No. B311426

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

JOYCE ALLEN,

Plaintiff and Appellant,

v.

STAPLES, INC., a Delaware Corporation; STAPLES CONTRACT & COMMERCIAL, LLC, a Delaware Limited Liability Company; JEFFREY ROMAN NARLOCK, an individual; CHARISSE CLAY, an individual,

Defendants and Respondents.

Appealing a Judgment of the Superior Court of the State of California,
County of Los Angeles, Case No. 19STCV08311
The Honorable Michael P. Linfield, Judge

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT

[PROPOSED] BRIEF OF AMICI CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION *ET AL*.

---

*MONIQUE OLIVIER, SBN 190835
OLIVIER SCHREIBER & CHAO LLP
201 Filbert Street, Suite 201
San Francisco, California 94133
(415) 484-0980
monique@osclegal.com

JENNIFER A. REISCH, SBN 223671
REISCH LAW
180 Grand Avenue, Suite 1380
Oakland, California 94612
(510) 686-3082
jennifer@jenniferreischlaw.com

Attorneys for Amici Curiae
CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, EQUAL RIGHTS ADVOCATES *ET AL*. (ADDITIONAL AMICI LISTED ON NEXT PAGE)

ADDITIONAL AMICI CURIAE

1. Ben Tzedek
2. Consumer Attorneys of California ("CAOC")
3. California Women's Law Center ("CWLC")
4. Centro Legal De La Raza
5. Inland Equity Partnership
6. Legal Aid at Work
7. Legal Momentum
8. National Committee on Pay Equity ("NCPE")
9. National Council of Jewish Women California ("NCJW")
10. National Network to End Domestic Violence ("NNEDV")
11. National Organization for Women ("NOW") Foundation
12. National Partnership for Women & Families
13. National Women's Law Center ("NWLC")
14. Worksafe, Inc.
15. Women Employed ("WE")
16. Women's Law Project ("WLP")

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

The following application and brief are made by and on behalf of the California Employment Lawyers Association ("CELA"), Equal Rights Advocates ("ERA"), and the 16 additional entities listed in the application filed herewith. Each of these entities is a non-profit organization and none is a party to this action. CELA, ERA, and other Amici know of no entity or person that must be listed under (d)(1) or (2) of California Rules of Court Rule 8.208.

Date: March 4, 2022

Respectfully submitted,

OLIVIER SCHRIEBER & CHAO LLP

REISCH LAW

By: */s/ Monique Olivier*
Monique Olivier
Jennifer A. Reisch
Attorneys for Amici Curiae California Employment Lawyers Association et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Legislative History

Other Authorities

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION *ET AL.*

Pursuant to California Rules of Court, Rule 8.520(f), the California Employment Lawyers Association ("CELA"), Equal Rights Advocates ("ERA"), and the 16 undersigned non-profit advocacy organizations listed below, filed herewith (collectively, "Amici") respectfully request leave to file the attached amicus curiae brief in support of Plaintiff and Appellant Joyce Allen ("Plaintiff-Appellant" or "Allen").

INTEREST OF AMICI CELA AND ERA: CELA is an organization of nearly 1,200 California attorneys whose members primarily represent employees in a wide range of employment cases, including those involving discrimination actions brought pursuant to the Fair Employment and Housing Act (Gov. Code § 12900, *et seq.*) and unpaid wage and retaliation actions brought under the California Labor Code, including the Equal Pay Act (Labor Code § 1197.5). CELA and its members have taken a leading role in protecting the rights of California workers, including by submitting amicus briefs and participating in oral argument in groundbreaking employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, and *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.

ERA is a national non-profit civil rights organization based in San Francisco that has been a leading advocate for gender justice at work and in schools since its founding in 1974. In addition to litigating class actions and other high-impact cases challenging pay inequity and gender discrimination in employment, ERA has appeared as amicus in numerous cases involving the interpretation of federal and state equal pay and anti-discrimination laws, including *Freyd v. University of Oregon* (9th Cir. 2021) 990 F.3d 1211, *reh'g en banc denied* (Apr. 23, 2021); *Rizo v. Yovino* (9th Cir. 2020) 950 F.3d

1217, *cert. denied* (July 2, 2020); *Moussouris v. Microsoft Corp.*, No. 18-80080, 2018 U.S. App. LEXIS 27041 (9th Cir. Sept. 20, 2018). ERA has a strong interest in ensuring that California courts interpret our state equal pay law broadly to effectuate its underlying remedial purpose so that all workers have access to fair pay, just working conditions, and economic security.

ERA and CELA have played pivotal roles in shaping and advocating for laws strengthening the California Equal Pay Act, Labor Code § 1197.5 ("CEPA"), serving as the organizational sponsors of the Fair Pay Act, which amended the CEPA, and supporting subsequent legislation which further amended this important statute to further expand its protections for employees and narrow affirmative defenses. CELA, ERA, and their co-Amici have a substantial interest in protecting the statutory rights of California workers and ensuring the vindication of the important public policies underlying California employment laws, including through robust enforcement of the CEPA, which is at issue in this case.

INTEREST OF CO-AMICI: CELA and ERA are joined by 16 non-profit organizations who also share an interest in ensuring that California courts interpret our state equal pay law broadly to effectuate its underlying remedial purpose so that all workers have access to fair pay and equal access to economic opportunity. Amici have special expertise[1] and shared interests in ensuring that courts correctly apply and broadly

[1] In addition to their collective expertise as organizations, counsel for Amici Jennifer Reisch, who was ERA's Legal Director at the time the Fair Pay Act was introduced and enacted, was appointed to serve on the California Pay Equity Task Force, convened by the California Commission on the Status of Women and Girls and tasked with developing guidance and resources to help ensure understanding of and meaningful compliance with the groundbreaking law. (See California Comm'n on the Status of Women and Girls, *California Pay Equity Task Force* <https://women.ca.gov/californiapayequity/pay-equity-task-force> [as of Mar. 1, 2022].) As a member of the Definitions and Jury Instructions Subcommittees of that Task Force, Ms. Reisch undertook research and engaged in dialogue concerning the meaning and application of new language in the law and co-authored comments submitted to the Judicial Council on the first proposed Civil Jury

construe the CEPA, as amended by the California Fair Pay Act of 2015, Sen. Bill No. 358 (2015-2016 Reg. Sess.) ("Fair Pay Act"), and subsequent legislation to favor the protection of employees, an interest heightened by California's role as a forerunner and influencer on other states.[2]

