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UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW JERSEY AND NEW  
JERSEY CIVIL SERVICE  
COMMISSION,

Defendants.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

Civil Action No.  
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

**PLAINTIFF UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF THE  
PARTIES' JOINT MOTION FOR PROVISIONAL ENTRY OF CONSENT DECREE  
AND SCHEDULING OF FAIRNESS HEARING**

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**PLAINTIFF UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF THE  
PARTIES' JOINT MOTION FOR PROVISIONAL ENTRY OF CONSENT DECREE  
AND SCHEDULING OF FAIRNESS HEARING**

**I. INTRODUCTION**

Plaintiff United States of America (“United States”) submits this memorandum in support of the parties’ joint Motion for Provisional Entry of Consent Decree and Scheduling of Fairness Hearing (“Motion”). The parties’ joint Motion requests the Court to provisionally enter a proposed settlement agreement as a Consent Decree (the “Decree”), which is attached as Exhibit 1, and schedule an initial fairness hearing. The initial fairness hearing will allow the Court to consider any objections to the terms of the Decree prior to final approval and entry.<sup>1</sup>

As set forth below, the Court should provisionally enter the Decree because its terms are lawful, fair, reasonable, adequate, and consistent with the public interest. These terms include: (1) ensuring that the employment practices used by New Jersey to promote candidates to the position of police sergeant do not violate Title VII of the Civil Rights Act of 1964 , as amended (“Title VII”), 42 U.S.C. § 2000e *et seq.*, on the basis of race and/or national origin; (2) establishing a new, lawful selection procedure that ensures promotions to police sergeant are based upon merit and do not unnecessarily exclude qualified African-American and Hispanic candidates; and (3) providing appropriate individual relief in the form of back pay and/or priority promotions to qualified persons who were denied promotion to police sergeant because of the employment practices challenged by the United States in this case.

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<sup>1</sup> After all objections are received as to the terms of the Decree, the parties will file another brief addressing those objections and requesting final approval and entry of the Decree.

## II. PROCEDURAL BACKGROUND

On January 7, 2010, pursuant to Section 707 of Title VII, 42 U.S.C. § 2000e-6, the United States commenced this action against New Jersey to enforce Title VII. The United States' complaint alleges that the State has engaged in a pattern or practice of race and/or national origin discrimination based upon its use of a written exam for promotion to police sergeant. Specifically, the United States alleges that, since 2000, the State's (1) pass/fail use of the police sergeant written exam and (2) certification of police sergeant candidates in descending rank-order based on a combination of candidates' written exam scores and seniority credits have resulted in an unlawful disparate impact upon African-American and Hispanic candidates for promotion to the rank of police sergeant in local jurisdictions participating in New Jersey's civil service system.<sup>2</sup>

The United States and New Jersey (collectively, the "parties") have engaged in a significant amount of discovery. In addition to information provided by the State during the United States' two-year pre-suit investigation,<sup>3</sup> the State produced voluminous information relating to the issues of disparate impact, job-relatedness, and validity during discovery. The parties exchanged reports from their respective experts on disparate impact; the State produced its expert report on job-relatedness and validity; the United States engaged an expert in industrial

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<sup>2</sup> The United States' complaint in this action does not include any allegation of intentional discrimination under Title VII and is not based upon any individual charges or complaints of discrimination.

<sup>3</sup> By letter dated May 22, 2008, the United States notified the State that it would be investigating whether the State had engaged in a pattern or practice of discrimination against African-American and Hispanics based on its use of a written exam for promotion to police sergeant. The United States then conducted a two-year investigation involving document review, data analysis, and consultation with experts.



organizational psychology to analyze job-relatedness and validity; and the parties conducted depositions related to disparate impact, job-relatedness, and validity.

As a result of extensive settlement discussions, the United States and the State have negotiated and executed the attached Decree, which is the subject of this memorandum. *See* Exhibit 1.

### **III. FACTUAL BACKGROUND**

For purposes of seeking provisional and final entry of the Decree, the United States makes the following factual assertions.

#### **A. Disparate Impact**

Since at least 2000, the process used by New Jersey to screen and select candidates for promotion to police sergeant in local jurisdictions that participate in the civil service system has included a written exam. *See* Declaration of Dr. Bernard R. Siskin, Ph.D. (“Siskin Decl.”), attached as Exhibit 2, at ¶ 2. From 2000 to 2009 inclusive, at least 182 counties and municipalities in the State participated in the civil service system with respect to screening and selecting candidates for the position of police sergeant. *Id.* Candidates who meet the minimum qualifications set by the State, and who achieve a passing score on the exam, are placed in descending rank order on eligible lists based on final scores. *Id.* Final scores are a combination of written exam scores, which are weighted 80 percent, and seniority credits, which are weighted 20 percent. *Id.*

Between 2000 and 2009 inclusive, the State administered the exam on a yearly basis to approximately 6,392 white candidates, 1,343 African-American candidates, and 1,363 Hispanic candidates. *Id.* According to the United States’ expert, Dr. Bernard R. Siskin, Ph.D., from 2000 through 2009 inclusive, African-American and Hispanic candidates passed the police sergeant

exam at a statistically significant lower rate than white candidates. *Id.* ¶¶ 5-6. Dr. Siskin concluded that the disparity in pass rates between African-American and white candidates from 2000 to 2009 equates to 17.33 units of standard deviation. *Id.* ¶ 5. Dr. Siskin also concluded that the disparity in pass rates between Hispanic and white candidates from 2000 to 2009 equates to 12.88 units of standard deviation. *Id.* ¶ 6.

According to Dr. Siskin, from 2000 to 2008 inclusive, the State's determination and use of final scores to certify candidates in descending rank order has resulted in a statistically significant disparate impact upon African Americans and Hispanics. *Id.* ¶¶ 7-8. Dr. Siskin concluded that from 2000 to 2008, African Americans and Hispanics who passed the police sergeant exam received statistically significant lower ranks on eligible lists than whites. *Id.* The likelihood that an African-American candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equates to 7.77 units of standard deviation, and the likelihood that a Hispanic candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equates to 4.66 units of standard deviation. *Id.*

Based upon Dr. Siskin's analysis, absent the disparate impact resulting from the pass/fail and rank-order use of the police sergeant written exam, an estimated 75 African Americans and 30 Hispanics would have been promoted to the rank of police sergeant in 43 jurisdictions throughout New Jersey. *Id.* ¶ 10.

#### **B. Job-Relatedness**

According to the United States' expert, Dr. David P. Jones, Ph.D., the State's use of the police sergeant written exam on a pass/fail basis and the State's determination and use of final scores to certify candidates from eligible lists in descending rank order have not been demonstrated, using professionally accepted validation standards, to be job-related or consistent

with business necessity. *See* Declaration of Dr. David P. Jones, Ph.D. (“Jones Decl.”), attached as Exhibit 3, at ¶¶ 6-11. First, Dr. Jones found that the police sergeant written exam is not based upon a job analysis that meets professionally accepted standards. *Id.* ¶ 6. In its 1996 job analysis for police sergeant, upon which New Jersey relied when developing the written exams challenged here, the State did not conduct any review of data it received from questionnaires completed by incumbents regarding the content of the police sergeant position. *Id.* ¶ 6(a)-(b). Nor did the analysis evaluate whether the incumbents who completed the job analysis questionnaires used to develop the police sergeant written exam were actually representative of the then-incumbent police sergeants in local jurisdictions. *Id.* ¶ 6(b). The job analysis also did not include any reliability measurement or analysis regarding the degree of agreement among incumbents’ ratings as to which knowledges, skills, and abilities (“KSAs”) were required in order to perform each task effectively. *Id.* ¶ 6(c). In addition, many of KSAs identified in the job analysis could not be tested, as they were either too general or too vague. *Id.* ¶ 6(d). Other KSAs were simply duplicative. *Id.*

Second, Dr. Jones concluded that the State is unable to establish that it used reasonable competence in developing the police sergeant written exam. *Id.* ¶ 7. The decision of the State to pursue a written exam resulted in the elimination of important KSAs because they were considered “not testable.” *Id.* ¶ 7(b). The State, therefore, limited the coverage of the police sergeant written exam to those KSAs that could be tested by such an exam. *Id.* Furthermore, the State did not develop adequate test plans, which would have indicated exactly which KSAs and tasks were to be tested and how many questions would test each KSA or task. *Id.* ¶ 7(c). Failure to devise such a test plan means that the State did not demonstrate that the written exam is representative of the full range of tasks and KSAs that incumbents deemed important. *Id.*

Third and fourth, Dr. Jones concluded that the State cannot demonstrate that the content of the police sergeant written exam is either related to or representative of the content of the police sergeant position. *Id.* ¶ 8. On the issue of relatedness, the State has proffered no evidence indicating that the exam questions measure what they were purportedly intended to measure. *Id.* ¶ 8(c). The State engaged subject matter experts (“SMEs”) to link exam questions with the tasks and KSAs that the questions intended to test. *Id.* ¶ 8(a)-(b). The State did not, however, collect empirical data about the extent to which various SMEs linked each exam question to a specific duty of entry-level police sergeants or to any KSA that entry-level police sergeants must possess to perform their jobs. *Id.* ¶ 8(b). On the issue of representativeness, the State cannot establish that the content of the police sergeant written exam is representative of the job, and indeed, materials the State has provided demonstrate the contrary. *Id.* For example, of the 66 critical abilities identified through the State’s 1996 job analysis, more than half are abilities that cannot be effectively measured on a written exam. *Id.* ¶ 8(f). Furthermore, in only one year did the State identify the specific work component and the particular KSA or task each question was intended to measure. *Id.* ¶ 8(e). As an example of the test content not being representative of the job, the State failed to include questions measuring 14 of the 27 tasks related to the “supervise patrol” component that, according to the job analysis, the exam was supposed to test. *Id.*

Finally, according to Dr. Jones, the State’s pass/fail use and rank-order use do not distinguish meaningfully among those candidates who can better perform the job of police sergeant. *Id.* ¶ 9. There are several professionally recognized methods for selecting an appropriate cutoff score in the context of promotion exams. *Id.* ¶ 9(a). These methods assist in distinguishing among candidates who can better perform the job at issue. *Id.* The State did not, however, use any of these methods. *Id.* Instead, the State selected the cutoff score based on

whether the results of the police sergeant written exam could avoid group-based disparate impact as defined by the 80% Rule.<sup>4</sup> See Hill 30(b)(6) Dep., p. 241:15-21, attached as Exhibit 4.

