

No. 17-1845

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Gayle GORDON and Teresa Maxwell, *Plaintiffs-Appellants*,

v.

UNITED STATES of America, *Defendant-Appellee*.

Appeal from the U.S. Court of Federal Claims (Hodges, J.)

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF THE DISTRICT OF COLUMBIA, AMERICAN CIVIL LIBERTIES UNION OF ARKANSAS, AMERICAN CIVIL LIBERTIES UNION, 9TO5 NATIONAL ASS'N OF WORKING WOMEN, AMERICAN ASS'N OF UNIVERSITY WOMEN, A BETTER BALANCE: THE WORK AND FAMILY LEGAL CENTER, CALIFORNIA WOMEN'S LAW CENTER, COALITION OF LABOR UNION WOMEN, EQUAL RIGHTS ADVOCATES, FAMILY VALUES @ WORK, FEMINIST MAJORITY FOUNDATION, GENDER JUSTICE, LEGAL AID AT WORK, LEGAL MOMENTUM, LEGAL VOICE, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, NATIONAL ASS'N OF WOMEN LAWYERS, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL ORGANIZATION FOR WOMEN FOUND., NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, WOMEN EMPLOYED, WOMEN'S LAW CENTER FOR SOCIAL JUSTICE & CHANGE, WOMEN'S LAW CENTER OF MARYLAND, AND WOMEN'S LAW PROJECT, IN SUPPORT OF PLAINTIFFS AND PETITION FOR REHEARING EN BANC

Galen L. Sherwin
Gillian Thomas
Lenora M. Lapidus
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2664
gsherwin@aclu.org
gthomas@aclu.org
llapidus@aclu.org

October 31, 2018

Scott Michelman
Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF THE DISTRICT OF COLUMBIA
915 15th Street NW, Second Floor
Washington, DC 20005
(202) 457-0800
smichelman@acludc.org
aspitzer@acludc.org

Holly Dickson
THE ARKANSAS CIVIL LIBERTIES UNION
FOUNDATION, INC.
904 West Second Street, Suite 1
Little Rock, AR 72201
(501) 374-2842
holly@acluarkansas.org

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE

Counsel for *amici curiae* certifies the following:

1. The full name of every party or *amicus* represented by me is:

American Civil Liberties Union of the District of Columbia
American Civil Liberties Union of Arkansas
American Civil Liberties Union
9to5, National Association of Working Women
American Association of University Women
A Better Balance: The Work and Family Legal Center
California Women's Law Center
Coalition of Labor Union Women
Equal Rights Advocates
Family Values @ Work
Feminist Majority Foundation
Gender Justice
Legal Aid at Work
Legal Momentum
Legal Voice
National Asian Pacific American Women's Forum
National Association of Women Lawyers
National Council of Jewish Women
National Employment Law Project
National Organization for Women Foundation
National Partnership for Women & Families
National Women's Law Center
Women Employed
Women's Law Center for Social Justice and Change
Women's Law Center of Maryland, Inc.
Women's Law Project

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: N/A.

3. All parent companies and any publicly held companies that own 10 percent or more of the stock of the party or *amicus* curiae represented by me are: none.
4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

Scott Michelman – ACLU Foundation of the District of Columbia
Arthur B. Spitzer – ACLU Foundation of the District of Columbia
Holly Dickson – The Arkansas Civil Liberties Foundation, Inc.
Galen Sherwin – American Civil Liberties Union Foundation
Gillian Thomas – American Civil Liberties Union Foundation
Lenora M. Lapidus – American Civil Liberties Union Foundation

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal: none.