BET TZEDEK: Bet Tzedek—Hebrew for the "House of Justice"—was established in 1974 as a nonprofit organization that provides free legal services to Los Angeles County residents. Each year their attorneys, advocates, and staff work with more than one thousand pro bono attorneys and other volunteers to assist more than 40,000 people regardless of race, religion, ethnicity, immigrant status, or gender identity. Bet Tzedek's Employment Rights Project focuses specifically on the needs of low-wage workers, providing assistance through a combination of individual representation before

---

Instructions ("CACIs") for Equal Pay Act claims in March 2018. (See Judicial Council of California, *Invitation to Comment on Civil Jury Instructions*, *CACI 18-01* (Mar. 2, 2018) <https://www.courts.ca.gov/documents/CACI18-01.pdf> [as of Mar. 1, 2022].) Following subsequent amendments to the law in 2018-2019, Ms. Reisch co-authored comments on proposed revisions and additions to the CACIs on Equal Pay Act claims that were submitted on behalf of CELA, ERA, and other organizations, including co-amicus curiae Legal Aid at Work ("LAAW"), in August 2019. The CACIs currently in effect reflect many of the revisions that were discussed in both sets of comments. (See Judicial Council of California Civil Jury Instructions (2022 edition), Nos. 2740-2743 <https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf> [as of Mar. 1, 2022].)

[2] See, e.g., National Women's Law Center ("NWLC"), *Report: Progress in the States for Equal Pay* (Jan. 2016) <https://nwlc.org/wp-content/uploads/2016/01/Progress-in-the-States-for-Equal-Pay-1.29.161.pdf> [as of Mar. 1, 2022] (discussing and analyzing notable state equal pay legislation enacted in 2015, including the California Fair Pay Act). NWLC's subsequent Reports and Fact Sheets highlight states that followed California's lead in strengthening their equal pay laws between 2016 and 2021 by, among other things, broadening coverage, narrowing employer defenses, requiring increased transparency and/or reporting around pay, and barring inquiries into and/or reliance on prior salary. (See, e.g., NWLC, *Report: Progress in the States for Equal Pay* (June 2018) <https://nwlc.org/wp-content/uploads/2018/06/Progress-in-the-States-for-Equal-Pay-2018-1.pdf> [as of Mar. 1, 2022], and NWLC, *Fact Sheet: Progress in the States for Equal Pay* (Nov. 2020) <https://nwlc.org/wp-content/uploads/2019/12/State-Equal-Pay-Laws-2020-11.13.pdf> [as of Mar. 1, 2022].)

the Labor Commissioner; civil litigation, including class action litigation; legislative advocacy; and community education. Bet Tzedek has taken a leading role in advocating for the rights of low-wage and immigrant workers in California, including by submitting amicus briefs and letters on such issues of broad importance to California employees. Bet Tzedek's interest in this case comes from nearly 20 years of experience advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in the correct development and interpretation of California's Equal Pay Act. Bet Tzedek recognizes that the Equal Pay Act is essential for workers to vindicate their rights to equal pay, and supports the interpretation of the Act that furthers access to justice.

CONSUMER ATTORNEYS OF CALIFORNIA: Founded in 1962, Consumer Attorneys of California ("CAOC") is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. CAOC's members represent individuals and small businesses in various types of cases including class actions and individual matters affecting such individuals and entities such as claims for equal pay that are before the Court. CAOC has taken a leading role in advancing and protecting the rights of employees, and injured victims in both the courts and the Legislature.

CAOC has participated as amicus curiae in precedent setting decisions shaping California law. (See, e.g., *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348; *Duran v. U.S. Bank Nat'l Assoc.* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.)

CAOC is familiar with the issues before this Court and the scope of their presentation in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context of the issues presented. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.)

CAOC voices its strong opinion to ensure that that California courts interpret our state equal pay law broadly to effectuate its underlying remedial purpose so that all workers have access to fair pay, just working conditions, and economic security.

CALIFORNIA WOMEN'S LAW CENTER: The California Women's Law Center ("CWLC") is a statewide, nonprofit law and policy center whose mission is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. CWLC's issue priorities include gender discrimination, economic security, violence against women, and women's health. For more than 30 years, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including sex-based discrimination and harassment against women in the workplace, and CWLC remains dedicated to ending practices contributing to the gender wage gap.

CENTRO LEGAL DE LA RAZA: Centro Legal de la Raza ("Centro Legal") was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income, predominantly Spanish-speaking residents of the San Francisco Bay Area. Centro Legal assists several thousand clients annually with support ranging from advice and referrals to full representation in court, in the areas of immigration, housing law, employment law, family law, and consumer protection. Centro Legal's Workers' Rights practice regularly assists workers who have experienced pay discrimination on the basis of sex, race, national origin, or other protected category. Centro Legal therefore has a significant interest in protecting workers' ability to bring these claims.

INLAND EQUITY PARTNERSHIP: The Inland Equity Partnership coalition identified housing and healthcare costs as the primary drivers of poverty and a project of Inland Equity Community Land Trust. The mission of the Inland Equity Community Land Trust is to develop and steward affordable housing in Riverside and San Bernardino counties. We plan to use the community land trust as a tool to provide permanently affordable housing for inland residents who fall under HUD's definition of "housing cost

burdened." While our immediate aims are to house the precarious, our ultimate goal is to include residents who are not housing cost burdened in mixed-income developments that maintain a commitment to affordability, diversity, high-quality architecture and energy conservation. Inland Equity Partnership has advocated for equal pay for equal work and committed to equality of rights for women and men under the Constitution and has worked to prevent sex-based employment discrimination such as sexual harassment and retaliation for complaints.

LEGAL AID AT WORK: Legal Aid at Work is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented 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 numerous times in federal and state courts, both as counsel for plaintiffs and in an amicus curiae capacity. Legal Aid at Work was one of the organizational sponsors of the California Fair Pay Act and has a strong interest in ensuring its proper interpretation.

LEGAL MOMENTUM: Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for over 50 years has used the power of the law to define and defend the rights of women and girls. As a champion of workplace quality, Legal Momentum has worked to ensure that all workers are treated fairly, regardless of their sex or gender and continues to lead initiatives to advance pay equity through litigation, legislation, and education. Legal Momentum has litigated cutting-edge gender-based employment discrimination cases, including *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, and has participated as amicus curiae on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523

U.S. 75, *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17 (1993), and *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228.

