

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FRANCES YVONNE SCHULMAN,

Plaintiff

v.

ZOETIS, INC. and
ZOETIS REFERENCE LABS, LLC,

Defendants.

No. 2:22-cv-01351-MEF-LDW

Magistrate Judge Leda Dunn Wettre

**Brief of *Amici Curiae* Women’s Law
Project, Equal Rights Advocates, and
Fourteen Organizations in Support
of Plaintiff’s Motion for Partial
Summary Judgment**

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amici Curiae, sixteen organizations dedicated to gender pay equity, by and through their attorneys, Catherine Merino Reisman, the Women’s Law Project, and Equal Rights Advocates, submit this Brief in Support of Plaintiff’s Motion for Partial Summary Judgment. Proposed *Amici* are various nonprofit organizations and civil rights groups dedicated to principles of sex and gender equality, both in New Jersey and across the nation. One of the principles to which proposed *Amici* are dedicated is the principle of pay equity among all genders. Among the ways in which *Amici* attempt to redress sex and gender discrimination and protect equal rights for women in the United States is by advocating for and working towards the elimination of the gender pay gap. Detailed statements of interest of individual *Amici* are in the accompanying Appendix A.

SUMMARY OF ARGUMENT

In the case before this Court, Plaintiff Frances Yvonne Schulman has alleged that Defendants Zoetis, Inc. and Zoetis Reference Labs, LLC violated the Equal Pay Act (EPA) when they paid her male colleagues vastly more than they paid her, for equal work for which she was far more experienced. Amended Complaint ¶¶ 3, 52-55, 61-62, 66-67, 72-73, Docket Entry No. 52. The Defendants have alleged that the male employees’ pay was based on the pay they received at their prior

place of employment. Answer to Amended Complaint, Docket Entry No. 79.

However, using prior pay to set an employee's future salary contributes to the perpetuation of the gender pay gap and runs counter to the Equal Pay Act's goal of eradicating gender-based wage differentials. While the Third Circuit has yet to rule on the specific question of whether employers can rely on prior pay as a justification for pay disparities that otherwise violate the EPA, many sister courts around the country have already prohibited or strictly limited the use of prior pay for this purpose, providing persuasive authority that the Third Circuit is well positioned to follow.

ARGUMENT

I. The Gender Pay Gap is a Pervasive, Long-Standing Problem Across the American Workforce.

When Congress enacted the Equal Pay Act in 1963, it found that “wage differentials based on sex” impact society and the economy in a number of deleterious ways: they depress standards of living for employees, lead to labor disputes, burden commerce and the free flow of goods, and “constitute[] an unfair method of competition.” P.L. 88-38 § 2. While there has been some narrowing of the wage differential in the intervening years, progress has been slow, and research overwhelmingly demonstrates that this differential (often referred to as the “gender pay gap”) and its various harms continue to persist.

When the Equal Pay Act was signed into law in 1963, women made just 59 cents for every dollar paid to men.¹ Though our nation has made some inroads in closing this gap, pay disparities between men and women still persist some sixty years later. In 2022, full-time, year-round working women on average were paid just 84 cents for every dollar paid to a man, while in 2023 that number fell to 83.6 cents for every dollar paid to a full-time, year-round working man.² This gap is even more pronounced when race and ethnicity are taken into account. In 2022, Black women were paid 67.4 cents per dollar compared to non-Hispanic white men, but only 65.8 cents per dollar in 2023, and Hispanic or Latina women were paid 61.4 cents per dollar in 2022 compared to non-Hispanic white men, dropping to 59.2 cents per dollar in 2023.³ The gender pay gap is most extreme for Native American women, who were paid just 54.7 cents per dollar compared to non-

¹ White House Press Briefing, *Honoring 60 Years of the Equal Pay Act and Advancing Pay Equity*, <https://www.whitehouse.gov/gpc/briefing-room/2023/06/10/honoring-60-years-of-the-equal-pay-act-and-advancing-pay-equity/>.

² Institute for Women's Policy Research, *Women Earn Less Than Men Whether They Work in the Same or in Different Occupations Fact Sheet*, Mar. 2024, <https://iwpr.org/wp-content/uploads/2024/03/Occupational-Wage-Gap-2024-Fact-Sheet-1.pdf>.