October 31, 2018

Respectfully submitted,

/s/ Scott Michelman

Scott Michelman

AMERICAN CIVIL LIBERTIES UNION

FOUNDATION OF THE DISTRICT OF COLUMBIA

915 15th Street NW, Second Floor

Washington, DC 20005

(202) 457-0800

smichelman@acludc.org

Attorney for Amici Curiae

TABLE OF CONTENTS

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE.....i

TABLE OF AUTHORITIESiv

IDENTITY OF *AMICI* AND STATEMENT OF INTEREST 1

ARGUMENT2

 I. *Yant* Is Unclear And Unmanageable3

 II. *Yant* Erroneously Raises The Burden On Equal Pay Act Plaintiffs.....6

CONCLUSION 11

CERTIFICATE OF COMPLIANCE..... 12

CERTIFICATE OF SERVICE 12

APPENDIX: STATEMENTS OF INTEREST OF *AMICI*A1

TABLE OF AUTHORITIES

CASES

<i>ABB Turbo Sys. AG v. Turbousa, Inc.</i> , 774 F.3d 979 (Fed. Cir. 2014)	10
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	9, 10
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	10
<i>Branch v. United States</i> , 101 Fed. Cl. 411 (2011).....	4, 5
<i>Brooks v. United States</i> , 101 Fed. Cl. 340 (2011).....	5
<i>Cline v. Catholic Diocese of Toledo</i> , 206 F.3d 651 (6th Cir. 2000)	9
<i>Corning Glass Works v. Brennan</i> , 417 U.S. 188 (1974).....	3, 4, 7
<i>Davis v. Prison Health Servs.</i> , 679 F.3d 433 (6th Cir. 2012)	10
<i>EEOC v. Port Auth. of N.Y. & N.J.</i> , 768 F.3d 247 (2d Cir. 2014)	10
<i>Gordon v. U.S. Capitol Police</i> , 778 F.3d 158 (D.C. Cir. 2015).....	10
<i>Jordan v. United States</i> , 122 Fed. Cl. 230 (2015).....	5
<i>Ledbetter v. Goodyear Tire & Rubber Co.</i> , 550 U.S. 618 (2007).....	6, 9

<i>Martin v. United States</i> , 96 Fed. Cl. 627 (2011).....	4, 5
<i>Reeves v. Sanderson Plumbing Prod., Inc.</i> , 530 U.S. 133 (2000).....	9
<i>St. Mary’s Honor Ctr. v. Hicks</i> , 509 U.S. 502 (1993).....	7
<i>Swierkiewicz v. Sorema N.A.</i> , 534 U.S. 506 (2002).....	10
<i>Tex. Dep’t of Cmty. Affairs v. Burdine</i> , 450 U.S. 248 (1981).....	7
<i>Thompson v. City of Waco</i> , 764 F.3d 500 (5th Cir. 2014)	10
<i>Washington Cty. v. Gunther</i> , 452 U.S. 161 (1981).....	6
<i>Yant v. United States</i> , 588 F.3d 1369 (Fed. Cir. 2009)	<i>passim</i>

STATUTES

29 U.S.C. § 206(d)(1).....	3, 8
Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (2009)	6

SECONDARY SOURCES

12 Fed. Proc. Forms § 45:193.50	9
Am. Ass’n of Univ. Women, <i>The Simple Truth about the Gender Pay Gap</i> , at https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap	1

Black’s Law Dictionary, “Prima facie,” <https://thelawdictionary.org/prima-facie...7>

Hegewisch & Williams-Baron, *Fact Sheet: The Gender Wage Gap: 2017 Earnings Differences by Race and Ethnicity*, Inst. for Women’s Policy Res. (Mar. 7, 2018), https://iwpr.org/wp-content/uploads/2018/03/C464_Gender-Wage-Gap-2.pdf.....2

Inst. for Women’s Policy Res., *Fact Sheet: The Gender Wage Gap by Occupation* (Apr. 2012), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C350a%20FINAL%20%2004%2016%2012.pdf.....2>

Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why, and What To Do*, available at <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do1>

IDENTITY OF *AMICI* AND STATEMENT OF INTEREST

Amicus American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan membership organization with over 1.3 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. *Amicus* American Civil Liberties Union of the District of Columbia is the ACLU affiliate serving Washington, D.C., with more than 15,000 members. *Amicus* American Civil Liberties Union of Arkansas has approximately 9,000 members and supporters throughout Arkansas. The ACLU, through its Women's Rights Project, and its affiliates have long been leaders in legal advocacy aimed at ensuring women's full equality in our society including in the workplace. Additional *amici* are listed in the Appendix.¹

As the petition for rehearing en banc explains, the Equal Pay Act (EPA) is a cornerstone of the legal framework protecting women from sex-based inequality and helping to narrow the persistent wage gap between workers of different sexes. More than 50 years after the EPA's passage, the gender wage gap persists: on average, women earn just 80 cents for every dollar earned by men.² This disparity is even

¹ No party has authored this brief in whole or in part, and no one other than *amici*, its members, or counsel has paid for the preparation or submission of this brief.

