

**PAYCHECK FAIRNESS ACT (H.R. 7):
EQUAL PAY FOR EQUAL WORK**

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN
SERVICES

AND THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS
OF THE

COMMITTEE ON EDUCATION
AND LABOR

U.S. HOUSE OF REPRESENTATIVES

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PAYCHECK FAIRNESS ACT (H.R. 7): EQUAL PAY FOR EQUAL WORK

**Wednesday, February 13, 2019
House of Representatives
Committee on Education and Labor,
Subcommittee on Civil Rights and Human Services
Joint with
Subcommittee on Workforce Protections
Washington, DC.**

The subcommittees met, pursuant to notice, at 10:23 a.m., in room 2175, Rayburn House Office Building. Hon. Suzanne Bonamici [chairwoman of the Subcommittee on Civil Rights and Human Services] presiding.

Present: Representatives Bonamici, Adams, Takano, DeSaulnier, Jayapal, Wild, McBath, Schrier, Hayes, Omar, Trone, Stevens, Lee, Comer, Byrne, Thompson, Stefanik, Walker, Wright, and Johnson.

Also present: Representatives Shalala, Underwood, Scott, and Foxx.

Staff present: Tylease Alli, Chief Clerk; Nekea Brown, Deputy Clerk; Ilana Brunner, General Counsel; David Dailey, Senior Counsel; Carrie Hughes, Director of Health and Human Services; Eli Hovland, Staff Assistant; Eunice Ikene, Labor Policy Advisor; Stephanie Lalle, Deputy Communications Director; Andre Lindsay, Staff Assistant; Richard Miller, Director of Labor Policy; Max Moore, Office Aide; Udochi Onwubiko, Labor Policy Counsel; Veronique Pluviose, Staff Director; Carolyn Ronis, Civil Rights Counsel; Banyon Vassar, Deputy Director of Information Technology; Katelyn Walker, Counsel; Cyrus Artz, Minority Parliamentarian, Marty Boughton, Minority Press Secretary; Courtney Butcher, Minority Coalitions and Member Services Coordinator; Rob Green, Minority Director of Workforce Policy; John Martin, Minority Workforce Policy Counsel; Sarah Martin, Minority Professional Staff Member; Hannah Matesic, Minority Legislative Operations Manager; Kelley McNabb, Minority Communications Director; Brandon Renz, Minority Staff Director; Ben Ridder, Minority Legislative Assistant; Meredith Schellin, Minority Deputy Press Secretary and Digital Advisor; and Heather Wadyka, Minority Staff Assistant.

Chairwoman BONAMICI. The joint subcommittees on Civil Rights and Human Services and Workforce Protections come to order. Welcome, everyone. I note that a quorum is present. I ask

unanimous consent that Ms. Underwood of Illinois and Ms. Shalala of Florida be permitted to participate in today's hearing with the understanding that their questions will come only after members of the Civil Rights and Human Services and Workforce Protections Subcommittees on both sides of the aisle who are present have had an opportunity to question the witnesses. Seeing no objection.

The subcommittees are meeting today in a legislative hearing to hear testimony on H.R. 7, the Paycheck Fairness Act. Pursuant to committee rule 7C opening Statements are limited to the chairs and ranking members. I recognize myself now for the purpose of making an opening Statement.

In 1963, President Kennedy signed the Equal Pay Act and our country enshrined into law a fundamental concept. Equal pay for equal work, regardless of sex. Because of this landmark law, Title VII of the Civil Rights Act of 1964, and more recently, the Lilly Ledbetter Fair Pay Act, we have made tremendous progress in reducing inequities for women in the workplace.

Unfortunately, loopholes and insufficient enforcement have allowed wage discrimination to persist. The Equal Pay Act has been law for more than half a century, but in 2019 equal pay for equal work is not always a reality.

Today, women earn, on average, 80 cents on the dollar compared to white men in substantially equal jobs. The wage gap is even worse for women of color. For example, black women earn an average of 61 cents on the dollar, native women earn an average of 58 cents on the dollar, and Latina women earn an average of 53 cents on the dollar compared to white men in substantially equal jobs.

The wage gap persists in nearly every line of work, regardless of education, experience, occupation, industry, or job title. This has severe consequences for the lives of working women and families and for our economy.

The lack of easily accessible data on wages makes discrimination difficult to detect, let alone prevent. Even when wage discrimination is discovered, working women still face significant barriers to meet the heavy burden of proof for holding employers accountable for discrimination.

Not only is it difficult to prove a pay disparity between employees, identifying an employee of the opposite sex in an equal position who is paid more in the exact same physical location can be impossible in many situations. This is even more challenging when information about wages and pay raises is often kept secret, and in many cases, even barred from being shared between coworkers.

The roadblocks to enforcing pay equity help explain why pay inequity still exists for women, even with the Equal Pay Act. Several States have acted to address pay inequities, including bipartisan efforts in my own home State of Oregon, but it is time for Congress to address persistent wage discrimination nationwide.

Today's legislative hearing will focus on H.R. 7, the Paycheck Fairness Act, a proposal to confront and eliminate loopholes that allow for gender-based wage discrimination.

The Paycheck Fairness Act would require employers to prove that a pay disparity exists for legitimate reasons. It would ban retaliation against workers who discuss their wages and allow more

workers to participate in class action lawsuits against systemic pay discrimination.

It would prohibit employers from seeking the salary history of prospective employees, which despite ongoing legal disputes, is in line with existing precedent. The bill would also develop wage data collection systems and provide assistance to businesses to improve equal pay practices.

With this legislation we have the opportunity to disrupt a national cycle of discriminatory pay that keeps too many women and families in poverty. And we have the opportunity to finally make equal pay for equal work a reality by passing the Paycheck Fairness Act.

Thank you, and I now recognize the distinguished Ranking Member of the Civil Rights and Human Services Committee, Mr. Comer, for the purpose of making an opening statement.

[The information referred to follows:]

**Prepared Statement of Hon. Suzanne Bonamici, Chairwoman,
Subcommittee on Civil Rights and Human Services**

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Unfortunately, loopholes and insufficient enforcement have allowed wage discrimination to persist. The Equal Pay Act has been law for more than a half century, but in 2019 equal pay for equal work is not always a reality.

Today, women earn, on average, 80 cents on the dollar compared to white men in substantially equal jobs. The wage gap is even worse for women of color. For example, Black women earn an average of 61 cents on the dollar, Native women earn an average of 58 cents on the dollar, and

Latina women earn an average of 53 cents on the dollar compared to white men in substantially equal jobs. The wage gap persists in nearly every line of work, regardless of education, experience, occupation, industry, or job title. This has severe consequences for the lives of working women and families and for our economy.

The lack of easily accessible data on wages makes discrimination difficult to detect, let alone prevent. Even when wage discrimination is discovered, working women still face significant barriers to meet the heavy burden of proof for holding employers accountable for discrimination. Not only is it difficult to prove a pay disparity between employees, identifying an employee of the opposite sex in an equal position who is paid more in the exact same physical location can be impossible in many situations. This is even more challenging when information about wages and pay raises is often kept secret, and in many cases, even barred from being shared between coworkers.

The roadblocks to enforcing pay equity help explain why pay inequity still exists for women even with the Equal Pay Act. Several States have acted to address pay inequities, including bipartisan efforts in my home State of Oregon, but it is time for Congress to address persistent wage discrimination nationwide. Today’s legislative hearing will focus on H.R. 7, the Paycheck Fairness Act, a proposal to confront and eliminate loopholes that allow for gender-based wage discrimination.