³ *Id.*

Hispanic white men. If this trajectory continues, Native American women will not achieve pay parity with non-Hispanic white men for another 120 years.⁴

While 16 cents per dollar does not appear to amount to much, it adds up over a lifetime of working. A woman, regardless of her race or ethnicity, would stand to lose nearly \$400,000 over the course of a 40-year career.⁵ It is, again, worse if race and ethnicity are taken into account. Compared to white, non-Hispanic men, Black women would lose almost \$885,000 over a 40-year career, Native American women would lose almost \$1,150,000, and Latinas would lose \$1,218,000.⁶

New Jersey is no exception to this national problem. In 2020, full-time female wage and salary⁷ earners in New Jersey had median weekly earnings of \$1,041, compared to median weekly earnings of \$1,267 for male wage and salary earners, amounting to a difference of nearly \$12,000 per year.⁸ Women in New

⁴ Institute for Women's Policy Research, *Native Women Will Not Reach Pay Equity with White Men Until 2144*, <https://iwpr.org/wp-content/uploads/2023/11/IWPR-Native-Women-Wage-Gap-Fact-Sheet-2023.pdf>.

⁵ Sarah Javaid, *The Wage Gap Robs Women Working Full Time, Year-Round of Hundreds of Thousands of Dollars Over a Lifetime*, National Women's Law Center, March 2024, <https://nwlc.org/wp-content/uploads/2023/03/EPD-FS-2024-3.1.24.pdf>.

⁶ *Id.*

⁷ Wage is pay per hour of labor, while salary is a fixed amount of pay during a pay period; see U.S. Bureau of Labor Statistics, *Glossary*, <https://www.bls.gov/bls/glossary.htm>.

⁸ Bureau of Labor Statistics Mid-Atlantic Information Office, *Women's Earnings in New Jersey – 2020*, https://www.bls.gov/regions/mid-atlantic/news-release/womensearnings_newjersey.htm.

Jersey are paid, on average, just 82.2 cents for every dollar paid to men in the state, putting New Jersey's gender pay gap just below the national average. The gender pay gap in New Jersey has been a consistent feature of the state's labor market since the Bureau of Labor Statistics first began collecting state level data in 1997, with the female to male earnings ratio ranging from a low of 74.3 cents on the dollar in 2004 to a high of a mere 84.8 cents on the dollar in 2010.⁹ The gaps again are worse when taking race and ethnicity into account. Full-time, year-round Black women workers in New Jersey were paid just 57 cents to every dollar a white, non-Hispanic man was paid in 2022, while Latinas were paid 46 cents, and Native American women just 44 cents to every dollar paid to a white, non-Hispanic man.¹⁰

The effects of the gender pay gap are both immediate and long-term. This gap directly contributes to the higher rates at which women experience poverty. In 2022, 11.8 percent of women were living below the poverty line, compared to 9.2 percent of men.¹¹ Women of color were even more likely to live in poverty, with 16.6 percent of Black women in poverty, 16.8 percent of Latinas, and 21.6 percent of Native American women.¹² These inequities follow women into retirement:

⁹ *Id.*

¹⁰ National Women's Law Center, *The Wage Gap, State by State*, March 5, 2024, <https://nwlc.org/resource/wage-gap-state-by-state/>.

¹¹ Shengwei Sun, *National Snapshot: Poverty Among Women & Families in 2022*, National Women's Law Center, Nov. 2023, https://nwlc.org/wp-content/uploads/2023/11/National-Snapshot-Poverty_ACCESSIBLE.pdf.

¹² *Id.*

because women have lower wages overall compared to men throughout their careers, their Social Security benefits and pensions are generally lower as well.¹³ Even higher education, which is often seen as an equalizer within the American workforce, has little effect on the gender pay gap. While female enrollment in college outpaces male enrollment by nearly twenty percentage points,¹⁴ and 46 percent of women in the 25-34 age group hold a college degree compared to just 36 percent of men in that group,¹⁵ one year out of college female college graduates still earn only 82 cents on the dollar compared to male college graduates.¹⁶ The pay gap between college-educated women and college-educated men is no narrower than the gap between women and men without college degrees.¹⁷ And in fact, women who hold advanced degrees do not on average earn as much as a man with

¹³ American Association of University Women, *The Simple Truth about the Gender Pay Gap Fall 2018 Edition*, <https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf>.

¹⁴ National Student Clearinghouse Research Center, *Term Enrollment Estimates Fall 2020*, https://nscresearchcenter.org/wp-content/uploads/CTEE_Report_Fall_2020.pdf.

¹⁵ Kim Parker, *What's Behind The Growing Gap Between Men And Women In College Completion?*, Pew Research Center, <https://www.pewresearch.org/short-reads/2021/11/08/whats-behind-the-growing-gap-between-men-and-women-in-college-completion/>.

¹⁶ Christianne Corbett & Catherine Hill, AAUW, *Graduating to a Pay Gap: The Earnings of Women and Men One Year After College Graduation*, <https://files.eric.ed.gov/fulltext/ED536572.pdf>.

