# 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,

MICROSOFT CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
District Judge James L. Robart, Case No. 15-cv-01483 (JLR)

# PLAINTIFFS-APPELLANTS' OPENING BRIEF
# (REDACTED VERSION)

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## INTRODUCTION

Katherine Moussouris and Holly Muenchow ("Appellants") respectfully appeal the District Court's June 25, 2018 Order (the "Order") denying certification of a class of female engineers and I/T professionals at Microsoft Corporation ("Microsoft") who bring disparate impact and treatment pay and promotion claims under Title VII and Washington State law.

The District Court's Order should be vacated because it applied incorrect legal standards to determine whether class certification was warranted.

***First***, the District Court held that Microsoft's company-wide processes and common criteria for making pay and promotion decisions could not support commonality in a disparate impact case because they guide but still permit discretion by the managers applying them. This holding misapplies *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011), which affirmed that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory where the plaintiff "identifie[s] a common mode of exercising discretion that pervades the entire company." It is also inconsistent with the opinions of each of the appellate courts that have had occasion to apply *Dukes* in comparable circumstances. *See, e.g.*, *McReynolds v. Merrill Lynch*, 672 F.3d 482, 489-90 (7th Cir. 2012); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013).

Contrary to the District Court's conclusion, this case is factually unlike *Dukes* in nearly every respect. Here, the proposed class consists of approximately 8,600 women in two subdivisional "Professions"—Engineering and I/T Operations—nearly all of whom report to the same four Executive Vice Presidents and work in the same state, and 72 percent of whom work in *one location* in that state. Appellants challenge uniform employment practices—Microsoft's company-wide processes and common criteria for making pay and promotion decisions—not the "policy *against having* uniform employment practices" that failed to support a finding of commonality in *Dukes*. 564 U.S. at 355.

***Second***, the District Court failed to credit Appellants' robust statistical evidence as "significant proof" of a general policy of discrimination supporting their disparate treatment claim because it erroneously held that Appellants failed to challenge a company-wide policy or practice. However, Appellants were not required to identify a specific employment policy to establish their disparate treatment claim. "A pattern of discrimination, revealed through statistics and anecdotal evidence, can alone support a disparate treatment claim, even where the pattern is the result of discretionary decision-making." *Brown v. Nucor Corp.*, 785 F.3d 895, 915 (4th Cir. 2015). Such evidence, "especially when combined, . . . provide[s] precisely the 'glue' of commonality that [*Dukes*] demands." *Id.* at 914.

***Third***, the District Court impermissibly failed to properly credit what constitutes, and has for decades been considered adequate to constitute, multiple categories of evidence that brings the statistics to life as "significant proof" of a general policy of discrimination supporting Appellants' disparate treatment claims. Critically, the District Court considered only one specific type of Appellants' evidence: litigation-generated declarations, for which it established an arbitrary numerical threshold required to satisfy Rule 23 that is nowhere found in law.

The District Court also suggested that anecdotal evidence of systemic bias and of Microsoft's knowledge of, but failure to address, discrimination could only be probative if Appellants showed that Microsoft engaged in *more* discrimination against women than its peer companies. But this is a lawsuit against Microsoft, not the technology industry writ large. While, consistent with women's under-representation in the technology sector, gender discrimination may be rampant or under-reported (or both) across technology jobs, that background ultimately has no bearing on whether women at Microsoft suffered illegal gender bias. Title VII imposes no *relative* threshold for anti-discrimination by industry. By adopting this erroneous standard, the District Court, in an abuse of discretion, disregarded substantial additional evidence of the common, discriminatory culture at Microsoft and of its knowledge of discrimination reflected in contemporaneous business

records, including hundreds of discrimination complaints made by female technical workers, corporate diversity records surfacing gender problems that were not addressed, and other anecdotal evidence that Appellants presented.

***Fourth***, the District Court determined on the merits (and thus wrongly in a Rule 23 Order) that Microsoft did not have an intent to discriminate based on sharply contested information. Microsoft's evidence of its anti-discrimination efforts is common proof of this merits question, as is Appellants' rebuttal evidence strongly undermining Microsoft's evidence, which the District Court overlooked. Whether Microsoft made sufficient efforts to combat gender disparities that *it acknowledged existed* at the company is a common merits question well-suited for class certification.

***Fifth***, the District Court incorrectly held that the named Plaintiffs' claims are not typical of the claims of class members even though they—like all class members—challenge the same company-wide processes and common criteria for making pay and promotion decisions with respect to their disparate impact claims, and the same culture of gender bias and failure to remedy class-wide disparities with respect to their disparate treatment claims.

***Sixth and finally***, the District Court held that a low-level supervisory employee could not be an adequate class representative, even though low-level supervisory employees in the proposed class merely followed common,

discriminatory policies that all class members have an interest in remedying. This circumstance does not give rise to an intra-class conflict under Rule 23(a)(4), and regardless is readily curable by the proper exercise of class manageability tools.

## JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over the federal claims under 28 U.S.C. § 1331 and over the state law claims under 28 U.S.C. § 1367. This Court granted Appellants' petition for appellate review of the District Court's Order denying class certification pursuant to Fed. R. Civ. P. 23(f) on September 20, 2018. Appellants' Excerpts of Record ("ER") at 41 (hereinafter cited as "ER41").

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. For a disparate impact claim, do company-wide policies that guide and limit, but still permit, managers to exercise discretion constitute the "common mode of exercising discretion" that the Supreme Court held would support a finding of commonality in *Dukes*?

2. Must plaintiffs establish a uniform employment practice to make a *prima facie* claim for disparate treatment on the merits and thus show at Rule 23 that there is common evidence of such a practice?

3. What type and quantity of evidence of bias is required at class certification to support a disparate treatment claim?

4. Did the District Court impermissibly decide a merits issue when it found that Microsoft did not intentionally discriminate, where Appellants presented sharply drawn rebuttal evidence showing on a class-wide basis that it did?

5. Is typicality established where Appellants and the class challenge the same company-wide policies with regard to their disparate impact claims and the

same culture of bias and failure to remedy class-wide disparities for their disparate treatment claims?

6. Can low-level managers who are subject to and must follow, but did not create, discriminatory policies be adequate class representatives for non-managerial class members?

## STATEMENT OF THE CASE

### I. Factual Background

Appellants Katherine Moussouris and Holly Muenchow and the class members they seek to represent are women who worked for Microsoft in its Engineering and/or I/T Operations "Professions" from September 16, 2012 to the present. ER1057. Ninety percent of the class worked in Washington, and over seventy percent worked in Microsoft's Redmond, Washington headquarters. ER514. Virtually the *entire class*, ninety-eight percent, reported to the same four Executive Vice Presidents ("EVPs"). ER521. All class members were subject to the same pay and promotion processes that Appellants allege disparately impacted women. Appellants refer to these processes overall as the "Calibration Process" and describe below how it was used to make pay and promotion decisions at Microsoft.

Ms. Moussouris alleges that Microsoft paid her less than her male peers throughout her tenure at the company and that, "[f]rom 2010 to 2014, Microsoft passed her over for promotions in favor of less qualified and less experienced men." ER321-322; *see also* ER253. Similarly, Ms. Muenchow alleges that she

has been paid less than comparable male coworkers and that men have been promoted to higher levels for which she was qualified and not considered. ER323; *see also* ER250. Both women were paid and promoted subject to Microsoft's Calibration Process.

On July 11, 2018, the District Court denied Microsoft's Motion for Summary Judgment as to the named Plaintiffs' claims, finding "ample evidence in the record" from which a jury could determine that they suffered adverse employment actions with respect to pay, promotion, and other issues vis-à-vis similarly situated men, and that Microsoft's reasons for its actions were pretextual. ER421-439. Additionally, the District Court found that Appellants' statistical expert, labor economist Dr. Henry S. Farber, had shown statistically significant disparities in women's pay and promotion rates, after controlling for various factors, and that these disparities supported the named Plaintiffs' disparate impact claims. ER430-433.

### A. Microsoft's Common Pay and Promotion Policies

#### 1. Common Parameters for Setting Pay

Microsoft uses the "Calibration Process" to assign pay, beginning with evaluating employee performance within "peer groups":

> [A]ll employees, including the putative class members, are first evaluated by their direct managers, then placed in peer groups of similar Stock Levels, and discussed in a broader meeting of managers—

> whether in a calibration meeting or a people discussion—with the consensus recommendation rolled up the management chain.

ER486.

Managers determine employee performance ratings by comparing employees within peer groups to each other. The peer group employees perform essentially the same work although they are assigned different pay bands ("Stock Levels") or rates of pay.[1] However, notwithstanding performance in a peer group, Microsoft requires managers to make pay recommendations only within the pay band corresponding to an employee's Stock Level, even if this means that some employees will be paid less than others in their peer group whose performance is no better or worse. *See* ER396-401; ER1060-1062; ER747-748. Appellants allege that this pay rule results in women being paid less than their male peers, regardless of their performance, because women are disproportionately represented in lower Stock Levels than men. *See* ER1061, 1063, 1066; ER670, 673, 697.