The Paycheck Fairness Act would require employers to prove that a pay disparity exists for legitimate reasons. It would ban retaliation against workers who discuss their wages and allow more workers to participate in class action lawsuits against systemic pay discrimination. It would prohibit employers from seeking the salary history of prospective employees, which despite ongoing legal disputes, is in line with existing precedent. The bill would also develop wage data collection systems and provide assistance to businesses to improve equal pay practices.

With this legislation we have the opportunity to disrupt a national cycle of discriminatory pay that keeps too many women and families in poverty. And we have the opportunity to finally make equal pay for equal work a reality by passing the Paycheck Fairness Act.

Thank you and I now yield to the Ranking Member, Mr. Comer.

Mr. COMER. Thank you, Madame Chair. Women deserve equal pay for equal work. In 1963, Congress amended the Fair Labor Standards Act with the Equal Pay Act, making it illegal to pay different wages to employees of the opposite sex for equal work.

The following year, Congress approved the Civil Rights Act of 1964 which made it illegal for employers to discriminate based on race, color, national origin, religion, and sex. These laws marked a seismic shift in the United States as we affirmed as a nation that discrimination cannot have a place in America. We learned the hard way that change this significant cannot and does not happen overnight. But the fact remains that while some bad bosses may have blurred the lines over the past several decades when it comes to fairness, the law has not been on their side.

Economic studies conducted by government and private entities alike have consistently demonstrated that women tend to make better choices about managing work life demands than men. If employees of different sexes are going to do the same work, they are entitled to the same pay.

The American work force is comprised of more women than ever before, 74.9 million women. Of the 2.8 million jobs created in the past year, more than 58 percent have been filled by women. The number of women-owned employer firms continues to rise and census data shows that women own about one in five employer businesses nationwide.

This contribution to the American work force is profound and it must be celebrated. All women deserve fairness and dignity as they seek greater options and opportunities in their respective careers.

Republicans are committed to that future and we will continue to focus on strengthening economic policies that affirm the bedrock principle of equal pay for equal work. Unfortunately, the legislation which is the focus of today's hearing has many shortcomings in this regard and does not help the people its authors want you to think it does.

I look forward to the dialog with our witnesses today and, Madame Chair, I yield back.

[The information referred to follows:]

**Prepared Statement of Hon. James Comer, Ranking Member,
Subcommittee on Civil Rights and Human Services**

Women deserve equal pay for equal work. In 1963, Congress amended the Fair Labor Standards Act with the Equal Pay Act, making it illegal to pay different wages to employees of the opposite sex for equal work. The following year, Congress approved the Civil Rights Act of 1964, which made it illegal for employers to discriminate based on race, color, national origin, religion, and sex.

These laws marked a seismic shift in the United States as we affirmed as a nation that discrimination cannot have a place in America. We learned the hard way that change this significant cannot and does not happen overnight. But the fact remains that while some bad bosses may have blurred the lines over the past several decades when it comes to fairness, the law has not been on their side.

Economic studies conducted by government and private entities alike have consistently demonstrated that women tend to make better choices about managing work-life demands than men. If employees of different sexes are doing the same work, they are entitled to the same pay.

The American work force is comprised of more women than ever before 74.9 million women. Of the 2.8 million jobs created in the past year, more than 58 percent have been filled by women. The number of women-owned employer firms continues to rise, and Census data shows that women own about 1 in 5 employer businesses nationwide.

This contribution to the American workforce is profound, and it must be celebrated. All women deserve fairness and dignity as they seek greater options and opportunities in their respective careers.

Republicans are committed to that future, and we will continue to focus on strengthening economic policies that affirm the bedrock principle of equal pay for equal work. Unfortunately, the legislation which is the focus of today's hearing has many shortcomings in this regard and does not help the people its authors want you to think it does. I look forward to the dialog with our witnesses today.

Chairwoman BONAMICI. Thank you, Mr. Comer. And I now recognize the distinguished chairwoman of the Workforce Protections Subcommittee, Ms. Adams, for the purpose of making an opening statement.

Ms. ADAMS. Thank you very much and good morning. I want to share my appreciation to Chairwoman Bonamici, Ranking Members Byrne and Comer, and to all of the witnesses who have joined us here today for this important discussion. Thank you all for being here.

It takes the average woman an additional 91 days, three additional months, to earn what her male peers earned in 2018 and that is unacceptable.

From the North Carolina House to the U.S. House, for 3 decades I have been fighting to close gender and gender-based wage gaps. Today, I guess I feel a little bit like Fannie Lou Hamer. Sick and tired of being sick and tired of the ongoing inequality.

Fifty-six years have passed since we signed the Equal Pay Act into law and it has been 10 years since President Obama signed into law the Lilly Ledbetter Fair Pay Act. But today in my district in North Carolina, women still only make about 82 cents for every dollar a man makes. And nationally, the statistic is even worse, 80 cents for every dollar.

Women of color are even less likely to make as much as a man working the same job. Black women earn only 63 cents for every dollar a man makes.

When women are shortchanged our children, our families, our economy, all shortchanged. In fact, it shortchanges us about \$500 billion dollars a year.

And that is why as the new chair of the Subcommittee on Workforce Protections, I am proud to host the subcommittee's first hearing on addressing persistent gender-based wage discrimination through the Paycheck Fairness Act. Because we can no longer wait while every day women across the Nation are deprived of equal wages for equal work. Time is up for that.

The Paycheck Fairness Act is an opportunity for Congress to strengthen the Equal Pay Act, bolster the rights of working women, and put an end to gender-based wage disparity once and for all. It is the right thing to do because it is right. It is always right to do what is right.

And so at this time, I ask unanimous consent to introduce for the record four letters all in support of the Paycheck Fairness Act. One from the National Partnership for Women and Families, one from the American Bar Association, one from the American Association of University Women, and the other from the National Women's Law Center.

I look forward to our discussion today—without objection, Madame Chair, I am sorry. And I look forward to our discussion today and yield to Ranking Member, Mr. Byrne, for the purpose of making an opening statement.

[The information referred to follows:]



February 13, 2019

The Honorable Alma S. Adams
 Chair, Subcommittee on Workforce
 Protections
 Committee on Education and Labor
 United States House of Representatives

The Honorable Bradley Byrne
 Ranking Member, Subcommittee on
 Workforce Protections
 Committee on Education and Labor
 United States House of Representatives

The Honorable Suzanne Bonamici
 Chair, Subcommittee on Civil Rights and
 Human Services
 Committee on Education and Labor
 United States House of Representatives

The Honorable James Comer
 Ranking Member, Subcommittee on Civil
 Rights and Human Services
 Committee on Education and Labor
 United States House of Representatives

Dear Chairwomen Adams and Bonamici and Ranking Members Byrne and Comer,

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy organization based in Washington, D.C. For more than four decades, we have fought for every major policy advance that has helped women and families. We promote fairness in the workplace, reproductive health and rights, access to quality, affordable health care, and policies that help women and men meet the dual demands of their jobs and families. **We write in strong support of H.R. 7, the Paycheck Fairness Act.**

As the Paycheck Fairness Act recognizes, women and workers from communities of color continue to face significant pay disparities in the United States. On average, women working full time, year round are paid only 80 cents for every dollar paid to men.¹ The wage gap is widest for many women of color: Among women who hold full-time, year-round jobs in the United States, Black women are typically paid 61 cents, Native American women 58 cents and Latinas just 53 cents for every dollar paid to white, non-Hispanic men.² White, non-Hispanic women are paid 77 cents and Asian women 85 cents for every dollar paid to white, non-Hispanic men, although some ethnic subgroups of Asian women fare much worse.³

The wage gap persists across different industries,⁴ occupations⁵ and education levels.⁶ The wage gap also exists in nearly every congressional district; in North Carolina's 12th congressional district, women are paid 83 cents for every dollar paid to a man, and in Oregon's first congressional district, women are paid 82 cents (see Appendix A for a full list of the wage gaps by Congressional district).⁷ If the annual gender wage gap were eliminated, on average, a working woman in the United States would have enough money for approximately:

- Nearly fourteen more months of child care;⁸

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 email: info@nationalpartnership.org ~ web: nationalpartnership.org

- More than two-thirds of an additional year of tuition and fees for a four-year public university, or the full cost of tuition and fees for a two-year community college;⁹
- More than seven additional months of premiums for employer-based health insurance;¹⁰
- Nearly seven more months of mortgage payments;¹¹
- More than 10 additional months of rent;¹²
- Up to 8.4 additional years of birth control;¹³ or
- The money to pay off her student loan debt in just under three years.¹⁴

These troubling statistics underscore the need to update our nation's equal pay laws.