² See Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why, and What To Do*, available at <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do>; Am. Ass'n of Univ. Women, *The Simple Truth about the Gender Pay Gap*, at <https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap>.

more pronounced for female workers of color.³ Although employers no longer maintain expressly sex-segregated pay scales, research reflects that they continue to pay women less than men who hold the same job, whatever the field — from nursing to technology to automotive — and regardless of whether they are in a subordinate, managerial, or executive role.⁴ Accordingly, decisions such as *Yant v. United States*, 588 F.3d 1369 (Fed. Cir. 2009), and the panel’s decision here, which impose a difficult and unnecessary burden on EPA plaintiffs, are of grave concern to *amici*.

An unopposed motion for leave to file accompanies this brief. Fed. R. App. P. 29(b)(2).

ARGUMENT

The Petition for Rehearing ably demonstrates how *Yant*’s engrafting an extra requirement onto the prima facie case for an EPA violation contravenes the statute, the Supreme Court’s governing interpretation, and the positions of five other circuits. These flaws alone warrant rehearing en banc.

But the problems with *Yant* do not end there. *Yant* is also unworkable and confusing. The requirement it adds is unclear: *Yant* demands that to establish a prima

³ Hegewisch & Williams-Baron, *Fact Sheet: The Gender Wage Gap: 2017 Earnings Differences by Race and Ethnicity*, Inst. for Women’s Policy Res. (Mar. 7, 2018), at 2, https://iwpr.org/wp-content/uploads/2018/03/C464_Gender-Wage-Gap-2.pdf.

⁴ Inst. for Women’s Policy Res., *Fact Sheet: The Gender Wage Gap by Occupation* (Apr. 2012), at 1-4, <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C350a%20FINAL%20%2004%2016%2012.pdf>.

facie case, plaintiffs must go beyond showing that women and men are paid differently for equal work and demonstrate something more — a “plus” factor that courts have struggled to define. And because this “plus” factor is a requirement of the prima facie case, *Yant* appears to require an EPA plaintiff to *plead* more than she needs to *prove* to win her case. The Court in *Yant* may have imposed this additional requirement on the assumption that EPA jurisprudence is akin to that of Title VII, but the two statutes are differently designed and require different showings.

The Court should grant rehearing en banc and overrule *Yant*'s erroneous interpretation of the Equal Pay Act.

I. *Yant* Is Unclear And Unmanageable.

The element that *Yant* added to the requirements of the EPA prima facie case is of uncertain content and consequently has created confusion for trial courts. *Yant* recites the elements of the prima facie case laid out by the Supreme Court based on the plain language of the statute: “plaintiffs ‘must show that an employer pays different wages to employees of opposite sexes “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” ’ ” 588 F.3d at 1372 (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), which in turn quotes 29 U.S.C. § 206(d)(1)). *Yant* goes on, however, to require something more: without acknowledging that it is adding a new requirement, *Yant* demands that the plaintiff

must also make “a showing that discrimination based on sex exists or at one time existed.” *Id.* at 1373. Although *Yant* acknowledges that EPA plaintiffs are not required to prove intent to discriminate and claims not to impose such a requirement, *see id.*, the decision never explains what its new requirement means or how it might be satisfied in practice.

As the petition for rehearing demonstrates, saddling EPA plaintiffs with an additional element to prove disrupts the statutory design by misallocating to the plaintiff the ultimate burden to show not only that a pay differential exists but also its cause. The statute, by its terms, places the burden of explaining the disparity squarely on defendants, by requiring them to prove that the real reason for any difference is gender-neutral. *See* Pet. for Reh’g 4-9. Requiring a plaintiff to anticipatorily rebut an affirmative defense as part of her prima facie case is thus contrary to the statute’s terms and in tension with its “broadly remedial” purpose. *Corning Glass*, 417 U.S. at 208.