Nonetheless, as detailed above, the State did not eliminate the *statistically significant* disparate impact of the exam. In addition, Dr. Jones concluded that the State has provided no evidence to support rank-order use of the police sergeant written exam. Jones Decl., at ¶ 9(d). The ratings from incumbents in the 1996 job analysis questionnaire on whether possessing differing levels of KSAs correspond to differing levels of performance on the job are insufficient to support rank-order use.<sup>5</sup> *Id.*

#### **IV. OVERVIEW OF THE CONSENT DECREE**

##### **A. Injunctive Relief**

Under the Decree's terms, the State, in consultation with the United States, will develop and administer a new lawful procedure for selecting qualified candidates for promotion to the position of police sergeant in local jurisdictions. Decree, at ¶¶ 15, 77. The State will also cease using current eligible lists as part of its police sergeant selection procedure in ten local jurisdictions, where continued use of such lists may create an additional "shortfall" of African Americans or Hispanics who would have been promoted but for the disparate impact of the challenged exam. *Id.* ¶ 16.<sup>6</sup>

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<sup>4</sup> The 80% Rule is a guideline for assessing the practical impact of an employment practice alleged to have a statistically significant disparate impact on a protected group.

<sup>5</sup> The United States also contends that alternative selection devices exist to select candidates for supervisory, public safety positions that would have served the State's legitimate needs and that have been demonstrated to have less adverse impact. Since the parties are proceeding under the theory that the challenged employment practices are not job related and consistent with business necessity, it is unnecessary to set forth these alternatives.

<sup>6</sup> Dr. Siskin concluded that continued use of eligible lists in the ten local jurisdictions identified in Attachment D to the Decree will likely result in the creation of an additional appointment

## **B. Individual Relief**

The State will also provide, where appropriate, individual relief in the form of back pay and/or priority promotions to qualified persons who, because of the employment practices at issue, were denied promotion to the rank of police sergeant. *Id.* ¶¶ 31, 60, 76.<sup>7</sup> Relief will be granted only to those individuals determined to be actual victims of practices challenged by the United States.

### 1. Individuals Potentially Eligible For Relief

An individual may be eligible for relief under the Decree if he or she is African-American or Hispanic, sought promotion in one of the 43 local jurisdictions identified in Attachment A to the Decree, was never promoted, and either (i) between 2000 and 2009, failed a police sergeant written exam given by the State that resulted in an eligible list from which appointments were made or (ii) passed the exam between 2000 and 2008 given by the State but ranked below the lowest ranking candidate appointed from any eligible list.<sup>8</sup> *Id.* ¶ 3. The Decree defines those eligible for relief as “Claimants.” *Id.*

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shortfalls. Siskin Decl., at ¶¶ 11-13. The appointment shortfall is the expected number of African Americans or Hispanics who would have been promoted to police sergeant but for the State’s uses of the challenged exam. *Id.* In all remaining jurisdictions with active eligible lists, Dr. Siskin concluded that continued use was unlikely to create additional shortfalls. *Id.*

<sup>7</sup> The amount of back pay (\$1,000,000.00) and the number of priority promotions (68) negotiated by the parties do not exceed what would be make-whole relief to victims of discrimination. Siskin Decl., at ¶¶ 10, 14-19, 25.

<sup>8</sup> The 43 local jurisdictions from where individuals may be eligible for relief were selected because the United States’ expert concluded that one or more promotions of African-Americans and/or Hispanics would have been made in those jurisdictions in the absence of the disparate impact resulting from New Jersey’s pass/fail and rank-order use of the police sergeant written exam. Siskin Decl., at ¶ 10.

## 2. Back Pay

Under the terms of the Decree, the State will pay \$1,000,000.00 in back pay, which will be divided into two settlement funds. Decree, at ¶ 28. The first settlement fund will be used to make back pay awards to African-American Claimants, and the second settlement fund will be used to make back pay awards to Hispanic Claimants. *Id.* ¶ 29. Claimants who are eligible for back pay will receive awards that do not exceed the amount of money they would have received had they been promoted based upon the challenged exam that they took. *See* Siskin Decl., at ¶ 23.

## 3. Priority Promotions

The Decree obligates New Jersey to ensure that 68 priority promotions are made to 48 African-American and 20 Hispanics Claimants from 13 local jurisdictions identified in Attachment K to the Decree. Decree, at ¶ 61.<sup>9</sup> Importantly, the Decree does not require the State to appoint anyone who is not qualified to be a police sergeant. All Claimants who receive priority promotions must first pass the new, lawful selection procedure developed by the State under the Decree. *Id.* ¶ 62. Upon passing the exam, any Claimant who earns a priority promotion will be entitled to limited retroactive seniority as of his/her “presumptive appointment

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<sup>9</sup> The selection of the 13 jurisdictions to which the State will certify Claimants for priority promotions, and the number of priority promotions in those jurisdictions, was based upon Dr. Siskin’s conclusion that three or more promotions of African-Americans and/or Hispanics would have been made in each of those 13 jurisdictions absent the disparate impact resulting from New Jersey’s pass/fail and rank-order use of the police sergeant written exam. Siskin Decl., at ¶ 10.

date” for purposes of receiving seniority credits for future promotional opportunities, if applicable.<sup>10</sup> *Id.* ¶ 76.

### **C. Fairness Hearings, Objections, And Individual Relief Claims Process**

#### **1. Initial Fairness Hearing**

Pursuant to the terms of the Decree, the United States moves the Court to schedule two fairness hearings. *Id.* ¶¶ 19, 43. At the first hearing (the “Initial Fairness Hearing”), the Court will determine whether the terms of the Decree are lawful, fair, reasonable, adequate, and consistent with the public interest. *Id.* ¶ 19. Prior to the Initial Fairness Hearing, individuals whose interests may be affected by the Decree (including all known potential Claimants, the appointing authority in each local jurisdiction participating in New Jersey’s civil service system, each union or association recognized as being authorized to represent police sergeants in each such local jurisdiction, and police sergeants in the local jurisdictions that participate in the State’s civil service system) will be given notice of the Decree and an opportunity to file objections. Decree, at ¶¶ 21-23. At the Initial Fairness Hearing, the Court will consider and resolve any objections received. Assuming the Court concludes at the end of the Initial Fairness Hearing that the Decree is lawful, fair, reasonable, adequate, and consistent with the public interest, the parties will ask the Court to enter the Decree as a final Order. *Id.* ¶ 27.

#### **2. Individual Relief Claims Process And Fairness Hearing On Individual Relief**

Contained in the Decree is a process, to occur after the Court has finally entered the Decree, for persons who believe that they are entitled to individual relief to submit interest in relief forms to the United States. *Id.* ¶ 34. The United States will make individual relief

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<sup>10</sup> The “presumptive appointment date” is the estimated date when the Claimant would have been promoted but for the challenged exam that adversely affected the Claimant. *Id.* ¶ 9.



determinations for all Claimants after considering any timely raised objections by New Jersey. *Id.* ¶¶ 37-41. Furthermore, the Decree provides for a second fairness hearing (the “Fairness Hearing on Individual Relief”) for the Court to approve or modify the individual relief determinations made by the United States, as well to review any timely made objections. *Id.* ¶ 49.

#### **D. Continuing Jurisdiction And Duration Of The Decree**

Per the terms of the Decree, the Court will retain jurisdiction over this matter for the duration of the Decree. Decree, at ¶ 93. The Decree will expire, and the case will be dismissed without further order of the Court, on the latest of the following occurrences: (i) three years from the date the Decree is entered; (ii) complete fulfillment of the parties’ obligations regarding the individual relief to be awarded under the Decree; or (iii) the State’s administration of the second police sergeant exam, as contemplated by the Decree, and after the expiration of time allotted by the Decree for either the United States to make recommendations regarding the content or manner of use of the police sergeant exam or for a hearing on any objections. *Id.* ¶ 89.

### **V. ARGUMENT**

#### **A. Standard Of Review**

“Courts have long recognized that cooperation and voluntary compliance are the preferred means of achieving Title VII’s goals of ensuring equal employment opportunities and eliminating discriminatory practices.” *United States v. New Jersey*, Nos. CIV 88-5087 WGB, CIV 88-4080(MTB), CIV. 87-2331(HAA), 1995 WL 1943013, at \*10 (D.N.J. March 14, 1995) (“*U.S. v. NJ*”) (citations omitted); *see also Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (“In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.”); *Alexander v. Gardner-Denver Co.*, 415 U.S.

36, 44 (1974) (identifying Title VII’s conciliation provisions as evidence that Congress wanted Title VII compliance to be voluntary). Congress placed an “extremely high premium...on voluntary settlements of Title VII suits.” *United States v. City of Miami*, 614 F.2d 1322, 1331 (5th Cir. 1980), *modified per curiam*, 664 F.2d 435 (5th Cir. 1981). “Accordingly, a district court should have a deferential attitude towards agreements reached by consent in Title VII suits.” *U.S. v. NJ*, 1995 WL 1943013, at \*10 (citation omitted).

A court may properly enter a consent decree if “the ‘settlement is fair, adequate and reasonable.’” *Id.* (citation omitted). Moreover, in a Title VII action, a consent decree that has been negotiated by the parties to the suit is presumptively valid. *Id.* at \*11. Significantly, the presumption of validity can be “‘overcome only if the decree contains provisions which are unreasonable, illegal, unconstitutional, or against public policy.’” *Id.* (citations omitted).

When assessing whether a proposed consent decree is fair, adequate, and reasonable, the Third Circuit considers many factors, the relative importance and applicability of which depend upon the nature of the claims at issue, type of relief sought, and particular facts involved. *Id.* at \*11-12 (citation omitted). Those factors may include:

- (1) the complexity, expense and likely duration of the litigation...;
- (2) the reaction of the class to the settlement...;
- (3) the stage of the proceedings and the amount of discovery completed...;
- (4) the risks of establishing liability...;
- (5) the risks of establishing damages...;
- (6) the risks of maintaining the class action through the trial...;
- (7) the ability of the defendants to withstand a greater judgment;
- (8) the range of reasonableness of the settlement fund in light of the best possible recovery...; [and]
- (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

*U.S. v. NJ*, 1995 WL 1943013, at \*11 (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)).

The above-enumerated factors may be properly distilled to one point, “the strength of plaintiff’s case on the merits balanced against the settlement offer.” *U.S. v. NJ*, 1995 WL

1943013, at \*12. Indeed, that “is generally regarded as the most important factor.” *Id.* When determining the strength of the plaintiff’s case, “the Court need only evaluate the probable outcome of the litigation and is not required to weigh and decide each contention; further, the probable result at trial must be balanced against the probable costs, in both time and money, of continued litigation.” *Id.* (citing *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 801 (3d Cir. 1974)).<sup>11</sup>

**B. The Consent Decree Is Lawful, Fair, Reasonable, Adequate, And Consistent With The Public Interest**

As noted above, when deciding whether to enter a consent decree, a court must consider the strength of the plaintiff’s case balanced against the settlement offer. *U.S. v. NJ*, 1995 WL 1943013, at \*12. This balancing test is necessary before a court can conclude that the decree is fair, reasonable, and adequate. *See id.* Here, the United States is well-positioned to prevail on the merits and, if victorious, could obtain the relief afforded by the Decree and more.