The Paycheck Fairness Act would make it safe for workers to discuss their wages with each other. Currently, employers are able to mask compensation discrimination with pay secrecy policies that forbid employees from discussing pay and benefits. Secrecy and the threat of retaliation leaves workers unable to learn about and challenge pay disparities. In a survey of private sector workers, over 62 percent of women and 60 percent of men reported that their employers discourage or prohibit the discussion of wage and salary information.¹⁵ The Paycheck Fairness Act would make pay secrecy policies illegal.

The Paycheck Fairness Act would also prohibit employers from screening job applicants based on their salary history or requiring salary history during the interview process. People should be paid fairly for the job they are being hired to do. Women are typically paid lower wages than men even in their first jobs. Salary disparities that begin early in a woman's career can follow them from job to job when employers are permitted to base a new hire's salary on her prior salary.

The bill would also make it more difficult for employers to justify pay discrimination. Workers in the same company, who do the same job and have the same years of experience, education and training should be paid the same. Currently, however, employers are able to explain away differences in pay too easily by relying on a catch-all defense in the Equal Pay Act. The Paycheck Fairness Act would close that loophole and require employers to prove that any differences in pay are not sex-based, are job related with respect to the position in question, are consistent with business necessity and account for the entire difference in compensation. Employees claiming pay discrimination would also have new opportunities to prove that the employer's defense is pretext.

In addition to these critical provisions, the Paycheck Fairness Act would also allow workers alleging pay discrimination within the same company to file class action suits; change the remedies of the Equal Pay Act to treat gender-based pay discrimination claims the same as other civil rights violations that result in unfair pay; recognize companies that want to do better; and improve fair pay enforcement, data collection and disclosure.

The Paycheck Fairness Act is a much needed update to our nation's equal pay laws. Congress should pass this bill without delay.

1 U.S. Census Bureau. (2018). *Current Population Survey, Annual Social and Economic (ASEC) Supplement. Table PINC-05. Work Experience in 2017 – People 15 Years Old and Over by Total Money Earnings in 2017, Age, Race, Hispanic Origin, Sex, and Disability Status*. Retrieved 8 February 2019, from <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps.pins/pinc-05.html> (Unpublished calculation based on the median annual pay for all women and men who worked full time, year-round in 2018)

- 2 U.S. Census Bureau. (2018). *Current Population Survey, Annual Social and Economic (ASEC) Supplement. Table PINC-05. Work Experience in 2017 – People 15 Years Old and Over by Total Money Earnings in 2017, Age, Race, Hispanic Origin, Sex, and Disability Status*. Retrieved 8 February 2019, from <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html>
- 3 U.S. Census Bureau. (2018). *Current Population Survey, Annual Social and Economic (ASEC) Supplement. Table PINC-05. Work Experience in 2017 – People 15 Years Old and Over by Total Money Earnings in 2017, Age, Race, Hispanic Origin, Sex, and Disability Status*. Retrieved 8 February 2019, from <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html>. Despite an overall wage gap for Asian women in the United States that is smaller than for other groups of women of color, there are substantial variations in the wage gap between particular ethnic groups of Asian women and white, non-Hispanic men, with many subpopulations of Asian women facing significantly greater wage penalties. For more information, see: <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/asian-women-and-the-wage-gap.pdf>
- 4 U.S. Census Bureau. (2018). *American Community Survey 1-Year Estimates 2017, Table S2414. Industry by Sex and Median Earnings in the Past 12 Months (in 2017 Inflation-Adjusted Dollars) for the Full-Time, Year-Round Civilian Employed Population 16 Years and Over*. Retrieved 8 February 2019, from https://factfinder.census.gov/tables/services/jsf/pages/productview.xhtml?pid=ACS_17_1YR_S2414&prodType=table
- 5 U.S. Census Bureau. (2018). *Current Population Survey, Annual Social and Economic (ASEC) Supplement. Table PINC-06. Occupation of Longest Job in 2017--People 15 Years and Over, by Total Money Earnings in 2017, Work Experience in 2017, Race, Hispanic Origin, and Sex*. Retrieved 8 February 2019, from <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-06.html>
- 6 U.S. Census Bureau. (2018). *Current Population Survey, Annual Social and Economic (ASEC) Supplement. Table PINC-03. Educational Attainment--People 25 Years Old and Over, by Total Money Earnings in 2017, Work Experience in 2017, Age, Race, Hispanic Origin, and Sex*. Retrieved 8 February 2019, from <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-03.html>
- 7 U.S. Census Bureau. (2018). *American Community Survey 1-Year Estimates 2017, Table B20017. Median Earnings in the Past 12 Months (in 2005 Inflation-Adjusted Dollars) by Sex, By Work Experience in the Past 12 Months for the Population 16 Years and Over with Earnings in the Past 12 Months*. Retrieved 31 January 2019, from https://factfinder.census.gov/tables/services/jsf/pages/productview.xhtml?pid=ACS_05_EST_B20017&prodType=table
- 8 Child Care Aware of America. (2018). *The US and the High Cost of Child Care: A Review of Prices and Proposed Solutions for a Broken System*. Retrieved 7 February 2019, from <http://usa.childcareaware.org/advocacy-public-policy/resources/research/costofcare/>. Unpublished calculation of \$9,170 based on the average cost of center-based child care for a four-year-old. This average is not representative of the mean and is an approximation calculated by weighting state child care cost averages by the number of programs by type reported by each state. It is not to be considered a "national average."
- 9 U.S. Department of Education, National Center for Education Statistics. (2017, November). *Digest of Education Statistics: 2016* (Table 330.10. Average undergraduate tuition and fees and room and board rates charged for full-time students in degree-granting postsecondary institutions, by level and control of institution: 1963-64 through 2016-17). Chapter 3. Retrieved 7 February 2019, from https://nces.ed.gov/ipeds/data/digest/d17_330.10.asp?current=yes (The average total annual cost of undergraduate tuition and required fees is \$8,804 for a four-year public college or university or \$3,156 for a two-year college)
- 10 Kaiser Family Foundation. (n.d.) *Average Annual Single Premium per Enrolled Employee For Employer-Based Health Insurance, 2017*. Retrieved 7 February 2019, from <https://www.kff.org/other/state-indicator/single-coverage/?currentTimeframe=0&sortModel=-%7B%22colId%22%22Employee%20Contribution%22%22sort%22%22desc%22%22D>
- 11 U.S. Census Bureau. (2018). *American Community Survey 1-Year Estimates 2017, Table GCT2511. Median Monthly Housing Costs for Owner-Occupied Housing Units with a Mortgage (Dollars)*. Retrieved 7 February 2019, from https://factfinder.census.gov/tables/services/jsf/pages/productview.xhtml?pid=ACS_17_1YR_GCT2511.US01PR&prodType=table (Calculation uses median monthly housing costs for owner-occupied housing units with a mortgage)
- 12 U.S. Census Bureau. (2018). *American Community Survey 1-Year Estimates 2017, Table GCT2514. Median Monthly Housing Costs for Renter-Occupied Housing Units (Dollars)*. Retrieved 7 February 2019, from https://factfinder.census.gov/tables/services/jsf/pages/productview.xhtml?pid=ACS_17_1YR_GCT2514.US01PR&prodType=table (Calculation uses median gross rent)
- 13 Center for American Progress. (2012, February 15). *The High Costs of Birth Control: It's Not As Affordable As You Think*. Retrieved 7 February 2019, from https://cdn.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/BC_costs.pdf (Calculated from a survey of retail costs of oral contraceptives for the uninsured and average copays, combined with the average cost of doctor visits to obtain the prescription. While the Affordable Care Act greatly advanced access to birth control by requiring coverage of contraceptives without cost sharing, many women still must pay out of pocket because they lack insurance, because their plan is grandfathered and does not cover contraceptives without a copay, or because their plan only covers generics.)
- 14 Siegel Bernard, T., & Russell, K. (2018, July 11). "The New Toll of American Student Debt in 3 Charts." *The New York Times*. Retrieved 7 February 2019, from <https://www.nytimes.com/2018/07/11/your-money/student-loan-debt-parents.html> (The average debt load at graduation for a student receiving a bachelor's degree was \$30,301 in 2015-2016.)
- 15 Drago, R., Hegevisch, A., & Williams, C. (2014, January). *Pay Secrecy and Wage Discrimination*. Institute for Women's Policy Research Publication. Retrieved 8 February 2019, from <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>



