

**Case No. 19-35428**

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

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JENNIFER JOY FREYD,

*Plaintiff-Appellant,*

v.

UNIVERSITY OF OREGON, HAL SADOFSKY, AND MICHAEL SCHILL,

*Defendants-Appellees.*

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**BRIEF OF *AMICI CURIAE* EQUAL RIGHTS ADVOCATES  
AND 47 ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT  
AND REVERSAL**

**Filed with Consent of All Parties**

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Impact Fund  
In Our Own Voice: National Black Women's Reproductive Justice Agenda  
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KWH Law Center for Social Justice & Change  
Legal Aid at Work  
Legal Momentum, the Women's Legal Defense and Education Fund  
Methodist Federation for Social Action  
National Advocacy Center of the Sisters of the Good Shepherd  
National Asian Pacific American Women's Forum  
National Center for Lesbian Rights  
National Council of Jewish Women  
National Employment Law Project  
National LGBTQ Task Force  
National Organization for Women Foundation  
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National Women's Law Center  
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The Women's Leadership Innovation Lab of Stanford University  
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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies that none of the *Amici Curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

Dated: September 30, 2019

/s/ Kelly M. Dermody  
Kelly M. Dermody

Counsel for *Amici Curiae*

## IDENTITY AND INTEREST OF *AMICI CURIAE*

Equal Rights Advocates and 47 other *Amici Curiae* are organizations committed to advancing gender equality and to the enforcement of laws prohibiting discrimination in employment. Detailed statements of interest are included in Appendix A.<sup>1</sup>

## ARGUMENT

### **I. The Gender Wage Gap Is a Pervasive and Structural Feature of the U.S. Labor Market.**

Women in the United States today make up nearly half of the workforce<sup>2</sup> and most working mothers are primary or co-breadwinners.<sup>3</sup> Although the Equal Pay Act (“EPA”)<sup>4</sup> and Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>5</sup> have explicitly prohibited sex (and race) discrimination in compensation for over fifty-five years, the gender pay gap remains a persistent feature of the U.S. labor market.

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<sup>1</sup> All parties consented to the filing of this brief. Accordingly, a motion for leave to file is unnecessary. Fed. R. App. P. 29(a)(2). No party or party’s counsel authored this brief in whole or in part, and no party or person contributed money towards its preparation and submission. Fed. R. App. P. 29(a)(4).

<sup>2</sup> Bureau of Labor Statistics, *Table 3: Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race, Current Population Survey* (2019), <https://www.bls.gov/cps/cpsaat03.htm>.

<sup>3</sup> See SARAH JANE GLYNN, BREADWINNING MOTHERS CONTINUE TO BE THE U.S. NORM, Center for American Progress (May 10, 2019), <https://ampr.gs/2JG0ny7>.

<sup>4</sup> 29 U.S.C. § 206(d) (2012).

<sup>5</sup> 42 U.S.C. §§ 2000e, *et seq.* (2012).

In 2018, women made an average of 82 cents for every dollar earned by men, a gender wage gap of nearly 20 percent.<sup>6</sup> This gap has not changed significantly since 2007<sup>7</sup> and, if the rate of change continues, it will not close until 2059.<sup>8</sup>

The gender wage gap is not a myth or the product of women’s “choices.” While occupational segregation—many men working in occupations with other men, and many women working with other women—is an important contributor to the gender wage gap,<sup>9</sup> the disparity between women’s and men’s earnings cannot be explained solely by this phenomenon.<sup>10</sup> Women are paid less than men in virtually every industry and occupation,<sup>11</sup> whether they work in jobs predominantly performed by women, by men, or by an even mix.<sup>12</sup>

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<sup>6</sup> INSTITUTE FOR WOMEN’S POLICY RESEARCH (“IWPR”), THE GENDER WAGE GAP: 2018 EARNINGS DIFFERENCES BY GENDER, RACE, AND ETHNICITY (2019), <https://bit.ly/2koqzTK>. For women of color, the disparities are much larger. *Id.*

<sup>7</sup> U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015 CURRENT POPULATION REPORTS 10 (2016), <https://goo.gl/pfzijQ>.

<sup>8</sup> IWPR, WOMEN’S MEDIAN EARNINGS AS A PERCENT OF MEN’S MEDIAN EARNINGS, 1960-2018 (2019), <https://bit.ly/2m6tmkR>.

<sup>9</sup> IWPR, GENDER WAGE GAP BY OCCUPATION 2018 AND BY RACE AND ETHNICITY (2019), <https://bit.ly/2FTMTfV>.

<sup>10</sup> See Francine Blau and Lawrence Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 THE ACADEMY OF MANAGEMENT PERSPECTIVES, no. 1 (2007), 7-23 (finding that 41 percent of the gender pay gap cannot be explained or accounted for by differences in occupation, work experience, union status, or race).

<sup>11</sup> WAGE GAP BY OCCUPATION 2018, *supra* n.9, at 1.

<sup>12</sup> *Id.*

Although women are now more likely than men to attain a college education<sup>13</sup> and have earned the majority of doctoral degrees for seven straight years,<sup>14</sup> women earn less than men starting just one year out of college, even when controlling for factors like major, occupation, and hours worked.<sup>15</sup> Pay gaps actually grow as education levels increase,<sup>16</sup> with the largest disparities among workers with advanced degrees and at the top of the wage distribution.<sup>17</sup> The gender wage gap exists in law,<sup>18</sup> business,<sup>19</sup> and academia<sup>20</sup>—even among men and

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<sup>13</sup> Kurt Bauman, *Shift Toward Greater Educational Attainment for Women Began 20 Years Ago*, U.S. CENSUS BUREAU BLOG (Mar. 29, 2016), <https://goo.gl/RCqxdY>.

<sup>14</sup> COUNCIL OF GRADUATE SCHOOLS, GRADUATE ENROLLMENT AND DEGREES: 2005 TO 2015 9-13 (2016), <https://goo.gl/LGzBpt>.

<sup>15</sup> AM. ASS'N OF UNIV. WOMEN (“AAUW”), GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 2 (2012), <https://goo.gl/tijC4x>.

<sup>16</sup> AAUW, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 12, fig.7 (2018), <https://bit.ly/2DyZpiK>.

<sup>17</sup> Francine D. Blau and Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, NATIONAL BUREAU FOR ECONOMIC RESEARCH (2016), <https://www.nber.org/papers/w21913.pdf>.

<sup>18</sup> ABA COMMISSION ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW (2019), <https://bit.ly/2msyy2U>.

<sup>19</sup> PAYSACLE, THE STATE OF THE GENDER WAGE GAP (2019), <https://bit.ly/2GDI4Ft>; Taylor H. Cox and Celia V. Harquail, *Career Paths and Career Success in the Early Career Stages of Male and Female MBAs*, 39 J. VOCATIONAL BEHAV. 54, 71 (1991).

<sup>20</sup> Joshua Hatch, *Gender Pay Gap Persists Across Faculty Ranks*, CHRON. HIGHER EDUC. (Mar. 22, 2017), <https://bit.ly/2HjsGzb>; Colleen Flaherty, *AAUP's Annual*

women who share the same rank and position in the same field, *e.g.*, equity partner<sup>21</sup> or tenured professor.<sup>22</sup>

The cumulative and collective impacts of the gender pay gap are enormous. Collectively, women employed full time in the U.S. lose *over \$915 billion a year* due to the wage gap.<sup>23</sup> Persistent inequality in earnings translates into lower lifetime pay and retirement security for women,<sup>24</sup> less income for families,<sup>25</sup> and higher rates of poverty.<sup>26</sup>

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*Report on Faculty Compensation Takes on Salary Compression and More*, INSIDE HIGHER ED (Apr. 11, 2018), <https://bit.ly/2GVrAJe>.