1. The United States Is Likely To Prevail At Trial

The United States filed suit pursuant to Section 707 of Title VII, 42 U.S.C. § 2000e-6, which authorizes the Attorney General to bring an action against a state or local government employer that has engaged in a pattern or practice of Title VII-proscribed discrimination. At issue here are the State’s practices from 2000 to 2009 inclusive of: (1) using a pass/fail police sergeant written exam and (2) certifying police sergeant candidates in descending rank-order based on a combination of candidates’ written exam scores and seniority credits. In its

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<sup>11</sup> In addition to balancing the factors set forth above, courts also consider whether there has been collusion in reaching the agreement, competent counsel’s opinion regarding the decree, and the governmental status of the parties. *U.S. v. NJ*, 1995 WL 1943013, at \*1. Here, because the United States is the plaintiff, these considerations all weight in favor of entry of the Decree.

Complaint, the United States alleges that New Jersey's use of the challenged practices has had an unlawful disparate impact upon African-American and Hispanic candidates.

The disparate impact theory requires the removal of "employment procedures or testing mechanisms that operate as 'built-in headwinds' for [protected] groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).<sup>12</sup> Employers may use written exams as a promotion selection tool without violating Title VII. *See id.* at 436 ("Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful."). However, if such a tool yields a disparate impact based on the race and/or national origin of promotional candidates, then Title VII prohibits its use, unless the employer proves that the test is "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Griggs*, 401 U.S. at 436. Furthermore, even if an employer can demonstrate validity, Title VII will not permit the employer to use the offending exam if there is an alternative employment practice with less disparate impact that will meet the employer's needs. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

a. The Employment Practices Challenged By The United States Resulted In A Disparate Impact Upon African-American And Hispanic Candidates

To establish a *prima facie* case of disparate impact under Title VII, the plaintiff must identify a specific employment practice and prove by a preponderance of the evidence that the practice has had a disparate impact upon a protected group. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986); *see also Newark Branch, NAACP v. City of Bayonne*, 134 F.3d 113, 121 (3d Cir. 1998). Generally, plaintiffs rely on statistical evidence to

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<sup>12</sup> This theory was first articulated in *Griggs*, 401 U.S. at 432, by the United States Supreme Court. Congress later codified the disparate impact theory of discrimination in the 1991 Civil Rights Act, which amended Title VII.

show disparate impact. *See Newark Branch, NAACP v. Town of Harrison*, 940 F.2d 792, 798 (3d Cir. 1991). Therefore, a plaintiff can demonstrate disparate impact by establishing that relevant statistical analysis reveals a significant disparity. *Id.* (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977)). Typically, statisticians, testing experts, and social scientists consider a disparity to be “statistically significant” if the probability of the disparity occurring randomly is 5% or less, which is equivalent to a difference of approximately 1.96 units of standard deviation. *See Stagi v. Nat’l R.R. Passenger Corp.*, 391 Fed. App’x 133, 137-38 (3d Cir. 2010) (stating general rule that difference greater than two or three units of standard deviation is sufficient to rule out the possibility that the disparity occurred at random).<sup>13</sup> As a result, courts typically accept, as sufficient to establish a *prima facie* case of disparate impact, disparities equivalent to more than two units of standard deviation. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977).

Based on information gathered and generated during both its pre-suit investigation and discovery, including the parties’ respective expert reports, the United States can demonstrate that the challenged employment practices at issue here – the use of a pass/fail exam as a barrier to promotion and the certification of police sergeant candidates in descending rank-order– have had a disparate impact upon African-American and Hispanic candidates for promotion to police sergeant.

First, African-American and Hispanic candidates were significantly less likely to pass the written exam at the cutoff scores used by the State. Analysis of test administration data from

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<sup>13</sup> *See also Waisome v. Port Auth.*, 948 F.2d 1370, 1376 (2d Cir. 1991) (“Social scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for a deviation could be random and the deviation must be accounted for by some factor other than chance.”) (citing *Ottaviani v. State Univ. of N.Y.*, 875 F.2d 365, 371 (2d Cir. 1989)).

2000 to 2009 inclusive indicates that the disparity between the respective pass rates of African-Americans and whites equates to 17.33 units of standard deviation, *see supra* Sec. III.A, which far exceeds the threshold of two to three units of standard deviation that courts usually deem sufficient to establish a *prima facie* case of disparate impact. Similarly, the differences between the respective written exam pass rates of Hispanics and whites during the 2000-2009 time period are statistically significant, with the disparity between the Hispanic pass rate and the white pass rate equal to 12.88 units of standard deviation.<sup>14</sup> *See supra* Sec. III.A.

Second, because African Americans and Hispanics, on average, scored lower on the police sergeant written exam than white candidates, those African Americans and Hispanics who passed the exam tended to receive lower final scores, which caused them to be ranked lower on eligible lists, which in turn made them less likely than whites to be certified and promoted. *Id.* Analysis of test administration data from 2000 to 2008 inclusive shows that African Americans were statistically significantly less likely to be ranked high enough to be considered for promotion than their white counterparts, equivalent to 7.77 units of standard deviation. *Id.* Similarly, for Hispanics, analysis of test administration data from 2000 to 2008 inclusive shows that Hispanics were statistically significantly less likely to be promoted than white candidates, equivalent to 4.66 units of standard deviation. *Id.*<sup>15</sup>

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<sup>14</sup> Analysis of test administration data by each year separately also indicates statistically significant disparities between the pass rates of African-American and white candidates from 2000 to 2009 and between the pass rates of Hispanic and white candidates from 2001 to 2009, that are sufficient to establish a *prima facie* case. Siskin Decl., at ¶¶ 5-6.

<sup>15</sup> Analysis of appointment data controlled by year also indicates statistically significant disparities in rank between African-American and white candidates from 2000 to 2009 and between Hispanic and white candidates from 2001 to 2008 inclusive, that are sufficient to establish a *prima facie* case. Siskin Decl., at ¶¶ 7-8.

In terms of real-world effects of these disparities, absent the State's pass/fail and rank order use of the police sergeant written exam, an estimated 75 African Americans and 30 Hispanics would have been promoted to police sergeant in 43 jurisdictions throughout New Jersey. *See supra* Sec. III.A. In sum, the United States would be able to satisfy its burden of establishing a *prima facie* case of disparate impact.

b. There Is Insufficient Evidence That The Challenged Practices Are Job-Related And Consistent With Business Necessity

Once the United States establishes a *prima facie* case, the State will be liable for violating Title VII unless it proves that the challenged practices are “job-related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see Vulcan Pioneers, Inc. v. N.J. Dep’t of Civil Serv.*, 625 F. Supp. 527, 545 (D.N.J. 1985) (“*Vulcan P*”); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (“[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be ‘predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job.’”) (quoting EEOC’s *Uniform Guidelines on Employee Selection Procedures* (“*Uniform Guidelines*”), 29 C.F.R. § 1607.4(C)); *El v. Se. Pa. Trans. Auth.*, 479 F.3d 232, 239 (3d Cir. 2007) (“[A] discriminatory employment test[] must ‘bear a demonstrable relationship to successful performance of the jobs for which it was used.’”) (citing *Griggs*, 401 U.S. at 431). Importantly, it is the State’s burden to prove validity; the United States does not carry the burden of demonstrating that the challenged employment practices lack validity. As discussed below, the materials the State produced to the United States during its pre-suit investigation and in connection with discovery, including a report from the State’s expert on job-relatedness, indicate that the State is unable to show that the police sergeant written exam is job-related (in other words, “valid”) or consistent with business necessity.

Of the three types of validity an employer may rely upon to satisfy its burden regarding the job-relatedness of a written promotional exam, New Jersey has asserted just one – content validity. *See generally Uniform Guidelines* 29 C.F.R. § 1607.14 (identifying three types of validation). “An examination has content validity if the content of the examination matches the content of the job.” *Vulcan Soc’y of New York City Fire Dep’t v. Civil Serv. Comm’n*, 360 F. Supp. 1265, 1274 (S.D.N.Y. 1973), *aff’d* 490 F.2d 387 (2d Cir. 1973); *see also Vulcan I*, 625 F. Supp. at 545-46 (content validity is established by demonstrating that the content of a test closely approximates the tasks performed on the job). To establish that an exam is content valid, an employer must prove, *inter alia*, that:

- (1) the test-makers must have conducted a suitable job analysis, ...
- (2) they must have used reasonable competence in constructing the test itself[,] ... (3) [] the content of the test must be related to the content of the job..., (4) the content of the test must be representative of the content of the job[,]... and the test must be used with (5) a scoring system that usefully selects from among the applicants those who can better perform the job.

*Id.* at 546 (citing *Guardians Ass’n of New York City Police Dep’t v. Civil Serv. Comm’n*, 630 F.2d 79, 91 (2d Cir. 1980)).

Based upon the above-enumerated factors, and as explained by the United States’ validity expert Dr. David P. Jones, Ph.D., the State cannot demonstrate that the police sergeant written exam is content valid. First, the State cannot show that its job analysis meets professionally accepted standards. *See supra* Sec. III.B. Second, the State is unable to establish that it used reasonable competence in developing the police sergeant written exam. *Id.* Third and fourth, the State cannot demonstrate that the content of the police sergeant written exam is either related to or representative of the content of the police sergeant position. *Id.* Finally, the State is unable to show that its two methods of use of the police sergeant written exam, the pass/fail use and rank-



order use, distinguish meaningfully among those candidates who can better perform the job of police sergeant.

Regarding the last point, an employer must establish, for instance, that the cutoff score used to make pass/fail decisions corresponds to “the minimum qualifications necessary for successful performance of the job in question.” *El*, 479 F.3d at 242. Pass scores should not be arbitrary; they should reflect the minimum performance necessary to successfully perform the job. *See id.*; *see also NAACP v. N. Hudson Reg’l Fire & Rescue*, 742 F. Supp. 2d 501, 522 (D.N.J. 2010) (stating that the job requirement must not be “an artificial, arbitrary, or unnecessary barrier”) (citing *Connecticut v. Teal*, 457 U.S. 440, 451 (1982)). There are several professionally recognized methods available for selecting an appropriate cutoff score in order to identify the more qualified candidates in a pool. The State did not use any of these methods. In fact, the State’s only criterion for selecting cutoff scores was its desire to avoid results that produced ethnic group-based disparate impact as defined by the 80% Rule. Thus, the State cannot contend that the cutoff score for the written exam bears any relationship to a candidate’s qualifications to perform the job of police sergeant.