2. Common Promotion Process and Criteria

Microsoft requires managers to discuss candidates for promotion in the Calibration Process. ER449. It defines "[a] promotion . . . as an increase in [Stock] level." ER743. Microsoft has established criteria that "must be met" in order for a manager to recommend an employee for promotion. *Id.* The criteria

[1] The relevant peer groups are 59-60, 61-62, 63-64, and 65-67. ER828.

are: "business need, demonstrated employee readiness, and available budget." ER449.

To determine whether a "business need" exists, managers must follow specific company guidance, to identify "a need for work that is of greater size, scope, and responsibility," including "a reorganization of work that results in a larger scope of role, taking on work with broader technical responsibility, or taking on larger customer accounts." ER743.

To assess "employee readiness," managers must answer "Yes" to the following: "Has the employee successfully delivered results at a level in his or her current role that indicates readiness for a greater scope? Does the manner in which the employee achieves results demonstrate his or her ability to be successful in the higher level role? Does the employee have a demonstrated history of taking on increasingly challenging work while continuing to deliver results?" *Id.*

With regard to "available budget," managers may not recommend a promotion if there is not sufficient money available in the budget. *Id.*

3. Upper Management Design and Control

Microsoft's corporate Human Resources team designed the Calibration Process and determined the criteria managers must use to make pay and promotion recommendations. ER1062.

All pay and promotion recommendations that originate with lower-level managers must be approved, rejected, or modified by each higher-level manager in the reporting chain, up to and including EVPs. *See* ER486, 488. Four EVPs reviewed and approved pay and promotion decisions for 98 percent of class members. ER521.

4. Robust Statistically Significant Gender Disparities in Pay and Rates of Promotion

Appellants presented evidence of robust statistically significant disparities in pay and promotions for women across the class. *See* ER1063-1066; ER673-674, 684, 689, 693. Dr. Farber's statistical report provided the District Court with evidence of sex discrimination attributable to Microsoft's common pay and promotion processes—*i.e.*, "differences in pay [and promotions] between men and women that cannot be explained by differences in productivity-related characteristics like work experience or differences in the type of work they perform." ER663, 673-674, 684, 689, 693.

The multivariate regression analysis conducted by Dr. Farber reveals that women are paid less than men, to a statistically significant level of 21.7 standard

deviations—or a less than 0.05% probability of occurring by random chance. ER673-674, 689. Dr. Farber's statistical model controlled for year (which accounts for different compensation budgets in different compensation years), age (as a proxy for work experience), tenure at Microsoft, job location, performance rating, and also for the categories that Microsoft uses to define the specific work class members perform—Profession, Discipline, and Standard Title.[2] *Id.* Dr. Farber estimates that a conservative shortfall value is approximately $100 million dollars. ER685-686, 694.

Similarly, Dr. Farber conducted a multivariate regression analysis relating to gender-based differences in promotion outcomes. Dr. Farber's statistical analysis shows that women are promoted less frequently than men when controlling for Profession, Discipline, Stock Level,[3] age, experience at Microsoft, location, and

[2] As discussed above, there are two Professions at issue in this case—Engineering and I/T Operations. Microsoft defines a Profession as "a group of functional areas . . . with common functional skillsets, business results, and success differentiators." ER444; ER1059. Within Professions, Microsoft classifies employees into Disciplines, which capture "the actual work that the individual is currently doing." ER1059; ER444-445. Within each Discipline, the next and most specific level of organization is Standard Title, which refers to specific roles within Disciplines. ER445; ER1059.

[3] Dr. Farber controlled for Stock Level even though, in his view, it is a "tainted" variable because he found that women are systematically assigned to lower Stock Levels than similar men. ER670-671, 674, 697. However, because Microsoft defines a promotion as a move from one Stock Level to the next, in order to study advancement from one level to the next, Dr. Farber controlled for Stock Level in this probit regression. *See* ER1065 n.9; ER679-680.

performance. ER684, 693. Dr. Farber found that, between 2011-2016 (the last year data was available) women in Engineering and I/T Operations received approximately 518 fewer promotions than would be expected given their characteristics other than gender, and that the difference is statistically significant. ER684, 693.

Microsoft moved to exclude Dr. Farber's opinions on the ground that he analyzed the data at the level at which Microsoft applied the challenged policies rather than disaggregating the data to conduct a manager-by-manager analysis (the level at which Microsoft asserted relevant decision-making occurred). ER180, 182, 186. The District Court rejected Microsoft's argument, concluding that Dr. Farber's "aggregate" analyses were relevant to commonality because "Plaintiffs challenge Microsoft's use of the Calibration Process – a companywide system – that was used across levels and managers in determining pay and promotion." ER18. The District Court found Dr. Farber's decision to control for a "worker's tenure, age, location, compensation year, performance review outcomes, job category, and . . . job title" appropriate because these metrics may "affect pay and promotion." ER21. The District Court also concluded that Dr. Farber had "legitimate bases" for excluding Stock Level—and Standard Level and Career Stage (similar measures of pay under Microsoft's control)—because they were "tainted" and "themselves affected by gender bias." ER22 & n.8. The District

Court explained that inclusion of these variables in a regression would "mask any discrimination." ER22.

5. Company-Wide Defects in the Calibration Process

Appellants also presented evidence from Dr. Ann Marie Ryan, an industrial-organizational psychologist, who identified several serious problems with Microsoft's Calibration Process. In particular, she opined that the criteria that Microsoft uses are invalid because they are not sufficiently job-related. ER749. Importantly, although Microsoft developed a competency model that identifies specifically what skills are expected of various positions, it failed to tie the criteria it uses to make pay and promotion decisions to that model. ER753-755. Thus, Microsoft has utilized common criteria which are invalid, but which can be cured on a common basis.

**B. Microsoft's Culture of Discrimination**

Appellants submitted significant evidence of a culture of discrimination against class members at Microsoft. They presented 238 formal complaints of sex discrimination made by female technical employees between 2010 and 2016, including at least 108 reported incidents of sexual harassment and assault.[4] They also included voluminous informal complaints—such as emails to Microsoft's

[4] *See* ER812-820.

leadership—about a "boys' club atmosphere" that hinders female advancement,[5] and concerns about pay and promotion disparities in response to claims by Microsoft's leadership that men and women are paid equally.[6] Appellants also submitted 11 class member declarations attesting to unequal pay and promotions and a discriminatory culture. For example, class members testified that: "men's contributions and projects were valued more highly than similar projects managed

[5] *See* ER1076 (citing, *inter alia*, ER1028 (Email to [redacted]: "I will not be able to recommend [Microsoft] to other female engineers. The main reason is that [Microsoft] culture accepts and tolerates abuse and toxic behavior, especially towards females."); ER1003 (Email to Kathleen Hogan, EVP: "In an Engineering role, I am surrounded by men and only men in most of my meetings. . . . The good ol boy culture and way of behaving at meetings is alive and well.")).

[6] *See* ER1069-1070 (citing ER972 ("The logic seems to be that men and women in the same pay grade receive roughly the same pay. This is not evidence of equal pay, but rather that Microsoft enforces an even compa ratio among men and women employees. As a manager with direct reports who might ask me whether or not I can provide any evidence that our pay system is fair, this doesn't pass the giggle test."); ER895 ("I disagree with the stats on equal pay. When people are not promoted at the same rate as their peers, the fact that they are paid on par within their level hides the facts that they are not paid equally. If I'm doing the exact same job but am at a different level, that's not pay equality."); ER970 ("It is vital that when discussing the pay gap, we don't simply say 'both genders at the same level are marking the same pay' and instead ask 'are the genders appropriately leveled?'"); ER911 ("But there is no check on promotions. We should put something into the system that does another check by HR to ensure this is the case. We could create a separate metric on promotions of woman (and minorities) to be sure we are driving toward it."); ER895 ("Have we looked at the data, though, to see if there is a 'promotion gap' between genders? That is, how long does a man stay in a role without being promoted versus how long a woman stays in the same role before being promoted? Or whether women and men with the same number of years' experience come in to Microsoft at different grade levels?")). *See also* ER267-273 (cataloguing similar employee concerns in response to Microsoft's April 2016 Equal Pay Study).

by women," ER244; men commented on women's looks "nearly constantly, even on conference calls before the meeting began," ER247; and a male manager told a class member that a promotion would be "waste[d]" on her because she may take parental leave.[7] ER262.

### C. Microsoft's Longstanding Knowledge of Gender Disparities

Appellants presented evidence that Microsoft knew of gender disparities in pay and promotions but failed to take meaningful steps to address them. The U.S.