<sup>21</sup> WOMEN IN THE LAW, *supra* n.18, at 6.

<sup>22</sup> Hatch, *supra* n.20.

<sup>23</sup> NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AMERICA'S WOMEN AND THE WAGE GAP 1 (2019), <https://bit.ly/2STHeKB>.

<sup>24</sup> IWPR, STILL A MAN'S LABOR MARKET: THE SLOWLY NARROWING GENDER WAGE GAP (2018), <https://bit.ly/2P9oiFw>; IWPR, WAGE GAP WILL COST MILLENNIAL WOMEN \$1 MILLION OVER THEIR CAREERS 2 (2018), <https://bit.ly/2kXjBFv>.

<sup>25</sup> BREADWINNING MOTHERS, *supra* n.3, at 5.

<sup>26</sup> IWPR, THE IMPACT OF EQUAL PAY ON POVERTY AND THE ECONOMY 1, 4, tbl. 2 (2017), <https://bit.ly/2HnaN2C>. Eliminating gender wage gap would cut poverty rate for working women and their families by more than half. *Id.*

## **II. The District Court Misapplied the Legal Standards for Equal Pay Act Claims.**

### **A. Applying a Title VII Burden-Shifting Framework to Equal Pay Act Claims Ignores Congressional Intent in Enacting the Landmark Statute.**

The District Court conflated and confused the different legal standards for Title VII and Equal Pay Act claims, suggesting that both statutes “prohibit an employer from discriminating between similarly situated employees on the basis of gender,” without acknowledging the distinct proof structures and burdens under each. ER 7. The distinctions between these statutes matter.

When Congress enacted the EPA, it established a new minimum labor standard based on the broad but straightforward principle that ““equal work will be rewarded by equal wages”” regardless of a worker’s sex. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)). Taking aim at the “ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same,” *id.*, the EPA prohibits an employer from “pay[ing] wages to employees... at a rate less than the rate at which he pays wages to employees of the opposite sex... for equal work[.]” 29 U.S.C. § 206(d)(1).

The subsequent enactment of Title VII did not alter or replace the labor standard set out in the EPA. The Supreme Court, this Court, and other courts have held unambiguously that a different proof scheme applies to EPA and Title VII

cases. *See Cnty. of Wash. v. Gunther*, 452 U.S. 161, 170-71 (1981) (recognizing that “[t]he structure of Title VII litigation, including presumptions, burdens of proof, and defenses” was “designed differently” than the EPA’s fourth affirmative defense);<sup>27</sup> *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 691, 696-97, 699-700 (9th Cir. 1984) (recognizing the distinct analytical approaches required for EPA and Title VII claims), *overruled on other grounds*, 810 F.2d 1477 (9th Cir. 1987); *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000) (same).

To establish a prima facie case under the EPA, “a plaintiff must show that the employer pays different wages to employees of the opposite sex for substantially equal work.” *EEOC v. Maricopa Cnty. Cmty. Coll. Dist.*, 736 F.2d 510, 513 (9th Cir. 1984). Unlike Title VII disparate treatment cases,<sup>28</sup> the EPA does *not* require a plaintiff to prove discriminatory intent. *Ledbetter v. Goodyear*

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<sup>27</sup> The Bennett Amendment to Title VII incorporates the four affirmative defenses of the EPA, clarifying that any lawful justification for a pay differential under the EPA is also lawful under Title VII (*e.g.*, may be a “legitimate nondiscriminatory reason”). 42 U.S.C. § 2000e-2 (h); *Gunther*, 452 U.S. at 167-68. While some courts have interpreted the Bennett Amendment as “unifying the two statutes... with respect to sex-based compensation discrimination,” it only imported EPA defenses into Title VII, *not the other way around*. *See* Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 842 (2010) (the Amendment “restrict[s] only Title VII by the EPA, and not vice versa”).

<sup>28</sup> Under Title VII, “the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (quotation marks omitted).

*Tire Co. Inc.*, 550 U.S. 618, 641 (2007);<sup>29</sup> *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986). Instead, it “creates a type of strict liability” for employers who pay men and women different wages for substantially equal work. *Maxwell*, 803 F.2d at 446 (quoting *Strecker v. Grand Forks Cty. Social Serv. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980) (*en banc*)); accord *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 120 (4th Cir. 2018) (collecting cases).

Once an EPA plaintiff establishes a prima facie case of pay disparity, the burden of proof—not mere production—shifts to the defendant to prove that one of the four statutorily enumerated exceptions to the general rule of equal pay for equal work applies as an affirmative defense. *Corning Glass*, 417 U.S. at 196-97. Those exceptions are: where payment is “made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production; or (iv) any other factor(s) other than sex” (hereinafter, “FOTS”). 29 U.S.C. § 206(d)(1). “[T]he employer’s ‘burden is a heavy one.’ The employer ‘must show that the factor of sex provided *no basis* for the wage differential.’” *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1362-63 (11th Cir. 2018)

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<sup>29</sup> *Superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

(emphasis in original); *Kocacevich v. Kent State Univ.*, 224 F.3d 806, 826-27 (6th Cir. 2000) (same).<sup>30</sup>

Under Title VII’s *McDonnell Douglas* framework, in contrast, the defendant bears only a burden of production, not proof, and may satisfy this burden by articulating any legitimate, non-discriminatory reason for the challenged employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-04 (1973). Once such a reason is articulated, the plaintiff must prove that it is inaccurate or pretextual to prevail on an intentional discrimination claim. *Id.* at 801. Courts have declined to impose a *McDonnell Douglas*-like burden on the plaintiff in EPA cases.<sup>31</sup> Instead, they repeatedly hold that the defendant-employer bears the burden to prove that permissible FOTS *actually account* for the pay differential. *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 474 (7th Cir. 2012).

Here, the Court narrowly defined the concept of “pay equity” under the EPA as providing men and women performing “the same job function... the same pay

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<sup>30</sup> Additionally, to establish an affirmative defense under the EPA, “the employer must show that none of the decision-makers... were influenced by [sex] bias.” *Bowen*, 882 F.3d at 1362 (quotation marks omitted).

<sup>31</sup> Courts have recognized that an employee “*may* rebut the employer’s affirmative defense with evidence that the employer intended to discriminate, and that the affirmative defense claimed is merely a pretext for discrimination,” but have stopped short of requiring an EPA plaintiff to prove pretext. *Maxwell*, 803 F.2d at 446 (emphasis supplied). Because it is the employer’s burden to prove that the pay disparity is due to its reasonable use of a FOTS, evidence of pretext may prevent the employer from satisfying this burden. *Id.*

*without regard to their gender.*” ER 2 (emphasis supplied). In so doing, the Court improperly imported something akin to Title VII’s intent requirement into the EPA, effectively relieving Defendants of satisfying their distinct, “heavy burden” of proof on the FOTS defense. *Bowen*, 882 F.3d at 1362. Allowing an employer to defeat an EPA claim by merely asserting any facially gender-neutral “business reason”—even one that is defined vaguely, applied inconsistently, and bears no relation to job performance or productivity—frustrates Congressional intent in establishing the EPA’s burden-shifting framework, and is manifest error that warrants reversal.