Additionally, where, as here, the rank-order processing of candidates based on their exam scores results in disparate impact, to prove job-relatedness and business necessity, an employer must show that a candidate with a higher score would likely perform the job better than a candidate with a lower score. *See El*, 479 F.3d at 239 (stating that “test results must predict or correlate with ‘important elements of work behavior’”) (citing *Albemarle*, 422 U.S. at 431); *see also Ensley Branch of NAACP v. Seibels*, 616 F.2d 812, 822 (5th Cir. 1980); *Guardians*, 630 F.2d at 103; *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 171-72 (D. Mass. 2006). *See generally Uniform Guidelines*, 29 C.F.R. § 1607.5(G). The State has provided no evidence to

support the proposition that its rank-order use of the police sergeant written exam has that effect. The ratings from incumbents in the 1996 job analysis questionnaire on whether possessing differing levels of KSAs correspond to differing levels of performance on the job are insufficient to support rank-order use. *See supra* Sec. III.B. Thus, it is unknown to what extent increased possession of critical KSAs might result in better performance in the position of police sergeant.

## 2. The Relief Sought Is Appropriate

District courts have “not merely the power but the duty to render a decree that will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.” *Albemarle*, 422 U.S. at 418 (citation omitted).<sup>16</sup> Here, the relief provided in the Consent Decree is lawful, fair, adequate, and reasonable because: (i) the prospective injunctive relief ensures that the State will use a police sergeant selection procedure that complies with Title VII and does not unnecessarily exclude qualified African Americans and Hispanics from the position of police sergeant; (ii) it provides individual relief to African Americans and Hispanics who have actually been harmed by the challenged employment practices; and (iii) individuals whose interests may be affected by implementation of the Decree are afforded an opportunity to object and to have their objections resolved by this Court.

### a. The Prospective Injunctive Relief Should Be Awarded

When an employer has engaged in a pattern or practice of discrimination in violation of Title VII, an award of prospective injunctive relief is justified without any further showing. *See Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977). Courts also have routinely

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<sup>16</sup> *See Mardell v. Harlesville Life Ins. Co.*, 65 F.3d 1072, 1074 (3d Cir. 1995) (“One purpose of Title VII is ‘to make persons whole for injuries suffered on account of unlawful employment discrimination.’”) (citing *Albemarle*, 422 U.S. at 418); *United States v. New Jersey*, 658 F. Supp. 9, 12 (D.N.J. 1986), *aff’d sub nom. Vulcan Pioneers, Inc. v. N.J. Dep’t of Civil Serv.*, 832 F.2d 811 (3d Cir. 1987) (“*Vulcan IP*”); *see also U.S. v. NJ*, 1995 WL 1943013, at \*15.

entered consent decrees that afford prospective injunctive relief. *See, e.g., Vulcan II*, 832 F.2d at 816. Appropriate prospective injunctive relief may include a bar against future discrimination, an order to maintain records and generate compliance reports, or any other directive that is “necessary to ensure the full enjoyment of the rights” Title VII protects. *See Teamsters*, 431 U.S. at 361. Such relief may also include prohibiting the use of an unlawful exam or other invalid selection criteria, restricting the ability to promote from eligible lists shaped by unlawful selection practices, and ordering the adoption of new, lawful selection procedures. *See, e.g., Vulcan II*, 832 F.2d at 816 (affirming, in matter involving enforcement of consent decree, district court’s prohibitions on using discriminatory exams and making promotions from lists generated by unlawful exams).

Consistent with these parameters, the Decree in this case requires the State to develop a new, lawful procedure for screening and selecting candidates for promotion to the rank of police sergeant. *See supra* Sec. IV. The Decree also enjoins the State from using existing eligible lists for certifying candidates to the position of police sergeant – but only in ten jurisdictions where continued use of such lists may result in additional African-American and Hispanic victims. *Id.* Thus, the injunctive provisions of the Decree are lawful, fair, reasonable, and consistent with the public interest.

b. The Individual Relief Should Be Awarded

One of the central purposes of Title VII is to make whole persons who have been harmed by employment practices that violate the statute. In enacting Title VII, “Congress took care to arm the courts with full equitable powers” so that the courts may fashion relief for identifiable individuals harmed by unlawful employment practices. *Albemarle*, 422 U.S. at 418. To exercise those equitable powers, a court may “order such affirmative action as may be appropriate, which

may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.” *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g)); *see also Booker v. Taylor Milk Co.*, 64 F.3d 860, 864 (3d Cir. 1995) (indicating that Title VII authorizes back pay); *U.S. v. NJ*, 1995 WL 1943013, at \*20-22 (noting that circuit courts have repeatedly upheld lower court decisions granting seniority relief as a remedy in Title VII cases and that Title VII authorizes the creation of priority eligibility lists from which priority promotions will be made). In Title VII pattern or practice cases, “[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.” *Albemarle*, 422 U.S. at 418-19 (citation omitted).

Given the above, courts have routinely entered consent decrees that confer the kinds of individual relief included here. *See, e.g., U.S. v. NJ*, 1995 WL 1943013, at \*20-22 (finding as lawful consent decree that affords retroactive seniority and priority promotion relief). Under the Decree, the individual remedial relief provided – back pay, priority promotions, and retroactive seniority in the form of seniority credits for future promotions to those receiving priority promotions – is appropriate in light of the broad power afforded the courts to grant relief to individuals harmed by employment practices that violate Title VII. Importantly, individual remedial relief under the Decree is only available to those who were adversely affected by the practices the United States challenged – namely, African Americans and Hispanics who were never appointed as police sergeants and who (i) took and failed the police sergeant written exam or (ii) passed the exam but ranked too low to be selected for promotion. *See supra* Sec. IV.A.

In terms of back pay, the settlement fund of one million dollars (\$1,000,000.00) does not exceed the back pay amount the United States' expert calculated would be due to victims should the United States prevail on its claims. *See supra* Sec. IV n.4 and IV.B.2.

The Decree also is narrowly tailored with respect to priority promotions. Indeed, the number of priority promotions required by the Decree (68 in 13 jurisdictions) is lower than the estimated promotions that would have been made absent the unlawful impact of the challenged employment practices (105 in 43 jurisdictions). *Compare supra* Sec.III.A with Sec. IV.A.3. Further, making priority promotions in 13 jurisdictions will have no effect on the other approximately 169 local jurisdictions that participate in the State's civil service system. Finally, only Claimants who demonstrate that they are presently qualified for the position of police sergeant will be eligible for priority promotions. *See supra* Sec.IV.B.3.

The Decree also provides retroactive seniority credits for purposes of future promotional opportunities to Claimants who receive priority promotions.<sup>17</sup> *Id.* Awarding retroactive seniority is necessary to attempt, to the extent possible, to put qualified individuals – who, but for the challenged practices, would have been promoted earlier – in the positions they would have occupied in the absence of the alleged discrimination. Such retroactive seniority relief ordinarily is necessary to achieve Title VII's "make whole" objective. *See Franks*, 424 U.S. at 764-65; *U.S. v. NJ*, 1995 WL 1943013, at \*19. In fact, courts have found that there is a presumption in favor of affording such seniority relief when the parties reach a voluntary settlement. *See Franks*, 424 U.S. at 780, n.41; *see also Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980); *Bockman v. Lucky Stores, Inc.*, No. CIV S 83-039 RAR, 1986 WL 10821, at \*4 (E.D.Cal. Aug. 11, 1986), *aff'd*, 826 F.2d 1069 (9th Cir. 1987).

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<sup>17</sup> The retroactive seniority awarded under the Decree is limited to seniority points and does not satisfy any time-in-grade requirements.

- c. To Avoid Future Challenges To The Relief Awarded By The Court, The Decree Provides For Fairness Hearings Prior To Entry Of A Final Relief Order

To safeguard against later challenges, the Decree provides for two fairness hearings – an Initial Fairness Hearing and a Fairness Hearing on Individual Relief. Before the Initial Fairness Hearing, written notice of the Decree and the date of the Initial Fairness Hearing, as well as instructions for submitting objections, will be provided to persons whose interests may be affected, including labor organizations that represent police officers in New Jersey, incumbent police officers, and incumbent police sergeants. *See supra* Sec.IV.C.1. Notice will be made in several ways including (i) by mail; (ii) by way of conspicuous postings on the State’s websites; and (iii) in various newspapers that are readily accessible to potential claimants and other interested parties. At the Initial Fairness Hearing, the Court will determine, after considering timely filed objections, whether the terms of the Decree are lawful, fair, reasonable, and adequate.

Assuming the Decree is finally entered by the Court, a claims process will follow, after which Claimants will be given a second opportunity to object, this time to their awards of individual relief. During the second fairness hearing, the Court can evaluate whether the awards of individual relief are fair and equitable given the Claimant population and the total amount of relief available under the Decree. The Decree contemplates that the Court will, after considering timely filed objections, enter an order approving or modifying the proposed individual relief, as appropriate.

Importantly, the fairness hearings set forth in the Decree comport with 42 U.S.C. § 2000e-2(n)(1), which states, in relevant part that:

**(1)(A)** Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that

implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

**(B)** A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

**(i)** by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

**(I)** actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

**(II)** a reasonable opportunity to present objections to such judgment or order; or

**(ii)** by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

42 U.S.C. § 2000e-2(n)(1). Thus, the hearings will protect the Decree from collateral attack, including by alleviating any due process concerns, because interested parties will have notice of the Decree and an opportunity to object. *See generally Edwards v. City of Houston*, 78 F.3d 983, 991 (5th Cir. 1996) (“Section 2000e-2(n) protects consent judgments from certain subsequent collateral challenges by persons who, although not parties to the litigation that produced it, may have interests adversely affected by the judgment.”); *U.S. v. NJ*, 1995 WL 1943013, at \*23 (concluding that fairness hearing process consistent with 42 U.S.C. § 2000e-2(n)(1)(A) protected the procedural due process rights of all individuals potentially affected by the consent decree).

**C. The *Ricci v. DeStefano* Standard Is Easily Satisfied**

Although *Ricci v. DeStefano*, 557 U.S. \_\_\_, 129 S. Ct. 2658 (2009) is not directly applicable to situations where an employer and the United States enter into a consent decree, the *Ricci* standard is easily satisfied here. In *Ricci*, the Supreme Court held that “race-based” action taken to avoid Title VII disparate impact liability may violate Title VII’s prohibition against disparate treatment. *Ricci*, 129 S. Ct. at 2664. To avoid such an outcome, an employer must possess a “strong basis in evidence” to conclude that absent taking the race-based action, it would be liable for a Title VII disparate impact violation. *Id.*

In this case, the United States’ extensive pre-suit investigation and the discovery that occurred (which involved the parties exchanging various expert reports and taking several depositions), along with the declarations of the United States’ experts offered in support of this memorandum, demonstrate *a strong basis in evidence* to conclude: (1) there is a *prima facie* case of disparate impact discrimination, *see supra* Sec. III.A; and (2) the challenged exams and their use by the State are not job-related and consistent with business necessity, *see supra* Sec. III.B.<sup>18</sup> Thus, the *Ricci* standard is easily met here.<sup>19</sup>

## VI. CONCLUSION

For the above reasons, the United States respectfully requests that the Court enter the accompanying proposed Order, which provisionally approves and enters the proposed Consent Decree and sets the time, date, and location of an initial fairness hearing.