¹⁷ Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, Pew Research Center, <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/>.

a bachelor's degree; if a woman wants any hope to earn as much as a man, she almost must attend graduate school.¹⁸

When controlling for other factors, including race, geography, education, work experience, occupation, and industry, research has found that anywhere from 60 to 70 percent of the wage gap remains “unexplained.”¹⁹ The research is clear that the wage gap affects women from the moment they enter the workforce and follows them throughout their careers, and that there is little individual women can do, including earning higher degrees or changing industries, to mitigate these disparities. A likely cause of much of the “unexplained” gap in pay is discrimination, both overt discrimination as well as unconscious biases that influence hiring, promotion, and salary decisions. For example, in one study researchers presented participants with resumes that were identical, save that the name on one resume was a traditionally female name, while the name on the other resume was a traditionally male name. On average, the study participants offered

¹⁸ Erin George and Gretchen Livingston, *What You Need to Know About the Gender Wage Gap*, U.S. Department of Labor Blog, March 12, 2024, <https://blog.dol.gov/2024/03/12/what-you-need-to-know-about-the-gender-wage-gap>.

¹⁹ Thomas Foster, Marta Murray-Close, Liana Christin Landivar, and Mark deWolf, Center for Economic Studies, *An Evaluation of the Gender Wage Gap Using Linked Survey and Administrative Data*, Nov. 2020, <https://www2.census.gov/ces/wp/2020/CES-WP-20-34.pdf>; U.S. Department of Labor Women's Bureau Issue Brief, *Understanding the Gender Wage Gap*, Mar. 2023, https://www.dol.gov/sites/dolgov/files/WB/equalpay/WB_issuebrief-undstg-wage-gap-v1.pdf.

the applicants with a traditionally male name a starting salary nearly 15% higher than applicants with a traditionally female name.²⁰ Similar research has been done in other industries. A study of restaurant waitstaff found that men were offered work in high-price and, therefore, high-paying restaurants far more often than women, while women were offered jobs in low-price and low-paying restaurants far more often than men.²¹ A resume audit study randomizing for gender found that high-achieving men (as measured by grades) received call-backs from employers at a nearly 2-to-1 rate compared to similarly high-achieving women.²² Finally, among top-tier law firms, a resume audit survey found that higher-class male applicants, where class was indicated by signifiers such as graduation from a prestigious university, were four times more likely to receive call-backs than other

²⁰ Corinne A. Moss-Racusin, et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PNAS 16474, 16475, Oct. 2012, <http://www.pnas.org/content/109/41/16474.full.pdf>. This study also found that the participants perceived the same applicant as less competent when given a female name, and more competent when given a male name, showing that assessments around competence are themselves plagued by gender biases. Thus, in cases where employers claim that individual male applicants are paid more based on their ability or competence, there is reason to believe that these assessments are affected by gender-based discrimination and may serve to both obscure and further exacerbate the gender pay gap.

²¹ David Neumark, Roy Bank, Kyle Van Nort, *Sex Discrimination in Restaurant Hiring: An Audit Study*, NBER Working Paper Series, Working Paper No. 5024, Feb. 1995, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=225803.

²² Natasha Quadlin, *The Mark of a Woman's Record: Gender and Academic Performance in Hiring*, 83 American Sociological Review (Mar. 2018), <https://journals.sagepub.com/doi/full/10.1177/0003122418762291>.

comparable female applicants.²³ Across industries, then, we see pronounced biases, whether conscious or not, in favor of men and to the detriment of women.

II. Allowing Employers to Rely on an Applicant's Prior Pay Contributes to the Perpetuation of the Gender Pay Gap.

If women start their careers with lower salaries than their male counterparts and future employers are permitted to set pay based on employees' prior salaries, gender-based pay disparities can follow workers from job to job and compound the inequity. This practice, in which employers rely on wage history or "prior pay" as a factor for negotiating or setting the salary of new employees, has the harmful and discriminatory effect of perpetuating pay disparities between men and women.²⁴ The Society for Human Resource Management has declared that "salary history should not be a factor in setting compensation," and instead that "compensation decisions should be based on the value of the position to the organization, competition in the market and other bona fide business factors."²⁵ Thus, in practice,

²³ Lauren A. Rivera and András Tilcsik, *Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market*, 81 *American Sociological Review* (2016), <https://ideas.wharton.upenn.edu/wp-content/uploads/2018/07/Rivera-Tilcsik-2016.pdf>.