**B. The District Court’s Erroneous Definition of “Equal Work” Effectively Carves Out Professional Workers from the EPA.**

The concept of “equal work” under the EPA is based on a determination that compared jobs are substantially equal, *not identical*, with respect to the skill, effort, and responsibility required. 29 C.F.R. § 1620.13(a) (2017). The statute demands a focus on the overall content of particular jobs, not individual employees,<sup>32</sup>

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<sup>32</sup> See, e.g., *E.E.O.C. v. City Council of Cleveland*, No. 88-3726, 1989 WL 54252, at \*5 (6th Cir. May 24, 1989) (“In comparing jobs under the [EPA] (at least for purposes of establishing a prima facie case) it must be emphasized that the *jobs* and not the *employees* are compared. Thus, ‘only the skills actually required by [the comparable] jobs, not the abilities of the persons currently in those position are relevant [and] it is the job as a whole, not just selected aspects of it that must form the basis for comparison.’”) (emphasis in original); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 592 (11th Cir. 1994) (“Only the ‘skills and

individual segments of work or tasks,<sup>33</sup> or the manners in which individuals carry out particular responsibilities.<sup>34</sup>

Focusing on the overall content of the jobs rather than on *how* individual employees carry out their work is especially important in professional or other non-standardized or high-skill fields, like academia. While Professors in the same department who share the same rank and are subject to the same evaluation criteria *should* readily be able to establish that they perform “substantially equal work,”<sup>35</sup>

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qualifications actually needed to perform the jobs are considered.’ Comparators’ prior experience is not relevant to the ‘substantially similar’ inquiry.”).

<sup>33</sup> See *Buntin v. Breathitt County Board of Education*, 134 F.3d 796, 799 (6th Cir. 1998) (“Whether the work of two employees is substantially equal ‘must be resolved by the overall comparison of work, not its individual segments.’”); *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) (finding that where two jobs generally share a common core of tasks, the fact that one of the jobs includes certain duties that entail a lower level of skill would not defeat a finding that the jobs are equal); *EEOC v. Central Kansas Medical Center*, 705 F.2d 1270, 1272 (10th Cir. 1983), *rejected on other grounds*, 486 U.S. 128 (1988) (“An employer may not ‘escape the Act’s reach by drawing overly fine distinctions in the tasks at issue.’”).

<sup>34</sup> See *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2d Cir. 2014) (focusing on overall “job content” and relying on EEOC guidance to construe underlying factors of skill, effort, and responsibility); *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979) (holding that “it will generally be necessary to scrutinize the job as a whole... over a full work cycle... because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time”).

<sup>35</sup> Paula Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867, 867 (2016) (“No profession is more suited to equal pay than the job of law professor.”).

they often encounter barriers to vindicating their equal pay rights because courts hold them to an artificially high standard of “sameness.”<sup>36</sup> Some courts—like the District Court here—have gone as far as to question whether the EPA applies to jobs in academia *at all*.<sup>37</sup> But defining “equal work” in this way—*e.g.*, as requiring professors to show they do the same amounts and types of research or writing, teach the same classes, and provide the same services to the school—would effectively exclude them, and many other high-skill employees that do non-standardized work, from the EPA.<sup>38</sup> Such a narrow reading of the statute ignores that when Congress created exemptions to the Fair Labor Standards Act for professional employees in 1972, the legislature specified that those employees “remained protected by the EPA.”<sup>39</sup>

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<sup>36</sup> Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENVER U. L. REV. 873, 883 n.53 (2014) (discussing difficulties encountered by academics in bringing EPA claims); Ana M. Perez-Arrieta, *Defenses to Sex-Based Wage Discrimination Claims at Educational Institutions: Exploring “Equal Work” and “Any Factor Other Than Sex” in the Faculty Context*, 31 J.C. & U. L. 393, 399-403 (2005) (same).

<sup>37</sup> See Hart, *supra* n.36, at 883; ER 3 (“When applied to a university setting, the notion of ‘equal pay for equal work’ has unique complexities not found in other institutions.”); *id.* (“[A] university is more akin to the National Baseball League than it is to a traditional employer.”).

<sup>38</sup> Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU L. REV. 17, 31 (2010); Perez-Arrieta, *supra* n.36.

<sup>39</sup> Hart, *supra* n.36, at 884 n.55 (citing 29 U.S.C. § 213(a)(1) (2012)).

Yet, in finding *as a matter of law* that Freyd and her comparators did not do substantially equal work, that is effectively what the District Court did here. The District Court focused on a narrow segment of Freyd’s and her comparators’ work (*e.g.*, their research methodologies and grant administration-related duties) and gave undue significance to distinctions between *how* Freyd and her male comparators carry out their job duties,<sup>40</sup> which is just one aspect of one principal part of their jobs. In ignoring, among other aspects, teaching, service, and scholarship, the District Court ignored overarching similarities in the underlying skills, efforts, and responsibilities required by Freyd’s and her comparators’ jobs. To quote Melissa Hart, the District Court “missed the forest for the trees.”

Additionally, by automatically conferring great value and high status to the *type* of research done by Freyd’s male comparators and ignoring the value and status of her work,<sup>41</sup> the District Court actually *reproduced* the implicit gender bias that exists at a structural level throughout the U.S. labor market. Allowing gendered stereotypes about what is “valuable” to infect the analysis of what

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<sup>40</sup> See ER 7-8 (suggesting professors “have significant freedom in how they accomplish [their] job duties... [and] direct their research”). Because these distinctions were not taken into account in setting professors’ salaries, they also do not support Defendants’ FOTS defense. See *infra*, section II.C.

<sup>41</sup> See ER 5 (“[Because] the work and the *value of that work* varies greatly from professor to professor... Freyd cannot establish that she performs substantially similar work in the unique setting of a university[.]”) (emphasis supplied).

constitutes “equal work” will greatly hinder enforcement of the EPA and perpetuate the gender wage gap by reproducing the very ills that the EPA was intended to eliminate.<sup>42</sup>

**C. A Practice of Giving Retention Raises that Is Untethered to Job Performance, Produces Gender Wage Disparities, and Fails to Account for the Challenged Pay Differential Is Not a Valid “Factor Other than Sex.”**

An employer seeking to defend against an EPA claim by relying on the FOTS defense has the burden of proving that it *actually used and applied in good faith* a FOTS that served as the basis for the challenged pay differential. *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982). This burden is a heavy one: the employer must submit evidence from which a reasonable factfinder could conclude not simply that its proffered defenses *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity. *EEOC v. Md. Ins. Admin.*, 879 F.3d at 121 (citing *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000); *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1312 (10th Cir. 2006)); *see also* EEOC Compliance Manual, at 10-IV.F.2 (“[T]he employer must establish that a gender-neutral factor, applied consistently, in fact explains the compensation disparity.”). Additionally, to establish an affirmative defense under

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<sup>42</sup> *See generally* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018).

the EPA, “the employer must show that none of the decision-makers... were influenced by [sex] bias.” *Bowen*, 882 F.3d at 1362-63.<sup>43</sup>

In granting summary judgment on Freyd’s EPA claim, the District Court failed to adhere to this standard. The University relied on its practice of giving retention raises to some faculty members in response to their presentations of external offers (from other institutions) as a FOTS to explain Freyd’s wage differential. While the District Court went to great length to explain why it believes such a practice is a necessary response to market forces in academia (ER 3), at no point did the District Court clearly explain or make findings as to the University’s process governing this practice. Nor did the District Court cite any evidence showing the University based its “retention pay” decisions on any objective measure of faculty members’ job performance or productivity. Most problematically, uncontroverted evidence showed female professors in the Psychology department received only 5 of the 26 retention raises during the relevant time period, despite comprising 49 percent of the department faculty. ER

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<sup>43</sup> *See also Md. Ins. Admin.*, 879 F.3d at 121 (“At the summary judgment stage of the proceedings, the employer’s justification for the differences is irrelevant, unless it is strong enough to establish one of the statutory affirmative defenses as a matter of law.”); *Bowen*, 882 F.3d at 1363 (reversing summary judgment where a rational jury could find employer failed to satisfy its “heavy burden” of showing sex provided no basis for the wage disparity and prior salary and experience alone did not explain the disparate pay).

