IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0152

NAIMA CERWICK
Petitioner-Appellant,

vs.

TYSON FRESH MEATS, INC.,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY FARRELL, JUDGE

AMICUS CURIAE PROOF BRIEF OF THE IOWA DEFENSE COUNSEL ASSOCIATION

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(c), the Iowa Defense Counsel Association states its interest in this case:

The Iowa Defense Counsel Association is an organization of 350 Iowa attorneys and insurance professionals actively practicing law or handling insurance claims. This organization seeks to advance the cause of justice in the civil bar. Toward that end, scientific and legal scrutiny of the implicit bias theory is paramount to ensuring justice. Because this case raises the issue of implicit bias and the application of this theory has wide-ranging consequences to our jurisprudence, consideration of this perspective is imperative.

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned states:

The undersigned authored this brief in whole without contribution from any party's counsel. The undersigned's preparation of this brief was funded solely by the Iowa Defense Counsel Association.

ARGUMENT

I. USE OF THE IMPLICIT BIAS THEORY WITHOUT PROPER SCRUTINY UNDERMINES THE CAUSE OF JUSTICE.

The implicit bias construct as used in this case is based upon a social science theory. It is not an uncontroverted, established scientific principle. It is not akin to the law of gravity or the anatomy of the human body. It should therefore be subjected to the same scientific and legal scrutiny as other scientific theories. Psychometric validation in the scientific field and a *Daubert*-type analysis in the legal field are vital. Assuming this theory to be true *a priori* ignores significant scientific concerns about its validity. This assumption also deprives the parties of the opportunity to question the theory itself and to challenge its applicability in a particular case. Additionally, this assumption improperly impinges on the mental-process privilege afforded decision makers. Further, importing this theory into our jurisprudence risks significant structural changes to the law in potentially every case and the accompanying cascade of unintended consequences. For the reasons explained below, this should not be undertaken given the current state of science. Assuming this theory to be true without meaningful scientific and legal scrutiny ultimately threatens justice.

A. The Current State of Science Does Not Support the Import of the Implicit Bias Construct into Legal Proceedings.

At its essence, the theory of implicit bias relies upon the implicit association test (IAT) wherein response time to stimuli presented on a screen is measured in milliseconds. *See* Gregory Mitchell, *An Implicit Bias Primer*, 25 Va. J. of Soc. Pol'y & L. 28, 32-34 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3151740 (last visited April 12, 2018) [hereinafter Mitchell, *Implicit Bias Primer*]; Gregory Mitchell & Philip E. Tetlock, *Popularity as a Poor Proxy for Utility, The Case of Implicit Prejudice,* Univ. of Va. School of L., Public Law & Legal Theory Research Paper Series 2017-32 at 181-82 (June 2017) https://ssrn.com/abstract=2973929) (last visited April 12, 2018) [hereinafter Mitchell, *Popularity*]. From this basic concept, proponents of this theory have extrapolated to a macro level that racial discrimination is the result of unconscious bias. *See* Mitchell, *Popularity* at 181-82. However, the science does not support such a big analytical leap.

One of the most problematic features of the IAT is the arbitrary interpretation of scores, where millisecond delays are attributed to the propensity to discriminate. *See* Mitchell, *Popularity* at 177-80; Mitchell, *Implicit Bias Primer*, at 32-34. The scoring of the IAT is based on "arbitrary and shifting judgments [of the creators] that have nothing to do with external

validation of the meaning of IAT scores." Mitchell, *Popularity* at 180. In fact, as the creators have changed their criteria for categorizing IAT scores, its measures of supposed anti-black bias have dropped from 48% to 27%. *Id*. at 181. This change was not due to a social shift or findings from studies, but was "due solely to the researchers' change in definitions." *Id*.

The arbitrary interpretation of scores presents risk in assuming discriminatory acts by the public generally and within our jurisprudence. *Id*. at 187-88.[1] For example, in updated meta-analyses, researchers found

[1] Many are intellectually and financially invested in the implicit bias theory. *See* Mitchell, *Popularity* at 177. It has too quickly spread with unquestioning enthusiasm into the popular culture and legal spheres:

> How can the grand popularity of the implicit prejudice construct be reconciled with the meager theoretical and practical accomplishments of the research program?
>
> ***
>
> The attention paid to the implicit prejudice construct illustrates how success in social science can depend less on theoretical clarity or predictive success and more on how skillfully like-minded researchers can use a paradigm to generate statistically significant but substantively insignificant results that they can then package into sound bites that support a particular worldview or political agenda.