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<sup>18</sup> There is also a *strong basis in evidence* to find that alternative selection devices exist to select candidates for supervisory, public safety positions that would have served the State’s legitimate needs and that have been demonstrated to have less adverse impact. It is unnecessary to set forth this evidence, however, since the challenged exam lacks validity.

<sup>19</sup> There is also a *strong basis in evidence* to find both that recipients of individual relief are actual discrimination victims, *see supra* Sec.III, and that the Decree does not provide more than make-whole relief, *i.e.*, it is limited to the relief necessary to remedy the alleged discrimination, *See supra* Sec. IV.



Date: August 1, 2011

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# **EXHIBIT**

# **2**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
STATE OF NEW JERSEY AND NEW  
JERSEY CIVIL SERVICE  
COMMISSION,  
  
Defendants.

UNITED STATES COURT FOR THE  
DISTRICT OF NEW JERSEY

VICINAGE OF NEWARK

Civil Action No.  
2:10-cv-00091-KSH-MAS

Hon. Katharine S. Hayden

**FIRST AMENDED DECLARATION OF BERNARD R. SISKIN, PH.D.**

I, BERNARD R. SISKIN, declare the following:

1. I am the Director of BLDS, LLC, based in Philadelphia, Pennsylvania. I received my Ph.D. in Statistics with a minor in Econometrics from the Wharton School of the University of

Pennsylvania in 1970. I have authored four books on statistical methodology, three book chapters (including one in a book entitled *Employment Discrimination Litigation: Behavioral, Quantitative and Legal Perspectives*), four research monographs, and numerous papers, including articles on the role of statistics in the analysis of employment discrimination issues. Since receiving my Ph.D., I have specialized in the application of statistics to the analysis of employment practices. In this capacity, I have been retained by numerous governmental and private organizations, including, but not limited to, the Third Circuit Task Force on Race and Gender, the Equal Employment Opportunity Commission, the United States Department of Justice, the Office of Federal Contract Compliance Programs, the Federal Bureau of Investigation, and various states and municipalities as well as numerous Fortune 500 Companies and other private corporations. I have been retained by Plaintiff United States as an expert witness in the above-captioned action.

2. On a yearly basis, the State of New Jersey and the New Jersey Civil Service Commission (collectively, "New Jersey") administer the same written exam state wide to all police officers applying for promotion to the position of police sergeant in local jurisdictions participating in the promotional process that year. At least 182 counties and municipalities in New Jersey participated in the civil service system during the period of 2000 to 2009. Candidates for police sergeant who meet the minimum qualifications set by New Jersey, and who achieve a passing score on a written exam administered by New Jersey, are placed in descending rank order on eligible lists based on final scores. Final scores are a combination of written exam scores, which are weighted 80 percent, and seniority credits, which are weighted 20 percent. Between 2000 and 2009 inclusive, New Jersey administered the exam on a yearly basis to approximately 6,392 white candidates, 1,343 African-American candidates, and 1,363 Hispanic candidates.

**Disparate Impact**

3. With respect to disparate impact, I have been asked to provide my expert opinion as to (i) whether the use by New Jersey of a written exam for promotion to police sergeant on a pass/fail basis from 2000 to 2009 had a statistically significant disparate impact upon African-American or Hispanic candidates; (ii) whether New Jersey's determination and use of final scores to certify candidates from eligible lists in descending rank order from 2000 to 2009 for the position of police sergeant in local jurisdictions had a statistically significant disparate impact upon African-American or Hispanic candidates; and (iii) whether any statistically significant disparate impact also resulted in a practical effect upon the promotional opportunities of African-American or Hispanic candidates.

4. On a yearly basis, New Jersey administers the same written exam state wide to all police officers applying for promotion to the position of police sergeant in local jurisdictions participating in the promotional process that year. New Jersey sets the same pass score state wide each year for all of the local jurisdictions participating in the promotional process that year. Accordingly, it is my opinion that it is appropriate to aggregate data from all test takers across jurisdictions, controlling for factors such as year and jurisdiction when appropriate, in analyzing whether New Jersey's uses of the police sergeant written exam result in a statistically significant disparate impact upon African-American and Hispanic candidates.

5. New Jersey's pass/fail use of the written exam from 2000 to 2009 resulted in a statistically significant disparate impact upon African-American candidates for the position of police sergeant. Analysis of test administration data from 2000 to 2009 as a whole indicates that the written exam resulted in a statistically significant disparity between the pass rate of African-American candidates and the pass rate of white candidates, equal to 17.33 units of standard

deviation. Analysis of test administration data for each year separately from 2000 to 2009 indicates that the written exam resulted in a statistically significant disparity between the pass rate of African-American candidates and the pass rate of white candidates in each individual year, ranging from a low (but highly statistically significant) disparity of 4.09 units of standard deviation in 2003 to a high of 9.62 units of standard deviation in 2002.

6. New Jersey's pass/fail use of the written exam from 2000 to 2009 resulted in a statistically significant disparate impact upon Hispanic candidates for the position of police sergeant. Analysis of test administration data from 2000 to 2009 as a whole indicates that the written exam resulted in a statistically significant disparity between the pass rate of Hispanic candidates and the pass rate of white candidates, equal to 12.88 units of standard deviation. Analysis of test administration data for each year separately from 2000 to 2009 indicates that the written exam resulted in a statistically significant disparity between the pass rate of Hispanic candidates and the pass rate of white candidates in each individual year since 2001, ranging from a low (but highly statistically significant) disparity of 3.03 units of standard deviation in 2003 to a high of 9.24 units of standard deviation in 2002.

7. New Jersey's determination and use of final scores to certify candidates from eligible lists in descending rank order from 2000 to 2008 resulted in a statistically significant disparate impact upon African-American candidates. African Americans who passed the police sergeant written exam administered from 2000 to 2008 were ranked statistically significantly lower on eligible lists than whites. Analysis of all eligible lists from 2000 to 2008 as a whole indicates a statistically significant disparity in the likelihood that an African-American candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equal to 7.77 units of standard deviation. Analysis of appointment data controlled by year also indicates

statistically significant disparities in rank between African Americans and white candidates from 2000 to 2008.<sup>1</sup>

8. New Jersey's determination and use of final scores to certify candidates from eligible lists in descending rank order from 2000 to 2008 resulted in a statistically significant disparate impact upon Hispanic candidates. Hispanics who passed the police sergeant written exam administered from 2000 to 2008 were ranked statistically significantly lower on eligible lists than whites. Analysis of all eligible lists from 2000 to 2008 as a whole indicates a statistically significant disparity in the likelihood that a Hispanic candidate would be ranked high enough to be considered for appointment, as compared to a white candidate, equal to 4.66 units of standard deviation. Analysis of appointment data controlled by year also indicates statistically significant disparities in rank between Hispanic and white candidates from 2000 to 2008.

9. The disparate impact resulting from New Jersey's uses of its written exam for promotion to police sergeant from 2000 to 2009 resulted in a significant real-world effect on the promotional opportunities of African-American and Hispanic candidates.

10. Absent the disparate impact of New Jersey's police sergeant written exam from 2000 to 2009, at least one or more African Americans and/or Hispanics would have been promoted to the position of police sergeant in each of the 43 jurisdictions identified in Exhibit A, Table 1, with an estimated total of 75 African Americans and 30 Hispanics excluded from promotions state wide due to the disparate impact of the exam. If I limit my analysis to those jurisdictions where at least three or more African Americans and/or Hispanics were excluded from promotions in a particular jurisdiction due to the disparate impact of the exam from 2000 to 2009, a total of 48

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<sup>1</sup> Controlling the data by year is to account for any differences that may occur when analyzing the data across years; it is not the same as analyzing the data for each year separately.

African Americans and 20 Hispanics would have been promoted to the position of police sergeant in those 13 jurisdictions identified in Exhibit A, Table 2.

**Injunctive Relief**

11. I have also been asked to provide my expert opinion on whether continued use of existing eligible lists would create an additional appointment “shortfall” of African Americans or Hispanics. The appointment shortfall is the expected number of African Americans or Hispanics who would have been promoted to police sergeant but for the State’s uses of the challenged examination.

12. For each jurisdiction, I used the average appointment rate per year based on appointment data from 2000 until 2009 to estimate the number of expected new appointments in each jurisdiction that would occur for an additional one year cycle.<sup>2</sup> Then, considering the race and/or national origin and rank of those remaining on the eligible list, I estimated the additional number of promotions one would expect broken down by race and national origin. I then determined whether these expected appointments would result in an increase in the shortfall of African Americans or Hispanics.

13. Based on the average appointment rates outlined in paragraph 12, I concluded that continuing the use of the existing eligible lists for their current duration or for an additional year of appointments (where the list extends beyond one year) would result in a shortfall that would increase by at least one African-American or Hispanic candidate in those jurisdictions listed in Exhibit A, Table 3.

14. I can also look at actual appointments from these unexpired eligible lists, and calculate on an appointment by appointment basis, whether additional appointments will create or increase

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<sup>2</sup> I did not incorporate into my analysis any jurisdictions whose eligible list has expired.



an African-American or Hispanic shortfall. To do so, I would conduct a shortfall calculation for a jurisdiction to determine whether the additional appointment would change the number of promotions, broken down by race and national origin, that one would expect to see in that jurisdiction. For purposes of determining whether an additional appointment would create or increase an African-American or Hispanic shortfall, I would treat each request for certification as an actual appointment.

#### **Individual Relief**

15. With respect to individual relief, I have been asked to provide my expert opinion as to the back pay due to the 105 African-American and Hispanic candidates (“Candidates”) in the 43 jurisdictions listed in Exhibit A, Table 1 to this Declaration who were not promoted to police sergeant in specified years due to the disparate impact of the State’s written exam from 2000 through 2009.

16. Using salary information reported by State agencies and publicly available through [www.app.com](http://www.app.com), I estimated back pay due to the Candidates, based on the jurisdiction and year in which the Candidate would have been promoted but for the disparate impact of the exam.

17. In calculating back pay, I assumed that losses began accruing either when the Candidate failed the exam or in May 2006, whichever was later, and stopped accruing in April 2011.

18. In calculating back pay, I compared salary data for individuals who participated in the challenged police sergeant selection process in the 43 jurisdictions listed in Exhibit A, Table 1, but who were not promoted, with salary data for police sergeants serving in those jurisdictions.

19. For each of the Candidates, I calculated the salary differential between the salaries earned by individuals who participated in the challenged police sergeant selection process but who were not promoted, and police sergeants in the jurisdiction to which that Candidate was assigned,

factoring in an annual salary increase of 5% for 2006, 2007, and 2008 and a 4% increase for both 2010 and 2011 (based on information provided by the State), plus interest.<sup>3</sup> Back pay was calculated for each Candidate by year using these salary differentials and then summed to create a total back pay calculation for each Candidate and for each jurisdiction as well as a total back pay calculation for all 105 Candidates.