²⁴ Jessica Gottsacker, *Waging War Against Prior Pay: The Pay Structure That Reenforces the Systemic Gender Discrimination in the Workplace*, St. Louis Univ. L. J. (Fall 2019), <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1763&context=lj>.

²⁵ Stephen Miller, *Compensation Equity Public Policy Issue Statement*, Society for Human Resource Management, April 2018, <https://www.shrm.org/topics-tools/news/benefits-compensation/shrm-issues-policy-statement-compensation-equity>.

using prior pay as a tool for setting salaries, especially when it is the primary factor justifying pay disparities between employees, significantly contributes to gender-based wage inequity.²⁶

The U.S. Equal Employment Opportunity Commission (EEOC) has recognized the discriminatory impact this practice has on women in the workforce. In its advice for small businesses, the EEOC recommends that a business “[a]void basing pay solely on factors that may be discriminatory, such as prior salary.”²⁷ Furthermore, in their guidance, the EEOC states that reliance on prior salary alone cannot justify a wage disparity, “because prior salaries of job candidates can reflect sex-based compensation discrimination.”²⁸ The EEOC has also observed that a barrier to pay equity may exist if “[a]n employer maintains a compensation policy or practice that is neutral on its face, but has a disparate impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity.”²⁹ The federal government recently released a rule prohibiting the use of

²⁶ National Women’s Law Center, *Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, Mar. 2022, <https://nwlc.org/wp-content/uploads/2020/12/Asking-for-Salary-History-2022.pdf>.

²⁷ U.S. Equal Employment Opportunity Commission, *Pay Tips*, <https://www.eeoc.gov/employers/small-business/pay-tips> (last visited Mar. 1, 2024).

²⁸ U.S. Equal Employment Opportunity Commission, *Compliance Manual*, No. 915.003 § 10-IV.F.2.g, Dec. 2000, <https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination>.

²⁹ Abigail Coleman, Robyn Dupont & Nina Rivera, U.S. Equal Employment Opportunity Commission, *In Pursuit of Pay Equity: Examining Barriers to Equal*

salary history for new federal workers.³⁰ Reliance on prior pay to set future pay constitutes just such a barrier to equal pay.

One intervention that has proved successful in narrowing the seemingly intractable problem of gender-based wage disparities is the use of salary history bans. Salary history bans prohibit employers from relying on an applicant's prior salary or asking about it when making hiring and compensation decisions. As of August 2023, twenty-two states and twenty-two local municipalities have enacted various laws limiting the use of salary history.³¹ New Jersey enacted a statewide salary history ban that went into effect on January 1, 2020. N.J. Stat. § 34:6B-20.

Research confirms that salary history bans improve women's wages. For example, one study found that workers who found new jobs in jurisdictions with salary history bans saw a pay increase, on average, of 4.1 percent. When broken down by gender, female applicants saw a pay increase of 6.2 percent, one and a half times the average.³² A study of California's salary history ban estimates that

Pay, Intersectional Discrimination Theory, and Recent Pay Equity Initiatives, Nov. 2021, <https://www.eeoc.gov/pursuit-pay-equity-examining-barriers-equal-pay-intersectional-discrimination-theory-and-recent-pay>.

³⁰ Advancing Pay Equity in Governmentwide Pay Systems, 89 Fed. Reg. 5737 (Apr. 1, 2024).

³¹ HRDive, *Salary History Bans*, Aug 2023, <https://www.hrdiver.com/news/salary-history-ban-states-list/516662/>.

³² James Bessen et al., *Perpetuating Inequality: What Salary History Bans Reveal About Wages*, July 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729.

women over age 35 saw a 2.3 percent increase in their earnings ratio relative to men, and that married women with all their children over age 5 saw an increase of 4.7 percent.³³ Based on these findings, researchers have concluded that “the use of salary histories appears to perpetuate the effects of past discrimination or other group inequities.”³⁴ By showing that the pay gap narrows when employers are unable to rely on prior pay to set current and future wages, existing bans further demonstrate that employers’ use of prior pay is a driving factor in the perpetuation of the gender pay gap.

The fact that the male comparators in this case were brought on from a company that Defendants acquired, rather than through the standard hiring process, does not differentiate this case in any meaningful way from a typical prior pay fact pattern, in which the old employer and new employer are unrelated. Amended Complaint ¶¶ 57, 69, Docket Entry No. 52. Keeping employees from acquired companies at their prior salary is no different than if a company has a policy of keeping employees hired through the standard application process at their prior salary – both such policies result in new employees retaining their prior salary. Furthermore, and perhaps most important, the effect here was the same. Male

³³ Benjamin Hansen and Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California’s Salary History Ban*, National Bureau of Economic Research, Apr. 2020, <https://www.nber.org/papers/w27054.pdf>.