NATIONAL COMMITTEE ON PAY EQUITY: The National Committee on Pay Equity ("NCPE") has a stake in the outcome of this case because it is the only national organization dedicated exclusively to achieving pay equity for women and people of color. State equal pay laws are one of the strategies that NCPE advocates for to achieve this goal. NCPE, founded in 1979, is a coalition of women's and civil rights organizations; labor unions; religious, professional, legal, and educational associations, commissions on women, state and local pay equity coalitions and individuals working to eliminate sex- and race-based wage discrimination and to achieve pay equity. The issues in this case are central to ensuring that California law is interpreted as enacted and provides relief for employees who receive unfair pay contrary to state law.

NATIONAL COUNCIL OF JEWISH WOMEN CALIFORNIA: National Council of Jewish Women California ("NCJW") works for social and economic justice for women, families and children and has done so for over 125 years. Wage equity and non-discrimination is fundamental to the well-being of women and those adjacent to them.

NATIONAL NETWORK TO END DOMESTIC VIOLENCE: The National Network to End Domestic Violence ("NNEDV") is a not-for profit organization incorporated in the District of Columbia to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence and sexual assault coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions of women, children and men victimized by domestic violence, and their advocates. NNEDV was instrumental in the passage and implementation of the Violence Against Women Act. Financial abuse is one of the most powerful methods of trapping victims. NNEDV works to advance laws that would ensure survivors can achieve long-term security, such as federal and state equal pay laws. NNEDV has a strong interest in

ensuring that such laws are implemented properly and that victims who need access to financial resources are able to bring home all the salary that they have rightfully earned.

NATIONAL ORGANIZATION FOR WOMEN FOUNDATION: The National Organization for Women ("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 nearly every state and the District of Columbia. Since NOW's inception in 1966, the National Organization for Women has advocated for equal pay for equal work. NOW Foundation is committed to equality of rights for women and men under the Constitution and has worked to prevent sex-based employment discrimination such as sexual harassment and retaliation for complaints.

NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES: The National Partnership is a nonprofit, nonpartisan advocacy organization based in Washington, D.C. Through local, state, and federal advocacy, we promote fairness in the workplace, reproductive health and rights, access to quality, affordable health care, and policies that help all people, especially women, meet the dual demands of work and family. Over the last five decades, we have focused specifically on tackling gender-based barriers, often rooted in longstanding stereotypes and biases, used to limit the opportunities available to women, men, gender minorities, and all those deemed out of step with assumptions about perceived gender norms and roles. We also have worked to advance strong legal protections against different forms of gender discrimination and to ensure that such laws are implemented fairly in the courts and throughout the legal process. Our goal is to create a society that is free, fair and just, where nobody has to experience discrimination, all workplaces are family friendly, and every family has access to equitable, affordable health care and real economic security.

NATIONAL WOMEN'S LAW CENTER: The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of the rights of all people to be free from sex discrimination. Since its founding

in 1972, NLWC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or amicus curiae in a range of cases before the Supreme Court, federal courts of appeals, federal district courts, and state courts to secure protections against sex discrimination. NWLC is committed to advocating for workers' rights and closing the racial and gender wage gaps that particularly harm women and people of color. As part of that work, NWLC has engaged in efforts to help strengthen California's equal pay protections and has analyzed California's equal pay law in advising other states seeking to strengthen their equal pay laws. Accordingly, NWLC also has a strong interest in ensuring that California's Equal Pay Act is interpreted and applied correctly.

WORKSAFE: Worksafe, Inc. is non-profit organization that advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund. We engage in California state-wide policy advocacy as well as advocacy on a national level to ensure protective laws for workers. Worksafe has an interest in the outcome of this case because we advocate for the workplace rights of low wage vulnerable workers. Many low wage workers who are affected by pay inequities may also be unable to raise health and safety issues since their employers are not held accountable for their obligations under California laws. Worksafe has a continuing interest in ensuring workplace justice for all workers.

WOMEN EMPLOYED: Women Employed ("WE") is a nonprofit advocacy organization based in Chicago. Founded in 1973, its mission is to improve the economic status of women and to remove barriers to economic equity. WE pursues equity for women in the workforce by effecting policy change, expanding access to educational opportunities, and advocating for fair and inclusive workplaces so that all women, families, and communities thrive. WE works with individuals, organizations, employers, educators, and policymakers to address the challenges women face in their jobs every

day, chief among them being pay discrimination. WE strongly believes that equal pay protections under state and federal law are critical to achieving equal opportunity and economic equity for women in the workplace, and that California's law has been a key model for those safeguards.

WOMEN'S LAW PROJECT: Founded in 1974, Women's Law Project ("WLP") is a nonprofit public interest legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people in Pennsylvania and beyond. WLP leverages impact litigation, policy advocacy, public education, and direct assistance and representation to dismantle discriminatory laws, policies, and practices and eradicate institutional biases and unfair treatment based on sex or gender. Throughout its history, the WLP has played a leading role in the struggle to eliminate discrimination based on sex in a wide range of areas including employment and equal pay and has supported legislation and litigation to strengthen federal, state, and local equal pay laws and their enforcement. WLP often looks to California law for guidance and therefore has an interest in how California's equal pay laws are applied and interpreted.

SUMMARY OF PROPOSED BRIEF OF AMICI CURIAE: Amici's proposed brief addresses issues regarding the interpretation and application of this extremely important law, which takes aim at the persistent gender wage gap by prohibiting pay differentials between men and women for substantially similar work. There have been no published appellate court decisions interpreting the CEPA since it was amended by the Fair Pay Act to significantly expand employee protections and coverage while raising the bar on affirmative defenses to make it harder for employers to justify pay differentials. To assist the Court with statutory construction, Amici's brief presents important perspectives on recent amendments to California's Equal Pay Act and elucidates the nature and implications of the trial court's fundamentally flawed analysis of Plaintiff-Appellant Joyce Allen's equal pay claim.

Specifically, Amici's brief will address the trial court's erroneous application of a Title VII *McDonnell Douglas* burden-shifting framework to Allen's CEPA claim and its acceptance of Defendant-Respondent's argument that Plaintiff-Appellant could not establish a prima facie violation of the CEPA by showing that she was paid less than a single male comparator. By providing context and background about the CEPA and the Legislature's intent with regards to its enforcement, Proposed Amici's brief will assist the Court in clarifying the standards and burden-shifting framework that apply to equal pay claims. The instant case also provides the Court with the opportunity to clarify and underscore the importance of construing this statute liberally to favor the protection of all employees, like other provisions of the California Labor Code which establish minimum labor standards for all workers. The proposed brief will focus not on the particular facts and circumstances of Allen's case, but will provide the Court with a broad perspective on the issues at stake.