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February 12, 2019

The Honorable Suzanne Bonamici, Chair
Subcommittee on Civil Rights and Human Services
Committee on Education and Labor
House of Representatives
Washington, DC 20515

The Honorable Alma Adams, Chair
Subcommittee on Workforce Protections
Committee on Education and Labor
House of Representatives
Washington, DC 20515

RE: ABA SUPPORT FOR H.R. 7, THE PAYCHECK FAIRNESS ACT

Dear Chair Bonamici and Chair Adams:

On behalf of the American Bar Association and its over 400,000 members, I commend you for scheduling tomorrow's joint hearing on H.R. 7, the Paycheck Fairness Act, and refocusing the nation's attention on the persistent and pernicious problem of gender-based wage discrimination. We offer the following comments in support of the legislation and request that this letter be made part of the hearing record.

H.R. 7, introduced by Representative DeLauro (D-CT), would update and strengthen the Equal Pay Act of 1963 (EPA), which was passed by Congress expressly to prohibit "discrimination on account of sex in the payment of wages by employers." Enacted over a half a century ago, the EPA needs a tune-up – it is sorely out of date and out of touch with today's business world. It no longer is an effective legal vehicle for uncovering and correcting workplace pay inequities. While the pay gap differential has been reduced since the EPA was enacted, it still exists and is still significant.

The Paycheck Fairness Act (PFA) will make critical, common-sense improvements to this important and historic law so that we can continue to make progress in eradicating gender-based wage discrimination and advancing this nation's longstanding goal of equal pay for equal work. In accordance with policy adopted in 2010 in furtherance of our commitment to work to eliminate discrimination in the workplace, the American Bar Association supports the following essential components of the PFA.

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1. The Paycheck Fairness Act will update the definition of a work “establishment.”

Under the EPA, a determination of wage discrimination is made by comparing the wages of a male and female employee who perform substantially equal jobs (i.e., jobs requiring similar skills, effort, and responsibility that are performed under similar conditions) and work at the same “establishment.”

The PFA will broaden the law’s definition of “establishment” by stating that wage comparisons may be made between employees who perform substantially equal jobs at any of the employer’s places of business that are in the same county or political subdivision. This change is needed because many businesses today operate out of multiple offices in the same area.

2. The Paycheck Fairness Act will clarify the “factor other than sex” defense.

Some pay differentials are legal under the EPA. An employer will not be liable if the employer can prove that the pay differential is based on: 1) seniority; 2) merit; 3) the quality or quantity of production; or 4) a “factor other than sex.”

Courts have interpreted the “factor other than sex” defense inconsistently and, at times, without regard to its relevance to job performance. The PFA provides much needed guidance to help courts determine when a “factor other than sex” qualifies as a legitimate defense.

The PFA provides that a “factor other than sex” defense must be based on a bona fide, job-related factor such as education, training or experience that is consistent with business necessity. In addition, it specifies that a factor will not qualify as an affirmative defense if the employee can demonstrate that the employer refuses to adopt an existing alternative business practice that would serve the same business purpose without producing a pay differential. This definition is modeled on the business necessity standard used by courts in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964.

3. The Paycheck Fairness Act will strengthen the remedies available under the EPA.

At present, the EPA provides for back pay and, in some cases, liquidated damages. These limited monetary remedies often provide inadequate compensation to make the victim whole and are insufficient to deter future violations of the law by employers who view them as a cost of doing business.

The PFA allows prevailing plaintiffs to recover compensatory and punitive damages. Compensatory damages include out-of-pocket expenses resulting from the discrimination and compensation for non-economic damages such as loss of reputation and mental anguish. Punitive damages would be allowed only in cases of intentional discrimination involving malice and reckless disregard and would not apply in cases against the United States.

These proposed changes would bring the remedy provisions of the EPA more in line with those of Title VII, and would put gender-based wage discrimination on an equal footing with discrimination based on race or ethnicity.

In addition, the PFA would allow Equal Pay Act class actions to proceed under the “opt-out” provisions of Rule 23(b)(3) of the Federal Rules of Civil Procedure. The EPA was adopted prior to Rule 23 and requires putative class members to “opt in” if they want to participate in a

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proposed class action. This amendment is needed to place Equal Pay Act plaintiffs in the same position as other victims of pay discrimination, to whom the "opt-out" provisions of Rule 23(b)(3) have long applied.

4. The Paycheck Fairness Act will strengthen oversight and enforcement mechanisms.

The PFA will revitalize the role of the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) in combating gender-based discrimination by requiring research, education, outreach, and ready public access to compensation discrimination information.

It also requires the DOL and the EEOC to collect compensation and other employment-related data by race, nationality, and sex for the purpose of enhancing the EEOC's ability to detect violations and improve enforcement of the EPA.

5. The Paycheck Fairness Act will prohibit retaliation for disclosure of salary information.

At present, the EPA prohibits an employer from retaliating against an employee who asserts his or her rights under the EPA, but it is silent regarding situations involving salary discussions.

The PFA will protect employees from retaliation not only for seeking redress, but also for inquiring about the employer's wage practices or disclosing their own wages to coworkers. Without the PFA's broad prohibition against retaliation by an employer, fear of being fired will continue to inhibit workers from discovering and seeking redress for discriminatory gender-based pay disparities.

Thank you for this opportunity to express these views on this important legislation. If you have any questions regarding these comments, please contact Denise Cardman at 202-662-1761 or denise.cardman@americanbar.org.

