

No. 16-15372

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

AILEEN RIZO, *Plaintiff-Appellee*,

v.

**JIM YOVINO, FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,
ERRONEOUSLY SUED HEREIN AS FRESNO COUNTY OFFICE OF
EDUCATION**, *Defendant-Appellant*.

On Appeal from the United States District Court for the Eastern District of California, Michael J. Seng, Magistrate Judge, Presiding, No. 1:14-cv-00423-MJS

**AMICI CURIAE BRIEF OF EQUAL RIGHTS ADVOCATES AND 21
OTHER ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF DURING PENDENCY OF REHEARING**

Filed with Consent of All Parties

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Local 892*

ADDITIONAL AMICI

- ACLU
- American Association of University Women
- Atlanta Women for Equality
- California Women's Law Center
- Clearinghouse on Women's Issues
- Costume Designers Guild, IATSE Local 892
- Feminist Majority Foundation
- Gender Justice
- KWH Law Center for Social Justice and Change
- Legal Aid at Work
- Legal Voice
- Make-Up Artists and Hair Stylists Guild, IATSE Local 706
- National Asian Pacific American Women's Forum
- National Council of Jewish Women
- National Organization for Women Foundation
- National Partnership for Women & Families
- National Women's Law Center
- Orange County Managers Association
- Southwest Women's Law Center
- Women Employed
- Women's Law Project

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, 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 20, 2019

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INTEREST OF AMICI¹

Amici are 19 civil rights groups and non-profit organizations committed to preventing, combating, and redressing sex discrimination, as well as three labor organizations representing employees whose salaries are heavily impacted by the reliance on salary history to set pay rates. Detailed statements of interest are included in Appendix A.

¹ *Amici Curiae* certify that no party or party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Amici submit this brief in support of Plaintiff-Appellee’s supplemental brief, filed on September 13, 2019 in response to this Court’s order of August 9, 2019 asking the parties to address “the Supreme Court’s opinion in *Yovino v. Rizo*, 139 S. Ct. 706 (2019), and any other developments since the case was submitted to the en banc court.” Dkt. 101.

On February 24, 2019, the Supreme Court vacated the Court’s en banc judgment and remanded based on its conclusion that Judge Reinhardt’s vote could not be counted. On April 4, 2019, Judge Bea was drawn to replace Judge Reinhardt on a newly constituted en banc panel, which now has authority to decide this case on the merits. Dkt. 100. The previous en banc panel unanimously held that the District Court properly denied Defendant-Appellant’s motion for summary judgment on the basis that Plaintiff-Appellee’s prior salary was not a “factor other than sex” that justified paying her less than coworkers of the opposite sex for equal work under the Equal Pay Act. The now-vacated majority opinion further held that “prior salary alone or in combination with other factors cannot justify a wage differential” under the Act. *Rizo v. Yovino*, 887 F.3d 453, 467-68 (9th Cir. 2018) (en banc). As set forth below, the statutory language and underlying purpose of the Act, as well as developments since this case was submitted to the en banc

court, support the conclusion that employers cannot rely on prior salary to justify paying women and men unequally for equal work.

ARGUMENT

I. The Gender Wage Gap is a Persistent Feature of the Labor Market

Congress enacted the Equal Pay Act (EPA) to combat pervasive “wage differentials based on sex.” Pub. L. No. 88-38, 77 Stat. 56 (1963). The Supreme Court has affirmed that the 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). Fifty-five years after its enactment, women make up almost half of the workforce,² more than half are the primary breadwinners in their households,³ and they receive more than half of bachelor’s degrees, master’s degrees, and doctorate degrees.⁴ Yet, on average, women continue to earn less than men in virtually every occupation for

² Bureau of Labor Statistics, *Table 3: Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race, Current Population Survey (2018)*, available at <https://www.bls.gov/cps/cpsaat03.pdf> (last visited Sep. 18, 2019).

³ Prudential, *The Cut: Exploring Financial Wellness Within Diverse Populations (2018)*, available at <https://bit.ly/2JJsLBp> (last visited Sep. 18, 2019).