17-18, 19-20, 126. This stark disparity alone raises a triable issue of fact as to whether the University's retention raise practice is *in fact* not based on or linked to sex.

Moreover, the Supreme Court has rejected the "market forces" reasoning applied by the District Court here, in holding that it is not a defense under the EPA to pay women less than men "simply because men would not work at the low rates paid women." *Corning Glass*, 417 U.S. at 205. *See also id.* ("That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.").<sup>44</sup> In fact, a policy or practice of basing faculty members' pay on their negotiation of retention raises tends to work to the disadvantage of female employees,<sup>45</sup> as it evidently did at the

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<sup>44</sup> *See also Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 423 (8th Cir. 2017) (rejecting employer's argument that *Corning Glass* is limited to cases where employers pay female employees less solely because women accept less pay than men); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988) ("The argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [EPA] was designed to eliminate, and has been rejected.").

<sup>45</sup> A large body of scholarship shows that whether and to what extent faculty pursue and obtain outside offers, and how their home universities respond to them (*e.g.*, with "counteroffers" or retention raises), is highly linked to sex. *See, e.g.*, Nicole Buonocore Porter and Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 164 (2011) (noting that employers' implicit bias affects the way in which employers react when women make "counteroffers" or try to negotiate higher pay). Research has also

University of Oregon. Like the practice of relying on employees' salaries at a prior job, it reproduces gender wage disparities to women's detriment.<sup>46</sup> These and other "market forces" defenses should be closely scrutinized by courts precisely because they are so likely to perpetuate the very gender wage disparities that the EPA was designed to address.<sup>47</sup>

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documented that employers react favorably to men who negotiate salaries, while women who ask for higher pay (using the same negotiation strategies as men) are often penalized for violating gender stereotypes. *See, e.g.*, Hanna Riley Bowles and Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 395 (2008); Deborah A. Small et al., *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007); Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84 (2007).

<sup>46</sup> Several courts of appeal, including this Court, have recognized that an employer's reliance on employees' prior salary to set pay is a form of "market forces" defense that the Supreme Court rejected in *Corning Glass* and that prior salary, on its own, may not justify paying a woman less than a man for equal work. *See, e.g.*, *Kouba*, 691 F.2d at 878 (prior salary may be an acceptable FOTS where it is supported or explained by some other, non-sex related factor relating to the employee's skills or job performance); *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005) ("Consideration of a new employee's prior salary is allowed as long as the employer does not rely solely on prior salary to justify a pay disparity."); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("[A]n employer may not overcome the burden of proof on the affirmative defense of relying on 'any other factor other than sex' by resting on prior pay alone."); *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003) ("[I]t is important to ensure that reliance on past salary is not simply a means to perpetuate historically lower wages.").

<sup>47</sup> *See, e.g.*, *Sauceda v. Univ. of Texas at Brownsville*, 958 F.Supp.2d 761, 779 (S.D. Tex. 2013) (denying summary judgment where university argued that it paid male faculty members more in order to attract them away from other institutions,

While the EPA does not prohibit an employer from offering retention raises *per se*, this Court should join others in concluding that an employer cannot proffer such a practice as a FOTS to justify paying a woman less for equal work—especially where it fails to present evidence that women are offered the same opportunities to negotiate as their male counterparts. *See, e.g., Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F. App’x 280, 283-85 (5th Cir. 2014) (denying summary judgment where female applicant was denied an equal chance to negotiate her salary); *Duncan v. Texas HHS Comm’n*, No. AU-17-CA-00023-SS, 2018 WL 1833001, at \*4 (W.D. Tex. April 17, 2018) (denying summary judgment because “a reasonable factfinder could... find [employer] discriminatorily applied its negotiation policy by allowing [the comparator] greater latitude to negotiate”).

Simply put: a desire to attract and retain “the best and the brightest” does not relieve an employer of its legal duty to provide equal pay for equal work. After all, “That’s what the Equal Pay Act says. If you see it, you have to fix it.”<sup>48</sup>

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because university failed to show that the market for new faculty was not shaped by sex discrimination and stereotyping).

<sup>48</sup> John Ingold, *EEOC Accuses DU Law School of Discriminating Against Women Professors*, DENVER POST (Aug. 31, 2015), <https://dpo.st/2neAjkv> (quoting Melissa Hart).

### **III. The District Court Misapplied the Legal Standards for Disparate Impact Claims.**

#### **A. The District Court Ignored Longstanding Case Law on the Use of Statistical Evidence in Evaluating Disparate Impact Claims.**

The disparate impact model for proving discrimination is a critical tool for protecting and advancing equality. By focusing on consequences, rather than motives, “[i]t permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015).

To make a prima facie case of disparate impact, a plaintiff must offer evidence of statistical disparities that are “sufficiently substantial” to raise “an inference of causation.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988). This statistical showing need not be “framed in terms of any rigid mathematical formula[.]” *Id.* at 994-95. However, academics, jurists, and the federal government agree that disparities falling below the 5% probability level are “statistically significant.” *See Contreras v. City of Los Angeles*, 656 F.2d 1267, 1273 n.3 (9th Cir. 1981) (“A .05 level of statistical significance... is generally recognized as the point at which statisticians draw conclusions from statistical data.”); 28 C.F.R. § 50.14, at § 14(b)(5) (“Generally, a selection procedure is considered related to the criterion... when... statistically significant at the 0.05 level[.]”). Statistically significant disparities are generally sufficient to raise a

legal inference of causation. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977).<sup>49</sup>

Here, Freyd challenged the disparate impact of Defendants’ “retention raise” practice with expert statistical analysis that exceeded the 5% probability level courts routinely accept.<sup>50</sup> Using a scientifically accepted regression-based approach,<sup>51</sup> labor economist Kevin Cahill found that female full professors earned, on average, \$15,000 less than their male counterparts. ER 246. Dr. Cahill determined that this gender pay disparity is statistically significant at the 1% level—substantially more powerful than the generally accepted 5% floor—with a p-value of 0.004. *Id.* When retention raises were included in the regression model, the indicator for having received a raise was highly statistically significant (with a

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<sup>49</sup> The degree of statistical significance is typically represented as a “p-value,” ranging from 0 to 1, with the level of statistical significance increasing as the p-value declines. A disparity that is statistically significant at the 0.01, or “1% level” is of greater statistical significance than a disparity that is significant at the 0.05, or “5% level.” *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 323 (N.D. Cal. 1992).