Sincerely,



Robert M. Carlson

cc. Honorable James Comer, Ranking Member
Subcommittee on Civil Rights and Human Services

Honorable Bradley Byrne, Ranking Member
Subcommittee on Workforce Protections



February 12, 2019

Congresswoman Suzanne Bonamici
Chair, Subcommittee on Civil Rights and Human
Services
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Congresswoman Alma Adams
Chair, Subcommittee on Workforce Protections
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Congressman James Comer
Ranking Member, Subcommittee on Civil Rights
and Human Services
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Congressman Bradley Byrne
Ranking Member, Subcommittee on Workforce
Protections
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chair Bonamici, Chair Adams, Ranking Member Comer, Ranking Member Byrne, and Members
of the Subcommittees:

On behalf of the more than 170,000 bipartisan members and supporters of the American Association of
University Women (AAUW), I would like to thank you for the opportunity to submit this letter in
advance of the Subcommittees' hearing on "*Paycheck Fairness Act (H.R. 7): Equal Pay for Equal
Work*." Despite federal and state equal pay laws, gender pay gaps persist. The Paycheck Fairness Act¹
offers a much-needed update to the Equal Pay Act of 1963 by providing new tools to battle these
pervasive pay gaps and to challenge discrimination. I applaud your examination of this important bill
and urge the Subcommittees to support and seek its swift movement.

Introduction

The American Association of University Women has long fought to end wage discrimination. Starting
as early as 1894, AAUW has conducted research into the gender pay gap.² By 1922, AAUW's legislative
program called for a reclassification of the U.S. Civil Service and for a repeal of gender-based salary
restrictions in the Women's Bureau of U.S. Department of Labor.³ In 1955, AAUW supported a bill
championed by Reps. Edith Green (D-OR) and Edith Rogers (R-MA) and introduced by Edna Flannery
Kelly (D-NY), providing "that there shall be equal pay for equal work for women" and requiring equal
pay "for work of comparable character."⁴ Congress enacted a version of the 1955 bill in the 1963 Equal
Pay Act—a law intended to close the wage gap.⁵

¹ Paycheck Fairness Act, H.R. 7, 116th Cong. (2019).

² *Gap and Gown: An AAUW Issue since 1984*, AAUW, <https://www.aauw.org/2012/10/16/gap-and-gown-an-aauw-issue-since-1894/> (last visited Feb. 12, 2019).

³ HISTORIC PRINCIPLES, 1881–2007, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (2007).

⁴ Women's Equal Pay Act, H.R. 281, 84th Congress (1955). *See also*, Legislative Notes, AAUW Archives, Washington, DC.

⁵ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as 29 U.S.C. § 206(d)).

As the Equal Pay Act celebrated its 55th anniversary last year, it has become clear that improvements are still necessary. Because of limited enforcement tools and inadequate remedies, the law has not been fully able to fulfill its promise. The Paycheck Fairness Act provides a much-needed update to the Equal Pay Act.

This bill, first introduced in 1997,⁶ passed the House of Representatives twice.⁷ In 2009, the House of Representatives overwhelmingly passed the Paycheck Fairness Act with bipartisan support. At that time, the bill failed to move forward on a procedural vote in the Senate, even though 58 senators -- a majority of the Senate -- also supported the bill. Momentum continues to build for this bill, with 240 original sponsors in the House and 46 in the Senate in the 116th Congress. This meaningful support demonstrates that Congress knows American families need fair pay.

And families cannot wait for equal pay because they increasingly rely on women's wages and economic participation. Women make up 47 percent of the civilian workforce,⁸ 64 percent of mothers are primary, sole, or co-breadwinners of their families,⁹ and women play a significant role in consumer purchasing through buying power and influence.¹⁰ Discriminatory paychecks that bring down women's yearly income not only hamper their short-term economic prospects—they also endanger their long-term economic security and that of their families. Equal pay for them means women, men, their families, and the economy are better off.

In this statement we will address the ongoing nature of the pay gap, some of its causes, and the need for swift passage of the Paycheck Fairness Act, in order to give women the tools they need to successfully challenge pay discrimination and to provide incentives to employers to comply with the law.

The Pay Gap Persists, Starts Early, and Widens Over Time

While the gap has narrowed since passage of the Equal Pay Act of 1963, progress has largely stalled in recent years. Data from the U.S. Census Bureau once again revealed that women working full-time, year-round are typically paid only 80 cents for every dollar paid to men.¹¹ The pay gaps have grown even wider for women of color. African American women and Latinas make, respectively, 61 and 53 cents on the dollar as compared to non-Hispanic, white men.¹² The overall pay gap has only decreased by a nickel during the 21st century and, unless action is taken, the pay gap between men's and women's earnings will not close until 2106.¹³

⁶ Paycheck Fairness Act, H.R. 2023, 105th Cong. (1997).

⁷ Paycheck Fairness Act, H.R. 110-783, 110th Cong. (2007) (passed House in 2008); Paycheck Fairness Act, H.R. 12, 111th Cong. (2009) (passed House in 2009).

⁸ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: HOUSEHOLD DATA ANNUAL AVERAGES, 2. EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 16 YEARS AND OVER BY SEX, 1978 TO DATE (Jan. 18, 2019) www.bls.gov/cps/cpsaat02.htm.

⁹ Sarah Jane Glynn, *Breadwinning Mothers Are Increasingly the U.S. Norm*, CENTER FOR AMERICAN PROGRESS (Dec. 19, 2016), www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-us-norm/.

¹⁰ See, e.g., Bridget Brennan, *Top 10 Things Everyone Should Know About Women Consumers*, FORBES, Jan. 21, 2015, <https://www.forbes.com/sites/bridgetbrennan/2015/01/21/top-10-things-everyone-should-know-about-women-consumers/#5e04613d6a8b>.

¹¹ See Kevin Miller & Deborah J. Vagins, *The Simple Truth about the Gender Pay Gap*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (Fall 2018), at 5 <https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/>.

¹² *Id.* at 9.

¹³ *Id.* at 5.

Research indicates that the gender pay gap develops very early in women's careers. In *Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation*, AAUW found that just one year after college graduation, women were paid 82 percent of what men were paid.¹⁴ Controlling for factors known to affect earnings, such as education and training, marital status, and hours worked, research finds that college-educated women still earn 7 percent less than men just one year out of college.¹⁵

Women with college degrees who work full time make, on average, 26 percent less than their male peers with college degree.¹⁶ It is important to note that this pay gap is larger than the overall pay gap for women; although women with degrees have higher earnings than women without degrees, men with degrees have even higher earnings. And even when women gain degrees in more lucrative majors and pursue higher-paying occupations, women still tend to be concentrated in lower-paying subfields and are paid less across fields, even with advanced degrees.¹⁷ Over time, the gap compounds and widens, impacting women's social security and retirement.

Factors in the Wage Gap

The gap of 20 cents on the dollar between men and women working full-time and year-round is a statistical fact, though the overall pay gap summarizes a huge diversity of women and life circumstances. Factors such as race, class, sexual orientation, and disability mean different women have different opportunities and advantages. Once in the workforce, women and men again face gendered perceptions, expectations, and other biases.

Wage inequalities are not simply a result of women's qualifications or choices. Wage discrimination persists despite women's increased educational attainment or greater level of experience in the workforce, regardless of any time spent out of the workforce.¹⁸ We address some of the causes, factors, and contributors to the pay gap below.

Gender and Race Discrimination

It is critical to note that not all of the gender and race pay gaps can be explained by observable differences in college major, occupation, work hours, and time out of the workforce or other factors. Direct discrimination and bias against women in the workplace are also pernicious factors in these pay gaps.

As discussed above, after accounting for college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status, AAUW found a remaining 7 percent "unexplained" difference between the earnings of male and female college graduates one year after graduation. That

¹⁴ Christianne Corbett & Catherine Hill, *Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (Oct. 2012), <https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf>.

¹⁵ *Id.*

¹⁶ Kevin Miller, *Deeper in Debt: Women and Student Loans*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (May 2017), <https://www.aauw.org/research/deeper-in-debt/>.