⁴ National Center for Education Statistics, *Table 318.30: Bachelor’s, Master’s, and Doctor’s Degrees Conferred by Postsecondary Institutions, by Sex of Student and Discipline Division: 2016-17*, 2018 Digest of Education Statistics (2018).

which there is sufficient data to calculate an earnings ratio.⁵ This disparity persists across education levels and is larger at higher levels of education and at the top of the wage distribution.⁶

Since this case was submitted to the en banc court, the gender pay gap has not changed in a statistically significant way and its effects extend beyond women. In 2018, women working full-time year-round typically earned 82 cents for every dollar earned by men, a statistically insignificant change from 2017. For women of color, the gaps are larger.⁷ At the current pace of change, it will take another 40 years for men and women to reach wage parity.⁸ Eliminating the gender wage gap would reduce the poverty rates of working women and their families by more than half and would add \$512.6 billion to the national economy.⁹

⁵ See Ariane Hegewisch and Asha DuMonthier, *The Gender Wage Gap by Occupation 2015 and by Race, and Ethnicity*, IWPR (Apr. 11 2016), available at <http://bit.ly/2kPmhoI>.

⁶ Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55(3) JOURNAL OF ECONOMIC LITERATURE 789-865.

⁷ Jessica L. Semega, Melissa A. Kollar, John Creamer, and Abinash Mohanty, *Income and Poverty in the United States: 2018*, Current Population Reports P60-266; Table A-7, U.S. Census Bureau (Sep. 2019), available at <https://bit.ly/2lLkrp8>.

⁸ See Ariane Hegewisch and Adiam Tesfaselassie, *The Gender Wage Gap: 2018; Earnings Differences by Gender, Race, and Ethnicity*, IWPR (Sep. 11, 2019), available at <http://bit.ly/2lWomiP>.

⁹ IWPR, *THE ECONOMIC IMPACT OF EQUAL PAY BY STATE 1* (May 11, 2017), available at <https://bit.ly/2pGUSlb>.

II. Use of Prior Salary to Set Pay Perpetuates Gender Pay Disparities

Studies show that women earn less than men from the outset of their careers.¹⁰ Reliance on prior pay to set new salaries therefore perpetuates those disparities. Recognizing this, a growing number of states and localities have passed related legislation, including 12 additional states and 13 additional cities since this case was submitted to the en banc court. Currently, a total of 15 states, 17 cities, and Puerto Rico have passed laws or executive orders prohibiting inquiry into and/or reliance on prior salary.¹¹ At the federal level, the pending 2019 Paycheck Fairness Act would prohibit employers from seeking or relying on salary history.¹² A study of the early effects of the salary history ban in California shows a reduction in pay inequities for female employees following the law's enactment.¹³

¹⁰ See e.g., Elise Gould and Teresa Kroeger, *Straight Out Of College, Women Make About \$3 Less Per Hour Than Men*, Economic Policy Institute (June 1, 2017), available at <http://bit.ly/2kqI6eb>; CHRISTIANNE CORBETT & CATHERINE HILL, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 2 (Oct. 2012), available at <https://goo.gl/tijC4x>.

¹¹ See Exhibit 1 for a list of all laws and executive orders as of September 20, 2019.

¹² H.R. 7, S.819, 116th Cong. (2019).

¹³ Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* (Feb. 2019), available at <http://bit.ly/2moUlsP>.

Similarly, since 2017, a growing number of employers have changed their hiring policies to eliminate questions about pay history¹⁴ and 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.”¹⁵

III. Prior Salary Cannot Constitute a “Factor Other Than Sex” Either Alone or In Combination With Other Factors

All members of the previous en banc panel held that Defendant-Appellant could not justify paying Plaintiff-Appellee less than her male counterparts for equal work based solely on her prior salary. *Rizo*, 887 F.3d at 468 (majority opinion), *id.*, at 472, 475, 478 (concurring). This unanimous conclusion is consistent with the decisions of other Courts of Appeals, holding that reliance on prior salary alone is simply another form of the “market force theory” rejected by the Supreme Court. *See e.g. Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th. Cir. 1988) (citing *Corning Glass Works*, 417 U.S. at 195). The recent decision of the Fourth Circuit in *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir.

¹⁴ *See, e.g.,* Yuki Noguchi, *More Employers Avoid Legal Minefield By Not Asking About Pay History*, NPR (May 3, 2018), available at <https://n.pr/2kSEYaX>.

¹⁵ *Compensation Equity Public Policy Issue Statement*, Society for Human Resource Management (April 2018), available at <http://bit.ly/2lZqtlQ>.

2019) is at odds with *Corning Glass*, the opinions of other circuits, and the conclusion of all members of the previous en banc panel in this case.

For the same reason that prior salary is an unlawful defense when asserted alone, it similarly cannot justify a gender wage differential even if accompanied by job-related factors. If prior salary can reflect historical sex discrimination and is therefore not a “factor other than sex” on its own, then the rational extension of this reasoning to a case where an employer asserts job-related factors (such as experience, education, training or job performance) as a defense *along with* prior salary, is that those other factors must account for the entire wage differential. For, if they do not, prior salary *alone* would be the *cause of* at least some portion of the gap.