³⁴ Bessen et al., *supra* note 30.

employees at Zoetis ended up with substantially higher salaries than a similarly situated female employee, because their prior employer paid them more. Whether Zoetis hired Ethos's employees during an acquisition or through the normal hiring process thus makes no appreciable difference to the outcome; under both scenarios, Zoetis would have used prior pay to determine salaries for new employees, and this practice would have resulted in a gender-based pay differential that served to perpetuate historic gender inequities. The use of prior pay in this case runs directly counter to the purpose and spirit of the Equal Pay Act, and this practice cannot be saved by the fact that Zoetis hired the male comparators in this case as part of an acquisition rather than through the typical hiring process. As the U.S. Supreme Court has held, the Equal Pay Act "is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Corning Glass Works v. Brennan*, 417 U.S. 188, 208, (1974).

III. It is Likely the Third Circuit Would Find That Using Prior Pay to Determine an Employee's Salary Contributes to the Gender Pay Gap and Cannot Serve as a Defense in an Equal Pay Act Claim.

While the Third Circuit has yet to rule on the specific issue of whether prior pay can serve as a defense under the Equal Pay Act, there are multiple indicators suggesting that, if presented with this question, the Third Circuit would find that prior pay either can *never* justify a gender-based pay differential or that such

evidence can only justify pay discrepancies when combined with other factors, including evidence that the employee's prior pay was not a result of gender discrimination.

Like the states and localities that have recognized the deleterious effects of using prior pay for salary decisions, courts around the country have also recognized that reliance on prior pay perpetuates the pay gap between men and women,³⁵ and that as a result, this practice can run afoul of the Equal Pay Act. The Ninth Circuit found as much in *Rizo v. Yovino*, reasoning that:

[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities.

³⁵ See, e.g., *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (holding that an employee's prior pay cannot serve as an affirmative defense to an Equal Pay Act violation because "[a]llowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate"); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (holding that an employer cannot rely on prior pay alone in establishing an affirmative defense because doing so would perpetuate the pay disparity between men and women); *Husser v. New York City Dep't of Educ.*, 137 F. Supp. 3d 253, 270 (E.D.N.Y. 2015) (denying summary judgment to employer where employee salaries were set based on a formula that included prior salary, resulting in vastly different salaries for male and female employees); *EEOC v. Grinnell Corp.*, 881 F. Supp. 406, 412 (S.D. Ind. 1995) (finding that a jury could reasonably conclude that the employer's practice of relying on prior pay "rewarded male employees for their higher prior salaries while taking advantage of the lower salaries historically paid to women.").

950 F.3d 1217, 1228 (9th Cir. 2020). The Ninth Circuit found that “using the heuristic of an employee’s prior pay, rather than relying on job-related factors actually associated with an employee’s present position, does not suffice to defeat an EPA claim,” and agreed with the EEOC “that setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination.” *Id* at 1228.

While the Ninth Circuit is the only circuit to hold that prior pay may *never* be used as an affirmative defense under the Equal Pay Act, many circuit courts have held that prior pay *alone* cannot justify wage disparities that otherwise violate the Equal Pay Act. *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005), *abrogated on other grounds by Fox v. Vice*, 563 U.S. 826, 832 (2011); *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500, 508 (10th Cir. 2003); *Irby*, 44 F.3d at 955. These circuit courts, like the Ninth Circuit, have recognized that allowing employers to justify paying female employees lower salaries based solely on the amount they were paid at a prior job perpetuates the historical inequality the EPA seeks to rectify. *See Irby*, 44 F.3d at 955 (“[i]f prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated.”) (quoting *Irby v. Bittick*, 830 F. Supp. 632, 636 (M.D. Ga. 1993)); *see also Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (“When prior salary is asserted as a defense to a claim of unequal pay, this court carefully examines the

record to ensure that an employer does not rely on the prohibited ‘market force theory’ to justify lower wages for female employees simply because the market might bear such wages.”).

The Third Circuit has yet to articulate a standard for assessing whether prior pay may be used as a defense in Equal Pay Act claims; however, the Court has had the opportunity to look at the pervasive nature of the gender pay gap and its historical roots. In *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, the Third Circuit heard a challenge to a Philadelphia ordinance prohibiting employers from inquiring into a prospective employee’s wage history and from relying on wage history to determine salary. 949 F.3d 116 (3d Cir. 2020). In its opinion, the Third Circuit found that “the wage gap is substantial and real,” that this gap persists even when controlling for such variables as education and work experience, that many researchers over the years have attributed a substantial part of the gap to discrimination, that existing laws “have been inadequate” to close the gap, and that “relying on wage history can perpetuate gender and race discrimination.” *Id.* at 143. The Court further found that the City of Philadelphia “made a reasonable judgment that a wage history ban would further the City’s goal of closing the gap and ameliorating the discrimination *inherent* in the disparate wages.” *Id.* (emphasis added).