¹⁷ Anthony P. Carnevale, Nicole Smith, & Artem Gulish, *Women Can't Win*, GEORGETOWN UNIVERSITY CENTER ON EDUCATION AND THE WORKFORCE, 4 (2018), https://1gyhoq479ufd3yna29x7ubju-wpengine.netdna-ssl.com/wp-content/uploads/Women_FR_Web.pdf.

¹⁸ U.S. GENERAL ACCOUNTING OFFICE, *WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS* (Oct. 2003) <http://www.gao.gov/new.items/d04335.pdf>.

gap jumped to 12 percent 10 years after college graduation.¹⁹ Other researchers have reached similar conclusions about gender discrimination and the pay gap when controlling for certain factors. For instance, a study of medical researchers found an unexplained gap of 6 percent between comparable men and women in the field, and a recent study of the American workforce as a whole found an unexplained gap of 8 percent.²⁰

The intersectional impact of race and gender biases contributes to the overall gender pay gap. In other words, when closely examining the impact of race and gender (as well as other factors) on the pay of black men, black women, white men, and white women, it is clear that black women experience a large gap that cannot be attributed to other observable characteristics, such as occupation and education, or by race or gender separately.²¹ Black women's education and other labor force characteristics are now such that they would be expected to be paid more than black men if gender bias were not a factor. Yet they are still paid less.²² Women of different racial and ethnic backgrounds all have different experiences of discrimination, but biases based on race, gender, and the intersection of race and gender all contribute measurably to the overall gap.

Motherhood Penalty

Becoming a parent produces very different professional outcomes for women and men. Mothers working full time are paid 71 percent as much as fathers.²³ Many employers and industries still prioritize long, continuous, traditional work hours rather than flexible schedules, a preference that tends to put women who have primary caregiving responsibilities at a disadvantage.²⁴ In 2017, 71 percent of mothers of children under age 18 participated in the labor force, compared with 93 percent of fathers of children under age 18.²⁵

Many working mothers also encounter a “motherhood penalty,” which extends beyond any actual time out of the workforce. Experimental studies have documented that employers are less likely to hire mothers (including mothers who never left the workforce) than they are to hire women without children, and when employers do make an offer to a mother, they offer her a lower salary than they offer to other women.²⁶ Fathers, in contrast, do not suffer a penalty compared with other working men. Many fathers

¹⁹ Christianne Corbett & Catherine Hill, *Graduating to a Pay Gap: The earnings of women and men one year after college graduation*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (Oct. 2012); Judy Goldberg Dey & Catherine Hill, *Behind the Pay Gap*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION (April 2007).

²⁰ Reshma Jaggi et al., *Gender Differences in the Salaries of Physician Researchers*, 307 J. OF THE AM. MED. ASS'N 22, 2410–17 (June 13, 2012); Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. OF ECON. LITERATURE 3, 789–865, 798 Fig. 2 (2017), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jel.20160995>.

²¹ Mark Paul, Hamilton Darrick, and William Darity, Jr., *Discriminatory penalties at the intersection of race and gender in the United States*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Aug. 7 2018), <https://equitablegrowth.org/discriminatory-penalties-at-the-intersection-of-race-and-gender-in-the-united-states/>.

²² *Id.*

²³ *Motherhood Wage Gap for Mothers Overall: 2016 State Rankings*, NATIONAL WOMEN'S LAW CENTER (May 2018), <https://nwlc-ciw49tixgw5lhab.stackpathdns.com/wp-content/uploads/2017/05/Motherhood-Wage-Gap-Overall-Table.pdf>

²⁴ Claudia Goldin, *A Grand Gender Convergence: Its Last Chapter*, 104 AM. ECON. REV. 4, 1091–119 (2014).

²⁵ Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families News Release (April 19, 2018), <https://www.bls.gov/news.release/famee.htm>.

²⁶ Shelly J. Correll, Stephen Benard, & In Paik, *Getting A Job: Is There a Motherhood Penalty?*, 112 AM. J. OF SOC. 5 1297–1338 (2007); Tamar Krichel-Katz, *Choice, Discrimination, and the Motherhood Penalty*, 46 LAW AND SOC'Y REV. 3, 557–87 (2012).

actually receive higher wages after having a child, known as the “fatherhood bonus.”²⁷

The very different experiences of women and men who become parents are the result of gendered stereotypes and expectations; institutional systems built around a worker who is not a primary caretaker; and a lack of systemic supports for new parents in the United States.

Retaliation for Wage Disclosure

One significant reason the gender pay gap is closing so slowly is that pay disparities are notoriously difficult to detect. Generally, salaries are not public and because many employees have no way of knowing when they are shortchanged, it’s hard for them to contest pay discrimination on their own.

Furthermore, employees may face retaliation for inquiring about wages because some workplaces have punitive pay secrecy policies that punish or even fire employees for disclosing or inquiring about their own wages or the wages of a co-worker. Such punitive pay secrecy policies make it difficult for workers to remedy wage disparities because they cannot find out if they’re being paid less.

In 2011, a national survey by the Institute for Women’s Policy Research (IWPR) found that about half of employees said they worked in a setting where managers either formally prohibited or discouraged discussions of wages and salaries.²⁸ According to IWPR, pay secrecy was particularly common in the private sector, where 61 percent of employees are either discouraged or prohibited from discussing wage and salary information.

In recognition of this problem, President Obama signed an executive order in 2014 banning retaliation for wage disclosure for federal contracting employers, reaching approximately 26 million workers. Moreover, there are limited protections under state laws and the federal National Labor Relations Act, and the EEOC recently issued guidance describing when employers’ retaliation for employees’ wage disclosure or inquiries may violate the Civil Rights Act of 1964.

These protections, however, do not reach all employees and circumstances, and that is why it is so important for there to be uniform federal protections, like the Paycheck Fairness Act.

Use of Prior Salary History

The practice of using past salaries to set current wages perpetuates the gender pay gap because it assumes that prior salaries were fairly established by previous employers. Relying on salary history allows a new employer to continue underpaying a woman who faced a pay gap and lost wages due to bias or discrimination at a previous job. Salary history questions can also introduce bias and discrimination into the recruitment process of a company that may be attempting to avoid it.

Employers should not use salary history to set wages, but should instead use market research to determine what the position is worth to the organization, pegged to the duties of the job. If a woman starts her career with a pay gap tainted by prior discrimination, it’s likely to follow her from job to job perpetuating the wage gap.

²⁷ Alexandra Killewald, *A Reconsideration of the Fatherhood Premium: Marriage, Coresidence, Biology, and Fathers’ Wages*, 78 Am. Soc. Rev. 1, 96–116 (2013); Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, THIRD WAY (Sept. 2, 2014).

²⁸ Ariane Hegewisch, Claudia Williams, & Robert Drago, *Pay Secrecy and Wage Discrimination*, INSTITUTE FOR WOMEN’S POLICY RESEARCH (June 9, 2011), <https://iwpr.org/publications/pay-secrecy-and-wage-discrimination>.

Occupational Segregation

Finally, segregation by occupation is a major factor behind the pay gap. In 2017, the U.S. civilian workforce included 160 million full- and part-time employed workers. Of these, 53 percent were men, and 47 percent were women.²⁹ But women and men tend to work in different kinds of jobs. Women are disproportionately represented in education, office and administrative support, and health care occupations. Men are disproportionately represented in construction, maintenance and repair, and production and transportation occupations.³⁰ Even though a pay gap exists within nearly every occupational field, jobs traditionally associated with men tend to pay better than traditionally female-dominated jobs that require the same level of skill.³¹

Women are not drawn to low-paying fields because they desire low pay, and no one wants to be paid less for doing the same job. The work that women do is valued less than work done by men because that work is done by women.