Mitchell, *Popularity* at 164-65.

substantially lower estimates of predictive validity for the IAT than reported by its creator, Greenwald. *Id*. at 179-80. *Even Greenwald agreed with this conclusion*, although dialogue continues relating to the small effects of implicit bias within aggregated data. *Id*. at 180; *cf*. Heather MacDonald, *The False Science of Implicit Bias*, W.S.J. (October 9, 2017) https://www.wsj.com/articles/the-false-science-of-implicit-bias-1507590908 (last visited April 24, 2018) ("Mr. Greenwald and Ms. Banaji now admit that the IAT does not predict 'biased behavior' in the lab…The psychometric problems associated with the race IAT make it 'problematic to use to classify persons as likely to engage in discrimination,' they wrote, along with a third co-author, in 2015."). Concerning predictive validity, Professors Mitchell and Tetlock concluded:

> Based on the existing research, it would be a high-risk gamble to predict even aggregate patterns of behavior of any kind from IAT scores, and one would fare just as well, and often better, at the betting table by basing one's bets on scores from explicit measures of prejudice than on IAT scores.

Mitchell, *Popularity* at 180.

Courts simply cannot be sure that what the test purports to measure is what it is actually measuring. *See id*. Rather than bias, IAT results may indicate empathy. *See id*. at 177.

For example, Professor Hart Blanton and colleagues examined the McConnell and Leibold (2001) and the Ziegert and Hanges (2005) studies of the IAT.[2] *See* Hart Blanton, Jonathon Klick, Gregory Mitchell, James Jaccard, Barbara Mellers & Phillip Tetlock, *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. of Applied Psych. 567, 567-69 (2009) [hereinafter Blanton et. al, *Strong Claims, Weak Evidence*]. These studies have been relied upon to urge changes in the law. *Id*. at 569 ("Kang and Banaji (2006) cited these studies to lay a foundation for their claim that antidiscrimination law must be made to address implicit biases, and they noted that McConnell and Leibold was 'the first study to demonstrate relations among the IAT, intergroup discrimination, and explicit measures of prejudice."); *see also State v. Plain*, 898 N.W.2d 810, 831-32 (Iowa 2017) (Appel, J., concurring specially, *citing* the McConnell and Leibold study and Kang to support implicit bias as an explanation for discrimination).

In the McConnell and Leibold experiment, forty-one white college undergraduates participated in a study described as "an experiment on word

[2] This study involves a detailed statistical analysis of original research. This brief examines pertinent portions of the study and the study's conclusions. For more detail on the statistical methodology, *see* Blanton et al.

perception involving four unrelated tasks." Blanton et al., *Strong Claims, Weak Evidence* at 570. The tasks unfolded in the following order: a white experimenter asked the college-undergraduate participants scripted questions, the participants answered a questionnaire which included explicit measures of prejudice, the participants took the IAT, a black experimenter replaced the white experimenter and asked scripted questions. *Id*. Two male judges viewed videotapes of the interactions and rated aspects of the participants' behavior. *Id*. at 571.

The reanalysis showed that those with higher (biased) IAT scores were the *least* behaviorally biased. *Id*. at 573. Ninety percent of the participants received high (biased) IAT scores. *Id*. The expectation would accordingly be that a large portion of that number would exhibit discriminatory behaviors toward the black interviewer. *Id*. However, over 70% of the sample engaged *more positively* toward the black interviewer. *Id*. Significantly, "[w]hen one examines the untransformed data, it appears that those with higher IAT scores were the least behaviorally biased in the sample." *Id*. The authors explained that a high (biased) IAT score *did not* predict discrimination:

> Thus, it is not accurate to say that high IAT scores predicted discrimination against the Black experimenter. Instead, high IAT scores appear to have predicted more egalitarian behavior toward

> both the Black and White experimenters, and lower scores appear to have predicted more discrimination toward the White experimenter. *There is thus a disconnect between the attitudinal and behavioral data, and the usual interpretation given to the McConnell and Leibold (2001) study as showing that the IAT predicts discrimination against Blacks is dubious.*