Like other provisions of the Labor Code that establish minimum labor standards, courts are bound to construe the CEPA liberally to favor the protection of employees. (See *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 865, citing *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 839; *see also Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105 [construing an employment statute or wage order whose language is susceptible of more than one reasonable interpretation requires that courts must consider "the ostensible objectives to be achieved by the statute, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction and the statutory scheme of which the statute is a part"].) The trial court's order and Defendant-Respondent's arguments in this case eschew this principle, ignoring the text and the fundamental purpose of the CEPA and recent amendments designed to make its protections even stronger. It is of vital importance to millions of California workers and their families that courts correctly apply this statute in a manner consistent with its letter and spirit, as the Legislature intended. Especially

given the dearth of authority interpreting the CEPA since it was substantially amended in 2015, Amici urge the Court to take this opportunity to provide much-needed guidance to lower courts to ensure that all California workers may benefit from the protection of this critical law.

On February 22, 2022, Amici submitted an application to extend the time in which to file the instant application and amicus brief. As of March 3, 2022, the Court had not ruled on that application.

Pursuant to Rule of Court 8.520(f)(4), CELA and ERA affirm that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than Amici, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CELA, ERA, and the 16 other Amici organizations listed herein respectfully request the Court's leave to file this brief.

Date: March 4, 2022

Respectfully submitted,

OLIVIER SCHRIEBER & CHAO LLP

REISCH LAW

By: */s/ Monique Olivier*
Monique Olivier
Jennifer A. Reisch
Attorneys for Amici Curiae California Employment Lawyers Association et al.

BRIEF OF AMICI CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, EQUAL RIGHTS ADVOCATES *ET AL.*

I. INTRODUCTION

The trial court in this case misapplied the legal standards for Plaintiff-Appellant Allen's claim under the California Equal Pay Act, Labor Code § 1197.5 (hereinafter, "CEPA" or "Section 1197.5") and, in so doing, ignored the language and legislative intent behind this important statute and recent amendments to the law that were designed to make it easier to enforce.

In dismissing Allen's CEPA claim, the trial court relied exclusively on case law preceding the Fair Pay Act of 2015,[3] which made significant changes to the statute; misstated the elements of a CEPA violation; and erroneously applied a *McDonnell Douglas*[4] burden-shifting framework to Allen's CEPA cause of action, effectively reading into the statute an intent requirement that does not exist. (V AA 945, 953.) The trial court's analysis not only fails to track the language of Section 1197.5, as amended by the Fair Pay Act and subsequent legislation; it nowhere acknowledges the significant differences between the proof structure and burdens that govern equal pay claims under the CEPA and discrimination claims under the Fair Employment and Housing Act, Gov. Code § 12900, *et seq.* ("FEHA"). These distinctions matter.

In addition, by requiring Allen to show that she was paid less than her male counterparts as a "class" in order to establish a prima facie case (V AA 953) and summarily rejecting undisputed evidence showing that she was paid less than (at least)

[3] Stats. 2015, ch. 546 (Sen. Bill No. 358), § 2, eff. Jan. 1, 2016 (hereinafter, "Fair Pay Act").

[4] V AA 945 (stating that, "[w]hen deciding issues of adverse employment actions, such as retaliation, discrimination, and wrongful termination, the court applies the McDonnell Douglas shifting burdens test," citing *Caldwell v Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203); see also *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDowell Douglas*).

one male comparator who did substantially similar work,[5] the court chose a divergent path and imposed a standard of its own making that is unsupported by the text of the CEPA and would make it extremely difficult—if not practically impossible—for an individual plaintiff to ever establish a prima facie violation of Section 1197.5. No California case has held that a plaintiff must identify *more than one* employee comparator to establish an Equal Pay Act claim. In fact, as discussed further below, it has been well settled for decades that a plaintiff may demonstrate unequal pay by comparing her salary to that of a single comparator of another sex. (See *infra*, Section II.C.) To hold otherwise and allow an employer to defeat an equal pay claim simply by pointing to variation in the relative pay rates of employees other than the plaintiff, as the trial court did here, would vitiate the CEPA's remedial purpose and frustrate the express intent of the California Legislature in enacting the Fair Pay Act.

For all of these reasons, Amici urge this Court to find that the summary adjudication of Allen's equal pay claim was manifest error that warrants reversal.

II. ARGUMENT

A. The California Equal Pay Act Establishes a Minimum Labor Standard That Must Be Construed Broadly to Favor the Protection of Employees.

California's equal pay law is among the oldest and strongest in the nation. When it was originally enacted in 1949, the CEPA, Labor Code § 1197.5, made it illegal for an employer to pay any employee at "wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." (Cal. Stats. 1949, ch. 804, p. 1541, § 1, as amended by Stats. 1957, ch. 2384, p. 4130, § 1; Stats. 1965, ch. 825, p. 2417, § 1; Stats. 1968, ch. 325, p. 705, § 1; Stats. 1976, ch. 1184, p. 5288, § 3; Stats. 1982, ch. 1116, p. 4034, § 1; Stats. 1985, ch.

[5] See V AA 958 ("The fact that one male FSD (Narlock) was paid more than one female FSD (Plaintiff) does not suffice in this instance to show a violation of the CEPA.")

1479, § 4; Stats. 2015, ch. 546 (Sen. Bill No. 358), § 2, eff. Jan. 1, 2016; Stats. 2016, ch. 856 (Assem. Bill No. 1676), § 2, eff. Jan. 1, 2017; Stats. 2016, ch. 866 (Sen. Bill No. 1063), § 1.5, eff. Jan. 1, 2017; Stats. 2017, ch. 776 (Assem. Bill No. 46), § 1, eff. Jan. 1, 2018; Stats. 2018, ch. 127 (Assem. Bill No. 2282), § 2, eff. Jan. 1, 2019.) Exceptions to this prohibition were made for wages paid pursuant to systems of seniority, merit, or that measure earnings by quantity or quality of production; or differentials based on a "bona fide factor other than sex." (*Id.*)

The CEPA came into effect ten years before the California Fair Employment Practices Act ("FEPA"),[6] which barred discrimination in employment based on race, religious creed, color, national origin, ancestry, and, many years later, sex.[7] California's equal pay law also predated the federal Equal Pay Act of 1963, Pub. L. 88-38; 77 Stat. 56 ("federal EPA"), which amended the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.*, to add a new subsection providing that:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex […].

---

[6] Cal. Stats. 1959, ch. 121, p. 1999, § 1 (former Labor Code § 1410). In 1980, the FEPA was combined with the 1963 Rumford Fair Housing Act and renamed the Fair Employment and Housing Act, Gov. Code § 12900, *et seq*. ("FEHA"). In addition to its initial protections, the FEHA now prohibits discrimination in employment on the basis of sex, gender, gender identity, age, disability, medical condition, sexual orientation, and marital status, among other bases, making it significantly broader than federal law both in terms of scope of protections and covered employers.