Working in traditionally male fields will likely improve wages for individual women, but, as discussed above, it is unlikely to eliminate the pay gap. Women in such male-dominated jobs as computer programming still face a pay gap compared with men in the field, even though women in such jobs may be paid higher salaries than women in traditionally female fields.³²

The Paycheck Fairness Act: The Next Step in Closing the Wage Gap

We have learned a lot about how discrimination operates in the workplaces since the Equal Pay Act of 1963 was enacted. The Paycheck Fairness Act would update and strengthen this law to ensure that it provides effective protection against sex-based pay discrimination in today's workplace by addressing many of the factors discussed in this statement. The bill takes several important steps, including:

- **Ensures Non-Retaliation:** The bill prohibits retaliation against workers for discussing or disclosing wages, while also protecting certain confidential wage information.³³ It's difficult for workers to learn how their pay compares with fellow employees; indeed, many employers prohibit employees from discussing their salaries. Without the non-retaliation provisions of the Paycheck Fairness Act, many women will continue to be silenced in the workplace—that is, prohibited from talking about wages with coworkers without the fear of being fired. This is

²⁹ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: HOUSEHOLD DATA ANNUAL AVERAGES, 2. EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION 16 YEARS AND OVER BY SEX, 1978 TO DATE (Jan. 18, 2019), www.bls.gov/cps/cpsaat02.htm.

³⁰ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: HOUSEHOLD DATA ANNUAL AVERAGES, 39. MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX (Jan. 18, 2019), www.bls.gov/cps/cpsaat39.htm.

³¹ Ariane Hegewisch & Heidi Hartmann, *Occupational Segregation and the Gender Wage Gap: A Job Half Done*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (Jan. 23, 2014), <https://iwpr.org/publications/occupational-segregation-and-the-gender-wage-gap-a-job-half-done/>.

³² And moving into a higher-paying field can have diminishing returns for women over time. A study of 50 years of U.S. workforce data concluded that when an influx of women enters a previously male-dominated profession, average wages for the occupation as a whole actually decrease, even for men in the field. See Asaf Levanon, Paula England, & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 U.S. Census Data*, 88 Soc. Forces 2, 865–91 (Dec. 2009).

³³ Many states have passed laws banning retaliation or discrimination against workers who disclose or discuss their salaries. In total, 18 states and D.C. have established these protections. *AAUW Policy Guide to Equal Pay in the States*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (2018), <https://www.aauw.org/resource/state-equal-pay-laws/>. Federal action, like the Paycheck Fairness Act is needed, however, to ensure that women nationwide receive these same protections.

exactly what happened to Lilly Ledbetter – because Goodyear prohibited employees from discussing or sharing their wages, she did not know of the discrimination against her until long after it began. Allowing workers to discuss their salaries without fear of losing their jobs will help women to know whether or not they’re being treated equally.

- **Prohibits Use of Prior Salary History:** The bill prohibits employers from relying on salary history in determining future pay, so that prior pay discrimination doesn’t follow workers from job to job. If a worker faced a pay gap (and thus lost wages) at one job – perhaps because of earlier discrimination – basing their next job’s salary on the one prior only continues that pay gap. Relying on salary history to set future salary assumes that prior salaries were fairly established. Even a well-meaning employer could be carrying forward a salary that had previously been tainted with discrimination. A worker should be compensated based on what their skills and the job in question are worth to the new company, rather than based on a different job she did in the past.
- **Ensures Job-Relatedness:** The bill clarifies acceptable defenses that can be asserted for differences in pay between men and women. Current law allows an employer to defend a difference in pay between men and women if they assert that the difference is based on “any factor other than sex.” Courts have interpreted “any factor other than sex” reason so broadly that it now embraces many factors that can be derived from sex-based factors. The PFA closes loopholes in the current law by affirmatively requiring that pay gaps between men and women be based on something other than their sex, which is justified by a business necessity and is related to the job.
- **Equalizes Remedies:** The bill ensures women can receive the same robust remedies for sex-based pay discrimination that are currently available to those subjected to discrimination based on race and ethnicity. The bill helps level the playing field by ensuring that women are compensated fairly when they have been discriminated against and can obtain the same robust remedies for sex-based pay discrimination that are currently available under other civil rights statutes. Under current law, winning an Equal Pay Act suit only provides for back pay plus an equal amount in liquidated damages. These limited remedies are often inadequate to compensate plaintiffs who have experienced sex discrimination, and can be viewed by employers simply as the cost of doing business, rather than a deterrent to future discrimination in the workplace. Allowing individuals to recover the full amount of their injuries, as they can in race discrimination cases, strengthens the penalties that courts may impose for sex-based equal pay violations and provides a much stronger deterrent effect.
- **Helps Challenge Systemic Discrimination:** The Equal Pay Act, adopted prior to the current federal class action rule, requires plaintiffs to opt-in to a collective action suit. This rule has excluded women who may not be aware initially that they have a claim, or women who may be aware that they have a claim, but may be afraid that they will be subjected to retaliation in the workplace if they affirmatively opt in. The PFA would allow Equal Pay Act lawsuits to proceed as opt-out class actions under the Federal Rules of Civil Procedure as other civil rights statutes permit. This change would also make it easier for women to band together to challenge systemic discrimination.

- **Clarifies Comparable Establishments:** The PFA would eliminate artificial geographic limits, allowing a woman to reasonably compare her salary to male colleagues with the same employer, so long as the facilities are in similar geographic regions. Current law forbids unequal pay within the same “establishment,” which some courts have interpreted narrowly to mean that employers are barred only from paying unequal wages to employees within the same physical location. This interpretation unfairly limits employees’ ability to bring cases under the Equal Pay Act. In many cases, particularly in the case of managers or supervisors, there are no similarly situated employees of the opposite sex at the same physical place of business, but there are within the same county or similar political subdivision within the state.
- **Provides for Data Collection and Additional Assistance and Resources for Businesses:** The bill also provides technical assistance to businesses, requires wage data collection, and supports salary negotiation skills training programs to give women the tools to advocate for higher wages. The provisions include:
 - authorizing additional training for EEOC staff to better identify and handle wage disputes and requiring the EEOC and U.S. Department of Labor to collect pay and other employment related data.³⁴
 - providing important business-related provisions, including:
 - an exemption for small businesses;
 - a six month waiting period from the time of enactment that allows businesses covered under the Act sufficient time to comply with its requirements;
 - a requirement that the Department of Labor help educate small businesses about what is required under the law and assist them with compliance;
 - recognition for employers’ excellence in their pay practices;
 - federal outreach and assistance to all businesses to help improve equal pay practices; and
 - support for salary negotiation skills training programs to give women the tools to advocate for higher wages.³⁵

Impact of Equalizing Pay

The gender pay gap has lifelong financial effects. While in the workforce, and even after women leave the workforce, the pay gap follows them. Employers’ using women’s salary history to set their wages in new jobs means wage discrimination can carry forward from job to job, compounding over time. And because women typically are paid less than men during working years, women receive less income from Social Security, pensions, and other sources when they retire than men do.³⁶ Other benefits, such as

³⁴ In 2016, the EEOC announced a new pay data collection, which would have begun collecting critical wage data based on sex, race, and ethnicity from private employers and federal contractors with 100 or more employees. This data collection could help the EEOC better identify wage discrimination and encourage voluntary compliance by companies. The Trump administration halted this collection, and while we urge the administration to reinstate this critical collection, the Paycheck Fairness Act would codify a pay data collection.