In the context of an Equal Pay Act claim where the employer asserts prior salary as a defense, without bona fide factors corresponding to the full wage differential between two employees of the opposite sex performing equal work, it is impossible to verify that their prior salaries are not reflective of the systemic pay discrimination that Congress recognized in 1963 and that Census Bureau data reflect to this day. If prior salary is not infused with past discrimination, then those factors would account for the full wage differential and the employer would not have to rely on prior salary at all. At best, prior salary might serve as a mirror that

reflects the relevant job-related qualities of an employee that justify earning more than a comparator of the opposite sex despite performing equal work.

IV. The Relevant Inquiry is Whether Prior Salary Constitutes an Affirmative Defense Under the Equal Pay Act

The relevant question is whether an employer can rely on an employee's salary from a previous job as an affirmative defense to an EPA claim where there is already a determination that the man and woman perform equal work but receive unequal pay. As explained above, prior salary is not a "factor other than sex" and job related factors must account for the full wage differential.

Reliance on prior salary has traditionally been used as a method of gauging the minimum amount an employer could pay a candidate, and in light of the well-documented gender wage gap, this practice will almost always have a disproportionate impact on women. However, holding that prior salary cannot justify a wage differential under the EPA does not prevent a prospective employee—male or female—from using their salary history to negotiate a new salary that is equal to or higher than what they earned at their previous job and/or use their prior salary to leverage a new job or position. Ideally, the candidate's prior salary is an accurate measure of the specific skills or qualities they bring to the job (i.e. the job qualifications for which the employer wants to hire them). If, once hired, the employee earns more than a comparator of the opposite sex, than those factors should justify the pay differential and constitute a valid defense.

However, if job-related factors do not fully account for the wage differential, then some portion of it results from prior salary *alone* and the employer would have to equalize the wages, which is corrective action explicitly contemplated in the EPA.¹⁶ This does not disadvantage an incoming employee, whether male or female, or the employer making the hire. It merely ensures that pay disparities between employees of the opposite sex performing equal work are justified by lawful reasons not related to sex. Employers are already obligated to ensure compliance and, in fact, many companies regularly perform compensation audits and make pay adjustments when necessary to rectify unjustified wage gaps.¹⁷

CONCLUSION

Prior salary cannot constitute a “factor other than sex” under the Equal Pay Act, either alone or in combination with other factors. While this defense was intended to be sufficiently broad to accommodate legitimate business practices, it is illogical to conclude that Congress intended to allow employers to justify violations based on the historical wage inequities that the law was enacted to

¹⁶ The EPA expressly prohibits employers from reducing the wages of either employee to equalize pay in order to comply with the Act. 29 U.S.C. §206(d)(1).

¹⁷ See e.g., Nick Bastone, *Salesforce's Chief People Officer explains how and why the company has spent \$8.7 million to close its gender pay gap*, Business Insider (Dec. 15, 2018), available at <http://bit.ly/2kOYMfv>; Tanya Tarr, *How Starbucks Achieved 100% Equal Pay In The United States*, Forbes (Mar. 22, 2018); Claire Zillman, *'It's an Ugly Number:' CEO Michael Corbat on Why Citi Revealed the Pay Gap Data Few Banks Want to Share*, Fortune (Jan. 23, 2019).

eradicate in the first place.

For the foregoing reasons, *amici* respectfully urge this Court to adopt the previous majority decision as its opinion in this matter.

Dated: September 20, 2019

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST OF AMICI

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. ERA cosponsored the California Fair Pay Act (Cal. Labor Code § 1197.5), which amended the state’s Equal Pay Act, and which prohibits the use of prior salary as the sole justification for a gender pay differential. ERA 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 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 Civil Liberties Union

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.

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, advocacy and education. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. 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. Using prior salary alone to calculate current wages perpetuates existing pay disparities and undermines the legislative intent of the Equal Pay Act.

Atlanta Women for Equality

Atlanta Women for Equality is nonprofit organization dedicated to providing free legal advocacy for women and girls facing sex discrimination in the workplace or at school, protecting and expanding economic and educational opportunities for women and girls, and helping our community shape our workplaces and schools

according to true standards of equal treatment. Ensuring pay equity is crucial to our mission

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.

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 signs on to the amicus brief of the National Women’s Law Center in the matter of Jane Doe v. University of Kentucky.