An independent problem is that the nature of the plaintiff’s additional burden under *Yant* has never been defined. The result has been confusion. Thus, for instance, *Branch v. United States*, 101 Fed. Cl. 411 (2011), applied the *Yant* “plus” factor independently of the other elements of the EPA prima facie case set forth in *Corning Glass*, *see id.* at 415, whereas the court in *Martin v. United States*, 96 Fed. Cl. 627 (2011), applied only the statutory elements identified by the Supreme Court in

Corning Glass and, while citing *Yant*, did not ask whether the plaintiff had shown “discrimination based on sex.” *See id.* at 631. In *Brooks v. United States*, 101 Fed. Cl. 340 (2011), the court distinguished *Yant* on its facts but nonetheless felt it necessary to hedge that “even if the Federal Circuit meant to impose a new requirement of evidential proof of gender discrimination on an [EPA] claim, the result here would remain the same” because the defendant had established the affirmative defense. *Id.* at 346 n.9. Looking back at *Branch*, *Martin*, and *Brooks*, the court in *Jordan v. United States*, 122 Fed. Cl. 230, 243 n.27 (2015), contrasted what it characterized as two opposing views of *Yant* — all within decisions of the Court of Claims since 2009. And the panel decision in this case never says what *Yant*’s requirement of “discrimination based on sex” means — only that Drs. Gordon and Maxwell have not met it and that it cannot be inferred from the “statutory elements of the prima facie case,” i.e., unequal pay for equal work. Pet. Addendum 9-10.

Additionally, to the extent the additional requirement added by *Yant* has been injected with any meaning, it is suspiciously similar to the intent requirement that *Yant* itself claimed not to impose. In particular, when the Court of Claims applied *Yant* in *Branch*, the court ruled against the plaintiff at least in part because the plaintiff did not show that government action in favor of an employee of the opposite sex was “due to her gender.” 101 Fed. Cl. at 415. If that language is understood to

mean intentional discrimination — and if it doesn't mean that, then it is difficult to ascribe *any* meaning to it — then *Yant* flies in the face of the Supreme Court's clear admonition that the EPA “does not require ... proof of intentional discrimination.” *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (2009).

The confusion *Yant* has generated and its application in conflict with Supreme Court precedent both weigh strongly in favor of reconsidering it.

II. *Yant* Erroneously Raises The Burden On Equal Pay Act Plaintiffs.

Yant's addition of a requirement that an EPA plaintiff show “that discrimination based on sex exists or at one time existed” as part of her prima facie case both blurs the line between EPA and Title VII jurisprudence and has broad and troubling implications for employees' access to justice.

First, the court in *Yant* appears to have conflated the burden-shifting frameworks of the EPA and Title VII and as a result wrongly imported aspects of the latter into the former, in spite of the Supreme Court's recognition that the EPA and Title VII were “designed differently.” *Washington Cty. v. Gunther*, 452 U.S. 161, 170 (1981). In EPA cases, a plaintiff bears merely a burden of *production* — that is, of showing unequal pay between the sexes for equal work — whereas the defendant bears the burden of *persuasion* that the difference is due to a sex-neutral

reason. *See Corning Glass Works*, 417 U.S. at 195–96. By contrast, under the *McDonnell Douglas* framework that applies in Title VII cases, the plaintiff makes out a prima facie case only when she “prove[s] by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination.*” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasis added).⁵ Thus, whereas the EPA plaintiff’s showing of unequal pay for equal work shifts to the employer the burden of *disproving* discrimination, the Title VII plaintiff at all times retains the burden of *proving* discrimination. *See St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

Yant’s extra-statutory and muddled addition to the EPA plaintiff’s prima facie case forces her to clear hurdles applicable to a plaintiff with a different cause of action under an entirely different statutory scheme. Instead of proving just unequal pay for equal work, an EPA plaintiff under *Yant* must make some unspecified kind of “showing that discrimination based on sex exists or at one time existed.” 588 F.3d

⁵ This use of “prima facie case” in Title VII law is not the standard use of that term. Normally, a plaintiff’s prima facie showing is one that, *if proved and if not overcome by an affirmative defense*, would entitle her to judgment. “A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it.” Black’s Law Dictionary, “Prima facie,” <https://thelawdictionary.org/prima-facie>.

at 1373. Thus, under *Yant*, this Court is making the EPA plaintiff jump higher to clear a statutory bar that Congress set lower.