<sup>50</sup> *See, e.g., Stender*, 803 F. Supp. at 323 (“Many courts have followed the social science convention which holds that for disparities below a 5% probability level (‘P-value’), chance explanations become suspect.”); *Paige v. California*, 233 F. App’x 646, 648 (9th Cir. 2007) (same).

<sup>51</sup> A regression analysis is a “common statistical tool” designed to “isolate the influence of one particular factor—*e.g.* sex—on a dependent variable—*e.g.* salary.” *Hemmings v. Tidyman’s, Inc.*, 285 F.3d 1174, 1183 n.9 (9th Cir. 2002). Both the Supreme Court and Ninth Circuit have approved the use of regression analyses to prove discrimination in Title VII cases. *See, e.g., Bazemore v. Friday*, 478 U.S. 385, 400 (1986); *E.E.O.C. v. Gen. Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 579-82 (9th Cir. 1989), *cert denied*, 498 U.S. 950 (1990).

p-value of 0.000) and gender was no longer a statistically significant determinant of salary. *Id.* Dr. Cahill therefore concluded that the gender discrepancy in full professor salaries could be attributed to retention raises. *Id.*

Nevertheless, the District Court failed to *even acknowledge* Dr. Cahill's statistical analysis, much less consider the probative value of its statistical power. Instead, the Court fixated on the perceived smallness of the Psychology department, to the exclusion of all other evidence in the record. In fact, the word "regression" appears nowhere in the Court's discussion of Freyd's disparate impact evidence. ER 17-18.<sup>52</sup> The District Court made no mention of the expert's control variables (gender, years in rank, retention raises, and time trends), number of observations studied (upwards of 100), or the statistical power of the model's results (p-value of .004). ER 245-47.

Permitting the District Court's order to stand would jeopardize the continued use of such statistical analyses to prove disparate impact claims, regardless of the size of the underlying data set.

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<sup>52</sup> The closest the Court came to recognizing the existence of Dr. Cahill's regression study was to briefly gloss over the results of that study: "a salary gap of at least \$15,000[.]" ER 17.

**B. The District Court’s Reasoning Would Preclude All Plaintiffs in Small Employee Pools from Proving Disparate Impact.**

The District Court’s singular focus on the size of the Psychology department contradicts substantial authority recognizing that employees must not be deprived of Title VII protections simply because they work in a small employee pool. *See, e.g., Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir. 1986) (“By necessity, courts sometimes must rely on statistics derived from small sample groups” because “[n]ot to do so would deny employees in small companies some of the protections that Title VII provides.”); *Bunch v. Bullard*, 795 F.2d 384, 395 (5th Cir. 1986) (“We cannot permit an employer to escape liability for discriminatory tactics merely because his work force is not vast enough to provide meaningful data for a sophisticated statistical evaluation.”); *Equal Emp. Opportunity Comm’n v. Am. Nat. Bank*, 652 F.2d 1176, 1194 (4th Cir. 1981) (warning against “cutting off the claims of some employees simply because of the small overall size of the work forces in which they happen to be employed”); *Chicano Police Officer’s Ass’n v. Stover*, 526 F.2d 431, 439 (10th Cir. 1975), *vacated on other grounds*, 426 U.S. 944 (1976) (“The smallness of the sample should not be grounds here for rejecting the proof. If it were, the tendency would be to deny employees in small plants the type of protection the civil rights statutes afford.”); *Boston Chapter, N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1020-21 (1st Cir. 1974) (holding that employment practices “should not be immunized from

study by placing an unrealistically high threshold burden upon those with least access to relevant data”).

Where data sets are limited by the size of the relevant employee pool,<sup>53</sup> vulnerabilities are routinely investigated by evaluation of p-values or conformity with the “four-fifths rule.”<sup>54</sup> *See, e.g., Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991) (affirming verdict of disparate impact despite small sample size, because disparity was significant at .05 level and four-fifths rule was satisfied). A plaintiff can also supplement data with other, non-statistical evidence. *See Watson*, 487 U.S. at 995 n.3 (noting the “significance” or “substantiality” of disparities is judged “on a case-by-case basis”); *Chin v. Port of Authority of New York & New Jersey*, 685 F.3d 135, 153 (2nd Cir. 2012) (same); *Smith v. United Bhd. of Carpenters & Joiners of Am.*, 685 F.2d 164, 167-68 (6th Cir. 1982) (noting that “statistics should not be considered in a vacuum”).

The District Court’s analysis flies in the face of this substantial authority. The District Court made no mention of the statistical power of Dr. Cahill’s analysis, and completely ignored the four-fifths rule in analyzing Defendants’ self-

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<sup>53</sup> *See Sengupta*, 804 F.2d at 1076 (“The impact of a practice on the protected class should generally be measured against the actual pool of employees affected by that practice.”).

<sup>54</sup> A selection practice has a disparate impact if it has a “selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate of the group with the highest rate.” 29 C.F.R. § 1607.4(D).

study.<sup>55</sup> Moreover, the record is rife with non-statistical evidence supporting Freyd’s disparate impact claims, including Defendant Sadofsky’s recognition of the gender pay gap and testimony from female professors of unequal treatment when engaging in retention negotiations. ER 115-17, 130, 146-47, 277-80. Yet the District Court cited none of this evidence in analyzing Freyd’s claim. Instead, the District Court summarily dismissed *all statistical proof* for the sole reason that “Professor Freyd’s data reflects such a small sample size as to render the statistical significance of Professor Freyd’s analysis suspect.” ER 18.<sup>56</sup>

None of the cases cited by the District Court stand for the proposition that small data sets necessarily produce statistically insignificant results stands for that proposition. In *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 219 (9th Cir. 1976)—which was not a disparate impact case—the plaintiff failed to satisfy an essential element of the claim (that he be qualified for

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<sup>55</sup> As discussed above, Dr. Cahill’s analyses were statistically significant at or below the 1% level, ER 246, and the self-study (analyzing a total of 26 retention raises) satisfied the four-fifths rule, ER 17-18.

<sup>56</sup> Substantial case law also supports a finding that the District Court’s granting of summary judgment on Freyd’s disparate impact claim based on data size was premature and inappropriate. *See, e.g., Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1245 (7th Cir. 1992) (holding that where sample was small but results nevertheless indicated a disparity, “granting of summary judgment in favor of [defendant] on this issue by the district court was premature”); *Dicker v. Allstate Life Ins. Co.*, No. 89 C 4982, 1993 WL 62385, at \*24 (N.D. Ill. 1993) (same); *Guinyard v. City of New York*, 800 F. Supp. 1083, 1089 (E.D.N.Y. 1992) (same).

the position), offered no statistically significant analysis, and studied a data set three times smaller than the self-study the District Court discredited here. In *Contreras*, 656 F.2d at 1272-74, the plaintiffs' statistical analysis was, unlike here, *not* significant at the 5% level and had been impeached by evidence that plaintiffs failed to study for the allegedly discriminatory examination.<sup>57</sup> In *Stout v. Potter*, 276 F.3d 1118, 1112-25 (9th Cir. 2002), the Court actually engaged with the statistical analysis (even though it covered a small sample), unlike here, and concluded that the statistical disparity did not conflict with the four-fifths rule.