Id. (emphasis added). The way the original study was structured (standardization of judges' ratings obscured behavioral preferences), could lead to the erroneous conclusion that "the study documented disparate treatment of Blacks relative to Whites…and that the IAT predicted behavioral tendencies that will likely 'disadvantage job applicants.'" *Id*. at 574 (citing Kang, Greenwald & Krieger). These inferences are not warranted because:

> …by focusing readers' attention only on the tendency for 90% of the sample to show IAT scores that IAT researchers traditionally interpret as indicative of an anti-Black implicit bias and *by not at the same time reporting the corresponding tendency for 70% of the sample to act more positively towards the Black experimenter than the White experimenter, the published report could give readers the mistaken impression that the distribution of IAT scores in the study correctly characterized the behavioral tendencies of the study sample. Such was not the case.*

Id. (emphasis added). The researchers also considered the standard error of estimate and found it corroborated their prediction interval findings,

concluding that "McConnell and Leibold's (2001) data do not present a strong case for the predictive utility of the IAT." *Id*. at 576.

Blanton and his colleagues also examined the Ziegert and Hanges study from 2005. *Id*. This study sought to discover whether "'implicit racist attitudes interacted with a climate for racial bias to predict discrimination.'" *Id*. (citations omitted). This study differed by testing in a climate that expressly promotes discrimination with the assumption that such a climate was necessary for implicit bias to translate into prejudice. *Id*. Here, 103 non-Black participants were asked to play the role of a manager evaluating job applicants for a vice president position. *Id*. Half were assigned to an equality-climate condition and half were assigned to a racial-bias climate condition. *Id*. In the racial-bias climate condition, the participants were told that most of the workforce was white and it was essential to put a white person in that position. *Id*. The original research found that scores on the race IAT correlated with the race-bias condition but no such correlation occurred in the equality condition. *Id*. at 577.

The reanalysis pointed to three methodological issues: (1) the hypothetical role-play setting with blatant racism was an unrealistic setting in today's world; (2) the original researchers did not test whether the hypothetical candidates had equivalent qualifications before assigning race;

and (3) the IAT was scored in a novel way, which to the authors' knowledge had never been used in another published study. *Id*. After performing statistical analysis on the IAT as a diagnostic tool, the authors concluded: "These data suggest the predictive utility of the IAT is limited even when individuals are directed to discriminate." *Id*. at 578. In relation to the law, the researchers advised caution: "We also found that the IAT is not informative as a diagnostic tool in the way that would be most natural in legal settings because no individual's discriminatory behavior could be reliably predicted from his or her IAT score." *Id*.

Courts should be concerned that implicit bias social scientists are "…doing a poor job of complying with the scientific norm of replication." Id. at 580. This is because conditional and fragile results do not permit broad conclusions about discrimination in American society. *Id*. Ultimately, given the existing state of science on this subject, "…psychologists and legal scholars do not have evidentiary warrant to claim that the race IAT can accurately or reliably diagnose anyone's likelihood of engaging in discriminatory behavior…." *Id.*

B. Legal Procedures and Safeguards Must be Observed *Before* Applying a Scientific Theory to a Legal Setting.

Even if a scientific theory has been embraced by some members of the scientific community, legal scrutiny must still be applied to determine

whether it has a role in the law (let alone a particular case), and if so, what that role should be. This is important because assuming a scientific theory is stronger and more accurate than it really is, and thereby wrongly presuming an individual's acts discriminatory, threatens the cause of justice.

Importing the implicit bias theory into the law has the potential to make significant foundational changes to our jurisprudence. Against whom will the courts impute implicit bias--administrative law judges, district court judges, appellate judges, attorneys, parties, witnesses? Is anyone exempt and, if so, why an exemption in those cases? In which cases will implicit bias apply and in which cases will it be inapplicable? Given that there could be any number of implicit biases at work, why a distinction? Will this theory inject an additional element in every case? How are the burdens of proof and persuasion affected? What about subsequent changes in social science affecting this theory and social science showing a tendency to over-compensate for bias?