[7] *See also* ER1076 n.46; ER253 (describing being passed over for promotions in favor of less qualified men, a culture where "women who shared their ideas were ignored" and "more likely to be called into question than men's"); ER250 (describing how men advance more rapidly than women, and women "receive negative criticism for being too aggressive" when speaking up); ER265-266 (paid and promoted less than similarly qualified men, and demoted after return from maternity leave); ER262-263 (describing being under-compensated relative to men); ER258-259 (describing discrimination in Calibration Process resulting in under-compensation relative to men and witnessing several instances of women "being cut off in meetings, excluded from meetings, . . . dismissed or undervalued"); ER256 (describing promotion discrimination as she remained a Level 64 for six years and observed similarly-situated men promoted to Level 65); ER247 (describing being paid and promoted less than men with less experience and less technical knowledge, and threatening sexist remarks from one male colleague that Microsoft did nothing to abate); ER244-245 (several female employees and fellow managers confided in her regarding experiences with gender discrimination and sexual harassment); ER241 (undercompensated relative to men, marginalized, excluded, left out of email lists and meetings in which men were included); ER238 (describing discriminatory culture of ignoring and excluding women that impaired ability to do her work); ER236 (describing similarly-situated men promoted to Level 65 and up while she remained Level 61, and describing Microsoft-hosted party including "scantily clad women dancing on tables," comments made to her by her manager on her looks and clothing, and women being admonished for being assertive or opinionated).

Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") issued a Notice of Violations[8] in May 2016 and an Amended Notice of Violations[9] in June 2016, [redacted].[10]

Appellants also showed that senior management was aware of these gender equity issues but allowed the problem to persist. This evidence included: communications among members of Microsoft's HR and Communications departments with regard to how the company should respond to employee comments and concerns that Microsoft's April 2016 Equal Pay Study was illegitimate;[11] statements and initiatives by Microsoft's Senior Leadership Team acknowledging problems with equal pay, diversity, and inclusion;[12] statements

[8] *See* ER1067; *see also* ER853-872.
[9] *See* ER1067; *see also* ER1030-1050.
[10] ER1038.
[11] Appellants provide here a sample of the evidence provided to the District Court. *See, e.g.*, ER1072; *see also* ER1008; ER1011; ER998; ER974; ER1006; ER1009.
[12] *See* ER1072-1074; *see also, e.g.*, ER953 ("D&I Core Priorities and Action Plan" acknowledges that data gathered from across the company revealed gender bias and cultural issues at Microsoft).

from HR employees acknowledging that Microsoft's diversity and inclusion initiatives were mere window-dressing;[13] and an overall failure to adequately investigate and address discrimination complaints.[14]

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[13] *See* ER1083-1084; *see also, e.g.*, ER960 ("we show up poorly"); ER964 (efforts "simply not enough"); ER887 ("We're not making enough progress with diverse leadership development."); ER888 ("haven't made material forward progress.").

[14] *See* ER1079-1083; *see also, e.g.*, ER266 ("I have no idea whether HR investigated my complaint, as HR never followed up. I believe that complaining to HR can be career-ending at Microsoft and I only did so because I saw no other option short of leaving the company, which I did when HR did nothing."); ER262-263 (HR ignored multiple complaints of discrimination, including when manager explicitly stated he denied her a promotion because he did not want to waste it on someone who might become pregnant); ER259 (ERIT found no violation after complaint of gender discrimination and told her it was technically impossible to remove unfair comments from her performance review; "This is not plausible at a tech company."); ER256 (for first complaint, "HR never followed up with me"; for second complaint, "despite telling me that my manager acted inappropriately, ERIT found no violation"); ER251 (complaining to HR "will not make any difference and will only subject the complainants to hostility and retaliation"); ER254 (HR took no action on multiple complaints of discrimination and retaliation); ER248 ("HR sent a single email to my work email while I was out of the office and never attempted to reach me again, even after I followed up with them upon my return."); ER242 ("ERIT collected information from me, but I did not see them take any action to address the discrimination. The multiple complaints I made did nothing to improve the hostility I and other women faced."); ER239 (After complaining that male co-workers with less experience were earning more, "HR told me there was nothing they could do."); ER230:6-13 (ERIT team has no policies on how to conduct investigations); ER296:24-270:4, 293:25-294:2, 299:14-24, 301:2-8, 296:4-14 (ERIT does not monitor for repeat offenders and knowledge of multiple complaints against an individual does not inform investigations); ER290:6-20, 292:19-293:19 (ERIT does not monitor for retaliation in response to raising complaint); ER305:1-3, 306:11-14 (Microsoft defers to business leaders regarding what discipline to impose based on a founded complaint); ER283:12-14, ER286:18-287:2 (Microsoft does not require employees to attend anti-harassment/discrimination training or training on handling internal complaints).

## II. The District Court's Denial of Class Certification

The District Court denied Appellants' motion for class certification, finding that the proposed class failed to satisfy Rule 23's commonality, typicality, and adequacy requirements. ER470.

### A. Commonality

#### 1. Disparate Impact Claims

Although the District Court acknowledged that "*Dukes* did not entirely foreclose the ability to establish commonality when the employer operates under a policy allowing discretion" where "lower-level supervisors operate under 'a common mode of exercising discretion,'" ER475, 477, it found that Appellants failed to establish a common mode for the following reasons:

First, the size of the class weighed against a finding of commonality notwithstanding that "class size 'has no per se bearing on commonality.'" ER478 (quoting *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 509 (N.D. Cal. 2012) ("*Ellis II*")). Comparing this case to a handful of other Title VII cases, *see* ER478, ER485, the District Court found that the 8,600-member class in this case—"a far cry from the 1.5 million in *Dukes*," ER485—was nonetheless larger than the certified classes in those cases and thus "more akin to the expansive *Dukes* class." ER485-486. It also found that Appellants' proposed class is not "'centralized' or 'localized,'" ER485 (quoting *Brown*, 785 F.3d at 910, 916), even though 70

percent of the class worked at Microsoft's headquarters, 90 percent worked in Washington, and 98 percent reported up to four EVPs.

Second, the District Court determined that the policies that Appellants challenge are not sufficiently "rigid[]" to raise a common question regarding their validity because "[s]imply showing a process in which discretion would be exercised is insufficient to establish commonality." ER478, 480. The District Court noted that "a structure that imposes specific requirements . . . may show sufficient common direction," ER479, but that the Calibration Process and its criteria (that Microsoft requires its managers to use) are too "subjective" and insufficiently well-defined to qualify. ER485-487.

The District Court acknowledged that, through the Calibration Process, "all employees, including the putative class members, are first evaluated by their direct managers, then placed in peer groups of similar Stock Levels, and discussed in a broader meeting of managers . . . with the consensus recommendation rolled up the management chain." ER486. However, it held that the existence of this structure "is insufficient" to raise a common question as to whether it resulted in pay and promotion disparities because managers retained "flexibility" in how they engaged in the process. *Id.* For example, some managers "may utilize a PowerPoint presentation to visually display relevant rating and budgetary information" while others might "dispense with visual props altogether . . . ." ER487.

With respect to Microsoft's requirement that managers pay employees within their Stock Level, rather than based on their performance relative to the peers in multiple Stock Levels against whom they are compared, the District Court determined that this policy also failed to raise a common question because within Stock Level, managers still had discretion to set employees' pay. ER483-484.

Third, the District Court held that while "the involvement of top management in the discretionary decision-making is a key consideration," ER481, the fact that Microsoft's EVPs review and approve all pay and promotion decisions did not weigh in favor of commonality because they typically approved the recommendations. ER489-490.

Finally, the District Court determined that Appellants' expert reports did not support commonality. ER490. In particular, Dr. Ryan's critique of the "lack of standardization" in the application of the Calibration Process precluded Appellants from raising a common question regarding its validity. ER491. Dr. Farber's statistical analysis, which the District Court had previously concluded was admissible and relevant to commonality because "[t]he disparity that Dr. Farber finds between women and men in pay and promotion logically advances a material aspect of Plaintiffs' case—namely, that a gender-based disparity, in fact, exists that impacts all putative class members," ER21-23, "shed[] no light on whether

Microsoft had a company-wide policy constraining the discretion of lower-level managers" and thus also did not support commonality. ER491.

2. Disparate Treatment Claims

Although the District Court acknowledged that "[u]nlike disparate impact claims, disparate treatment claims do not require plaintiffs to identify a specific companywide employment practice responsible for the discrimination," it refused to rely on Appellants' statistical evidence of discrimination for the disparate treatment claim because it found that Appellants failed to establish a uniform pay and promotion policy with respect to their disparate impact claim. ER494-497.

The District Court also found that Appellants' other evidence did not constitute "significant proof" of discrimination. ER495. The District Court found that Appellants had not offered a sufficient number of declarations (11 for 8,630 class members, ER498 n.22), and disregarded the 238 formal complaints of discrimination that Appellants submitted because they are not "tied" to the policies that Appellants challenge as causing a disparate impact on women, ER499, and because it could not tell whether the "number was unusual for a company like Microsoft with hundreds of thousands of employees." ER501.

Finally, the District Court disregarded OFCCP findings of discrimination and numerous employee critiques of Microsoft's purported efforts to address

gender inequity because it determined that Microsoft's actions do not reflect a "culture of evasion and refusal to acknowledge the problem." ER500.

### B. Typicality

The District Court found that Appellants failed to establish typicality for the same reasons that it found commonality lacking—the "discretion exercised by countless lower-level managers." ER503. The District Court cited "differences" in class members' characterization of their experiences with respect to the uniform policies at issue in support of its finding. ER504.