Costume Designers Guild, IATSE Local 892

Costume Designers Guild, Local 892 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC (“IATSE Local 892”) is a labor organization representing most costume designers, assistant costume designers and costume illustrators in the entertainment industry, craftspersons and artists who are heavily impacted by the use of salary history to cap so-called “overscale” pay rates (or more than the contractually prescribed minimum) and to perpetuate pay distinctions among workers with similar skills and experience. IATSE Local 892 has a unique perspective because while, for most unionized employees, uniform pay rates tend to be set forth in labor agreements and, thus, to reduce the role of past pay rates, this is not true for the employees represented by IATSE Local 892, because there is a practice in the entertainment industry of paying “over scale.”

Feminist Majority Foundation

The Feminist Majority Foundation (“FMF”) is a non-profit organization dedicated to eliminating sex discrimination and to the promotion of gender equality and women’s empowerment. FMF programs focus on advancing the legal, social, economic, education, and political equality of women with men; countering the backlash to women's advancement; and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, FMF engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs. FMF supports the elimination of all sex discriminatory barriers to pay equity including use of past salaries.

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.

KWH Law Center for Social Justice and Change

KWH Law Center for Social Justice and Change is a nonprofit legal advocacy organization dedicated to protecting civil rights and social justice for women. We work to ensure that women are paid fairly for the work they perform and to eliminate workplace discrimination at every level of their employment. KWH has participated as an amicus curiae in a range of cases before the United States Supreme Court and continually advocates for policies that will help women 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 equal pay and sex discrimination cases. LAAW’s interest in preserving the protections afforded employees by this country’s antidiscrimination laws is longstanding.

Legal Voice

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 and sexual harassment 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.

Make-Up Artists and Hair Stylists Guild, IATSE Local 706

Make-Up Artists and Hair Stylists Guild, Local 706 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO, CLC (“IATSE Local 706”) is a labor organization representing make-up artists and hair stylists in the entertainment industry, craftspersons and artists who are heavily impacted by the use of salary history to cap so-called “overscale” pay rates (or more than the contractually prescribed minimum) and to perpetuate pay

distinctions among workers with similar skills and experience. IATSE Local 706 has a unique perspective because while, for most unionized employees, uniform pay rates tend to be set forth in labor agreements and, thus, to reduce the role of past pay rates, this is not true for the employees represented by IATSE Local 706, because there is a practice in the entertainment industry of paying “over scale.”

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 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's Resolutions state that 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.” Consistent with our Principles and Resolutions, NCJW joins this brief.

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 (“National Partnership”), formerly the Women’s Legal Defense Fund, is a national advocacy organization

that develops and promotes policies that help achieve fairness in the workplace, reproductive health and rights, access to quality health care, and policies that help women achieve equality and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance equal opportunities and fairness through several means, including by challenging discriminatory practices and policies in the courts.

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, the Center has focused on issues of key importance to women and their families, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. The Center 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. The Center seeks to ensure that all individuals enjoy the full protection against sex discrimination promised by federal law and has a strong interest in

closing wage gaps based on gender, national origin and race and ending pay discrimination.

Orange County Managers Association

Orange County Managers Association (“OCMA”) is a labor organization representing managerial level employees of the County of Orange, California—employees whose salaries are heavily impacted by the County’s reliance on salary history to set pay rates, something that distinguishes them from a great many other public employees. OCMA has a unique perspective because while, for most unionized employees, uniform pay rates tend to be set forth in labor agreements and, thus, to reduce the role of past pay rates, this is not true for the employees represented by OCMA because there is a practice in local government employment in California of exercising more discretion in setting the specific pay rate for managers than typical for civil service employment.

Southwest Women’s Law Center

The Southwest Women's Law Center is a non-profit policy and advocacy law center formed in 2005. The Law Center focuses on advancing positive outcomes for girls and women in the State of New Mexico by ensuring that women and girls are paid equally and fairly. The Southwest Women’s Law Center is dedicated to advancing women’s economic security by ensuring that all women

receive equal pay aligned with their talent, skills and abilities. Accordingly, the Law Center is uniquely qualified to comment on, and inform, the Court about the impact of the decision in *Rizo v. Yovino*, No. 16-15372 (9th Cir. April 27, 2017), and the need for a rehearing en banc.

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 believes that basing pay differentials between men and women on previous salaries should not be allowed as a "factor other than sex" as this is not gender neutral.

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 adopted of federal and state equal pay laws more than fifty years ago. 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 insidious perpetuation of pay discrimination by employers who seek to justify pay discrimination on the basis of prior pay.

