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April 27, 2021

Blake A. Hawthorne  
Clerk of the Supreme Court of Texas  
Supreme Court Building  
201 W. 14th Street, Room 104  
Austin, Texas 78701  
*Via Electronic Filing*

Re: *Apache Corporation v. Cathryn Davis*, No. 19-0410

Dear Mr. Hawthorne:

I serve as local counsel to the National Women's Law Center ("NWLC").

I write to inform the Court that NWLC joins the arguments advanced by AARP and AARP Foundation (collectively, "AARP") in their amici curiae brief in support of Respondent Cathryn Davis.<sup>1</sup>

NWLC is a non-profit legal organization that is dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons 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 in the workplace context, with particular attention to those who face multiple and intersecting forms of discrimination. NWLC has worked to secure equal treatment and opportunity through enforcement of the Constitution and laws prohibiting discrimination and has filed or participated in numerous amicus briefs in state and federal courts in many cases concerning sex discrimination. NWLC seeks to ensure that all individuals enjoy the full protection of our civil rights laws, including the protections against sex discrimination.

NWLC has a specific interest in this matter given both its work to ensure appropriate interpretations of our civil rights protections against discrimination and retaliation, and its work to ensure that claims based both on sex and other protected categories (e.g., age) are analyzed correctly as cognizable claims of discrimination under our state and federal civil rights laws.<sup>2</sup>

In addition to joining AARP's arguments, NWLC wishes to emphasize three points.

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<sup>1</sup> NWLC understands that this Court accepts letter briefs from amicus curiae parties and that an amicus party may support the position previously advocated by another amicus party.

<sup>2</sup> NWLC has no financial interest in this case or financial relationship with any party.

First, the United States Supreme Court recently held that discrimination on more than one protected basis--referred to in this litigation as “hybrid” or “composite” discrimination—is actionable under Title VII. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1744 (2020). In *Bostock*, the Supreme Court acknowledged that so long as sex plays a role in an adverse employment action, it “has no significance” that a factor other than sex “might also be at work,” even if that other factor “play[s] a more important role [than sex] in the employer’s decision.” *Id.* Relying on *Bostock*, courts have allowed claims based on multiple protected categories to proceed, including claims of “sex plus age” discrimination. *See, e.g., Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1048 (10th Cir. 2020) (“We hold that sex-plus-age claims are cognizable under Title VII. There is no material distinction between a sex-plus-age claim and the other sex-plus claims we have previously recognized for which the ‘plus-’ characteristic is not protected under Title VII.”). Thus, *Bostock* and its progeny support the jury’s finding that Ms. Davis had an objectively reasonable belief that Apache subjected her and other older female employees to hybrid/composite sex and age discrimination.

Second, given the large number of retaliation claims filed by employees, as documented by the U.S. Equal Employment Opportunity Commission (“EEOC”)<sup>3</sup> and organizations like NWLC,<sup>4</sup> it is critical that courts correctly analyze those claims and do so in a manner that does not deter their filing. Year after year, EEOC receives tens of thousands of retaliation charges, more than any other kind of complaint.<sup>5</sup> Crucially, these numbers do not include those who are deterred from reporting at all. “Fear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.” *Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U.S. 271, 279 (2009) (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)). An EEOC task force observed that “based on the empirical data, the extent of non-reporting [of harassment on every basis protected under equal employment opportunity laws] is striking.”<sup>6</sup> Thus, it is only through encouraging employees to raise concerns regarding workplace discrimination that employers can work in earnest to address critical issues of sex, age, race, and other forms of illegal discrimination that remain pressing matters in our nation today. Analyzing claims of retaliation in an unduly restrictive manner will only further deter employees from alerting employers regarding concerns of potential discrimination that may violate our state and federal civil rights laws.

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<sup>3</sup> See EEOC, *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2020*, <https://bit.ly/2W0tdPR> (last visited Apr. 26, 2021).

<sup>4</sup> See Jasmine Tucker & Jennifer Mondino, Nat’l Women’s Law Ctr. & Time’s Up Legal Def. Fund, *Coming Forward: Key Trends and Data from the TIME’S UP Legal Defense Fund 4* (Oct. 2020), <https://bit.ly/3bFv3gV>.

<sup>5</sup> EEOC, *Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), <https://bit.ly/2LoG7EK>.

<sup>6</sup> See EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), <https://bit.ly/35DIPNA>.

Third, NWLC seeks to ensure that this Court interprets our civil rights laws in a manner that protects older women, particularly given the high rates of discrimination against older women, as fully discussed in AARP’s amicus brief. When older workers suffer age discrimination, they often experience difficulty in finding new work and are offered lower salaries.<sup>7</sup> Age discrimination also disproportionately affects women, people of color, and lower-income workers, who face longer periods of unemployment and more difficulty re-entering the workforce or switching jobs.<sup>8</sup> This discrimination, based on sex and age—taken together—is particularly harmful at this time, when women have sustained substantial job losses because of the Covid pandemic. As has been well-documented, women have borne the majority of job losses since the onset of the pandemic.<sup>9</sup> In addition, over 1.8 million women have left the labor force entirely since the start of the pandemic, leaving women’s labor force participation rate—the share of adult women who are either working or looking for work—at 57.4%.<sup>10</sup> Before the pandemic, women’s labor force participation rate had not been this low since 1988.

Accordingly, for the reasons stated in AARP’s amici brief and in this letter, NWLC respectfully urges this Court to deny Apache’s Petition for Review or affirm the Court of Appeals’ decision.

Should this Court have any questions or require any additional information, please feel free to contact NWLC through the undersigned at [Katrina@voiceoftheemployees.com](mailto:Katrina@voiceoftheemployees.com) or through NWLC’s Legal Director, Sunu P. Chandy, at [schandy@nwlc.org](mailto:schandy@nwlc.org).

Once again, NWLC appreciates the opportunity to provide this amicus submission in support of Respondent Cathryn Davis.

Sincerely,

/s/ Katrina Patrick

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<sup>7</sup> EEOC, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)* (June 2018), <https://bit.ly/3bBa1QL>.

<sup>8</sup> See AARP, *The Economic Impact of Age Discrimination: How Discriminating Against Older Workers Could Cost the U.S. Economy \$850 Billion* (Jan. 30, 2020), <https://bit.ly/3bHwjAg>.

<sup>9</sup> Claire Ewing-Nelson, Nat’l Women’s Law Ctr., *Another 275,000 Women Left the Labor Force in January* (Feb. 2021), <https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf>.

<sup>10</sup> Claire Ewing-Nelson, Nat’l Women’s Law Ctr., *Only About One Third of the 916,000 Jobs Gained Last Month Went to Women*, <https://nwlc.org/wp-content/uploads/2021/04/March-Jobs-Day-2021-v1.pdf>.

**CERTIFICATE OF SERVICE**

I hereby certify that, on April 27, 2021, I served this letter on all parties through their respective counsel of record via e-filing in accordance with the Texas Rules of Appellate Procedure.

**/s/ Katrina Patrick**