In sum, both UGESP and OFCCP recognize that the first step in a proper analysis of employment selections is to isolate discrete processes, using any number of relevant criteria, including but not limited to factors such as location, time, and job title.

The plaintiffs in this case have done just what UGESP and OFCCP acknowledge is nonsensical. They attempt to lump together, and draw conclusions from, completely unrelated pay and promotion decisions, simply because the decisions all stem from delegated discretion accorded to individual managers under the Calibration Process and people discussions. They have aggregated employment decisions made about more than "8,600 female employees across 41 states holding thousands of unique positions," *Moussouris*, at *25, and across multiple years, for the purpose of achieving class certification. As noted above, no meaningful discrimination analysis can be performed across such a dissimilar group of comparators.

Just as it would produce misleading and potentially meaningless results to analyze an employer's total selection process across multiple years without accounting for the many differences in selection decisions for individual jobs, so is it unwise to draw conclusions about the pay and promotion decisions made about more than 8,600 people by different managers applying different criteria. The intensely varied decisions that resulted must be analyzed according to how the plaintiffs' own evidence shows they were made: individually, by supervisors who "'were free to weight criteria for pay and promotions,' [and over whom] Microsoft did not exercise sufficient oversight to ensure that managers applied 'the same standards consistently with each other.'" *Moussouris*, at *18. The plaintiffs' effort to treat Microsoft's Calibration Process and people discussions as a single, unifying employment practice for the purposes of satisfying commonality runs contrary not only to common sense and analytical best practices, but also to federal regulatory guidance and enforcement decisions made by federal agencies.

B. Improper Aggregation Of Dissimilar Claims Encourages Misuse Of The Class Action Mechanism As A Means Of Forcing Settlement Regardless Of The Underlying Merits

Aggregation of individual discrimination claims that are ill-suited for class treatment places employers at great financial risk, both in terms of the substantial fees associated with merely defending such claims, as well as the frequently exorbitant cost to resolve them. A trial court's certification of a class alone can

"coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit …." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (citations and internal quotations omitted). This pressure to settle tends to increase in direct proportion to the "magnitude of the potential damages." *Id*. Worth noting, the statutory damages available to a successful Title VII plaintiff include compensatory and punitive damages, capped at $300,000 (per victim) for large employers, as well as injunctive and equitable relief and attorney's fees and costs. Thus, apart from the substantial costs incurred to mount a defense, employers facing a Title VII class action of any meaningful size must contend with the possibility of liability in the many millions, if not billions, of dollars. It is conceivable, for example, that improper certification of a class of more than 8,600 discrimination plaintiffs alleging pattern-or-practice sex discrimination could lead to a potential classwide award in the billions of dollars.

Accordingly, while in such a case "the plaintiffs' attorney has to incur the costs of filing the class action lawsuit and has to invest a substantial amount of time that could potentially be wasted if the class is not certified, once the class is certified, in the majority of cases the defendant will settle …." Steven Bolaños, *Navigating Through the Aftermath of* Wal-Mart v. Dukes*: The Impact of Class Certification, and Options for Plaintiffs and Defendants*, 40 Western St. U. L. Rev.

179, 183 (Spring 2013) (footnote omitted). The Supreme Court has acknowledged that reality, observing:

> [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail ….

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011). That pressure exists largely independent of the actual merits: for all the reasons described above, defendants that find themselves on the wrong side of a class certification decision "are likely to settle after certification even when they might have a strong case on the merits. Bolaños, 40 Western St. U. L. Rev. at 183; *see also* Thomas H. Barnard & Amanda T. Quan, *Trying to Kill One Bird with Two Stones: The Use and Abuse of Class Actions and Collective Actions in Employment Litigation*, 31 Hofstra Lab. & Emp. L.J. 387, 405-06 (2014) ("Class actions are extremely popular and [a] heavily-used means of pursuing employment litigation because the plaintiffs, and their class action attorneys, often see class actions as an easy way to maximize damages while minimizing effort: Certification as a class action can coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit") (citations and footnote omitted).

CONCLUSION

For the reasons set forth above, the *amicus curiae* Center for Workplace Compliance respectfully submits that the decision below should be affirmed.

Respectfully submitted,

s/ John R. Annand
Rae T. Vann
John R. Annand
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600
Attorneys for *Amicus Curiae*
Center for Workplace Compliance

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