### C. Adequacy

The District Court found that Appellants were not adequate class representatives because Ms. Moussouris participated in the Calibration Process as a low-level supervisor (as well as a supervisee subject to the same Process) and "thus was obligated to implement the very system that Appellants challenge." ER507 (internal quotation marks omitted). The District Court nonetheless acknowledged this Court's holding that there is "no *per se* rule regarding adequacy where a class includes 'employees at different levels of an employment hierarchy.'" ER506 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir. 2003)). The District Court did not address Appellants' suggestions for ameliorating the purported conflict, such as creating subclasses, or the fact that Plaintiff Muenchow never participated in the Calibration Process as a supervisor.

## SUMMARY OF THE ARGUMENT

Appellants challenge specific common employment practices, which they claim disparately impacted female technical employees at Microsoft, as well as a culture of gender-based intentional discrimination at the company.

### I. Disparate Impact Claims

Appellants have shown that the specific common practices they challenge—Microsoft's uniform use of a Calibration Process to promote and pay employees, including specific promotion criteria and the requirement that employees be paid within their Stock Level and not based on their performance relative to peers—result in disparities between similarly situated men and women.

The District Court misconstrued Appellants' challenge to Microsoft's Calibration Process as a challenge to the discretion exercised by individual managers—which *Dukes* found failed to satisfy commonality under the circumstances of that case. *See* ER473-475, 483. However, *Dukes* affirmed that "giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory" where, as here, the plaintiffs "identif[y] a common mode of exercising discretion"—*i.e.*, "some common direction" from the management of the company relating to how discretion should be exercised. 564 U.S. at 355-56; *see also McReynolds*, 672 F.3d at 489-90 (company-wide policies that "influenced" exercise of discretion satisfy *Dukes*); *Scott*, 733 F.3d at 113-14

(exercise of discretion that is "tied to a specific employment practice" satisfies *Dukes*). Unlike the mere exercise of discretion, an allegedly discriminatory policy that guides discretion can be remedied through a class-wide proceeding—consistent with the goals of Title VII and Rule 23.

This Court should reject the District Court's analysis and hold that an employment policy that guides, even if it does not preclude, the exercise of employee discretion can support a finding of commonality under *Dukes*.

## II. Disparate Treatment Claims

Appellants demonstrated that the question of whether Microsoft maintains a "systemwide pattern or practice" of gender discrimination such that discrimination is "the regular rather than the unusual practice" can be answered with common proof. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Plaintiffs submitted statistical evidence of pay and promotion disparities, anecdotal evidence of Microsoft's discriminatory culture, and evidence that Microsoft knew of gender disparities but failed to adequately address them. *See Brown*, 785 F.3d at 914-15. Microsoft submitted rebuttal evidence that was also common to the class.

The District Court should have credited Appellants' robust statistical evidence in determining whether Appellants established a "pattern of discrimination" with respect to their disparate treatment claim, notwithstanding its determination that they failed to identify a specific policy or practice with respect

to their disparate impact claim. The evidence shows gender disparities in pay to a statistically significant level of 21.7 standard deviations—or a less than 0.05% probability of occurring by random chance—when controlling for all relevant factors, including exactly those that Microsoft asserts differentiate class members—Profession, Discipline, and Standard Title. It also shows statistically significant disparities in the rates of promotion between men and women, including when controlling for Profession, Discipline, and even Stock Level that amounted to hundreds of missed promotions for putative class members.

The District Court also should have credited Appellants' anecdotal evidence of discrimination—in declarations and hundreds of formal and informal employee complaints. The evidence brought the "cold numbers convincingly to life," *Teamsters*, 431 U.S. at 339, by reflecting a companywide culture in which female technical employees are marginalized, undervalued, evaluated against the work of (increasingly male) individuals in higher Stock Levels, and ultimately paid less and promoted less frequently than male co-workers. The District Court's exclusive focus on the quantity of anecdotal evidence—not its substance or significance in conjunction with all of the evidence presented—is directly contrary to Title VII authority and should be rejected.

Finally, the District Court should have recognized that the parties' conflicting common evidence regarding whether Microsoft made sufficient efforts

to address gender disparities about which it was aware presented a common merits issue supporting certification. The District Court's resolution of that question in Microsoft's favor was not necessary or appropriate at the class certification stage.

## III. Typicality

The District Court erred in finding that Appellants' disparate impact and disparate treatment claims are not typical of the class's claims. *See* ER503. The Court's analysis suffered from the same errors as its commonality analysis, in that it failed to recognize that Appellants challenge employment practices and a culture of discrimination that applied equally to them as to other class members. Accordingly, Appellants' claims are typical of the class's claims.

## IV. Adequacy

The District Court erroneously found that including supervisors and subordinates in the same class created an insurmountable intra-class conflict that precludes a finding of adequacy. *See* ER508-509. Appellants' interests in this case are not in conflict with the interests of the class. They "were not themselves discriminating" but merely "neutrally appl[ying] a flawed rating system" that produced "a discriminatory result." *In re Johnson*, 760 F.3d 66, 74 (D.C. Cir. 2014) (finding no conflicting interests in a class of employees that included supervisors who participated in the allegedly discriminatory evaluation process). Appellants, who were both also subject to the same flawed practices, share the

class's interest in remedying the Calibration Process and addressing the resulting gender pay gap and promotion shortfall.

## STANDARD OF REVIEW

The Court "review[s] a district court's order on class certification for an abuse of discretion." *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). However, because "[a]n error of law is a per se abuse of discretion," the Court "first review[s] a class certification determination for legal error under a de novo standard . . . ." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018).

A district court applying the correct legal standard abuses its discretion if "it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors." *Id*. (internal quotation marks omitted). A district court's findings of fact are reviewed under the clearly erroneous standard and are reversible if "they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record." *Id.* (internal quotation marks omitted).

## ARGUMENT

### I. Microsoft's Pay and Promotion Criteria Support a Finding of Commonality Under *Dukes* Despite Evidence of Manager Discretion.

The District Court misapprehended *Dukes* when it found, notwithstanding that "all putative class members are subject to the 'same, uniform compensation

and promotion process,'" ER486, that the existence of manager discretion precluded a finding of commonality. ER487-488.

### A. Manager Discretion Does Not Preclude Commonality Under *Dukes*.

The Calibration Process is the type of "employment practice" that the U.S. Supreme Court has long held may give rise to a disparate impact claim: it was mandated and designed by Microsoft, used throughout the company, and explains to a statistically significant degree when controlling for all relevant factors the disparities in how men and women were paid and the rates at which they were promoted. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987-88 (1988) ("[F]acially neutral employment practices that have significant adverse effects on protected groups have been held to violate [Title VII] without proof that the employer adopted those practices with a discriminatory intent.") (emphasis in original); *Dukes*, 564 U.S. at 355-56 (plaintiffs must identify "a common mode of exercising discretion that pervades the entire company" in order to establish commonality).

That managers retain discretion to apply the common criteria does not preclude Appellants from challenging the Calibration Process under a disparate impact framework on a class-wide basis. In *Watson*, the Supreme Court noted that its prior decisions recognizing the validity of disparate impact claims "could

largely be nullified if disparate impact analysis were applied only to standardized selection practices" that left no room for discretion:

> However 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. Thus, for example, if the employer in *Griggs* had consistently preferred applicants who had a high school diploma and who passed the company's general aptitude test, its selection system could nonetheless have been considered "subjective" if it also included brief interviews with the candidates. So long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge. If we announced a rule that allowed employers so easily to insulate themselves from liability under *Griggs*, disparate impact analysis might effectively be abolished.

487 U.S. at 989-90. Thus, the Supreme Court held in *Watson* "that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests." *Id.* at 990.

*Dukes* specifically affirmed *Watson*'s holding, while concluding that the plaintiffs in that case had failed to identify specific employment practices responsible for gender disparities. 564 U.S. at 355-56. In *Dukes*, "[t]he only corporate policy that the plaintiffs' evidence convincingly establishe[d] [wa]s Wal–Mart's 'policy' of *allowing discretion* by local supervisors over employment matters[,] . . . just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices." *Id.* at 355.

Here, by contrast, Appellants challenge Microsoft's specific pay-setting and promotion decision-making practices. *See supra* Statement of the Case, § I(A). Under this Calibration Process, managers set pay and make promotion decisions, pursuant to required and specified criteria. *See id.* Microsoft also requires managers to pay peer employees within their Stock Level regardless of how their performance compares to peers outside of their Stock Level against whom they are compared in the Calibration Process. *See id.* § I(A)(1).

The District Court's determination that these practices cannot support class certification because managers retain discretion to apply them misinterprets *Dukes* and would result in the outcome that the Supreme Court sought to avoid in *Watson—i.e.*, that an employer could avoid a disparate impact challenge brought by a class of employees by designing its employment policies to permit discretion in their application.

### B. A Common Policy Requiring the Application of Subjective and Objective Criteria May Satisfy Rule 23 Commonality Requirements.