Second, by requiring EPA plaintiffs to put forth this “plus” factor at summary judgment, *Yant* invites dismissal at the pleading stage based on a plaintiff’s failure to allege plausibly in her complaint “that discrimination based on sex exists or at one time existed”— despite the fact that the statute never requires this showing to be pleaded *or* proved. The terms of the EPA make clear that discrimination is established where an employer “pay[s] 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), unless the employer can prove its affirmative defense that the difference is based on merit, seniority, output, or some other sex-neutral factor. Accordingly, when female plaintiffs like Drs. Gordon and Maxwell show that they have been paid less than their male counterparts for work that is “equal” as understood by the statute (that is, requiring substantially equal skill, effort, and responsibility, and performed under similar conditions), they are entitled to win their EPA case, absent an affirmative showing by the employer that the discrepancy resulted from a factor unrelated to sex. Indeed, the federal model jury instructions explain that plaintiffs win if these elements are met — equal work, similar conditions, and a lower wage as compared with someone of a different sex —

without requiring a further finding of “discrimination based on sex.” 12 Fed. Proc. Forms § 45:193.50.

Yet under *Yant*, plaintiffs making the same showing that the model jury instructions say is sufficient at trial could not only lose at summary judgment (as they did here) but also have their case thrown out on a motion to dismiss for failure to plead affirmatively that the pay differential is (or at one time was) “based on sex.” Pleading such a fact plausibly is particularly difficult in light of the information asymmetry between employees and employers. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 141 (2000) (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.” (citation and internal quotation marks omitted)); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 665 (6th Cir. 2000) (noting “the disparity in access to information between employee and employer regarding the employer’s true motives for making the challenged employment decision” (citation and internal quotation marks omitted)). It is the employer who is likely to know the reason for setting wage rates; indeed, employees have trouble discovering that a wage disparity exists, let alone the reason for it. *See Ledbetter*, 550 U.S. at 650 (Ginsburg, J., dissenting). If this Court requires EPA plaintiffs to explain pay disparities by pleading reasons that are no more than guesses, they are vulnerable to dismissal prior to discovery. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009) (explaining that the plausibility showing “asks for more than a sheer possibility that a defendant has acted unlawfully”).

It is black-letter law that a plaintiff is not required to rebut an affirmative defense in her pleadings. *See, e.g., ABB Turbo Sys. AG v. Turbousa, Inc.*, 774 F.3d 979, 985 (Fed. Cir. 2014). Closely related, the Supreme Court and several courts of appeals have rightly found it “incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002); *accord Gordon v. U.S. Capitol Police*, 778 F.3d 158, 161–62 (D.C. Cir. 2015); *Thompson v. City of Waco*, 764 F.3d 500, 508 (5th Cir. 2014); *Davis v. Prison Health Servs.*, 679 F.3d 433, 440 (6th Cir. 2012).⁶ Yet that is precisely the type of incongruity that *Yant* introduces into the law of this circuit. In introducing a non-statutory requirement for EPA plaintiffs to show — affirmative “discrimination based on sex” — *Yant* encourages courts to dismiss EPA cases based on plaintiffs’ failure plausibly to *plead* an element that they need never *prove*. The Court should rehear this case to correct this erroneous requirement that may result in the dismissal of meritorious cases.

⁶ Courts have rightly rejected the suggestion that this element of *Swierkiewicz* was eclipsed by *Iqbal* or *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Gordon*, 778 F.3d at 162; *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 254 (2d Cir. 2014).

CONCLUSION

The Court should grant rehearing en banc to correct its erroneous precedent interpreting the Equal Pay Act.