The District Court's failure to meaningfully engage with the law or the record—solely because of the size of the Psychology department—finds no support in Title VII. Its reasoning would rob countless workers in small employee pools of Title VII's protections by exempting employers of all sizes from liability where their discriminatory policies impacted a “small enough” subset of the workforce. But Title VII contains no such limitation. In fact, the District Court's logic would limit Title VII where it is needed most: in traditionally segregated occupations where “small sample sizes are presumably due at least in part to the

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<sup>57</sup> See also *Bouman*, 940 F.2d at 1226 (cautioning courts not to “misinterpret[] the significance of our statement in *Contreras*” regarding sample size, especially where statistical analyses are otherwise significant at the 5% level).

[employer's] prior discrimination in hiring.” *Jordan v. Wilson*, 649 F. Supp. 1038, 1052 (M.D. Ala. 1986).

### CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully submit that the decision below should be reversed.

Respectfully Submitted,

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Additional Amici Curiae Listed in Appendix*

## APPENDIX

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### *Statements of Interest of Amici Curiae*

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#### **Equal Rights Advocates**

Equal Rights Advocates (ERA) is a national non-profit civil rights organization that fights for gender justice in workplaces and schools across the country. Since its founding in 1974, ERA has sought to protect and expand economic and educational access and opportunities for women, girls, and people of all gender identities through groundbreaking litigation, bold policy reform advocacy, free advice and counseling services, targeted community outreach, and public education. ERA has litigated numerous class actions and other high-impact cases to combat gender discrimination in employment, advance pay equity, and vindicate the civil rights of vulnerable and disadvantaged workers. ERA chairs the national Equal Pay Today campaign, which aims to close the gender wage gap that harms women of color and low-paid workers the most. ERA has led efforts to pass important pay equity legislation, including the California Fair Pay Act of 2015 which significantly amended the state Equal Pay Act (Cal. Labor Code § 1197.5) and led to passage of subsequent legislation prohibiting reliance on prior salary as a bona fide factor other than sex under that statute. ERA has appeared as *amicus curiae* in numerous cases involving the interpretation of equal pay and anti-discrimination laws in this Court and the U.S. Supreme Court, including *Moussouris v. Microsoft Corp.*, No. 18-80080, 2018 U.S. App. LEXIS 27041 (9th Cir. Sept. 20, 2018); *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018); *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). ERA has a strong interest in ensuring that federal courts broadly interpret equal pay and civil rights laws to effectuate their underlying purpose so that all workers have access to fair pay, just working conditions, and economic security.

#### **9to5, National Association of Working Women**

9to5, National Association of Working Women has a 46 year history of organizing for stronger, more effective laws, policies and enforcement to close the wage gap. We continue to be deeply concerned about the pervasive gender wage gap and the barriers that all women, particularly women of color, face in enforcing their right to fair pay. Legal decisions that have the effect of undermining enforcement of

equal pay laws would have widespread negative implications for millions of workers and their families.

### **ACLU Women's Rights Project**

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace.

### **Activism Caucus of the Association for Women in Psychology**

The primary mission of the Activism Caucus of the Association for Women in Psychology is to bring psychological research and clinical experiences to bear on attempts to understand social issues and to work for the betterment of society. Among our concerns are sex/gender discrimination, pay equity, LGBTQ rights, racism, violence against women, and reproductive justice. We support and mentor career women and promote women's leadership in academia and in professional organizations.

### **American Association of University Women**

In 1881, the American Association of University Women (AAUW) was founded by like-minded women who had defied society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education and employment through research, education and advocacy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is economic security. In adherence with our member-adopted Public Policy Program, AAUW is a staunch advocate for pay equity and seeks to uphold the protections of the Equal Pay Act and other employment discrimination laws.

### **AnitaB.org**

AnitaB.org is a nonprofit organization working toward equity for women in technology. We connect, inspire, and guide women in computing, and organizations that view technology innovation as a strategic imperative. We work with corporations to advance their inclusion efforts for women technologists, provide a consistent benchmark of the technical workforce across a wide range of industries, and elevate practices that support the recruitment, retention, and advancement of women in tech. Pay equity for all women, across all industries,

and regardless the size or nature of their employer, is a diving pillar of our work, and we are inherently concerned about decisions that would make it more difficult for anyone, especially those working in skilled or professional occupations and/or for smaller employers, to vindicate their right to equitable compensation.

### **California Women Lawyers**

California Women Lawyers (CWL) is a non-profit organization chartered in 1974. CWL is the only statewide bar association for women in California and maintains a primary focus on advancing women in the legal profession. Since its founding, CWL has worked to improve the administration of justice, to better the position of women in society, to eliminate all inequities based on gender, and to provide an organization for collective action and expression germane to the aforesaid purposes. CWL has also participated as amicus curiae in a wide range of cases to secure the equal treatment of women and other classes of persons under the law.

### **California Women's Law Center**

The California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center that breaks down barriers and advances the potential of women and girls through transformative litigation, policy advocacy and education. CWLC's issue priorities include gender discrimination, economic justice, violence against women, and women's health. For 30 years, CWLC has been on the frontlines of the fight to secure women's economic empowerment in California, including working to end practices that contribute to the gender wage gap and women in poverty.

### **Center for Advancement of Public Policy**

Center for Advancement of Public Policy are national non-profit consultants on gender pay equity, serving state and local governments and private sector clients.

### **Center for the Study of Women in Society**

Center for the Study of Women in Society (CSWS) has a decades long interest in issues of pay equity and women and work. CSWS supports, sponsors and conducts research on the intersecting nature of gender identities and inequalities at the University of Oregon and beyond.

### **Centro Legal de la Raza**

Centro Legal de la Raza represents low-wage and immigrant workers in individual and impact lawsuits to protect their rights and improve conditions more broadly. Often, litigation in state and federal courts is the only way our clients can protect their rights and communities. Centro Legal often co-counsels these cases with

other highly respected nonprofit organizations, local government, and law firm partners. Our cases include class actions to combat wage theft and individual lawsuits to address discrimination, retaliation, and harassment in the workplace.

### **Child & Family Advocacy Clinic, Willamette University**

The Child & Family Clinic at Willamette University advocates for children and families. Gender pay discrimination contributes to family instability.

### **Clearinghouse on Women's Issues**

The mission of the Clearinghouse on Women's Issues is to: Provide information on issues relating to women, including discrimination on the basis of gender, age, ethnicity, marital status or sexual orientation with particular emphasis on public policies that affect the economic, educational, health and legal status of women; cooperate and exchange information with organizations working to improve the status of women; and take action and positions compatible with our mission. In furtherance of CWI's mission of providing nondiscriminatory educational opportunities that are free of gender bias consistent with statutory and regulatory requirements of Title IX, CWI supports as amicus law suits in furtherance of this interest.

### **Congregation of Our Lady of the Good Shepherd, U.S. Provinces**

The Congregation of Our Lady of Charity of the Good Shepherd, US Provinces represents Sisters who, with their Mission Partners address the needs of thousands of low-income people in 28 states of the United States and overseas each year. Dedicated to serving girls, women, and families who experience poverty, exploitation, vulnerability, and marginalization, the Congregation and their lay partners work with immigrants and persons in the situation of human trafficking here and abroad as well as persons in situations of domestic violence. Equal pay rights here and in the other 71 countries where the Congregation is located is important in order to positively meet the challenges our program participants face as they join the workforce.