20. Based on my comparison of the salary differentials between individuals who participated in the challenged police sergeant selection process, but who were not promoted, with police sergeants in the 43 jurisdictions listed in Exhibit A, Table 1, I determined that back pay, including interest, due to 105 African-American and Hispanic Candidates in those jurisdictions from May 2006 to April 2011 exceeded \$1,000,000.

21. I have also been asked to provide my expert opinion on how to distribute \$1,000,000 in back pay to any African-American or Hispanic person from those 43 jurisdictions identified in Exhibit A, Table 1 who has not been promoted to police sergeant and who has either:

- (i) between 2000 and 2009, failed a police sergeant written exam where appointments from the eligible list resulted in a shortfall of his or her race; or
- (ii) between 2000 and 2008, passed a police sergeant written exam where appointments from the eligible list resulted in a shortfall of his or her race, but ranked below the lowest-ranking candidate appointed from that eligible list.

22. I have also been asked to identify which Candidates who took a police sergeant exam administered by the State from 2000 to the present met the definition of "Claimant" in the Consent Decree. Based on my analysis, the United States prepared Attachments B and C to the

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<sup>3</sup> If salary data was not available for individuals who participated in the challenged police sergeant selection process but were not promoted and police sergeants for a specific jurisdiction and year, I used the average salaries for all other jurisdictions for that year to calculate the salary differential.

Decree, which set forth, respectively, a list of Claimants eligible for back pay and a list of Claimants eligible for both back pay and priority promotion relief. I have since revised Attachments B and C upon discovering that these attachments included Claimants who did not participate in a test administration that resulted in a shortfall of his or her race. I also revised these attachments to correct other minor errors and to reflect updated appointment data. I understand that these attachments are being submitted to the Court as First Amended Attachment B and First Amended Attachment C.

23. To distribute the \$1,000,000, I divided the total into separate funds for African-American Claimants (Settlement Fund I) and Hispanic Claimants (Settlement Fund II). I assigned \$710,000 to Settlement Fund I for the African-American Claimants and \$290,000 to Settlement Fund II for the Hispanic Claimants, because 71% of the shortfall (75 of 105) is African American and 29% of the shortfall (30 of 105) is Hispanic.

24. To determine the total amount of damages to be paid to each Claimant, I will calculate the amount of damages to be paid to each Claimant for each fund separately and for each year of back pay he or she is eligible to receive. To do so, I will determine the total number of years in back pay that all Claimants are eligible to receive. I will then divide the amount of money in each settlement fund by the total number of years in back pay to determine the monetary value of one year of back pay. I will then multiply that amount by the number of years of back pay each Claimant is eligible to receive in order to determine the total amount of damages to be paid to each Claimant.<sup>4</sup>

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<sup>4</sup> I will be able to determine the value of one year of back pay once the Court has approved a Final Relief Awards list, which will set forth the number of Claimants by race who are eligible for back pay.

25. The back pay awarded to each Claimant will not exceed the pay that the Claimant would have received had he or she been promoted to police sergeant on his or her presumptive appointment date, which is based upon the median appointment date for individuals on the eligible list that would have included the Claimant or from which the Claimant would have been appointed.

26. The median appointment date for an eligible list is the date by which half of the candidates from the list were appointed. It is appropriate to use the median appointment date because absent discrimination, all of the appointments from an eligible list would have been spread out proportionately among all appointments from each respective list.

27. As stated above in paragraph 10, I determined that, absent the disparate impact of New Jersey's written exam from 2000 to 2009, an estimated additional 75 African Americans and 30 Hispanics would have been promoted to the position of police sergeant in 43 jurisdictions throughout New Jersey. I have reviewed the Consent Decree that the parties have executed in this case, and the 68 priority appointments allocated among 13 jurisdictions provided by the Decree do not exceed the shortfall in any of the 13 jurisdictions.

Executed this 20<sup>th</sup> day of October, 2011.



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Bernard R. Siskin, Ph.D.

TABLE 1

JURISDICTIONS IN WHICH CLAIMANTS ARE  
ELIGIBLE FOR INDIVIDUAL RELIEF

	Jurisdiction	Type of Individual Relief for Which Claimants Are Eligible	
		Back Pay	Priority Promotion
1	Asbury Park	x	
2	Atlantic City	x	x
3	Bayonne	x	
4	Bridgeton	x	x
5	Burlington	x	
6	Camden	x	x
7	Deptford	x	
8	Dover	x	
9	East Orange	x	x
10	Elizabeth	x	x
11	Ewing	x	
12	Garfield	x	
13	Hackensack	x	
14	Hamilton	x	
15	Hillside	x	
16	Hoboken	x	x
17	Irvington	x	
18	Jersey City	x	x
19	Kearny	x	
20	Lawrence	x	
21	Magnolia	x	
22	Morristown	x	
23	New Brunswick	x	x
24	Newark	x	x
25	North Brunswick	x	
26	Orange	x	
27	Passaic	x	x
28	Paterson	x	x
29	Pennsauken	x	
30	Perth Amboy	x	
31	Plainfield	x	
32	Pleasantville	x	
33	Roselle	x	
34	Scotch Plains	x	
35	Somerdale	x	

36	Teaneck	x	x
37	Trenton	x	x
38	Vineland	x	
39	Wallington	x	
40	Weehawken	x	
41	West New York	x	
42	Willingboro	x	
43	Woodridge	x	

TABLE 2

## ALLOCATION OF PRIORITY PROMOTION POSITIONS TO JURISDICTIONS

	Jurisdiction	African American	Hispanic
1	Atlantic City	5	2
2	Bridgeton	2	1
3	Camden	3	1
4	East Orange	2	1
5	Elizabeth	3	3
6	Hoboken	0	3
7	Jersey City	6	3
8	New Brunswick	1	2
9	Newark	14	1
10	Passaic	2	1
11	Paterson	5	1
12	Teaneck	2	1
13	Trenton	3	0

**TABLE 3**

JURISDICTIONS IN WHICH CONTINUED USE OF AN EXISTING ELIGIBLE LIST FOR ITS CURRENT DURATION OR FOR AN ADDITIONAL YEAR (WHERE THE LIST EXTENDS BEYOND ONE YEAR) MAY RESULT IN DISPARATE IMPACT ON AFRICAN-AMERICAN AND/OR HISPANIC CANDIDATES

1	Atlantic City
2	Camden
3	Irvington
4	Jersey City
5	Passaic
6	Paterson
7	Pleasantville
8	Salem City
9	Teaneck
10	Trenton



# **EXHIBIT**

# **3**

THOMAS E. PEREZ  
Assistant Attorney General  
LORETTA KING  
Deputy Assistant Attorney General  
DELORA L. KENNEBREW  
Chief  
ESTHER G. LANDER  
Deputy Chief  
VARDA HUSSAIN  
VALERIE L. MEYER  
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Attorneys for Plaintiff United States

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
STATE OF NEW JERSEY AND NEW  
JERSEY CIVIL SERVICE  
COMMISSION,  
  
Defendants.

UNITED STATES COURT FOR THE  
DISTRICT OF NEW JERSEY  
  
VICINAGE OF NEWARK  
  
Civil Action No.  
2:10-cv-00091-KSH-MAS  
  
Hon. Katharine S. Hayden

**DECLARATION OF DAVID P. JONES, PH.D.**

I, DAVID P. JONES, declare the following:

1. I currently serve as President and CEO of Growth Ventures, Inc., a human capital advisory firm. I hold a Ph.D. in Industrial/Organizational Psychology from Bowling Green

University, received in 1976. My experience includes hands-on involvement and supervision of the development of promotional examination procedures for first-level law enforcement supervisory positions typically referred to as the position of sergeant. I have been qualified by federal courts to serve as an expert witness in connection with lawsuits and other matters related to employment selection and promotion, and in matters involving both challenges to, and defenses of, employer practices. These assignments have called for my professional opinion regarding evidence of validity, or job-relatedness and business necessity. I have been retained by Plaintiff United States as an expert witness in the above-captioned matter.

2. I reviewed information provided to Plaintiff by the State of New Jersey (the "State") concerning the design, development, and implementation of the State's written promotional examination process for the position of police sergeant ("police sergeant written exam" or "written exam"), used by the State during the period 2000 through 2009. This declaration sets forth my professional opinion as to whether the written exam process meets currently accepted professional standards for establishing the validity, or job-relatedness and business necessity, of promotional procedures.

**Standards for Evaluating a Promotional Procedure's Validity or Job-Relatedness**

3. In reaching my opinions regarding the validity of the State's uses of its police sergeant written exam, I have drawn upon principles and standards by which my profession is guided, including the Principles for the Validation and Use of Personnel Selection Procedures ("Principles") (Society for Industrial and Organizational Psychology, 2003); Standards for Educational and Psychological Testing ("Standards") (American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, 1999); and Uniform Guidelines on Employee Selection Procedures ("Uniform

Guidelines”) (Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor, and Department of Justice, 1978). These sources reference three general types of validity strategies acceptable for documenting a selection or promotional procedure’s validity: content validity, criterion-related validity, and construct validity.

4. Regardless of the strategy employed to demonstrate validity, whether a promotional procedure is job-related and consistent with business necessity (*i.e.*, valid) depends on the manner in which the procedure is used to make promotional decisions. Therefore, a proper showing of validity amounts to producing evidence that the procedure is valid for making the kinds of employment decisions the employer wishes to make, whether pass versus fail decisions, rank-ordering decisions, or other possible applications of information produced by the procedure.

5. My review of the provided materials reveals that the State claims the written exam and its manners of use are supported by evidence of content validity.<sup>1</sup> To demonstrate that its uses of the police sergeant written exam are content valid, the State must meet the following criteria:

- a. A suitable job analysis of police sergeant position has been conducted, providing information regarding the job’s important tasks, the tasks’ relative importance, and the knowledge, skills, and abilities required to perform the tasks;
- b. Reasonable competence has been shown in constructing the exam, including involvement of individuals qualified to undertake and participate in creating the exam;
- c. The content of the exam is both (i) related to the content of the job, a requirement focusing on the specific knowledge, skills, and abilities addressed, and their connection with information produced by the job analysis; and (ii) representative

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<sup>1</sup> A list of materials I reviewed and relied upon in reaching my conclusions is set forth at the end of this Declaration.

of the content of the job, a requirement that the exam not leave unaddressed any major parts of the job's knowledge, skill, and ability requirements, and that it "weights" individual components in a way supported by job analysis information; and

- d. The exam uses a scoring system that usefully selects from among applicants who can better perform the job, including a showing of a sound justification for pass versus fail cut-off scores, and any rank-ordered use of candidate scores.