This Court should hold that a plaintiff can satisfy her burden to establish commonality by identifying a corporate-wide policy or practice that guides lower-level employees' discretion, regardless of whether the guidance is objective or subjective. Such a standard is consistent with *Dukes*' "common mode" requirement, 564 U.S. at 356, and with *Watson*'s admonition that disparate impact

analysis is "no less applicable to subjective employment criteria than to objective or standardized tests," 487 U.S. at 990. In addition, it would ensure that plaintiffs bringing such claims are not held to a higher certification standard than plaintiffs who similarly challenge a uniform policy or practice under other laws. For example, in an Eighth Amendment case challenging the inadequate provision of medical care to prison inmates, this Court approved the certification of a class of 33,000 inmates and rejected the defendant's argument that the plaintiffs challenged "little more than an aggregation of many claims of individual mistreatment" rather than a uniform policy or practice. *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014); *see also Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 911 (10th Cir. 2018) (affirming grant of class certification for class of 50,000 immigrant detainees claiming that GEO Group subjected detainees to forced labor by means of the use or threat of serious harm or physical restraint under the Trafficking Victims Protection Act).

This standard is also consistent with the decisions of other Circuits holding that plaintiffs may establish commonality in a disparate impact case where, as here, they challenge a company-wide policy even though employees retain discretion in carrying it out. In *McReynolds*, the plaintiffs challenged two company policies: (1) allowing brokers to form teams to share clients (using whatever criteria the brokers chose) that allegedly disparately impacted African American brokers; and

(2) requiring local managers to consider brokers' "past success" (which could be impacted by teaming) in re-assigning departing brokers' accounts. 672 F.3d at 488-89. Although Merrill did not require teaming, left discretion to individual brokers to make teams, and gave managers discretion to adopt additional criteria for re-assigning accounts, the teaming and "past success" policies nevertheless "influenced" the exercise of discretion. *Id.* at 489. The Seventh Circuit rejected Merrill's argument that "any discrimination here would result from local, highly-individualized implementation of policies rather than the policies themselves." *Id.* at 490.

The Fourth Circuit followed this approach in *Brown v. Nucor Corp.*, where the plaintiffs asserted that Nucor's "bid on open promotions" policy disparately impacted African American employees. 785 F.3d at 916. "For purposes of class certification, . . . such a policy, paired with the exercise of discretion by supervisors acting within it," was sufficient to establish commonality, because the process may have "created or exacerbated racially disparate results." *Id.*; *see also Scott*, 733 F.3d at 110 ("*Wal-Mart* did not set out a per se rule against class certification where subjective decision-making or discretion is alleged. Rather, where subjective discretion is involved, *Wal–Mart* directs courts to examine

whether 'all managers [ ] exercise discretion in a common way with [ ] some common direction.'") (quoting *Dukes*, 564 U.S. at 356).[15]

### C. Microsoft's Common Policies Firmly Guide Managers' Discretion.

#### 1. Appellants' Critique of the Calibration Process Presents a Class-wide Merits Issue that Supports Commonality.

The District Court failed to credit the class-wide critique of Appellants' expert, Dr. Ryan, an organizational psychologist, who opined that Microsoft's company-wide criteria, which constrain and guide managers' discretion in pay and promotion decision-making, are not sufficiently job-related. ER749; *see* ER483, 488, 490-491. Dr. Ryan specifically stated that Microsoft developed a common competency model, but then failed to tie criteria for compensation and promotion decisions to the model. ER753-755. Dr. Ryan also opined that the Calibration Process suffers from the class-wide

[15] Courts that find a lack of commonality typically do so because, unlike here, there was little evidence of a company-wide policy guiding employment decision-making. *See, e.g.*, *Bennett v. Nucor Corp.*, 656 F.3d 802, 815-16 (8th Cir. 2011) ("strong evidence that employment practices varied significantly from department to department"); *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896 (7th Cir. 2012) (company "has a few policies, . . . but for most [] subjects the superintendents are in charge"); *Tabor v. Hill*, 703 F.3d 1206, 1224, 1229 (10th Cir. 2013) (challenged promotion policy not "maintain[ed] . . . in any uniform matter" where managers free to ignore minimal promotion criteria); *Davis v. Cintas Corp.*, 717 F.3d 476, 487-89 (6th Cir. 2013) (in hiring discrimination context, commonality not established where plaintiffs characterized policy as highly subjective and hiring decisions were made locally "depend[ing] on widely differing circumstances at each facility").

defect of failing to ensure that employees are evaluated based on common competencies. ER749, 755-756.

Similarly, in *McReynolds*, the teaming practice lacked "objective criteria" for selecting teams but the existence of the practice itself—a decision made by top management—was sufficient to establish commonality for a practice covering 15,000 financial advisors in 600 branch offices within 135 complexes (or "stand alone business[es]"). 672 F.3d at 489; *McReynolds v. Lynch*, No. 05 Civ. 6583, 2010 WL 3184179, at *1 (N.D. Aug. 9, 2010). Likewise, in *Chen-Oster v. Goldman Sachs & Co.*, 325 F.R.D. 55 (S.D.N.Y. 2018), following *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001), the plaintiffs established commonality because all class members were subjected to the performance review and tap-on-the-shoulder process informing pay and promotions. *Id.* at 72-76. The court concluded that the defendants' argument rejecting commonality "because the challenged processes 'contained general criteria' that 'individual managers applied . . . in highly individualized ways' . . . stretch[ed] *Dukes* far beyond its meaning." *Id.* at 73.

This Court should affirm that the consistent application of uniform standards used to decide pay and promotion outcomes that are unvalidated or insufficiently job-related constitute an employment practice subject to challenge under a disparate impact theory and support a finding of

commonality under *Dukes*. Such standards "direct[]" the exercise of manager discretion, as *Dukes* requires, 564 U.S. at 356, and constitute the "glue" that the plaintiffs' theory in *Dukes* lacked, *id.* at 352. A class proceeding is well-suited to address the types of deficiencies that Appellants have identified and thereby remedy an issue that affects the class as a whole.

2. Requiring Peer Employees to Be Paid Within Their Stock Level Is a Uniform Policy that Supports Commonality.

Whether Microsoft's uniform policy of requiring managers to pay peer employees based on their Stock Level, rather than their performance relative to peers, disparately impacted women is a common question. *See* ER483-484; *Scott*, 733 F.3d at 110, 116-17 (whether company's "mandatory salary range" locks in gender disparities supported commonality); *see also Parra*, 536 F.3d at 979 (reversing denial of certification in case challenging use of pay ranges associated with adverse impact). That Stock Level is "determined by promotions," ER484 n.12, militates in favor of commonality—not against it—because it demonstrates how the pay and promotions processes are interconnected and how one potentially exacerbates the disparities caused by the other. *See McReynolds*, 672 F.3d at 489-90.

### 3. Microsoft's Use of Uniform Criteria for All Promotion Decisions Supports Commonality.

Unlike in *Dukes*, where store managers had complete discretion to make promotion decisions once candidates met minimum qualifications, *see* 564 U.S. at 343, 371, Microsoft requires managers to: (1) discuss candidates in the Calibration Process; (2) assess candidates based on three common criteria—business need, employee readiness or performance, and budget; and (3) submit promotion recommendations through the entire chain of supervisions and up to top management for approval. ER399-401.

That managers have flexibility in justifying their promotion recommendations, *see* ER401,[16] does not negate their obligation to apply common criteria or transform this case into *Dukes*. *See McReynolds*, 672 F.3d at 488 (reversing class certification denial in a disparate impact challenge where managers retained "a measure of discretion" but "the exercise of that discretion is influenced by the two company-wide policies at issue"); *see also Chen-Oster*, 325 F.R.D. at 73 ("[A] common mode [of exercising discretion] need not strip managers of all flexibility in compensation and promotion decisions . . . . because, if 'common mode' were so defined, it would divest lower-level managers of *all* discretion, and,

[16] The declaration on which the District Court relied simply states that managers have discretion to choose what to write in the form justifying their promotion recommendation—not that they can deviate from Microsoft's prescribed criteria. *See* ER739.

as a result, would render the phrase 'common mode of exercising discretion' oxymoronic.").

Here, as in *Chen-Oster*, there is a required process for generating, assessing, and justifying promotion decisions, which is precisely the common mode of exercising discretion that supports commonality. *See* 325 F.R.D. at 74 (describing the fact that "all promotions . . . were awarded through the [promotion] cross-ruffing process" as a "critical fact[] distinguish[ing] the instant case from *Dukes*"); *see also Brown*, 785 F.3d at 916 (holding that the district court abused its discretion by denying class certification to a group of workers who "provided sufficient evidence that [a promotion] policy, paired with the exercise of discretion by supervisors acting within it, created or exacerbated racially disparate results"); *Ellis II*, 285 F.R.D. at 518 (rejecting Costco's claim that commonality was negated because the "challenged practices allow for a certain degree of discretion among managers in making promotion decisions").

4. The Review and Approval of All Pay and Promotion Decisions by a Small Group of EVPs Supports Commonality.

The District Court also incorrectly found commonality lacking despite evidence that four EVPs reviewed and approved "all pay and promotion decisions," because it found that EVPs rarely change employees' ratings.[17] ER489.

[17] Microsoft's own declarations describe how the recommendations at issue have been changed by senior management. ER198.