Not only did the Third Circuit hold that there was ample evidence to establish the history and prevalence of the gender pay gap as a societal evil, but it also cited favorably to the Ninth Circuit’s opinion in *Rizo*. Specifically, the Third Circuit opined that the Ninth Circuit’s analysis in *Rizo* was “straightforward,” including its central finding “that consideration of salary history ‘allow[s] employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum.’” *Id.* at 148 (emphasis in original). The Third Circuit also recognized that “[o]ther courts have reached the same conclusion.” *Id.* (citing *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) and *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015)).

While some courts have permitted prior pay as a defense to an EPA claim, the Third Circuit did not rely on any such cases when making its decision in *Greater Philadelphia Chamber of Commerce* and did not discuss these cases in any depth. Rather, the Third Circuit acknowledged this contrary jurisprudence by way of a parenthetical at the end of a footnote, suggesting that while the Court was aware of such decisions it did not consider them persuasive. *See id.* at 148 n.240. Given that the Third Circuit recognized the serious harm of reliance on prior pay when upholding the Philadelphia prior pay ordinance, and that it relied heavily on *Rizo* to support this decision, the Third Circuit is well positioned to follow the lead

of *Rizo* and other opinions that have prohibited or limited the use of prior pay as a justification for wage differentials in Equal Pay Act cases.

While the Third Circuit has yet to address this specific question, the District Court of New Jersey did confront this issue in *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, 922 F. Supp. 985 (D.N.J. 1996). In *Dubowsky*, a female associate at a law firm who was paid less than male associates with equal or lesser experience brought an Equal Pay Act claim against her employer. The employer argued that it did not violate the Equal Pay Act, because salary decisions for these employees were made pursuant to a “factor other than sex,” and were therefore permissible under the statute. One “factor other than sex” cited by the employer was “market forces,” including plaintiff’s prior pay. *Id.* at 993. The *Dubowsky* court evinced great circumspection about the use of “market forces” to justify paying female employees lower salaries:

In evaluating this defense, the Court will bear in mind the [Ninth Circuit’s] clarification that “[a]n employer may consider the marketplace value of the *skills* of a particular individual when determining his or her salary.” It is not legitimate under the EPA to pay an equally qualified woman less than a man because of her inferior bargaining power in the market *as a woman*. A court should not accept a “market forces” defense unless the employer can rationally explain the use of market information.

Id. (internal citations omitted) (emphasis in original). While the *Dubowsky* court did not hold that prior pay can *never* be used to justify paying a female employee less than a male employee, the court placed the burden on the employer to show

that plaintiff's prior salary was an accurate reflection of her skills and was not affected by sex. This is a significant burden,³⁶ one which the defendants in *Dubowsky* failed to meet, as the court ultimately determined that "plaintiff's previous salary [did not] explain the discrepancy [in pay], as defendants have not established beyond dispute that plaintiff's previous salary was unrelated to her status as a woman in the marketplace or that her previous salary accurately reflected the value of her skills in the marketplace." *Id.* at 994. The District Court of New Jersey came to a similar conclusion in *Hodgkins v. Kontes Chemistry & Life Sciences Product*, finding on summary judgment that prior wages, absent a nondiscriminatory explanation of these wages, could not justify pay discrepancies between a female plaintiff and her male co-workers, because a reasonable factfinder could conclude that the employer's "stated reasons for differential pay—experience, *prior wages*, marketability, skill—are a pretext for gender discrimination." No. CIV. A. 98-2783 JBS, 2000 WL 246422, at *17 (D.N.J. Mar. 6, 2000) (emphasis added). Thus, the District of New Jersey has held on multiple occasions that reliance on prior pay *alone*, as well as reliance on prior pay absent meaningful investigation into the factors that influenced this prior pay and proof

³⁶ *See id.* ("Once an EPA plaintiff makes out her *prima facie* case, the burden of persuasion shifts to the defendants to prove by a preponderance of the evidence one of the affirmative defenses permitted by the Equal Pay Act. Defendants' burden is a heavy one . . .").

that those factors were not themselves discriminatory, cannot justify pay discrepancies between similarly-situated male and female employees.