#### **Findings Regarding Written Exam Content Validity**

6. First, the police sergeant written exam is not based upon a job analysis that meets professional requirements because the State's job analysis efforts for the police sergeant position show several fundamental flaws. As noted above, promotional procedure design, development, and validation efforts commence with a systematic job analysis. There are many protocols for conducting such analyses. All focus on gaining a clear understanding of the job's entry-level requirements, and on deciding what types of candidate assessment procedures make sense in the employer's setting. Among the most significant shortcomings in the State's job analysis efforts are:

- a. In conducting its 1996 job analysis for the police sergeant position, the State created a questionnaire to identify the job's most important tasks, as well as its most important knowledge, skill, and ability (KSA) requirements. The questionnaire was distributed to 578 current police sergeants, selected from 147 police departments. Each police sergeant was asked to make approximately 750 individual ratings judgments. Among the judgments were ones collected on 120 job tasks to indicate the importance, frequency of performance, and need for

police sergeants to be capable of performing the task on “Day One” of the job. In addition, judgments regarding the importance, connection to performing the job, and necessity to be “brought to the job” were made for 134 KSAs. Such a complex ratings process demands a plan for evaluating the quality and meaningfulness of the data that result.

- b. The State’s job analysis study offers no review of the questionnaire data to explore whether the job analysis sample was truly representative of the targeted population, or whether different response rates for different groups of police sergeants affected the picture of the job that emerged. For example, only about 57 percent of rural police departments sampled actually returned a questionnaire, as compared to 84 percent of urban departments. The State did not produce information regarding the level of agreement in job analysis data produced by 116 different urban, suburban, and rural departments, northern, central, and southern geographic locations, or other groups of police sergeants, or how the job analysis results compared to those of previous studies. Therefore, it is unclear whether there is wide variance in the ratings of tasks and KSAs between groups of police sergeants. Likewise, information regarding the reliability of the job analysis data, which would indicate the relative agreement among job analysis participants in the KSAs they cited as most and least important to the job, was not provided by the State.
- c. For the 59 tasks and 85 KSAs that survived the job analysis questionnaire summarization process, 11 police sergeants (including one African-American sergeant) each were asked to make over 5,000 ratings judgments in less than eight

hours (more than ten ratings per minute) regarding the extent to which each KSA was required in order to perform each task effectively. Even given the complex nature of this “linkage process,” no review of the reliability, degree of agreement, or quality of these “linkage” judgments is offered in the State’s report.

- d. Some of the KSAs and tasks identified in the 1996 job analysis and subjected to ratings judgments were too general or vague to be tested properly or were duplicative. For example, “knowledge of US Constitution (Constitutional rights)” is too general to be tested properly, and “knowledge of principles of decision making” is so vague that the police sergeants making ratings judgments may have had vastly different understandings of that knowledge. With respect to abilities, the “ability to use firearms in a proficient manner,” includes both the “ability to qualify and use a revolver on a yearly basis,” and the “ability to qualify shooting a firearm.” Not only are these abilities are duplicative, all three were deemed critical.
- e. Each of the State’s job analyses used to develop the police sergeant written exam administered by the State from 2000 to the present suffer from many of the same shortcomings in the level of data quality review, statistical evaluation, and interpretation of the information collected from those participating in job analysis efforts.

7. Second, the development of the police sergeant written exam does not meet professional requirements because steps taken in designing the promotional procedure were not consistent with content validity guidance provided in the Uniform Guidelines and other professional standards. Among the most significant shortcomings are:

- a. The State's exam development documentation summarizes a content-oriented approach to promotional examination design. The result of this approach was development of a multiple-choice, written exam.
- b. The decision to pursue this type of exam format resulted in eliminating important KSAs from consideration, because they were considered "not testable," and limited the coverage of the written exam to "paper-and-pencil testable" concepts.
- c. The State did not develop adequate test plans, which should indicate exactly which tasks or KSAs are to be tested and how many questions will be written to test each one, so that exam questions are representative of the full range of tasks and KSAs that have been deemed important. Instead, during the 1996 job analysis, the State identified only four general work components to be measured, and the relative weight to be given to each work component.
- d. These shortcomings pertain to each of the police sergeant written exams developed and administered by the State from 2000 to the present.

8. Third, the police sergeant written exam fails to demonstrate job-relatedness, because (i) the State's job-relatedness information is unacceptable according to the Uniform Guidelines and other professional standards, that is, the State provides inadequate assurance that the written exam measures what it is intended to measure; and (ii) the written exam fails to meet standards of representativeness because it does not reflect the range of job requirements identified during the course of the job analysis process. Among the most significant shortcomings are:

- a. The State's documentation shows a process wherein incumbents at the rank of police sergeant or higher, known as Subject Matter Experts (SMEs), assisted in



producing, reviewing, and commenting upon questions that compose the written exam. The State's 1996 Validation Report summarizes such a process.

- b. The 1996 Validation Report, however, does not document the SMEs' input in the exam development process, instead describing a process where test questions were developed by consensus. As a result, no empirical data are provided regarding the extent to which various SMEs linked each exam question to a specific KSA, or evaluated it as relevant to the "Day One" requirements of the job. No structured process appears to have been followed to document either the question-level content validity or overall examination content validity.
- c. Further, no psychometric evidence is provided to support the premise that "the exam measures what it was intended to measure." In other words, the State did not produce data to indicate whether candidates' answers to the exam questions support the underlying measurement objectives.
- d. In addition, because of the large pool of job incumbents available, the State might have undertaken validity analyses for at least one of its police sergeant written exams wherein, after candidates had completed the exam, it was administered to a sample of current sergeants to determine whether those performing the job more effectively in the view of their command officers actually performed better on the exam. Such reviews are commonplace and, here, would lend validation support not only for the specific exam, but for the State's overall examination design process. No such efforts were undertaken.
- e. The police sergeant written exam is also not representative of the work components the State attempted to test. In only one year, 2004, did the State

identify the particular work component and the particular task or KSA each question was intended to measure. Of the 90 questions related to the “supervise patrol” work component, a full 30 percent were related to the same task (out of 27 tasks within that work component). 14 of the 27 tasks within the “supervise patrol” work component were not tested at all. Therefore, the exam was not representative of the full range of tasks and KSAs that were deemed critical.

- f. While the State’s test development plan claims to address certain of the job’s important KSAs, many of which are related to interpersonal interaction, evaluation, and communication (*e.g.*, the ability to comprehend oral directions and instructions, the ability to convey information via telephone and radio, the ability to interact with the public in a courteous and respectful manner, the ability to work effectively as a member of a team), it is difficult to comprehend how the format of a written exam allows for measurement of these attributes. Of the 66 critical abilities identified through the State’s 1996 job analysis, more than half are abilities that cannot be effectively measured in the State’s chosen exam format. The State offers no evidence that its exam measures these KSAs or that its exam offers any insight into such candidate qualifications. As a result, the exam takes on a knowledge-measurement profile.
- g. Many of these shortcomings pertain to each of the police sergeant written exams developed and administered by the State from 2000 to the present.

9. Finally, the State’s two methods of use of the promotional procedure, pass-fail qualification of candidates and rank-ordering of candidates in descending rank order based in large part on exam scores, do not usefully distinguish among candidates more and less qualified

to perform the job. The State's written exam fails to employ a passing standard that identifies candidates better able to perform the duties of police sergeant than those who fall short of the standard. Further, the State's use of the written exam on a rank-ordered basis is unsupported by evidence of the procedure's effectiveness in identifying better qualified candidates, resulting in my opinion that the exam fails to offer evidence of appropriate "method of use." Among the most significant shortcomings are:

- a. The State has provided no analysis or documentation to establish that the pass versus fail cut-off scores established for its written exam bears any relationship to identifying more versus less qualified candidates. There are a variety of professionally recognized techniques for establishing cut-off scores on selection and promotional exams, including strategies that deal with measures of job knowledge and draw upon SMEs to help determine a cut-off score that differentiates between acceptable and unacceptable performance. The State has used no such techniques, deferring to an approach that attempts to establish a cut-off score for each exam that meets the Uniform Guidelines' referenced "80 percent rule" for identifying disparate impact.
- b. While this approach attempts to identify a level of exam performance at which pass versus fail determinations will not produce ethnic group-based disparate impact, as defined by the "80 percent rule," it offers no linkage to a candidate's qualifications to perform in the position of police sergeant. Hence, the State offers no support for the resulting cut-off scores.
- c. In addition, candidates who pass the written exam are rank-ordered according to their exam score, coupled with consideration of their seniority in an "80 percent

exam score, 20 percent seniority” formula. Promotional decisions within individual police departments are then driven by the resulting rank-order position. Far more candidates are eligible for promotion than are ever promoted.

- d. The State has offered no evidence to support this rank-order use of the written exam, along with minor consideration of seniority. Ratings from incumbents in the 1996 job analysis questionnaire on whether possessing differing levels of KSAs correspond to differing levels of performance on the job are insufficient to support rank-order use. It is therefore unknown to what extent increased possession of the “critical” KSAs might result in better performance in the position of police sergeant. The State has produced no other evidence of efforts to determine whether a higher score on the exam is an accurate predictor of more successful job performance.
- e. Since commencement of the timeframe covered in this matter, hundreds of candidates have been promoted to the position of police sergeant. It would have been possible for the State to assemble information regarding the exam scores of these individuals, and to evaluate the relationship among their scores and indices of the same sergeants’ training success, job performance, retention, and other measures that might help support the validity and business necessity of the rank-ordering process. Such post-administration evaluation is common. However, no such work has been reported.
- f. These shortcomings pertain to each of the police sergeant written exams developed and administered by the State from 2000 to the present.

#### **Findings Regarding Alternatives**

10. Since 2000, alternative selection procedures have existed for first-line public safety supervisory positions that would have served the State's legitimate needs and had less disparate impact upon African Americans and Hispanics.

- a. The format of a multiple-choice written exam is among the most likely to introduce ethnic group-based disparate impact, as compared to other assessment formats (*e.g.*, oral board interviews, assessment center approaches, job simulation, etc.). Since promotions are determined largely by candidates' rank-order standing on the written exam among other local department candidates, creation of such an assessment format would be expected, from the outset, to introduce more disparate impact upon ethnic minorities than other alternatives.
- b. Selection procedures other than multiple-choice written exams – including, for instance, assessment centers, structured oral interviews, oral boards, and video-based scenarios – can be valid and result in less disparate impact on African-Americans and Hispanics. Several testing companies routinely market such devices to police departments and civil service boards.
- c. Many jurisdictions use these alternative selection procedures to fill police sergeant and other similar first-level supervisory positions. For example, the State uses oral boards, in lieu of a written exam, to evaluate candidates for various supervisory positions in its firefighter department.