### **Disability Rights Education & Defense Fund**

The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF was founded in 1979 by people with disabilities and parents of children with disabilities, and remains board- and staff-led by members of the communities for whom we advocate. Recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform

efforts. Consistent with its civil rights mission, DREDF recognizes that social justice for specific communities can only be fully realized when there is social justice for all. DREDF supports legal protections for all diversity and minority communities, including women, many of whom are also people with disabilities.

### **Domestic Abuse Center**

The Domestic Abuse Center (DAC) is a private non-profit 501(c)-3 organization that works exclusively with victims of domestic violence and their children by providing support, counseling, advocacy and policy work in the field of domestic violence. The vast majority of DAC's clients are women. Economic abuse and control is a major issue for abused women. The existence of disparities in pay and working conditions is a common reason victims stay in violent and abusive relationships. DAC supports all efforts to equalize pay and respect in the workforce for all. This is a central issue of importance to the people we serve. DAC also believes it is important that a body of law protects women in the workforce and their families by providing equal pay for equal work and job security in professions they love.

### **Feminist Majority Foundation**

Founded in 1987, the Feminist Majority Foundation (FMF) is a cutting-edge organization devoted to women's equality, reproductive health, and non-violence. FMF uses research and action to empower women economically, socially, and politically through public policy development, public education programs, grassroots organizing, and leadership development. Through all of its programs, FMF works to end sex discrimination in all sectors of society and to achieve civil rights for all people, including people of color and LGBTQ individuals.

### **Friedman & Houlding LLP**

Friedman & Houlding LLP (FH) represents women employees in workplaces such as shipyards, mines and oil fields in cases arising under Title VII of the Civil Rights Act and other anti-discrimination laws. As civil rights litigators, we use regression analysis to analyze data in cases where it is available and have found that it often uncovers stark, unexplained disparities in compensation between men and women with similar qualifications and/or doing substantially similar work. It is of utmost importance to FH and our clients that district courts properly interpret and apply equal pay and anti-discrimination laws in cases where an employer is, or should be, aware that it is paying an equally qualified woman employee less than it is paying her male colleagues.

### **Gender Justice**

Gender Justice is a nonprofit legal and policy advocacy organization based in the Midwest that is committed to the eradication of gender barriers through impact litigation, policy advocacy, and education. As part of its litigation program, Gender Justice represents individuals and provides legal advocacy as amicus curiae in cases involving issues of gender discrimination. Gender Justice has an interest in ensuring that women are paid equally and not otherwise discriminated against at work.

### **Impact Fund**

The Impact Fund is a non-profit legal foundation that provides funding for impact litigation, offers innovative training and support, and serves as counsel in impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights class actions, including cases enforcing workers' rights and challenging gender discrimination in the workplace.

### **In Our Own Voice: National Black Women's Reproductive Justice Agenda**

In Our Own Voice: National Black Women's Reproductive Justice Agenda is a national-state partnership with eight Black women's Reproductive Justice organizations: The Afiya Center, Black Women for Wellness, Black Women's Health Imperative, New Voices for Reproductive Justice, SisterLove, Inc., SisterReach, SPARK Reproductive Justice NOW, and Women with a Vision. In Our Own Voice is a national Reproductive Justice organization focused on lifting up the voices of Black women leaders on national, regional, and state policies that impact the lives of Black women and girls. Reproductive Justice is a framework rooted in the human right to control our bodies, our sexuality, our gender, and our reproduction. Reproductive Justice will be achieved when all people, of all immigration statuses, have the economic, social, and political power and resources to define and make decisions about our bodies, health, sexuality, families, and communities in all areas of our lives with dignity and self-determination.

### **Institute for Women's Policy Research**

The Institute for Women's Policy Research (IWPR) is a leading economic and public policy think tank founded in 1987 that focuses on quantitative and qualitative analysis of issues particularly relevant to women and their families. IWPR's research addresses issues of race, ethnicity, and socioeconomic status, and is concerned with policies that can help women achieve social and economic equality. The gender wage gap is a major contributing factor to poverty and inequality. IWPR's research finds that if women's hourly earnings rose to the level of similarly qualified men's, eliminating the gender wage gap, poverty rates

among families with working women would be reduced by half, *see The Economic Impact Case of Equal Pay by State* <https://statusofwomendata.org/featured/the-economic-impact-of-equal-pay-by-state/>.

### **International Action Network for Gender Equity & Law**

The International Action Network for Gender Equity & Law (IANGEL) works to harness the power of pro bono engagement to further the cause of gender equality, locally, nationally and globally. Through education, advocacy and engagement in the areas of reproductive justice, peace & security, and empowerment, we are building a network for transformative gender justice. IANGEL's commitment to gender equity cannot be realized without pay equity as it is one of the key drivers to obtaining empowerment and self-determination. As such, it is paramount that the pervasive gender wage gap and the barriers many workers face to vindicating their right to fair pay be eliminated. Proper enforcement of our equal pay laws is a necessary precursor to attaining gender equality.

### **KWH Law Center for Social Justice & Change**

KWH Law Center for Social Justice and Change is a nonprofit legal advocacy organization dedicated to the advancement and protection of legal rights for women to be free from sex discrimination, to be paid fairly for the work they perform and to have equal access to social justice. KWH has participated as an amicus curiae in a range of cases before the United States Supreme Court and continually advocates for equal treatment of women and challenges all forms of discrimination. KWH advocates to ensure that all individuals enjoy the full protections promised under the law.

### **Legal Aid at Work**

Legal Aid at Work (formerly the Legal Aid Society – Employment Law Center) (LAAW), founded in 1916, is a public interest legal organization that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, Legal Aid has represented low-wage clients in cases involving a broad range of employment-related issues, including cases involving pay inequity and sex discrimination. LAAW's interest in preserving the protections afforded employees by this country's antidiscrimination and equal pay laws is longstanding.

### **Legal Momentum, the Women's Legal Defense and Education Fund**

Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for nearly 50 years has used the power of the law to define and defend the rights of girls and women. Legal

Momentum has worked for decades to ensure that all employees are treated fairly in the workplace, regardless of their gender. Legal Momentum has litigated cutting-edge gender-based employment discrimination cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as amicus curiae on leading cases in the area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum has also worked to secure the rights of women under state constitutions and local laws, including the right to equal pay for equal work.

### **Methodist Federation for Social Action**

Methodist Federation for Social Action (MFSA) is an intersectional faith based progressive social justice organization that connects United Methodists to each other to build power to make change in the church and the world. Gender justice and economic justice are two of our priorities.

### **National Advocacy Center of the Sisters of the Good Shepherd**

The National Advocacy Center of the Sisters of the Good Shepherd (NAC) educates and develops strategies to address social justice issues and advocates for the transformation of society to the benefit of all people. NAC reflects the spirituality, history and mission of the Sisters of the Good Shepherd, working in solidarity with the disenfranchised – particularly families, women and children. Over the years, we have consistently advocated for equal pay for equal work.

### **National Asian Pacific American Women's Forum**

The National Asian Pacific American Women's Forum (NAPAWF) is the leading, national, multi-issue community organizing and policy advocacy organization for Asian American and Pacific Islander (AAPI) women and girls in the U.S. NAPAWF's mission is to build collective power of all AAPI women and girls to gain full agency over our lives, our families, and our communities. NAPAWF advocates and organizes with a reproductive justice framework that acknowledges the diversity within our community and ensures that different aspects of our identity – such as ethnicity, immigration status, education, sexual orientation, gender identity, and access to health – are considered in tandem when addressing our social, economic, and health needs. Our work includes fighting for economic justice for AAPI women and advocating for the adoption of policies and laws that protect the dignity, rights, and equitable treatment of AAPI women workers.