October 31, 2018

Respectfully submitted,

/s/ Scott Michelman

Scott Michelman

Arthur B. Spitzer

AMERICAN CIVIL LIBERTIES UNION

FOUNDATION OF THE DISTRICT OF COLUMBIA

915 15th Street NW, Second Floor

Washington, DC 20005

(202) 457-0800

smichelman@acludc.org

aspitzer@acludc.org

Galen L. Sherwin

Gillian Thomas

Lenora M. Lapidus

AMERICAN CIVIL LIBERTIES UNION

FOUNDATION

125 Broad Street, 18th Floor

New York, NY 10004

(212) 549-2664

gsherwin@aclu.org

gthomas@aclu.org

llapidus@aclu.org

Holly Dickson

THE ARKANSAS CIVIL LIBERTIES UNION

FOUNDATION, INC.

904 West Second Street, Suite 1

Little Rock, AR 72201

(501) 374-2842

holly@acluarkansas.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and Fed. Cir. R. 35(g) because it contains 2,532 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

/s/ Scott Michelman

CERTIFICATE OF SERVICE

I certify that on October 31, 2018, I electronically filed this brief and appendix with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott Michelman

APPENDIX: STATEMENTS OF INTEREST OF *AMICI*

9to5, National Association of Working Women is a 45-year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Our membership includes transgender individuals. 9to5 has a long history of supporting local, state, and national measures to combat discrimination. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

American Association of University Women (“AAUW”) was founded in 1881 by like-minded women who had challenged society’s conventions by earning college degrees. Since then it has worked to increase women’s access to higher education and equal employment opportunities. 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 to advance gender equity. In adherence with its member-adopted Public Policy Priorities, AAUW supports equitable access and advancement in employment, pay equity, as well as vigorous enforcement of employment discrimination statutes.

A Better Balance: The Work and Family Legal Center is a national legal advocacy organization dedicated to promoting fairness and equality in the workplace

and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance also advocates for policies that promote workplace equality and fair pay, including salary history legislation, fair scheduling laws, equal pay disclosure laws, and fair minimum wage laws.

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. Since its inception in 1989, 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.

The **Coalition of Labor Union Women** is a national membership organization based in Washington, D.C. with chapters throughout the country. Founded in 1974, it is the national women's organization within the labor movement that is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families.

During our history we have fought against discrimination in all its forms, particularly when it stands as a barrier to employment or is evidenced by unequal treatment in the workplace or unequal pay.

Equal Rights Advocates (ERA) is a national, nonprofit civil rights organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated numerous class action and other high-impact cases related to gender discrimination, pay discrimination, and civil rights, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of anti-discrimination laws, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). ERA, along with 15 other national organizations, appeared as *amicus curiae* in *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), which interpreted the Equal Pay Act, and has a strong interest in ensuring that the Equal Pay Act is interpreted consistent with its language and purpose to ensure that employees of different sexes are paid equally for equal work. ERA also serves as home to Equal Pay Today (EPT), an innovative collaboration of women's legal and workers' rights organizations working at the

local, state, and federal level to close the gender wage gap and engage new and diverse constituencies in the fight for equal pay. EPT has members in nearly every region of the country and six state projects in California, Illinois, Minnesota, New Mexico, Pennsylvania, and Washington State. Understanding that many factors contribute to the gender wage gap, EPT focuses on combating pay discrimination, pay secrecy, occupational segregation, pregnancy and caregiver discrimination, wage theft, and an inadequate minimum wage.

Family Values @ Work is a national network of 27 state and local coalitions helping spur the growing movement for family-friendly workplace policies, such as paid sick days and family leave insurance. Too many people have to risk their job to care for a loved one, or put a family member at risk to keep a job. We're made to feel that this is a personal problem, but it's political – family values too often end at the workplace door. We need new workplace standards to meet the needs of real families today. The result will be better individual and public health, and greater financial security for families, businesses and the nation. Our coalitions represent a diverse, nonpartisan group of more than 2,000 grassroots organizations, ranging from restaurant owners to restaurant workers, faith leaders to public health professionals, think tanks to activists for children, seniors and those with disabilities.

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 and achieve civil rights for all people, including people of color and LGBTQ individuals.