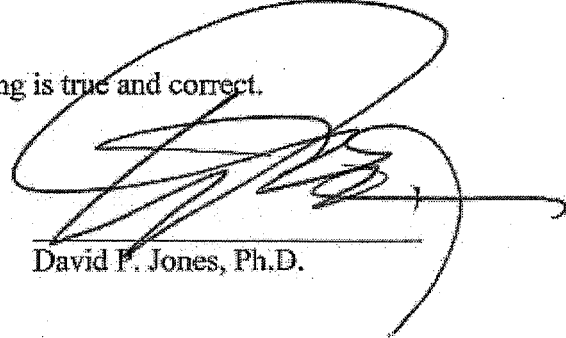
#### Summary

11. The State provides no professionally acceptable evidence of content validity and no support for the claims of job relatedness and business necessity with respect to its police sergeant written exam. Held to the five content validity standards referenced throughout this report, the

State's written exam does not meet professional requirements. In addition, alternative selection procedures have existed for the police sergeant position that would have served the State's legitimate needs and had less disparate impact upon African Americans and Hispanics.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 29 July 2011



Handwritten signature of David F. Jones, consisting of a large, stylized 'D' and 'J' followed by a horizontal line.

David F. Jones, Ph.D.

**List of Materials Reviewed**

1. Validation Report for the State of New Jersey Municipal & County Police Sergeant, September, 1996 (US INV001389-1851).
2. Attachment 7A, Summary of 2008 Police Sergeant Job Analysis (US INV000050-INV000051).
3. Attachment 7B, Police Sergeant Job Analysis Narrative Report (US INV000051-INV000079).
4. Validation Report for the State of New Jersey Police Sergeant Applied Knowledge Multiple Choice Exam (Including Appendices), October 2009 (DEF008215-DEF008294.014).
5. Chapter 7, Setting Passing Points (DEF008525-DEF008543).
6. Job Analysis for Police Promotional Examinations for the State of New Jersey – Final Report, Assessment Alternatives, Inc., June 1989 (US INV002191-INV002432).
7. 2006 Police Sergeant Cut Point Rationale.
8. 2007 Police Sergeant Cut Point Rationale.
9. April 1, 2011 Report of Rick R. Jacobs, Ph.D., in *United States of America v. State of New Jersey and New Jersey Civil Service Commission*.
10. Deposition of James Golden (April 14, 2011).

# **EXHIBIT**

**4**



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

**ORIGINAL**

UNITED STATES OF AMERICA,

Plaintiff

v.

Case No.: 2:10-cv-0009-KSH-MAS

STATE OF NEW JERSEY  
and NEW JERSEY CIVIL  
SERVICE COMMISSION,

Defendants

402 East State Street  
Trenton, New Jersey

Monday, December 6, 2010

Oral deposition of DANIEL LEE HILL, taken at  
the Trenton United States Attorney's Office, Trenton, New  
Jersey, on Monday, December 6, 2010, before Dianna R.  
Pugliese, Registered Merit Reporter, Certified Realtime  
Reporter, Certified Shorthand Reporter (NJ & DE), and  
Notary Public, pursuant to notice.

FREE STATE REPORTING, INC.  
Court Reporting Transcription  
D.C. Area 301-261-1902  
Balt. & Annap. 410-974-0947

A P P E A R A N C E S

APPEARANCES:

U.S. DEPARTMENT OF JUSTICE  
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BY: VALERIE L. MEYER, ESQUIRE  
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DANIEL L. HILL

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P R O C E E D I N G S

(9:39 a.m.)

COURT REPORTER: Are there any stipulations for the record?

MS. MEYER: No.

DANIEL LEE HILL,  
having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. MEYER:

Q. Good morning.

A. Good morning.

Q. My name is Valerie Meyer. I represent the United States in this case, which is the United States versus the New Jersey Civil Service Commission. I'm here today with my colleagues, trial attorneys Varda Hussain and Elizabeth Banaszak, and Deputy Chief Esther Lander. We're taking this deposition today pursuant to Rule 26 and to Rule 30(b)(6). All objections, except as to the form of the question, should be reserved for trial. Could you please state your name for the record?

A. Daniel Lee Hill.

Q. Could you provide your address, please?

A. My address is



1 Q. And your telephone number?

2 A. Area code

3 Q. Are you represented by counsel here today?

4 A. Yes.

5 MR. JESPERSEN: Yes.

6 BY MS. MEYER:

7 Q. And that is counsel to your right?

8 MR. JESPERSEN: I'm Assistant Attorney General

9 Kevin Jespersen.

10 MS. MEYER: Thank you.

11 BY MS. MEYER:

12 Q. Have you ever had your deposition taken before,

13 Mr. Hill?

14 A. Not for the State.

15 Q. Okay. But you have had your deposition taken

16 before?

17 A. I have had a deposition taken, yes.

18 Q. Okay. And when was that?

19 A. Approximately 1986, 1987.

20 Q. Okay. And what was the case that you were

21 deposed for?

22 A. It was a civil action regarding a car accident.

23 Q. Okay. And were you one of the parties to the

24 civil action or were you a witness?

25 A. I was a party.

1 Q. Okay. Were you the plaintiff or the defendant?

2 A. Defendant.

3 Q. And was that here in New Jersey or was it  
4 elsewhere?

5 A. It was in New Jersey.

6 Q. Have you ever testified as a witness in court  
7 before?

8 A. No.

9 Q. And you just mentioned that you had been in a  
10 lawsuit before. Have you ever been a plaintiff or a  
11 defendant in any other lawsuit?

12 A. No.

13 Q. Do you understand generally what the procedures  
14 for today's deposition will be?

15 A. Yes.

16 Q. Okay. I'm just going to go over some basic  
17 ground rules that should hopefully make everything go much  
18 more smoothly. Your answers are being recorded by the  
19 court reporter, so it's important that you provide verbal  
20 responses rather than just shaking your head or saying uh-  
21 huh or huh-uh so that she can take it down. Similarly, to  
22 make it easier for the court reporter, I'm going to ask  
23 that you allow me to finish my question before you provide  
24 your response, and I'll do my best to allow you to finish  
25 your answer before I ask any follow-up questions. If you

1 don't understand a question that I ask, will you tell me?

2 A. Yes.

3 Q. I'll try to find out if there's a problem with  
4 the question and then rephrase it; okay?

5 A. Okay.

6 Q. If you do not hear any part of a question, will  
7 you let me know?

8 A. Yes.

9 Q. If you do not tell me otherwise, I'm going to  
10 assume that you have heard and understand the question.  
11 Do you understand?

12 A. Yes.

13 Q. If you realize at any point during the course of  
14 the deposition that an earlier -- earlier testimony that  
15 you've given was inaccurate or not complete, let me know  
16 and I'll give you a chance to correct it; okay?

17 A. Okay.

18 Q. Do you understand that you will have the right to  
19 review, correct, and sign your deposition at a future date?

20 A. Yes.

21 Q. Okay. I plan on taking periodic short breaks  
22 and, you know, I'm sure there will be a break for lunch at  
23 some point, but are there any special needs for breaks that  
24 you have that I should know about?

25 A. No.

1 Q. If you do need a break at any time, please just  
2 let me know. I'll try and find a convenient breaking point  
3 as soon as possible. But if there is a pending question  
4 on the table, I ask that you complete the question before  
5 we take a break.

6 A. Okay.

7 Q. Is there any reason at all why you feel you  
8 cannot testify fully and accurately today?

9 A. No.

10 Q. Okay. Are you aware of any physical or mental  
11 conditions that would interfere with your ability to  
12 testify --

13 A. No.

14 Q. -- truthfully today? Are you taking any  
15 prescription medications that could interfere with your  
16 ability to testify today?

17 A. No.

18 Q. And do you have any questions about the  
19 procedures that we'll follow today?

20 A. No.

21 Q. Okay.

22 MS. MEYER: I'm going to ask that this be marked  
23 as Exhibit 1.

24 (Plaintiff's Exhibit 1 was marked for  
25 identification.)



1 BY MS. MEYER:

2 Q. Mr. Hill, you've just been handed by the court  
3 reporter an exhibit that's been marked as Plaintiff's  
4 Exhibit No. 1. The first page is a letter to Kevin  
5 Jespersen from the United States, dated November 29th,  
6 2010. I'm going to ask that you page past the first  
7 three pages of the letter to the caption where it says  
8 Plaintiff United States First Notice of Rule 30(b)(6)  
9 Deposition. Do you see that?

10 A. Yes.

11 Q. Have you seen this Notice of Deposition before?  
12 And, please, take your time to look at it if you need to.

13 A. (Witness reviews document.) Yes, I've seen this.

14 Q. Okay. And are you here today to testify on  
15 behalf of the New Jersey Civil Service Commission?

16 A. Yes, I am.

17 Q. And I want to verify that you have been  
18 designated by the New Jersey Civil Service Commission to  
19 testify on several topics that were designated in this  
20 notice. Those are Topics Nos. 5 through 18, 23, and 24.  
21 Are you prepared to testify on those topics?

22 A. Yes.

23 Q. All right. I'd like to have you turn to the  
24 Definitions section of the Notice, which is on the second  
25 page. I want to confirm that you are prepared to testify

1 analysis.

2 A. What would be represented by that?

3 Q. Uh-huh.

4 A. Well, as I said, that is a range of scores that  
5 appears to be linked to the MXW and the MXR.

6 Q. Could the State propose a cutoff score just based  
7 on that statistical analysis?

8 A. It could.

9 Q. Has it ever?

10 A. Not for police sergeant testing.

11 Q. So the second step in the process for setting the  
12 cutoff score is to look at certain cutoff scores for their  
13 satisfaction of the four-fifths rule; is that correct?

14 A. Correct. Yes.

15 Q. What besides satisfying the four-fifths rule with  
16 respect to minority passers, what other factors aside from  
17 that does the State consider in setting the cutoff score  
18 for the police sergeant written exam?

19 A. With respect to minority passers, what other  
20 considerations? No, it would -- to my knowledge, there  
21 aren't other considerations.

22 Q. In setting the cutoff score, was -- from 2000  
23 onward, was input sought in any way from any of the police  
24 departments from local jurisdictions?

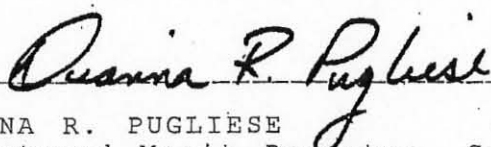
25 A. No.

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CERTIFICATION

I, DIANNA R. PUGLIESE, a Registered Merit Reporter, Certified Realtime Reporter and Commissioner of Deeds, hereby certify that the foregoing is a true and accurate transcript of the deposition of said witness who was first duly sworn by me on the date and place herein before set forth.

I FURTHER CERTIFY that I am neither attorney nor counsel for, not related to nor employed by any of the parties to the action in which this deposition was taken; and further that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.



DIANNA R. PUGLIESE  
Registered Merit Reporter, Certified Realtime Reporter and Commissioner of Deeds