This sets too high a standard. In *Dukes*, there was *no* evidence of senior management involvement in decision-making under the challenged process. 564 U.S. at 343. Here, top management review and approve or reject personnel decisions, and design the process that managers follow.[18] ER130-131 (describing prior process for compensation and promotion decisions, and how Microsoft "redesigned its . . . approach").

### D. The Size and Concentration of the Class Distinguish It from *Dukes*.

#### 1. This Case Is a Small Fraction of the Size of *Dukes* and Is Geographically Centered in Microsoft's Headquarters.

*Dukes* addressed "one of the most expansive class actions ever"—1.5 million women in 3,400 stores across 50 states. *Ellis II*, 285 F.R.D. at 507 (quoting *Dukes*, 564 U.S. at 342). By contrast, this class is a small fraction of that—approximately 8,600 women, with 90 percent working in one state, 72 percent working in one location, and 98 percent reporting to the same four EVPs. *See* ER514, 520-521.

[18] Although there may have been greater hands-on involvement by the CEO in *Ellis II*, such involvement there may have been necessary to establish commonality because of the absence of a formal promotions policy. *See* 285 F.R.D. at 498. Here, Microsoft's top management created and oversaw a formal pay and promotion system with uniform criteria. Direct involvement in decision-making by senior management is less critical. *See McReynolds*, 672 F.3d at 489.

Nonetheless, comparing the class size and scope of this case to somewhat smaller certified classes in Title VII cases,[19] the District Court concluded that the size and scope here weighed against a finding of commonality.[20] ER495. The District Court's sliding scale approach is not only inconsistent with Rule 23 and Supreme Court precedent, it would set a higher, possibly insurmountable bar for employees of large employers, including national companies or government entities, to challenge widespread discriminatory policies and practices, and would undermine Title VII's equal employment goals. Even if such an approach were appropriate, which it is not, the size and concentration of the class in this case place it far from *Dukes*. In fact, the proposed class here is 174 times smaller than the size of the *Dukes* class.

[19] The District Court cited the 700-member class in *Ellis II*, 285 F.R.D. at 509, and the 2,000-member class in *Chen-Oster*, 325 F.R.D. at 63. ER485.

[20] The District Court asserted that out of 8,600 class members there are "thousands" of "unique positions" in the class. ER499. That is a vast overstatement. All class members worked in two Professions, defined by Microsoft as "people doing similar work," ER277:2-12; ER1059, and frequently moved between these Professions. ER525-526. The "unique positions" to which the District Court pointed are projects or products class members worked on during the class period—not discrete jobs. *See* ER395; ER716, ER722 (Standard Titles define roles, though within each Title employees work on different products).

2. Class Size and Geography Are Not Independently Significant Indicators of Commonality Under Rule 23.

Rule 23 does not support the District Court's presumption against certification of classes that are relatively large in number or geographic scope. Rule 23(a)(1)'s numerosity requirement suggests a preference in favor of larger—not smaller—classes. *See* Fed. R. Civ. P. 23(a)(1) (requiring the class to be "so numerous that joinder of all members is impracticable").

Moreover, because "Rule 23 provides a one-size-fits-all formula," district courts are not free to impose "additional requirements" for certain types of cases beyond Rule 23's express criteria. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399, 401 (2010); *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend [Rule 23] outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'" (quoting 28 U.S.C. § 2072(b))). The District Court's "additional requirement" in the form of a presumptively higher burden under Rule 23(a)(2) for plaintiffs seeking to certify a supposedly large or geographically-dispersed class should be rejected.

3. *Dukes* Does Not Support the Imposition of a Heightened Standard Based on Class Size or Geography.

*Dukes* did not establish a numerical or geographic cap on class size, nor did it create a sliding scale pursuant to which commonality necessarily becomes harder

to satisfy as the class expands. The Supreme Court merely held that, under the highly unusual facts of *Dukes* (involving "literally millions of employment decisions"), it would be "quite unbelievable that all managers would exercise their discretion in a common way without some common direction." 564 U.S. at 343, 352-57; *see also id.* at 360 (commonality not satisfied where class members "have little in common but their sex and this lawsuit") (internal quotation marks omitted). The plaintiffs failed to establish commonality in *Dukes*, not because their class was too numerically large or geographically dispersed, but because they provided "no convincing proof" of any "companywide discriminatory" policy across such an extraordinarily expansive class that guided or constrained the exercise of discretion. *Id.* at 359. Appellants here provided exactly that proof.

4. Courts Routinely Certify Materially Larger Classes Challenging Facially Neutral Policies.

This Circuit and others have consistently endorsed the certification of classes that are much larger or more dispersed than the class in this case. *See, e.g.*, *Staton*, 327 F.3d at 953 (affirming class certification of "some 15,000 employees, from a wide range of positions both salaried and hourly, who [we]re employed at Boeing facilities located in 27 different states" in an employment discrimination case); *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258, 263-68 & nn.1-2 (D. Colo. 2017) (certifying class of more than 50,000 immigrant detainees as to whether

defendant coerced class members to work under threat of solitary confinement), *aff'd*, 882 F.3d 905 (10th Cir. 2018).

Although a class size of approximately 8,600 would not be considered large in virtually any other context, it is worth noting that the bias against more substantial class sizes purely due to their size would undermine the efficiency of class litigation. Larger classes allow plaintiffs to pool more resources, impact greater numbers of victims, and eliminate the drain that courts and litigants would bear if the claims were disaggregated. *See generally* 1 William B. Rubenstein, Newberg on Class Actions §§ 1:7-10 (5th ed. 2018) (hereinafter "Newberg"); *see also Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 964 (9th Cir. 2013) ("A principal purpose behind Rule 23 class actions is to promote efficient and economy of litigation" (quoting *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009))). These benefits are furthered, not hindered, when challenges to nationwide policies are litigated in one case on behalf of all affected class members.

Moreover, under the District Court's reasoning, large government employers and corporations with a national presence could be immunized against classwide discrimination challenges due to an artificially heightened Rule 23 standard simply because their policies could harm *more* individuals. Yet class litigation is often the only means by which plaintiffs can effectively challenge such powerful

adversaries. *See Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 863 (9th Cir. 2016) ("Class actions are used to 'vindicate[e] [sic] . . . the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'") (quoting *Amchem Prods.*, 521 U.S. at 617); *Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 973 (4th Cir. 1981) (Murnaghan, J., dissenting) ("Without the backing of a comprehensive class, individual plaintiffs or their lawyers will find it difficult to muster the resources and incentives sufficient to tackle industrial giants . . . . We will observe classic applications of the strategy of divide and conquer."). This is particularly important in the employment context, where plaintiffs put their reputations, careers, and workplace relationships at risk when they complain of discrimination, perhaps especially so at large employers with a global reach.[21]

Finally, further heightening the standards for Title VII class actions could threaten the positive effects on workplace conduct that these cases promote. Class actions "generate important spillover effects—what economists call 'positive externalities'" that "make the enforcement of law more efficient," for example, by creating norms that influence potential defendants' behavior. Newberg § 1:9

[21] *See* Lilia M. Cortina & Vick J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. Occupational Health Psychol. 247, 255 (2003) (substantial majority of employees who spoke out against workplace mistreatment faced either professional or social retaliation).

(citing William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. Rev. 709 (2006)). Title VII class actions—especially those against larger employers with a nationwide impact—help to clarify appropriate workplace behavior, set new norms, and deter unlawful conduct by other employers. *See* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 414-27 (2008) (examining factors that contribute to success of consent decrees in large employment discrimination class actions); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 690-705, 724 (2003) (Title VII class actions "hold[] the capacity to trigger change in the organizational structures, cultures, and taken-for-granted institutionalized practices that continue to engender unequal treatment in the workplace").

Title VII cases challenging a common defect, as this one does, should not face arbitrary hurdles that much larger cases in other contexts do not.

## II. The District Court Applied the Wrong Legal Standards to Appellants' Disparate Treatment Claim.

The District Court erred in failing to certify Appellants' disparate treatment claim (that Microsoft has a gender-biased culture and knew of gender disparities but failed to remedy them) by: 1) conflating the legal standards for disparate impact and treatment, 2) requiring manager-level disaggregation to evaluate Appellants' statistical evidence, 3) adopting an arbitrary quantitative standard to

evaluate their anecdotal evidence, 4) considering the evidence in isolation rather than all together, and 5) resolving merits issues in Microsoft's favor instead of recognizing that their class-wide nature supported certification.

### A. Disparate Treatment Claims Do Not Require Plaintiffs to Identify a Facially Neutral Employment Practice Causing a Disparate Impact.

The District Court erred by conflating the legal standards for disparate treatment and disparate impact claims. Though the District Court recited the correct standard in its opinion—stating that "[u]nlike disparate impact claims, disparate treatment claims do not require plaintiffs to identify a specific company-wide employment practice responsible for the discrimination," and this "burden may be met through statistics alone"—the Court then erred by requiring exactly that showing. ER494, 496. In so doing, the District Court failed to assign any weight to Appellants' statistical evidence of gender disparities in pay and promotions "[b]ecause Plaintiffs have not identified the existence of common pay and promotion practices that apply to the class as a whole." ER495 n.19. The law is clear that plaintiffs are not required to make such a showing for a disparate treatment claim, and therefore the Court erred in denying class certification on this basis. *See Teamsters*, 431 U.S. at 336 n.16; *Brown*, 785 F.3d at 915 ("Unlike a disparate impact claim, a showing of disparate treatment does not require the

identification of a specific employment policy responsible for the discrimination.").