Gender Justice is a nonprofit legal advocacy organization based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its impact litigation program, Gender Justice acts as counsel in cases enforcing civil rights laws in support of gender equality. The organization has an interest in ensuring that the Equal Pay Act is interpreted correctly to help eliminate pay disparities.

Legal Aid at Work (LAAW) is a nonprofit public interest law firm, founded in 1916, whose mission is to protect, preserve, and advance the employment rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAAW has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an *amicus curiae* capacity, to promote the interests of women in the workplace. LAAW also has extensive policy experience advocating for the employment rights of women and has a strong interest in ensuring

that workers are granted the full protections of the Equal Pay Act and other federal and state anti-discrimination laws.

Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national nonprofit 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 this 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.

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and LGBTQ persons through litigation, legislation, and public education on legal rights. Since its founding in 1978 as the Northwest Women's Law Center, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations. In addition, Legal Voice has worked to advance

women's economic security by supporting policies that help women in the workplace, including equal pay, paid leave for survivors of gender-based violence, pregnant workers' rights, and policies that support women workers in low-wage industries such as hotel, farm work, and domestic work.

The **National Asian Pacific American Women's Forum** (NAPAWF) is the only national, multi-issue Asian American and Pacific Islander (AAPI) women's organization in the country. NAPAWF's mission is to build the collective power of all AAPI women and girls to gain full agency over our lives, our families, and our communities. NAPAWF's work is centered in 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.

The mission of the **National Association of Women Lawyers** (NAWL) is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

As part of its mission, NAWL works to protect women’s right to equal pay and ensuring that the rights granted under the Equal Pay Act are appropriately enforced.

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’s Resolutions state that NCJW resolves to work for “[e]mployment laws, policies, and practices that provide equal pay and benefits for work of comparable worth and equal opportunities for advancement.” Consistent with our Principles and Resolutions, NCJW joins this brief.

The **National Employment Law Project** (“NELP”) is a nonprofit organization with more than 45 years of experience advocating for the employment and labor rights of low wage and unemployed workers. NELP seeks to ensure that all employees receive the full protection of labor and employment laws. NELP prioritizes workplace equity and ensuring that workers are not discriminated against due to their race, sex, sexual orientation or other status. NELP has litigated and participated as *amicus curiae* in numerous cases in circuit and state courts and the U.S. Supreme Court addressing the importance of equal access to labor and employment protections for all workers.

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.

The **National Partnership for Women & Families** (formerly the Women’s Legal Defense Fund) is a national advocacy organization that promotes 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 their jobs and families. 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 to combat sex discrimination, including pay discrimination, and to ensure that all people are afforded protections against discrimination under federal law.

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 the Equal Pay Act.

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.

The **Women's Law Center for Social Justice and Change** is a newly formed entity focused on protecting the economic interests of women and cultivating the

well-being of children in the south and southwest using a two-generational approach. We test the strength of policies and work to improve policies where there are gaps in protections. Our mission includes helping women of color receive fair and equal pay for every aspect of their work, and to ensure there is no difference in the pay for workers based on sex or gender identity. For the reasons stated above, The Women's Law Center for Social Justice and Change is uniquely qualified to comment on the issues before the Court in *Gordon v. United States*.

The **Women's Law Center of Maryland, Inc.** is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, especially regarding gender discrimination in the workplace and in family law issues. Through its direct services and advocacy, and in particular through the operation of a statewide Employment Law Hotline, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law. The Women's Law Center is participating as an *amicus* in *Gordon v. United States*, because we believe equal pay for equal work is a fundamental right for women.

The **Women's Law Project (WLP)** is a nonprofit public interest law center with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP's mission is to create a more just and equitable society by advancing the rights and status of women throughout their lives. To meet these goals, the WLP engages in high impact

litigation, policy advocacy, public education, and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination, including with respect to this case, equal pay laws. Economic justice and equality for women is a high priority for WLP. To that end, WLP has advocated for equal pay for women, law reform to strengthen federal, state, and local equal pay laws, and proper application and enforcement of existing laws to end the insidious perpetuation of pay discrimination.