The Third Circuit's analysis in *Greater Philadelphia Chamber of Commerce* and the persuasiveness of opinions by district courts within the circuit suggest that the Third Circuit would join the *Rizo* Court and other circuit courts that have prohibited or significantly limited the use of prior pay as evidence that can support an employer's defense in an Equal Pay Act case that it paid a female employee less than her male counterparts due to a "factor other than sex." 29 U.S.C. § 206(d)(1).

Despite some narrowing in the decades since the Equal Pay Act was signed into law, the gender pay gap persists, and researchers have determined that discrimination is behind a sizable percentage of this gap. Employer reliance on prior pay when setting salaries often ends up reproducing historical discrimination, rather than reflecting the value of the individual job applicant. Targeted interventions, such as salary history bans, have been shown to alleviate gender pay disparities by explicitly preventing employers from relying on prior salary which is often a proxy for gender in pay setting. The Third Circuit has signaled its reluctance to hold that prior pay can constitute a defense to an Equal Pay Act claim, and instead is well positioned to hold that prior pay either can never be used as an affirmative defense to an Equal Pay Act claim or cannot be the sole factor in such a defense. A holding to the contrary would undermine the purpose and spirit

of the Equal Pay Act. The decision in this case will be of particular importance to women of color and working-class women, because of how those women are more seriously affected by the gender wage gap.

CONCLUSION

For these reasons, *Amici* respectfully request that Plaintiff's Motion for Partial Summary Judgment be granted.

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Respectfully submitted,

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APPENDIX A: STATEMENTS OF INTEREST OF *AMICI CURIAE*

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’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. 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 that end, WLP has advocated for equal pay for women, a goal that is far from achieved despite the adoption of federal and state equal pay laws. We have supported reform to strengthen federal and state equal pay laws and to enact local laws banning reliance on prior pay to set wages in Philadelphia and Pittsburgh. Such laws are necessary to end the perpetuation of pay discrimination by employers who seek to justify pay discrimination on the basis of prior pay.

Equal Rights Advocates

Equal Rights Advocates (“ERA”) is a national non-profit legal 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 actions and other high-impact cases on issues of gender discrimination and civil rights, including pay equity. ERA cosponsored the California Fair Pay Act which amended the state's Equal Pay Act and prohibits employers from using prior salary as the justification for a gender pay differential. ERA has appeared as amicus curiae in numerous cases involving the federal Equal Pay Act, including *Rizo v. Yovino*, 950 F.3d 1217, and 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 has an interest in ensuring that federal courts interpret the federal Equal Pay Act so as to effectuate its intent to ensure equal pay for equal work irrespective of gender.

American Association of University Women (AAUW)

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 700 branches, 450 college and university partners, and tens of thousands of members and supporters 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.

California Women's Law Center

The California Women's Law Center ("CWLC") is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. Since its inception in 1989, CWLC has placed a particular emphasis on eradicating all forms of discrimination against women, with a focus on advocating for the rights of low-income women. CWLC is dedicated to the fight to end practices contributing to the gender wage gap and women in poverty.

Center for WorkLife Law

The Center for WorkLife Law at the University of California College of the Law, San Francisco, is a national research and advocacy organization widely recognized as a thought leader on the issues impacting family caregivers, including pregnant and breastfeeding employees and students, such as caregiver discrimination, pay equity, and access to reasonable accommodations. Caregiver discrimination disproportionately impacts women, people of color, and low-wage workers; and research shows the gender pay gap is largely attributable to motherhood. WorkLife Law regularly collaborates with employees, lawyers, health

care providers, and community organizations to combat caregiver discrimination and advance gender, racial, and socioeconomic justice.

Coalition of Labor Union Women

The Coalition of Labor Union Women (CLUW) is America's only national membership organization for all union women based in Washington, DC with chapters throughout the country. Founded in 1974 it 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. From its inception CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on public policy issues such as equality in employment and educational opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom, and increased participation of women in unions and in politics. Through its 40 chapters throughout the United States, CLUW members work to end discriminatory laws and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination. CLUW has provided educational and training programs for many

years to educate and inform workers, union leaders and employers about issues of gender equality in the workplace.

Gender Equality Law Center

The Gender Equality Law Center is a not for profit public interest law firm and advocacy organization based in New York City. We seek to use the law to break down barriers to economic equality for women, girls and LGBTQ + individuals with an emphasis on redressing discrimination in the workplace and in academic settings. When women are paid less in jobs at any point in their work lifespan the impact follows them for decades and creates disparate economic incomes for themselves and their families. There is no place in our society for pay to be based on gender as opposed to work contributions and skills.