As a threshold matter, the legal setting is distinct from the laboratory setting. Judges and administrative law judges are *required* to be neutral and unbiased. Iowa Code of Judicial Conduct 51:2(3)(B) (stating judges shall not manifest bias or prejudice in the performance of judicial duties); Iowa Code of Admin. Judicial Conduct 481-15.2(10A)(3) ("A presiding officer

shall perform all administrative judicial and other duties without bias or prejudice.") (effective January 24, 2018). These professionals undoubtedly strive to be fair and impartial, rendering decisions in a contemplative manner. *See generally* Daniel Kahneman, Thinking Fast and Slow (2011) (discussing the difference between modes of thought which are fast, instinctual, and emotional and those which are slow, deliberative and logical). This is a far cry from the laboratory setting used to test the implicit prejudice construct where split-second decisions are used to arbitrarily assess bias. In fact, assuming *arguendo* the validity of the 2005 study discussed above, racial prejudice manifested significantly only in the condition where the participants were told to be racist. This is not the climate in which legal proceedings operate. The concept of a fair, impartial, and unbiased judge or decision maker is unquestionably central to our system of justice.

In an employment law case alleging discrimination in federal district court, the defense attorney pointed out the weaknesses in the IAT research developed by Dr. Greenwald:

> All Dr. Greenwald can tell us is that people who spontaneously react to virtual strangers in laboratory settings whom they will never meet or see again, with nothing at stake, will tend to make unconscious associations that are not favorable to blacks.... In this lawsuit, by contrast, we are

> considering deliberate business decisions in the workplace—not split second decisions in a laboratory—by individuals who know the people for whom they are making important decisions concerning their pay, promotions, and performance evaluations, in a setting where the decision makers operate in a supervised environment and under the constraints of EEO policies and laws, the violation of which has serious consequences, including individual liability.

Jones v. Nat'l Council of Young Men's Christian Ass'n, 34 F.Supp.3d 896, 900 (N.D. Ill. 2014). The district court agreed that Dr. Greenwald's opinions derived solely from laboratory testing did not remotely replicate real-world, employer decision making. *Id*. The court stated:

> Neither Dr. Greenwald nor the plaintiffs establish a logical connection between the principle that hidden bias may be manifested in the absence of any other information and the premise that hidden bias says anything about the results of employment decisions made by supervisors and managers who are armed with abundant data and are personally invested in the results of the process.

Id.

Racial bias should not be assumed. An LSU study analyzing thousands of cases in the Louisiana juvenile justice system from 1996 through 2012 showed surprising results. Although researchers expected that group identity would produce positive in-group bias, the opposite occurred. Researchers discovered that white judges treated white defendants more

harshly. Similarly, black judges treated black defendants with less leniency. The reason for the negative in-group bias was undetermined. https://www.npr.org/2016/06/01/480247291/study-judges-treat-juveniles-of-the-same-race-as-themselves-more-harshly (transcript of NPR report on Morning Edition June 1, 2016) (last visited April 16, 2018); http://www.nber.org/papers/w22003.pdf ("Judges, Juveniles and In-Group Bias" NBER Working Paper Serious February 2016).

As discussed above, the implicit bias theory stems from laboratory work involving the IAT. Analyzing this concept and its predictive validity in discrimination requires a critical look at pertinent scientific studies and their limitations. Our rules of evidence addressing expert testimony speak to the type of analysis these studies should receive.

Iowa generally has a liberal view on the admissibility of expert testimony. *Hutchinson v. American Family Mut. Ins. Co.*, 514, N.W.2d 882, 885 (Iowa 1994); Iowa. R. Evid. 5.702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."). However, under Iowa Rule of Evidence 5.702, the court must first assess whether the expert testimony will assist the

trier of fact followed by a determination of the expert's qualifications. *Ranes v. Adams Labs, Inc.*, 778 N.W.2d 677, 685 (Iowa 2010).

Regarding relevance, expert testimony is only considered relevant if it is helpful to the factfinder. *Taft v. Iowa Dist. Ct.*, 828 N.W.2d 309, 319 (Iowa 2013). "In assessing the reliability of scientific evidence under the first area of preliminary inquiry, we essentially utilize an ad hoc approach to decide if the scientific area of expertise produces results that are reliable enough to assist the trier of fact." *Ranes*, 778 N.W.2d at 685-86.

Where, as here, a case involves a novel and disputable scientific theory, application of the factors articulated in *Daubert* may be applied in assessing the reliability of proposed expert testimony. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (Iowa 1999) (*Daubert* factors "will be helpful to a court in assessing reliability of evidence in complex cases."). These factors include but are not limited to whether the theory or technique: "(1) can and has been tested, (2) has been subjected to peer review and publication, (3) is generally accepted within the relevant scientific community, (4) has a known or potential rate of error." *Williams v. Hedican*, 561 N.W.2d 817, 824 (Iowa 1997) (citing *Daubert v. Merrill Dow Pharm., Inc.* 509 U.S. 579, 595 (1993)).