EXHIBIT 1

**Cities, States and Territories That Have Passed Laws or Executive Orders
Regarding Prior Salary**

STATE	CITATION
California	Cal. Lab. Code § 1197.5 (2016)
Colorado	S.B. 085, 75th Gen. Assem., Reg. Sess. (Colo. 2019) (codified at Colo. Rev. Stat. § 8-5-101, <i>et seq.</i>) (effective January 1, 2021)
Connecticut	Conn. Gen. Stat. § 31-40z (2019)
Delaware	Del. Code. Ann. tit. 19, § 709B (2017)
Hawaii	Haw. Rev. Stat. § 378-2.3 (2017)
Illinois	Act of July 31, 2019, Pub. Act 101-0177, 820 Ill. Comp. Stat. 112/10 (2019) (amendment effective September 29, 2019)
Maine	Me. Rev. Stat. tit. 5, § 4577 (2019)
Massachusetts	Mass. Gen. Laws ch. 149, § 105A (2016)
Michigan	Executive Order - Order No. 2019-10
New Jersey	N.J. Rev. Stat. § 34:11-56.1 <i>et seq.</i> (2018)
New York	N.Y. Exec. Order No. 161 (2017) (controlling state agencies); S.B. S6549, 2019-2020 Reg. Sess. (N.Y. 2019) (codified at N.Y. Lab. Law § 194-A (2019)) (effective January 6, 2020)
North Carolina	N.C. Exec. Order No. 93 (2019) (controlling state hiring processes)
Oregon	Or. Rev. Stat. § 652.220 (2017)
Pennsylvania	Pa. Exec. Order No. 2018-18-03 (2018) (controlling commonwealth agencies)
Vermont	Vt. Stat. tit. 21 § 495(7) (2018)
Washington	H.B. 1696, 66 th Legislature, 2019 Regular Session (Wash. 2019)
Puerto Rico	H.B. 9, Act 16-217, 2017-18 Sess. (P.R. 2017)

CITY	CITATION
San Francisco, California	S.F., Cal., Police Code art. 33J (2017)
Chicago, Illinois	Chi., Il. Exec. Order No. 2018-1 (2018)
Louisville, Kentucky	Louisville, Ky., Ordinance No. 066 (2018)
New Orleans, Louisiana	New Orleans Exec. Order MJL17-01 (2017)
Montgomery, Alabama	Mont. County, Ala., Mont. County Code § 33-25 (2019)
Jackson, Mississippi	Jackson, Miss., Ordinance Addressing the Compensation of Personnel and the Content of Applications for Employment (May 14, 2019)
Kansas City, Missouri	Kansas City, Mo., Ordinance No. 190380 (May 9, 2019) (codified at Code of Ordinances § 38-102) (effective Oct. 31, 2019)
Albany, New York	Albany County, N.Y., Local Law No. P for 2016 (October 10, 2017) (amending Local Law No. 1 for 2000, “An Omnibus Human Rights Law for Albany County”)
Westchester, New York	West Chester County, N.Y., Res. No. 28-2018 (March 12, 2018) (amending Laws of Westchester County § 700.03)
Suffolk, New York	Suffolk County, N.Y., Local Law No. 25-2018 (2019) (amending Suffolk County Code § 528-7)
Cincinnati, Ohio	Cincinnati, Ohio, Ordinance No. 83-2019 (2019) (creating Cincinnati Municipal Code Ch. 804)
Toledo, Ohio	Toledo, Ohio, Ordinance No. O-173-19 (creating Toledo Municipal Code Ch. 768) (effective June 29, 2020)
Salt Lake City, Utah	Salt Lake City, Utah, Policy No. 3.02.01 (2018)

Columbia, South Carolina	Columbia, S.C., Ordinance No. 2019-022 (June 27, 2019) (adding Art. VII to 1998 Code of Ordinances of the City of Columbia, South Carolina, Ch. 2)
New York City, New York	N.Y.C. Admin. Code § 8-107 (2017)
Philadelphia, Pennsylvania	Phila. Admin. Code § 9-1131 (2017)
Pittsburg, Pennsylvania	Pittsburgh, Pa., Code Ordinances tit. 1, art. XI, § 181.13 (2017)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned counsel certifies that this Brief: (i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word and is set in Times New Roman font in a size equivalent to 14 points or larger; and (ii) complies with the length requirement of Federal Rule of Appellate Procedure Rules 5(c)(1) and 29(a)(5) because it is 2,100 words (excluding cover page, corporate disclosure statement, table of contents, table of authorities, appendix, exhibit, certificates of counsel, signature block, and proof of service), equivalent to one-half the maximum length authorized for the Plaintiff-Appellee's supplemental brief.

Dated: September 20, 2019

By: /s/ Jessica Stender
Jessica Stender

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on September 20, 2019, I electronically filed this Brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 20, 2019

By: /s/ Jessica Stender
Jessica Stender

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