Institute for Women's Policy Research

The Institute for Women's Policy Research (IWPR) is a leading national economic and public policy think tank founded in 1987 that builds evidence to shape policies that grow women's power and influence, close inequality gaps, and improve the economic well-being of families. The gender wage gap is a major contributing factor to poverty and inequality. IWPR's research documents the role of gender and racial/ethnic discrimination in women's lower earnings. IWPR's estimates of pay trends show that at the current rate of change, it will take almost four decades for all women full-time workers to reach pay equity with men and

close to 200 years for Hispanic or Latina women to reach pay equity with White men workers.

Legal Aid at Work

Legal Aid at Work is a non-profit public interest law firm founded in 1916 whose mission is to partner with people to help them understand and assert their workplace rights, and to advocate for employment laws and systems that empower low-paid workers and marginalized communities. Legal Aid at Work has represented low-wage clients in cases involving a broad range of issues, including gender-based equal pay claims and discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid at Work has appeared many times in federal and state courts, both as counsel for plaintiffs and in an amicus curiae capacity. Legal Aid at Work's interest in preserving the protections afforded to employees by this country's antidiscrimination laws is longstanding.

Legal Momentum

Legal Momentum, originally founded as the NOW Legal Defense and Education Fund, is the country's first and longest-serving legal advocacy organization advancing gender equality. For the past five decades, we have employed three main strategies—high-impact litigation, educational initiatives, and policy advocacy—to strengthen gender equality under the law and in our society.

Our areas of focus include gender-based violence, workplace equality, educational opportunity, and fairness in the courts.

Recognizing that our vision has always been inextricably linked to the work of many other justice movements, including racial justice, we are committed to an intersectional approach and a view of gender equality that is inclusive of all gender identities.

National Advocacy Center of the Sisters of the Good Shepherd

The National Advocacy Center of the Sisters of the Good Shepherd educates and advocates on social justice issues for the transformation of society to the benefit of all people reflecting the spirituality, history and mission of the Sisters of the Good Shepherd. NAC advocates at the federal level for people living in poverty, immigrants, survivors of human trafficking, survivors of domestic abuse, and other vulnerable populations. The National Advocacy Center reflects the spirituality, history and mission of the Congregation of Our Lady of Charity of the Good Shepherd (better known as the Sisters of the Good Shepherd). The sisters and their agencies work in solidarity with the disenfranchised - particularly families, women and children - who often are forgotten, left-behind or dismissed. The Sisters of the Good Shepherd was founded in France in 1835 and are in 70 countries on 5 continents and have had a presence in the United States for over 175 years. With a presence in 22 states and 1 U. S. Territory, the Sisters and their Lay

Mission Partners have dedicated themselves to serving girls, women and families who experience poverty, exploitation, vulnerability and marginalization.

National Employment Law Project

The National Employment Law Project (“NELP”) is a non-profit legal and research organization with more than 50 years of advocating for the employment and labor rights of workers, especially those paid low wages and workers of color. 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 pay disparities based on gender. 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 enforcement of labor and employment protections for all workers.

National Organization for Women Foundation

The National Organization for Women (NOW) Foundation is a 501 (c) (3) entity of the National Organization for Women and is dedicated to advocating for women’s equal rights through education and litigation. NOW is the nation’s oldest and largest grassroots feminist activist membership organization. NOW Foundation focuses on a range of issues, including economic justice, pay equity, sex-based discrimination and equal opportunity in education and athletics, among others. Since our founding, we have advocated for equal pay, worked against sex-based

pay discrimination, and stood for the ability of a class of affected employees to be represented in litigation.

National Partnership for Women & Families

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group that has over 50 years of experience in combating barriers to equity and opportunity for women. The National Partnership works for a just and equitable society in which all women and families can live with dignity, respect, and security; every person has the opportunity to achieve their potential; and no person is held back by discrimination or bias. The Schulman amicus presents core issues for the National Partnership, such as the value of work and equal pay, gender discrimination in the workplace, and simple fairness. Holding those who pay unfairly accountable guarantees equal opportunity, equity, and strengthens the U.S. economy.

Southwest Women's Law Center

The Southwest Women's Law Center (SWLC) is a nonprofit policy and advocacy law center that was organized in 2005 to advance opportunities for women and girls in New Mexico. By fostering collaboration among community members, organizations, attorneys, and public officials, SWLC strives to address economic disparities impacting women and their families. The mission of SWLC is

to create opportunities and empower women to realize their full economic and personal potential.

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 and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed strongly believes that pay inequity is one of the main barriers to achieving equal opportunity and economic justice for women in the workplace and that relying on salary history perpetuates sex discrimination and creates ongoing harms faced by all women, with compounding effects for women of color.