The Eighth Circuit observed: "To be deemed reliable, the methodology underlying an expert's conclusions must be 'scientifically valid.'…Speculative testimony should not be admitted…. In deciding to exclude expert testimony, '[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *Junk v. Terminix Int'l Co.* 628 F.3d 439, 448 (8th Cir. 2011) (citations omitted) (finding district court properly determined that expert had not used a "scientifically valid" method to estimate chemical exposure; scientist failed to follow his own general practice; and his unfounded assumptions led to "too great of an analytical gap" between his opinion and the data on which he relied).

The Appellant asks this Court to *assume* the validity and reliability of the science behind implicit bias and apply it to this case without subjecting it to a *Daubert*-type scrutiny. This presents an unfair attack on the decision maker. This theory assumes the thing to be proven, *i.e.* bias, is true. Proof of such bias would require a fishing expedition into the judicial subconscious, essentially requiring a decision maker to defend subconscious intent.

A claim of implicit bias also raises all manner of thorny proof issues. Alleging to know the subconscious workings of a decision maker's mind is guess work at best given the current state of science. How is it even possible

to prove implicit bias? Are all judges and decision makers going to be subject to psychoanalysis and an IAT test following their decisions? Are there IAT tests which even measure every conceivable bias that will no doubt be alleged? *See, e.g.*, Yale News (March 27, 2008) https://news.yale.edu/2008/03/27/yale-study-shows-weight-bias-prevalent-racial-discrimination (last visited April 16, 2018) ("Discrimination against overweight people—particularly women—is as common as racial discrimination, according to a study by the Rudd Center for Food Policy & Obesity at Yale University."). What about bald people, or people who resemble the decision maker's ex-spouse? Curiously, despite the disparities in occupational representation and pay, there "…has been [a] dearth of attention paid to the finding that men usually do not exhibit sexism, while women do show pro-female implicit attitudes." Mitchell, *Popularity* at 182.

Rather than implicit bias, maybe litigants need to be wary of a judge in a bad mood. "In looking at decisions handed down by judges in Louisiana's juvenile courts between 1996 and 2012, [researchers] found that when LSU lost football games it was expected to win, judges—specifically those who had earned their bachelor's degrees from the school—issued harsher sentences in the week following the loss," disproportionally affecting black defendants. Emily Deru, *Judge's Foorball Team Loses,*

Juvenile Sentences Go Up, The Atlantic, (September 7, 2016) https://www.theatlantic.com/education/archive/2016/09/judges-issue-longer-sentences-when-their-college-football-team-loses/498980/ (last visited April 16, 2018). They also discovered that the juvenile's behavior in court was not a factor in sentencing, economic background did not seem to play a role, and a placebo test revealed that non-LSU games did not have an impact. *Id*. Implicit bias was not alleged to be a factor.

We all abhor discriminatory bias, wanting it to have no place in our system of law. Although alluring, assigning responsibility for an array of societal problems to the subconscious is not supported by science and potentially dodges true causation. Erroneously assuming the subconscious is the cause of discriminatory bias could result in our efforts at solutions being focused in the wrong direction, inadvertently perpetuating the true cause. It is possible that the fundamental economic structures and policies of our society demonstrate *explicit* racial bias.

In analyzing how flawed science makes its way into the courtroom, an "echo chamber" effect has been observed:

> We have termed this phenomenon the "Echo Chamber." Courts fail to engage in a meaningful review of the proffered evidence through either a *Frye* or *Daubert* hearing and, instead, cite "persuasive" authority from sister states admitting such evidence, even in cases of first impression. *In*

> *other cases, courts admit the technique based on some other rationale, typically that analysts—often those testifying, who have a professional interest in the technique's continued admissibility—agree that the evidence at issue is "generally accepted" within their own "scientific" community."* A third line of reasoning leading to the uncritical admission of invalid scientific evidence involves abdicating judicial gatekeeping responsibly entirely and allowing juries to evaluate competing opinions, or even the legitimacy of the discipline itself.

M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science's Overdue Evolution from Magic to Law*, 4 Va. J. of Crim. L. 1, 37-38 (2016); http://innocenceproject.olemiss.edu/assets/Shifted-Paradigm.pdf (last visited April 12, 2018) (emphasis added).