[7] When it was enacted in 1959, the FEPA did not prohibit sex discrimination. Sex was added as a prohibited basis of discrimination in 1970. (Cal. Stats. 1970, ch. 1508.)

(29 U.S.C. § 206(d)(1).)

For decades after it was enacted, CEPA remained substantively unchanged and almost identical to the federal EPA. Both statutes established a minimum labor standard based on the broad by straightforward principle that "equal work will be rewarded by equal wages" regardless of a worker's sex. (*Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, quoting Sen. Rep. No. 176, 88th Cong., 1st Sess., p. 1 (1963).) Thus, while the plain language of the CEPA and federal EPA remained essentially the same, it made sense for California courts to look to federal case law in interpreting Section 1197.5, as they did in *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620 (*Green*) and *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318 (*Hall*). Beginning in 2015, however, the California Legislature passed multiple amendments to Section 1197.5 that caused the CEPA to diverge from federal law in several key aspects that are more favorable to employees, making continued reliance on federal authorities to construe the CEPA misplaced. (See *Armenta v. Osmose* (2005) 135 Cal.App.4th 314, 323 [noting that "federal authorities are of little assistance, if any, in construing state laws and regulations that provide greater protection to workers" and "where the language or intent of state and federal labor laws substantially differs, reliance on federal regulations or interpretations to construe state regulations is misplaced"], citing *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805, 817-18 and *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798.)

The most significant of these changes was the passage of the Fair Pay Act of 2015 (Sen. Bill No. 358 (2015–2016 Reg. Sess.) §§ 1-3), which amended the CEPA, and whose purpose was to eliminate the longstanding gender wage gap and strengthen California's commitment to achieving true gender pay equity. (*Id.* § 1.)[8] The Legislature

[8] Fair Pay Act of 2015 (Sen. Bill No. 358 (2015–2016 Reg. Sess.) §§ 1-3) <https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201520160SB358&cversion=20150SB35893CHP> [as of Mar. 1, 2022].

found that the persistent gender wage gap—the disparity in earnings between full-time working women and men across occupations—was having a significant negative impact on the economic security and welfare of working women and their families, (*id.* § 1(a)-(b)), and recognized that the state equal pay law was "rarely utilized" because its language "ma[de] it difficult to establish a successful claim." (*Id.* at § 1(c).) Accordingly, the Fair Pay Act was designed to "improve" California's equal pay provisions by closing loopholes and addressing ambiguities in the statute that had made it difficult for employees to vindicate their rights. (See *id.* § 1(e).)[9]

The Fair Pay Act made a number of procedural and substantive changes to the CEPA designed to make it easier for employees to identify an unlawful wage disparity and seek an appropriate remedy. Notably, the bill redefined the "work" to be compared by replacing the term "equal" with "substantially similar," "when viewed as a composite of skill, effort, and responsibility" and eliminated the requirement that a plaintiff compare her wages to that of an employee working in "the same establishment." (Lab. Code § 1197.5, subd. (a).) These changes had the purpose and effect of broadening the field of potential comparators and making it easier for employees to establish a prima facie violation.

The Fair Pay Act also expressly laid out the burden shifting required to prove (or defeat) an equal pay violation: The plaintiff has the burden to prove that he or she was paid a wage rate less than an employee of the opposite sex for substantially similar work, performed under similar working conditions. Once she has done so, then it is the

[9] See, e.g., Assembly Com. on Judiciary, Analysis of Sen. Bill No. 358 (2015-2016 Reg. Sess.), as amended May 12, 2015, p. 1 ("The author believes that certain ambiguities and outdated terms have made the equal pay law less effective than it might otherwise be. SB 358, therefore, proposes a number of procedural and substantive changes to the Equal Pay Act in order to make it easier for a victim of wage discrimination to identify an unlawful wage disparity and seek an appropriate remedy.") <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB358#> [as of Mar. 1, 2022].

employer's burden to "demonstrate" that the pay differential is justified entirely by one or more of the enumerated "factors," (Lab. Code § 1197.5, subds. (a)(1)(A)-(D), (a)(3)), and that each factor was "applied reasonably." (Lab. Code § 1197.5, subd. (a)(2).) The statute further specifies that where the employer demonstrates that the wage differential is based on a "bona fide factor other than sex," as defined in that subsection, the defense may be defeated "if [plaintiff] demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential." (Lab. Code § 1197.5, subd. (a)(1)(D).)

Thus, unlike claims brought under Title VII and the Fair Employment and Housing Act, where the plaintiff has the ultimate burden to prove discrimination,[10] the CEPA, as amended by the Fair Pay Act and subsequent legislation, unequivocally places on the *employer* the ultimate burden of proving that a difference in pay between employees performing substantially similar work is fully justified by the reasonable application of an enumerated, non-sex- (or race or ethnicity-) based factor. Because the CEPA now differs in several important aspects from the federal EPA, the premise of the Court's holding and analysis in *Green*, *supra*, 111 Cal.App.4th at 623, written before the Fair Pay Act, when "[t]he California statute [was] nearly identical to the federal Equal Pay Act of 1963," no longer holds true. Courts must thus look anew at claims asserting CEPA violations.

B. Applying a *McDonnell Douglas* Burden-Shifting Framework to CEPA Claims Ignores the Plain Language of Section 1197.5 and Reads into the Statute an Intent Requirement That Does Not Exist.

Even prior to and following enactment of the Fair Pay Act, courts held unambiguously that a different proof scheme applies to equal pay claims than to claims brought under state and federal anti-discrimination statutes, such as Title VII and FEHA.

[10] See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.* (2000) 530 U.S 133, 142-43; *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 317, 357 (citing *Reeves*).

(See *Cnty. of Wash. v. Gunther* (1981) 452 U.S. 161, 170-71 (*Gunther*) [recognizing that the structure of Title VII litigation, including presumptions, burdens of proof, and defense was designed differently than the EPA's fourth affirmative defense].)[11] As with the federal EPA, proving a violation of Section 1197.5 does not require plaintiff to allege, produce, or persuade the court that the employer acted with discriminatory intent. (See *Green*, *supra*, 111 Cal.App.4th at 622-25 [no requirement that employee show discriminatory intent as element of claim]; *Maxwell v. City of Tucson* (9th Cir. 1986) 803 F.2d 444, 446 (*Maxwell*).) Instead, the federal EPA (and laws with similar language) create "a type of strict liability" for employers who pay men and women different wages for substantially equal work. (*Maxwell*, *supra*, at 446 (quoting *Strecker v. Grand Forks Cty. Social Serv. Bd.* (8th Cir. 1980) 640 F.2d 96, 99 fn.1 (en banc); accord, *EEOC v. Md. Ins. Admin.* (4th Cir. 2018) 879 F.3d 114, 129 [collecting cases].)