### B. Appellants' Robust Statistical Evidence Shows a Clear Pattern of Discrimination at the Correct Level of Analysis.

Appellants' statistical expert, Dr. Farber, concluded that women in the proposed class were statistically significantly underpaid and underpromoted relative to men at Microsoft. After first crediting this analysis in the Court's denial of Microsoft's *Daubert* motion,[22] the District Court reversed course and rejected Appellants' statistical expert because he did not analyze the pay and promotion disparities at the lowest possible level, for each employee's immediate supervisor.[23] ER496-497. But Microsoft does not implement pay and promotion policies at the level of individual supervisors. Moreover, neither at this stage nor at the liability phase are plaintiffs required to show with statistical evidence that *all* managers discriminated; instead, plaintiffs' burden is to show *a pattern* of discriminatory treatment. *Ellis II*, 285 F.R.D. at 518. The District Court

[22] In denying Microsoft's *Daubert* motion, the District Court found that "even if Microsoft is correct that the effects of the Calibration Process vary across decision-maker, that variety does not render an aggregate statistical analysis wholly irrelevant." ER18.

[23] The District Court also inexplicably faulted Dr. Farber for not opining on how Microsoft's *policies* cause this gender disparity. ER497 n.21. As noted above, Plaintiffs need not identify a specific policy causing this disparity to establish their disparate treatment claim. In addition, Dr. Farber's analyses of pay and promotion *outcomes* are sufficient to provide an inference of a prima facie case of discrimination. *Teamsters*, 431 U.S. at 340-42.

fundamentally misunderstood the role and meaning of statistical evidence in a Title VII case by requiring manager-level disaggregation of data. *See Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) ("[I]t is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data. . . .The plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies."); *see also Ellis II*, 285 F.R.D. at 522 ("The Court finds there is good reason to rely on nationwide statistics. Not only do the larger aggregate numbers allow for a robust analysis and yield more reliable and more meaningful statistical results, Costco's own promotion practices support a nationwide statistical analysis."). Appellants' class-wide statistical evidence is sufficient to raise an inference of discrimination experienced across the proposed class, supporting certification of Appellants' disparate treatment claim.

### C. The District Court Incorrectly Considered Each Type of Appellants' Proof of Discrimination in Isolation.

When considering the remainder of Appellants' disparate treatment evidence, the District Court focused only on whether any of Appellants' "proffered categories of evidence"—in *isolation*—"constitute[d] the necessary 'significant proof,'" ER495, instead of considering the evidence together and in conjunction with the statistical evidence. *See, e.g.*, *Teamsters*, 431 U.S. at 339 (statistical

evidence comes "to life" when considered in conjunction with other forms of evidence, such as personal anecdotes); *Brown*, 785 F.3d at 914 ("[T]he workers' statistical and anecdotal evidence [including internal complaints], especially when combined, thus provide precisely the 'glue' of commonality that *Wal-Mart* demands."); *see also N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) ("Any individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context.").

Here, the type and quantity of evidence that Appellants presented at certification—statistical proof, class member declarations, formal complaints of sex discrimination, informal complaints of company-wide bias, internal and external audits revealing gender disparities, and senior-management awareness of gender equity problems—has regularly been found sufficient to support class certification of a disparate treatment claim. *See Ellis II*, 285 F.R.D. at 510-31; *Chen-Oster*, 325 F.R.D. at 76-77; *Brown*, 785 F.3d at 914; *Beck v. Boeing*, 203 F.R.D. 459, 464 (W.D. Wash. 2001), *vacated in part on other grounds*, 60 F. App'x 38 (9th Cir. 2003).

Appellants do not simply challenge the weight that the District Court assigned to any particular evidence. Rather, they challenge the District Court's use

of arbitrary or incorrect standards to analyze Appellants' evidence and its failure to consider some of the evidence entirely.

1. The Combined Weight of Hundreds of Discrimination Complaints and Class Member Declarations Support Certification.

*a. Formal internal complaints*

The District Court applied an erroneous quantitative standard to evaluate Appellants' non-statistical evidence, causing it to disregard 238 internal complaints of gender discrimination and harassment that Appellants submitted to support their disparate treatment claim. The Court refused to consider the complaints because there was "no evidence regarding whether that number is unusual for a company like Microsoft with hundreds of thousands of employees." ER501. However, the Court's suggestion that Microsoft's workplace problems could only be probative if Microsoft were shown to have had *more* issues than other companies is wrong under the law and is particularly troublesome given that the employer in question operates within an industry with well-known gender under-representation.[24]

[24] *See, e.g.*, Rani Molla, *How Facebook compares to other tech companies in diversity*, Recode (Apr. 11, 2018), https://www.recode.net/2018/4/11/17225574/facebook-tech-diversity-women; Daisuke Wakabayashi, *At Google, Employee-Led Effort Finds Men Are Paid More Than Women*, N.Y. Times (Sept. 8, 2017), https://www.nytimes.com/2017/09/08/technology/google-salaries-gender-disparity.html.

Moreover, notwithstanding that the Court was mistaken about the population from which the complaints in this case were produced,[25] there is no basis for disregarding complaint evidence based on the sheer ratio of complaints to the population of employees covered. For example, a company with multiple reported sexual assaults by senior leaders who went undisciplined could be highly probative of a company culture. Here, the District Court's focus on the percentage of workforce complaints and how they compared to other companies' numerical statistics wholly ignored the substance of the complaints and the purpose for which they were offered—to show "the company's knowledge of the complaints and its failure to act,"[26] and that "the company was on notice of a major problem happening, sufficient that hundreds of women that are working in career professional jobs come forward." ER57:6-17.

*b. Declarations*

The District Court additionally used an arbitrary quantitative test to evaluate Appellants' 11 declarations, deciding that "on the numbers alone, Appellants'

[25] The District Court implies that the 238 complaints represent all complaints from Microsoft's entire workforce. This is incorrect. Plaintiffs submitted only gender discrimination and harassment complaints from 2010 to 2016 from women in U.S.-based technical professional jobs at Microsoft, a small subset of Microsoft's workforce. ER813-820.

[26] Among other failures to act, Microsoft's Human Resources personnel only deemed one complaint to be "founded" out of the 119 complaints that professional technical women filed alleging gender discrimination alone (and not in combination with another type of harm). ER813-820.

anecdotal evidence is 'too weak.'" ER497-498. Without analysis or support, it concluded that the declarations, which spanned the job titles and Stock Levels in the class and spoke uniformly about the challenged policies, the company-wide culture, and central HR complaint system,[27] were numerically insufficient, comparing them to the 120 store-level declarations found insufficient as evidence of discrimination for the 3,400-store, 1.5 million-person class in *Dukes*. ER497-499.

The District Court erected a nearly insurmountable numerical requirement, suggesting that the ratio of anecdotal evidence in *Teamsters*, or "1 for every 8 class members," was the number necessary to support certification. ER497-498. The District Court also suggested that there must be declarations from every state in which Microsoft operates. ER498 ("only 5 of the 41 states").[28] While the Court did not actually articulate the quantity of declarations it would have deemed sufficient, its arbitrary and impossibly high numerical requirement, based on the ratio in *Teamsters*, would seemingly have required approximately 1,075 declarations here, essentially turning Rule 23 on its head and requiring individual opt-ins (albeit in the absence of any notice and opt in process), and from

[27] *See supra* note 7.

[28] The Court's demand that Appellants submit a declaration from every state ignores that 72% of class members work at Microsoft's Redmond headquarters, and 90% of class members worked in Washington State. ER514.

professionals who in all likelihood could be risking their careers within an insular industry to come forward and attach their names to public litigation.

That result was implicitly rejected by the Supreme Court in *Dukes*, which noted that it was "not quite accurate" to state that the number of anecdotal accounts must be "proportionate to the size of the class," but simply that in a case with 1.5 million putative class members, a "few anecdotes" were insufficient. 564 U.S. at 358 n.9. Courts regularly find that declarations can support class certification, based on their substance and whether they offer "examples" of the harms faced by putative class members as a result of a defendant's policies. *See Parsons*, 754 F.3d at 672 (affirming grant of class certification for class of 33,000 incarcerated individuals supported by 14 declarations, or 1 for every 2,357 class members); *Menocal*, 882 F.3d at 911 (affirming grant of class certification for class of 50,000 immigrant detainees where court considered 8 declarations, or 1 for every 6,250 class members); *Chen-Oster*, 325 F.R.D. at 77 (certifying class of over 2,300 women challenging pay and promotion policies where plaintiffs submitted 8 declarations).