When it comes to the law, decisions come down to the unique, individual facts of each case. Fortunately, our system of justice has in place protections against improper bias of any type—judicial review.

The Appellant in this case has four distinct opportunities for review: agency review, district court review, and review in the Iowa Court of Appeals and the Iowa Supreme Court. *See* Iowa Code §§ 86.24, 86.26; *see generally* Iowa Code Ch. 17A. Additionally, a litigant may be able to conduct an investigatory deposition of an administrative law judge's decision upon a showing of bad faith or improper behavior sufficient to overcome the mental-process privilege. *See Office of Citizens'*

Aide/Ombudsman v. Edwards, 825 N.W.2d 8, 21 (Iowa 2013) ("We hold IDOC ALJs are entitled to assert the mental-process privilege in an Ombudsman's investigatory deposition absent a strong showing of bad faith or improper behavior sufficient to overcome the privilege.").

"It has long been recognized that attempts to probe the thought and decision making processes of judges and administrators are generally improper." *Id*. at 19 (citations omitted). In fact, "'the process of agency adjudication is currently structured so as to assure that the [ALJ] exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency' ... [in a role] " 'functionally comparable' " to that of a judge." *Id*. (citations omitted). Conversely, the judicial deliberative privilege is absolute. *Id*. at 19 (citing *In re Enforcement of a Subpoena*, 972 N.E.2d 1022, 1033 (2012)) ("This absolute privilege covers a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials."). If implicit bias is believed to be at work in the judicial system, then it raises the question of whether the mental-process privilege should exist for judges. If this theory is valid, then the subconscious workings of judges becomes relevant.

Judicial review allows reviewing courts to look at the individual facts of a case and review the judge's reasoning. Iowa Code §17A.16(1) addresses what must be included in a worker's comp decision:

> A proposed or final decision or order in a contested case shall be in writing or stated in the record. *A proposed or final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of underlying facts supporting the findings. The decision shall include an explanation of why the relevant evidence in the record supports each material finding of fact.* If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. *Each conclusion of law shall be supported by cited authority or by a reasoned opinion.*
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> ***

Iowa Code § 17A.16(1) (emphasis added). If a commissioner fails to state any reasons for rejecting overwhelming evidence, reversal is in order. *See Tussing v. George A. Hormel & Co.*, 417 N.W.2d 457, 458 (Iowa 1988) (finding commissioner's failure to state any reasons for rejecting overwhelming evidence, including medical evidence, that work-related injury occurred on date in question required reversal).

Generally, the agency decision is reviewed for a showing of substantial evidence. *JBS Swift & Co. v. Hedberg*, 873 N.W.2d 276, 280

(Iowa Ct. App. 2015). "The deference afforded the agency on substantial evidence review is predicated on the assumption the agency reviewed and considered the evidence in reaching its decision." *Id*. If the record affirmatively discloses the agency did not review and consider the evidence, then substantial evidence review is inapplicable. *Id*. at 280-81. The agency may reconcile competing evidence but may not ignore competing evidence. *Id*. at 281 (ordering remand after finding "the commissioner's designee's action is unreasonable, arbitrary, capricious, an abuse of discretion, and the product of illogical reasoning.)." This judicial review process is objective and fair, and the appellant in the instant case has applied each of the above arguments to the record before the court, thereby demonstrating the effectiveness of our judicial review process without resort to a theory of implicit bias.

Given that the IAT is subject to arbitrary scoring and lacks predictive validity, it should not make an unchecked entry into our legal system without *Daubert*-type scrutiny. This is particularly important given that re-analysis of the foundational Leibold study showed that high (biased) IAT scores predicted more egalitarian behavior toward black and white experimenters. Blanton, et al., *Strong Claims, Weak Evidence* at 573. Fortunately, our system of justice has protections in place to ensure fair legal

proceedings. The rules requiring our decision makers to be unbiased and our system of judicial review ensure that justice will be best served without ceding judicial autonomy to a questionable social science theory.

CONCLUSION

The Amicus respectfully requests this Court reject the assumption that the implicit bias theory is valid, consider the science challenging the implicit bias theory, and at a minimum, require a *Daubert*-type analysis before applying this theory within our jurisprudence.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

    - This brief contains 4,724 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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