In *Rizo v. Yovino* (9th Cir. 2020) 950 F.3d 1217 (second en banc decision following *Rizo v. Yovino* (9th Cir. 2018) 887 F.3d 453, *cert. granted, judgment vacated* (2019) 139 S. Ct. 706), the Ninth Circuit clarified the framework applicable to federal EPA claims. The Court explained that because the federal EPA does not require proof of intentional discrimination, the three-step burden-shifting framework of *McDonnell Douglas* is inapplicable to federal EPA claims. (*Id.* at 1223.) In doing so, the Ninth Circuit clarified that federal EPA claims have two basic steps: (1) the plaintiff bears the burden of proof to establish a prima facie showing of a sex-based wage differential; and

[11] As the Supreme Court explained in *Gunther*, the Bennett Amendment to Title VII, 42 U.S.C. § 2000e-2(h) (1976), incorporates into Title VII only the four specific affirmative defenses enumerated in the federal EPA, not its prohibitory language requiring equal pay for equal work. (*Gunther*, *supra*, 452 U.S. at 168-171.) Importantly, however, while some courts have interpreted the Bennett Amendment as "unifying [Title VII and the federal EPA] … with respect to sex-based compensation discrimination," it only imported EPA defenses into Title VII, *not the other way around*. (See Sharon Rabin-Margalioth, *The Market Defense* (2010) 12 U. Pa. J. Bus. L. 807, 842 [the Amendment "restricts only Title VII by the EPA, and not vice versa"].)

(2) if the plaintiff meets this burden, then the burden shifts to the employer to prove that one of the four statutory affirmative defenses applies. (*Id.*) "An employee bears the burden of establishing a prima facie case of wage discrimination by showing that the employer pays different wages to employees of the opposite sex for substantially equal work. [Citation.] If the plaintiff puts forth a prima facie case of an EPA violation, 'the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions.' [Citation.] To counter a prima facie case, an employer must prove 'not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.'" (*Id*. at 1222, citations omitted.) In articulating this burden-shifting framework, the Ninth Circuit clarified that no showing of pretext—that is, no *McDonnell Douglas* burden shifting—is required and emphasized that the EPA operates within a "strict liability" framework. (*Id.* at 1228.)

Like its federal counterpart, the CEPA is a strict liability statute that is subject to a burden-shifting scheme distinct from the FEHA.[12] Here, the trial court failed to acknowledge any distinction at all between the framework governing Allen's CEPA claim and her claims under the FEHA. (See V AA 945 ["When deciding issues of adverse employment actions, such as retaliation, discrimination, and wrongful termination, the court applies the McDonnell Douglas shifting burdens test."], citing *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal.App.4th 189, 023; *Loggins v. Kaiser Permanente Intern.* (2007) 151 Cal.App.4th 1102, 1108-09; V AA 953 [citing *Hall* for proposition that once an EPA plaintiff establishes a prima facie case, "the burden shifts to the employer to prove the disparity is permitted by one of the EPA's statutory

[12] See, e.g., Amici Curiae's Request for Judicial Notice, Ex. B, *Jewett, et al. v. Oracle America, Inc.*, Cal. Super. Ct. (San Mateo County) Case No. 17CIV02669, Order Granting Representative Plaintiffs' Motion for Class Certification (April 30, 2020), p. 3 ("This is a strict liability statute: proving violation of the [California] EPA (like the federal EPA), does not required proving intent, discriminatory animus, or the cause or motive for the identified pay disparity."), citing Lab. Code § 1197.5.

exceptions… [and] that '[i]f an exception is established, the burden shifts back to the plaintiff to prove pretext"].) In applying the *McDonnell Douglas* pretext model of proof to Plaintiff-Appellant's CEPA claim, the trial court effectively read into the CEPA an intent requirement that does not exist.

Prior to the Fair Pay Act, Labor Code section 1197.5 did not contain language expressly calling out the two-stage burden-shifting structure that applies to claims brought under the law, as it now does.[13] California cases interpreting the CEPA prior to the Fair Pay Act were not clear on the distinction between the burdens and proof schemes applicable to CEPA claims and those applicable to discrimination claims brought under FEHA. For example, in *Hall v. County of Los Angeles*, the only case interpreting CEPA cited in the trial court's analysis of Allen's equal pay claim, the Court expressly imports the *McDonnell Douglas*-based burden-shifting framework for proving intentional discrimination into its evaluation of claims under Labor Code section 1197.5. (See *Hall*, *supra*, 148 Cal.App.4th at 323-24; V AA 952-953.) Likewise, the Court in *Green*, *supra*, Cal.App.4th 620 (cited in Plaintiff-Appellant's Opening Brief), confused and conflated

[13] In the Fair Pay Act, the Legislature intentionally added language to Section 1197.5 to clarify that, once a prima facie case has been established, the burden shifts and stays with the employer to demonstrate that it satisfies one of the enumerated exceptions. (See Lab. Code § 1197.5(a) ["[…] except where the employer demonstrates:"]; Sen. Com. on Judiciary, Analysis of Sen. Bill No. 358 (2015-2016 Reg. Sess.), as amended April 6, 2015, pp. 5-7 [discussing changes and clarifications to burdens of proof made by Fair Pay Act] <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB358#> [as of Mar. 1, 2022]; Assembly Com. on Judiciary, Analysis of Sen. Bill No. 358 (2015-2016 Reg. Sess.), as amended May 12, 2015, p. 4 ["This bill would clarify that the burden of proof is on the employer to demonstrate the existence of one of these other factors. That is, the employee should not have the burden of proving that the difference in wages is based on sex. Although it might be implicit that the burden is on the employer to demonstrate some legitimate reason for the wage disparity, the existing statute is silent on this point. This bill would expressly state that the employer must demonstrate the existence of legitimate factors, other than the sex of the employees, for the disparity in pay."] <https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB358#> [as of Mar. 1, 2022].)

the distinct proof structures and burdens under the CEPA and anti-discrimination statutes. On the one hand, the *Green* Court acknowledged that establishing a prima facie case under the CEPA does not require proof of discriminatory intent. (*Id.* at 622-625.) However, it then went on to apply the three-stage *McDonnell Douglas* burden-shifting test for discrimination claims under the FEHA articulated in *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317 *(Guz*) to claims brought under Labor Code section 1197.5, even though that test rests on the notion that, "the ultimate burden of persuasion on the issue of actual discrimination [in the FEHA context] remains with the plaintiff." (*Green*, *supra*, 111 Cal.App.4th at 626 [holding that once the employer showed that "one of the exceptions listed in section 1197.5 is applicable," the burden shifts back to the plaintiff to "show that the employer's stated reasons are pretextual"], citing *Slatkin v. Univ. of Redlands* (2001) 88 Cal.App.4th 1147, 1156.)[14]

It is vitally important for this Court to clarify, once and for all, that claims brought under the CEPA are not subject to the pretext model of proof that applies to intentional discrimination claims in order to give effect to the plain language and legislative intent behind the CEPA, as amended by the Fair Pay Act.