Moreover, by arbitrarily focusing "on the numbers alone" for these declarations, the District Court failed to heed the Supreme Court's instruction that such evidence is meant to "bolster" plaintiffs' statistical evidence and bring "the cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339. Appellants'

declarations highlight how women experienced Microsoft's culture of discrimination and corroborate Appellants' other anecdotal evidence. *See, e.g.*, ER244 (male manager lowered female employee's performance rating for Calibration Process because she and the team of women she managed did not smile enough and were "not fun"); ER250 (female manager would not advocate assertively for her female reports during Calibration Process because she felt she would be perceived as too aggressive). This Court has noted that such evidence supports class certification. *See Parsons*, 754 F.3d at 672 ("[P]laintiffs submitted these declarations as evidence of the defendants' unlawful policies and practices, and as examples of the serious harm to which all inmates in ADC custody are allegedly exposed."). These declarations, together with Appellants' other evidence, illustrate a biased work culture and demonstrate that Appellants' disparate treatment claims are capable of class-wide resolution.

*c. Additional anecdotal evidence*

The District Court also erroneously swept aside other evidence of Microsoft's biased culture: critiques of Microsoft's efforts to address gender equity issues made by female employees in a Microsoft Poll Survey; discrimination lawsuits and charges filed against Microsoft with governmental agencies; Microsoft's pattern of repeatedly finding that internal complaints of discrimination lack merit; and internal, high-level communications regarding persistent bias and

systemic problems for women. *See supra* Statement of the Case §§ I(B), (C). The District Court dismissed this evidence as merely "a glimpse into individual incidents" or certain "employees' belief regarding the pay equity issue" that "fall short of illustrating a common corporate culture." ER500. This impossibly high standard is inconsistent with Title VII jurisprudence and should be rejected. *See Chen-Oster*, 325 F.R.D. at 77 (finding plaintiffs "provided 'significant proof' on their disparate treatment claims" with "internal complaints, survey answers, emails, articles, business records, and declarations"); *see also Parsons*, 754 F.3d at 668-69 (commonality demonstrated with additional evidence including letters and e-mails describing prison conditions, informal complaints, and survey results). Reaching this decision also reaches an inappropriate merits question.

2. Proof that Microsoft Knew of Gender Disparities Is Common Evidence that Supports Certification.

The District Court ignored Appellants' evidence that Microsoft's leadership was aware of gender-based pay disparities and failed to remedy them—the heart of Appellants' disparate treatment claim.

Appellants' evidence included reaction emails from employees and supervisors explaining why Microsoft's two announcements that it had achieved pay equity were wrong, the findings by the [redacted]

[redacted],[29] where 72% of class members worked, emails from Microsoft's senior leadership regarding "window dressing" in its diversity efforts,[30] and the internal complaints themselves.[31]

Such class-wide evidence is capable of demonstrating at a class trial that Microsoft's leadership knew of the disparities, believed that a company-wide response was required, and failed to take corrective action. *See Williams v. Boeing Co.*, 225 F.R.D. 626, 636 (W.D. Wash. 2005) (internal audits showing senior Boeing executives knew of disparate impact was evidence of intentional discrimination); *Chen-Oster*, 325 F.R.D. at 77 ("Plaintiffs provide documents demonstrating that Goldman Sachs recognized the bias of its processes, . . . , that women at Goldman Sachs suffered professionally because of the firm's policies and processes, . . . , and that Goldman Sachs did not adequately apply corrective measures . . . . Plaintiffs have, therefore, provided 'significant proof' of discriminatory disparate treatment.").

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[29] ER853 (Notice of Violations); ER1030 (Amended Notice of Violations).

[30] ER976 [redacted]; ER886 [redacted]; ER958 [redacted]; ER943 [redacted] ER876 [redacted].

[31] *See* ER1066-1074 (citing robust evidence); *see also* ER813-820.

The District Court appeared to misunderstand or ignore Appellants' disparate treatment theory. In its Order, the Court dismissed this knowledge evidence as "culture evidence," divorced from the purpose for which it was offered. ER499-502. Moreover, to the extent that it considered the evidence at all, the District Court inappropriately resolved the disputed merits issue—whether Microsoft intentionally discriminated against class members—in Microsoft's favor. ER500 & n.24; *see Ellis II*, 285 F.R.D. at 501 ("[B]ased on Plaintiffs' evidence that Costco itself regarded evidence of gender disparities in the company as a company-wide issue, Costco's treatment of gender disparities . . . as a company-wide issue establishes a common question of fact.") (internal quotation marks omitted). Such a merits finding is not permissible at the class certification stage. Instead, such a finding must be made after a trial—and in the context of disparate treatment—by a jury. *See* 42 U.S.C. § 1981a(c). Moreover, in making this finding, the District Court abused its discretion by largely ignoring the common evidence discussed above that supported Appellants' merits argument.

## III. The Named Plaintiffs' Claims Are Typical of the Class's Claims.

The District Court erred in finding that the named Plaintiffs' claims are not typical of the class's claims. As the Court correctly noted, "[w]here the challenged conduct is a policy or practice that affects all class members, the underlying issue presented with respect to typicality is similar to that presented with respect to

commonality." ER503 (quoting *Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001)). Here, the named Plaintiffs submitted evidence that they, like all class members, were subject to the Calibration Process and Microsoft's discriminatory corporate culture, and that, as a result, they experienced injuries similar to class members—lower pay, fewer promotions, and gender bias. *See* ER421-429 (finding "ample evidence in the record" from which a jury could determine that Plaintiffs suffered adverse employment actions with respect to pay and promotions as compared to similarly situated men); ER253 (describing being passed over for promotions in favor of less qualified men, a culture where "women who shared their ideas were ignored" and "more likely to be called into question than men's," and "male colleagues excluded women from important discussions and business opportunities"); ER250 (describing how men advance more rapidly than women, and women "receive negative criticism for being too aggressive" when speaking up and are encouraged to be "cheerleader[s]") .

The District Court's typicality analysis suffers from the same errors as its commonality analysis. In essence, it failed to recognize the policies that Appellants challenge as the type of employment practices that are actionable under Title VII because they allow a measure of discretion in their application. Notwithstanding that Appellants challenge policies that applied to them and to every class member—not the fact that the policies allow discretion, as in *Dukes*—

the District Court erroneously concluded that the named Plaintiffs failed to establish that their claims were typical of the class's claims.

## IV. Low-Level Managers Who Neither Create Nor Control Discriminatory Policies Are Adequate to Represent Themselves and Others Subject to Such Policies.

The District Court erroneously found that including supervisors and subordinates in the same class created an insurmountable intra-class conflict that precluded a finding of adequacy. *See* ER508-509. This Court has previously declined to "adopt any per se rule concerning adequacy of representation where the class includes employees at different levels of an employment hierarchy." *Staton*, 327 F.3d at 958-59 (upholding class certification decision in part on basis that supervisors and subordinates sought the same relief). The District Court's adoption of such a rule in this case should be rejected.

The named Plaintiffs' interests in this case are not in conflict with the interests of the class they seek to represent. *See Amchem Prods.*, 521 U.S. at 626 (adequacy requires the named plaintiff to "possess the same interest and suffer the same injury" as class members). They share the class's interest in remedying the flawed pay and promotion practices to which they too were subject, and obtaining monetary relief to address the resulting compensation disparities and promotion shortfalls. *See* ER642.

As the D.C. Circuit explained, "[i]f class members neutrally applied a flawed rating system and thereby reached a discriminatory result, then they were not themselves discriminating and therefore have no apparent interest that is in conflict" with the interests of other class members. *In re Johnson*, 760 F.3d at 74 (finding no conflicting interests in a class of employees that included supervisors who participated in the allegedly discriminatory evaluation process); *see also Staton*, 327 F.3d. at 959 (finding no conflicting interests in a class of employees at different levels in the hierarchy where there was a general policy of discrimination).

*Donaldson v. Microsoft Corporation*, on which the District Court relied, is distinguishable. 205 F.R.D. 558, 568 (W.D. Wash. 2001). The plaintiffs there challenged the "unfettered discretion vested in Microsoft's management," *id.* at 566, not specific employment practices developed and mandated by top management. Thus, the fact that some class members themselves exercised the challenged discretion led to a conflict. Class members in this case are subject to the same "uniform policy" and "both supervisors and subordinates . . . have been affected similarly." *Pena v. Taylor Farms Pac., Inc.*, 305 F.R.D. 197, 215 (E.D. Cal. 2015). The District Court's decision here creates a death knell in a Title VII case where any members of the proposed class have some role in following policies they neither created nor control.

Finally, even if an intra-class conflict existed, the District Court should have created subclasses to protect subclass interests, or even excluded Class Members who participated in the Calibration Process, as Appellants suggested,[32] rather than deny class certification. *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) ("district courts have broad discretion to modify class definitions"); *Johnson v. Meriter Health Servs. Employee Ret. Plan*, 702 F.3d 364, 368 (7th Cir. 2012) ("The fact that a class is overbroad and should be divided into subclasses is not in itself a reason for refusing to certify the case as a class action.").

## CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court vacate the District Court's order denying class certification and remand the case for the District Court to evaluate class certification under the correct legal standards.

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|---|---|
| Dated: January 30, 2019 | Respectfully submitted, |
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[32] *See* ER642; ER107:15-23.

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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