### **National Center for Lesbian Rights**

The National Center for Lesbian Rights (NCLR) is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBTQ people in the workplace through legislation, policy, and litigation, and represents LGBTQ people in employment and other cases in courts throughout the country.

### **National Council of Jewish Women**

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW resolves to work for employment laws, policies, and practices that provide equal pay and benefits for work of comparable worth and equal opportunities for advancement.

### **National Employment Law Project**

The National Employment Law Project (NELP) is a non-profit legal and research organization with 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, including protections against discrimination and for fair pay based on gender. NELP has litigated and participated as amicus curiae in numerous cases in circuit and state and U.S. Supreme Courts addressing the importance of enforcement of labor and employment protections for all workers.

### **National LGBTQ Task Force**

The National LGBTQ Task Force is the nation's oldest national LGBTQ advocacy group. As a progressive social-justice organization, the Task Force works to achieve full freedom, justice, and equality for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) people and their families. The Task Force trains and mobilizes activists across the Nation to combat discrimination against LGBTQ people in every aspect of their lives, including housing, employment, healthcare, retirement, and basic human rights. Recognizing that LGBTQ persons of color are subject to multifaceted discrimination, the Task Force is also committed to racial justice. To that end, the Task Force hosts the Racial Justice

Institute at its annual Creating Change Conference, which equips individuals with skills to advance LGBTQ freedom and equality.

### **National Organization for Women Foundation**

The National Organization for Women Foundation (“NOW Foundation”) is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to end sex-based pay discrimination.

### **National Partnership for Women & Families**

The National Partnership for Women & Families (formerly the Women’s Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National Partnership has worked to advance women’s equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades for equal pay and to combat sex discrimination.

### **National Women’s Law Center**

The National Women’s Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women’s legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and their families, including economic security, employment, education, and health, with particular attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity in all aspects of society including numerous cases addressing sex discrimination in the workplace, such as pay discrimination. NWLC seeks to ensure that all individuals enjoy the full protection against sex discrimination promised by federal law and has a strong interest in closing gender and race wage gaps and in the proper interpretation of Title VII and the Equal Pay Act.

### **NewsGuild-CWA**

The NewsGuild-CWA is a union that represents journalists and other communications professionals and that advocates for equal pay and against discrimination in the workplace. The NewsGuild represents approximately 20,000 people in 46 locals in the U.S.

### **Oregon Trial Lawyers Association**

Oregon Trial Lawyers Association (OTLA) is a statewide organization of approximately 900 attorneys and 300 other professionals who represent individuals and businesses in civil court. For over 50 years, OTLA and its member attorneys have advocated for the rights of consumers by promoting safer products, workers' rights, investors' rights, access to quality health care, safeguarding the environment and eliminating discrimination in the workplace. OTLA promotes juries and jury service, and the civil justice rights of all Oregonians.

### **Public Counsel**

Public Counsel is the nation's largest public interest law firm, specializing in the delivery of pro bono services. Founded in 1970, Public Counsel is dedicated to advancing equality, justice and economic opportunity by delivering pro bono legal services and impact litigation to low-income individuals and communities. In 2018, Public Counsel staff and almost 5000 pro bono partners served more than 16,000 clients and conducted impact litigation on behalf of over 12 million people. Public Counsel operates eight legal projects: Children's Rights/Education, Community Development, Consumer Rights, Homelessness Prevention, Immigrants' Rights, Center for Veteran's Advancement, the Audrey Irmas Project for Women & Girls' Rights, and Opportunity Under Law. Public Counsel advocates for the rights of women across program areas, including employment, immigration, housing, education, and civil rights.

### **Public Justice Center**

The Public Justice Center (PJC), is a non-profit civil rights and anti-poverty legal organization established in 1985. PJC uses impact litigation, public education, and appellate and legislative advocacy to accomplish law reform for its clients. The PJC has a longstanding commitment to advancing the rights of employees and particularly low-income workers and has litigated cases and filed amicus briefs involving worker protection and anti-discrimination statutes. As such, the PJC has an interest in ensuring that the Equal Pay Act and Title VII are interpreted consistent with their legislative purposes.

### **Sanford Heisler Sharp, LLP**

Sanford Heisler Sharp, LLP is a public interest class-action litigation law firm, specializing in employment, civil rights, and general public interest cases. The firm fights for gender pay equality and has brought numerous individual and class action cases on behalf of women in a variety of industries.

### **The Women's Leadership Innovation Lab at Stanford University**

The Women's Leadership Innovation Lab at Stanford University seeks to accelerate women's leadership.

### **The Women's Law Center of Maryland**

The Women's Law Center of Maryland, Inc. is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal representation, research, policy analysis, legislative initiatives, education and implementation of innovative legal-services programs to pave the way for systematic change. The Women's Law Center is participating as an amicus in *Freyd v. University of Oregon* because the Women's Law Center seeks to ensure the physical safety, economic security, and autonomy of all women. This can only be done if women are provided the same opportunities, resources, and rights as men – including equal pay for equal work.

### **Washington Lawyers' Committee for Civil Rights and Urban Affairs**

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC), founded in 1968, is a nonprofit, nonpartisan organization that works to create legal, economic and social equity. WLC fights discrimination against all people, recognizing in particular the central role that current and historic race discrimination plays in sustaining inequity. As part of its work, WLC has combatted gender discrimination through litigation, client and public education and public policy advocacy.

### **Women Employed**

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed strongly believes that pay

discrimination is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace.

### **Women of Reform Judaism**

Founded in 1913, Women of Reform Judaism (WRJ) strengthens the voice of women worldwide and empowers them to create caring communities, nurture congregations, cultivate personal and spiritual growth, and advocate for and promote progressive Jewish values. Representing more than 65,000 women in nearly 500 women's groups in North America and around the world, WRJ comes to this issue out of our deep commitment to women's equality and dignity for all people. Jewish tradition teaches the importance of paying fair wages as a matter of justice. Our texts also teach that all human beings are created b'tzelem Elohim, in the image of the divine, and are thus deserving of equal rights and treatment. Together, these teachings compel us to fight for fair wages for all people.

### **Women's Law Project**

The Women's Law Project (WLP) is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP seeks to create a more just and equitable society by advancing the rights and status of women throughout their lives through high impact litigation, policy advocacy, public education, and individual counseling. Founded in 1974, the WLP has a long and effective track record on a wide range of legal issues related to women's health, legal, and economic status. Economic justice and equality for women is a high priority for WLP. To this end, WLP has advocated for equal pay for women and supported litigation through amicus briefs and legislation to strengthen federal, state, and local equal pay laws.

### **YWCA of the University of Illinois**

The YWCA of the University of Illinois is committed to women's economic empowerment, and considers the issue of equal pay central to lifting women out of poverty and creating an equitable society.

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned counsel certifies that this Brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure (“FRAP”) 32(a)(7)(B) because this brief contains 6,416 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman type style, 14-point font.

Dated: September 30, 2019

/s/ Kelly M. Dermody  
Kelly M. Dermody

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 30, 2019. All participants in this case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: September 30, 2019

/s/ Kelly M. Dermody

Kelly M. Dermody