[14] See also *Guz*, *supra*, 24 Cal.4th at 356-58 (discussing application of general principles of *McDonnell Douglas* to FEHA cases). Federal courts have recognized that an employee "*may* rebut the employer's affirmative defense with evidence that the employer intended to discrimination, and that the affirmative defense claims is merely a pretext for discrimination," but have stopped short of requiring plaintiffs asserting federal EPA claims to prove pretext. (*Maxwell*, *supra*, 803 F.2d at 446, italics added.) Because it is the employer's burden to prove that the pay disparity is due to its reasonable use of a factor other than sex, evidence of pretext may prevent the employer from satisfying this burden. (*Id.*; see also *Bowen v. Manheim Remarketing, Inc.* (11th Cir. 2018) 882 F.3d 1358, 1362-63 ["[T]he employer's 'burden is a heavy one.' [Citation.] The employer 'must show that the factor of sex provided *no basis* for the wage differential. [Citation.]'"], citations omitted.)

C. An Individual Plaintiff Needs Only a Single Comparator to Establish a Prima Facie Case Under the Equal Pay Act.

Although both the CEPA and the federal EPA refer to *employees* of the opposite sex (or different race or ethnicity), the overwhelming weight of authority shows that plaintiffs may establish a claim of unequal pay by reference to only one comparator.

The use of the plural ("employees") in Labor Code section 1197.5 mirrors language used in the federal law, 29 U.S.C. § 206(d). Neither the Fair Pay Act nor any subsequent legislation changed California's equal pay statute with regard to how many other employees doing substantially similar work must be getting paid more than the plaintiff to establish a prima facie case. Thus, while no California case has expressly held that a single comparator is sufficient, cases interpreting the federal EPA are (still) instructive in this regard. (See *Hall*, *supra*, 148 Cal.App.4th at 324 [plaintiff has to show "that she is paid lower wages than *a male comparator*" to establish prima facie case under Section 1197.5], italics added; *Green*, *supra*, 111 Cal.App.4th at 628 ("plaintiff in a section 1197.5 action must first show that the employer paid *a male employee* more than a female employee for equal work"], italics added.)

A federal EPA plaintiff can meet the burden of establishing a prima facie case by pointing to a single comparator of a different sex who performs substantially equal work under similar working conditions who is paid more. (See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195 [identifying elements of prima facie case under federal EPA]; *U.S. Equal Emp't Opportunity Comm'n (EEOC) v. Md. Ins. Admin.* (4th Cir. 2018) 879 F.3d 114, 120 ["A plaintiff establishes a prima facie case of discrimination under the EPA by demonstrating that (1) the defendant-employer paid different wages to an employee of the opposite sex (2) for equal work on jobs requiring equal skill, effort, and responsibility, which jobs (3) all are performed under similar working conditions."].)

To establish that she was paid less, a plaintiff may, but is not required to, compare her salary to that of a single male employee. (See, e.g., *Mehus v. Emporia State University* (D. Kan. 2004) 222 F.R.D. 455, 473 [plaintiff may "identify one comparator or many"]; *EEOC v. Md. Ins. Admin.*, *supra*, 879 F. 3d at 122 ["An EPA plaintiff is not required to demonstrate that males, as a class, are paid higher wages than females, as a class, but only that there is discrimination in pay against an employee with respect to one employee of the opposite sex."]; *Mitchell v. Jefferson County Bd. of Educ.* (11th Cir. 1991) 936 F.2d 539, 547 ["An employee 'need only show discrimination in pay against an employee vis-a-vis one employee of the opposite sex.'"], citing *EEOC v. White & Son Enterprises* (11th Cir. 1989) 881 F.2d 1006, 1009; *Riser v. QEP Energy* (10th Cir. 2015) 776 F.3d 1191, 1196 [reversing grant of summary judgment in favor of employer and explaining that there was a fact question as to whether plaintiff's work was substantially equal to the work of a higher paid male comparator]; *cf. Brooks v. United States* (2011) 101 Fed. Cl. 340, 344-46 [plaintiff satisfied prima facie case under the federal EPA by demonstrating that she was paid less than a male comparator for equal work even though she selected one comparator from among a group of four men in similar positions, three of whom were paid less than she was paid].)[15] Similarly, an EPA plaintiff establishes a prima facie case where they point to a predecessor or successor of the opposite sex who is paid more. (E.g., *Ackerson v. Rector and Visitors of the Univ. of Va.* (W.D. Va., June 27, 2018) No. 3:17-CV-00011, 2018 WL 3209787, at *5, citing *Brinkley-Obu v. Hughes Training, Inc.* (4th Cir. 1994) 36 F.3d 336, 343; 29 C.F.R. § 1620.13(b)(2), (4), and (5).)

Where it is not possible or appropriate for a plaintiff to identify or compare her wages to those of a single employee, an EPA plaintiff may establish a prima facie case by

[15] See also U.S. Equal Employment Opportunity Comm'n, *Compliance Manual, Section 10 Compensation Discrimination* (Dec. 5, 2000), at § 10-IV(E)(1) <https://www.eeoc.gov/policy/docs/compensation.html> ("A prima facie EPA violation is established by showing that *a* male and *a* female receive unequal compensation for substantially equal jobs . . . ."), italics added.

showing they received "lower wages than the average of wages paid to all employees of the opposite sex performing substantially equal work and similarly situated with respect to any other factors, such as seniority, that affect the wage scale." (*Hein v. Or. Dept. of Educ.* (9th Cir. 1983) 718 F.2d 910, 916 [agreeing with the Eighth Circuit that "'a comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness'" where the plaintiffs chose "a single employee for comparison apparently because he was the highest paid employee performing substantially equal work, not because he was the only comparable employee"], quoting *Heymann v. Tetra Plastics Corp.* (8th Cir. 1981) 640 F.2d 115, 122.)

Alternatively, courts have held that plaintiffs may—but are not required to—rely on statistical evidence of a gender-based disparity among comparable male and female employees to establish the final element of their prima facie equal pay case. (See, e.g., *Lavin-McEleney v. Marist College* (2d Cir. 2001) 239 F.3d 476, 481; *Beck-Wilson v. Principi* (6th Cir. 2004) 441 F.3d. 353, 364 [relying on class-wide statistical evidence to establish a prima facie EPA case because the defendant had not shown any differences between the jobs performed by the female nurse practitioner plaintiffs and male physician assistant comparators]; see also Amici Curiae's Request for Judicial Notice, Ex. A, *Ellis v. Google, Inc.*, Cal. Super. Ct. (S.F. County) Case No. CGC-17-561299, [Redacted] Order Granting Plaintiffs' Motion for Class Certification (May 27, 2021), at pp. 8-9 [finding that plaintiffs' statistical evidence and analysis were sufficient to establish second element of prima facie case under CEPA and presented predominant common questions for purposes of class certification].) While statistical evidence is more commonly used in class and collective actions, courts have recognized multiple regression analysis as a valid statistical technique that may be used to identify unlawful wage disparities in individual cases as well. (See, e.g., *Ottaviani v. State Univ. of NY* (2d Cir. 2001) 875 F.2d 365, 367 [using multiple regression analysis, "individual plaintiffs can make predictions about what job or job benefits similar situated employees should

ideally receive, and then can measure the difference between the *predicted* treatment and the *actual* treatment of those employees"].)

Here, the trial court ignored all this authority in finding that Allen failed to establish a prima facie case under the CEPA as a matter of law because she could not show that Staples had engaged in a pattern or practice of gender-based wage discrimination by paying her less than (all) males in the "comparator class." (V AA 957-958.) The court reasoned that because Allen's Complaint included allegations that Staples paid her and other female employees less than men who held the same positions, Allen therefore had to prove that she was paid less than *all* of these men in order to defeat summary judgment on her individual CEPA claim and faulted Plaintiff for failing to cite any "statistics" in support of her prima facie case. (*Id.*) The trial court imposed this requirement notwithstanding the fact that Allen does not assert any class claims and despite its previous rulings denying Plaintiff-Appellant discovery about what Staples paid her male counterparts. (See App. Opening Br. at 30-32; I AA 19-46; V AA 938.)

This Court should reverse summary judgment on Allen's CEPA claim and clarify that a CEPA plaintiff is not required to demonstrate that males, as a class, are paid higher wages than females, as a class, to establish a prima facie case. (See *EEOC v. Md. Ins. Admin.*, 879 F. 3d at 122; see also *Moorehead v. United States* (2009) 88 Fed. Cl. 614, 619 ["To show a prima facie case, 'the plaintiff need not compare herself to all similarly classified male employees but may choose one or more among those allegedly doing substantially equal work.'"], quoting *Ellison v. United States* (1992) 25 Cl. Ct. 481, 486; *Goodrich v. International Bhd. of Elec. Workers* (D.C. Cir. 1987) 815 F.2d 1519, 1524 [applying same standard].)

To hold otherwise would contravene the statutory language and the remedial purpose of the CEPA by allowing an employer to evade liability whenever a plaintiff could not show she was the *lowest* paid employee—even if she were still *underpaid* compared to at least one employee doing substantially similar work—or where the

employer did not pay *all* employees of one sex less than employees of another. California's equal pay law makes it illegal for an employer to pay *any* employee less than it pays an employee of a different sex, race or ethnicity for substantially equal work. An employer could be paying *most* employees fairly and still be violating the law as to one. And if that employer fails to demonstrate that the wage difference is explained entirely by a bona fide, job-related factor other than sex (or race/ethnicity), then a California court must find that a violation of the CEPA occurred.

Moreover, requiring individual plaintiffs to adduce evidence of or prove a pattern or practice of pay discrimination to get past summary judgment on their CEPA claims would render the law unenforceable as a practical matter. As demonstrated by the facts of this case, it is already difficult for individuals to prove an equal pay violation because most employees do not know or have access to information about what their co-workers are paid. Most employers are not transparent about pay and many (unlawfully) discourage or prohibit employees from discussing pay amongst themselves, notwithstanding the express prohibition on such policies contained in the Fair Pay Act (Lab. Code § 1197.5, subd. (k)) and other laws.[16] Like Plaintiff-Appellant in this case, many employees will be unable to obtain evidence of a pattern or practice affecting other employees besides themselves even after they file a lawsuit.

III. CONCLUSION

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

---

[16] Institute for Women's Policy Research, *On The Books, Off The Record: Examining The Effectiveness Of Pay Secrecy Laws In The U.S.*, IWPR #C494 (Jan. 2021) (finding that in 2017/2018, despite more than a dozen states plus the District of Columbia having adopted anti-pay secrecy legislation since 2010, nearly half of all full-time workers and 55.7% of non-unionized workers reported being either discouraged or banned from discussing wages and salaries by their employers) <https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf> [as of Mar. 1, 2022].

Date: March 4, 2022

Respectfully submitted,

OLIVIER SCHRIEBER & CHAO LLP

REISCH LAW

By: */s/ Monique Olivier*
Monique Olivier
Jennifer A. Reisch
Attorneys for Amici Curiae California Employment Lawyers Association et al.

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this [Proposed] Amici Curiae brief contains 9,302 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief. The brief also otherwise complies with the California Rules of Court in its format.

Date: March 4, 2022

Respectfully submitted,

OLIVIER SCHRIEBER & CHAO LLP

REISCH LAW

By: */s/ Monique Olivier*
Monique Olivier
Jennifer A. Reisch
Attorneys for Amici Curiae California Employment Lawyers Association et al.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is Olivier Schreiber & Chao LLP, 201 Filbert Street, Suite 201, San Francisco, CA 94133. On March 4, 2022, I served the following document(s):

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT; [PROPOSED] BRIEF OF AMICI CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION *ET AL*.

AMICI CURIAE'S REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MONIQUE OLIVIER AND [PROPOSED] ORDER

on the interested parties in this action by placing a true copy thereof enclosed in an envelope addressed to each as follows:

Hon. Michael P. Linfield
Stanley Mosk Courthouse
111 N. Hill Street
Los Angeles, CA 90012

[X] BY MAIL: I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of California that the above is true and correct. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 4, 2022 at San Francisco, California.

/s/ Raika Kim
Raika Kim