³⁵ While no one can negotiate around discrimination, learning how to effectively negotiate for higher salary and benefits is a great tool when navigating one’s own career. AAUW offers Salary Negotiation Program to teach women skills and resources to negotiate for fair and equitable salaries and benefits. For more information, see SALARY, AMERICAN ASSOCIATION FOR UNIVERSITY WOMEN, <https://salary.aauw.org/> (last visited Feb. 12, 2019).

³⁶ Jocelyn Fischer, & Jeff Hayes, *The Importance of Social Security in the Incomes of Older Americans: Differences by Gender, Age, Race/Ethnicity, and Marital Status*, INSTITUTE FOR WOMEN’S POLICY RESEARCH (Aug. 14, 2013), <https://iwpr.org/publications/the-importance-of-social-security-in-the-incomes-of-older-americans-differences-by-gender-age-raceethnicity-and-marital-status/>.

disability and life insurance, are also smaller for women because these benefits usually are based on earnings.

And ultimately, pay inequity contributes directly to women's poverty. In 2017, 13 percent of American women ages 18–64 were living below the federal poverty level, compared with 9 percent of men. For ages 65 and older, 11 percent of women and 8 percent of men were living in poverty.³⁷

The impact of the pay gap has also broadened in recent years as a result of changes in family structure. Between 1967 and 2015, the proportion of mothers working outside the home and contributing at least a quarter of the family's earnings rose from less than a third (28 percent) to nearly two-thirds (64 percent). As families increasingly rely on women's wages, the gender pay gap directly affects more men and children as well. In 2015, 42 percent of mothers with children under the age of 18 were their families' primary or sole breadwinners.³⁸ That figure jumps to 64 percent of mothers when including primary, sole, and co-breadwinners.³⁹

Ensuring that women have equal pay would have a dramatic impact on families and the economy. According to a 2017 report from IWPR, the poverty rate for all working women would be cut in half, falling from 8 percent to 3.8 percent if women were paid the same as comparable men.⁴⁰ The same study by IWPR indicates that the U.S. economy would have produced an additional \$512.6 billion in income if women had received equal pay for equal work.⁴¹

Business Support

Understanding these benefits and the power of women's increased economic participation, some companies across the country are leading the way to ensure their employees receive equal pay for equal work by removing barriers that result in pay discrimination. A more open approach can foster the perception that compensation is handled fairly, thereby improving employee morale.⁴²

Starbucks, for example, has banned retaliation against employees for asking about or discussing wages, as would be required by the Paycheck Fairness Act. Starbucks has also committed to providing a position's pay range upon a candidate's request, as well as using a pay calculator to objectively determine starting pay ranges.⁴³ With these and other best practices in place, Starbucks announced in March of 2018 that it achieved 100 percent pay equity in the United States.⁴⁴

³⁷ KAYLA FONTENOT, JESSICA SEMEGA, & MELISSA KOLLAR, U.S. CENSUS BUREAU, U.S. DEP'T OF COMM., INCOME AND POVERTY IN THE UNITED STATES: 2017 (Sep. 12, 2018), <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

³⁸ Sarah Jane Glynn, *Breadwinning Mothers Are Increasingly the U.S. Norm*, CENTER FOR AMERICAN PROGRESS (Dec. 19, 2016), www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/.

³⁹ *Id.*

⁴⁰ Jessica Milli *et al.*, *The Impact of Equal Pay on Poverty and the Economy*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (April 2017), <https://iwpr.org/wp-content/uploads/2017/04/C455.pdf>.

⁴¹ *Id.*

⁴² *New Payscale Study Reveals Employees' Perceptions About Pay Fairness and Transparency are Five Times More Impactful on Engagement Than Actual Compensation*, PAYSCALE, (Nov. 7, 2017), <https://www.payscale.com/about/press-releases/new-payscale-study-reveals-employees-perceptions-pay-fairness-transparency-five-times-impactful-engagement-actual-compensation>.

⁴³ *History of Partner Benefits at Starbucks*, STARBUCKS (July 2016), <https://stories.starbucks.com/press/2016/starbucks-history-of-partner-benefits/>.

⁴⁴ Press Release, Starbucks, Starbucks announces 100 percent gender, racial pay equity for U.S. partners, sets global commitment (March 21, 2018), <https://news.starbucks.com/news/starbucks-pay-equity-for-partners>.

Several companies have begun proactively banning salary history inquiries in an effort to reduce pay discrimination. In September 2016, Staples eliminated salary inquiries during its application processes.⁴⁵ Amazon instituted a similar policy in January 2017, banning its hiring managers and recruiters from asking prospective US employees about their salary histories.⁴⁶ Zillow also removed salary history questions from pre-screen conversations with potential candidates.⁴⁷ These employment policies are directly aligned with the Paycheck Fairness Act's provision banning employers from relying on salary history in determining future pay, so that prior pay discrimination doesn't follow workers from job to job.

At the urging of activist investors, many companies have also recently agreed to analyze or disclose pay data. For example, after a gender pay shareholder proposal from the investment management firm Arjuna Capital, Citigroup publicly released the results of its pay equity review in 2018 covering a third of its global workforce. The bank found an average pay gap of 1 percent after accounting for factors like job and geography, and adjusted salaries where there were gaps.⁴⁸ In 2019, Citigroup conducted a more comprehensive review, covering its entire workforce and providing the raw pay gap, not accounting for the aforementioned factors. This review found a 29 percent gap between the median pay for women and the median for men.⁴⁹

When businesses do not play by the rules, they make it harder on those companies trying to pay employees fairly. That is why the Paycheck Fairness Act has been supported by business groups like the U.S. Women's Chamber of Commerce and the Main Street Alliance, which represents small business owners.⁵⁰

Conclusion

The pay gap is persistent and can only be addressed if women are armed with the tools necessary to challenge discrimination against them and employers are provided with effective incentives and technical assistance to comply with the law. The Paycheck Fairness Act (H.R. 7) brings the Equal Pay Act's principles and practices in line with the nation's other civil rights laws and is an important and reasonable approach in the effort to finally close the wage gap in the workplace. Families need to bring home every dollar they rightfully earn. Pay equity is necessary not only to families' economic security, but also to the nation's economy. This Congress has the historic opportunity to change the lives of women and families all across America.

I want to thank the Subcommittees for holding this important hearing on the Paycheck Fairness Act and hope the bill will move quickly through Committee. I also urge you to take a critical step towards pay equity by calling for swift floor action and passage of the Paycheck Fairness Act. Cosponsorship and

⁴⁵ Press Release, Staples, On Women's Equality Day, Staples Shows Commitment to Ending Gender Wage Gap (Aug. 26, 2016) <https://www.businesswire.com/news/home/20160826005329/en/Women%E2%80%99s-Equality-Day-Staples-Shows-Commitment-Gender>.

⁴⁶ Caroline O'Donovan, *Amazon Won't Ask Prospective Hires for Salary History Anymore*, BUZZFEEDNEWS, Jan. 17 2018, <https://www.buzzfeednews.com/article/carolineodonovan/amazon-wont-ask-prospective-hires-for-salary-history-anymore#.vr379qbM7/>.

⁴⁷ Spencer Rascoff, *Want to Further Gender Equality at Work? Do These 3 Things*, INC., April 2018, <https://www.inc.com/spencer-rascoff/want-to-further-gender-equality-at-work-do-these-3-things.html>.


⁴⁸ Michael Murray, *Pay Equity at Citi*, CITIGROUP, Jan. 15, 2019, <https://blog.citigroup.com/2018/01/pay-equity-at-citi>.

⁴⁹ Sara Wechter, *Global Pay Equity at Citi*, CITIGROUP, Jan. 16, 2019, <https://blog.citigroup.com/2019/01/global-pay-equity-at-citi>.

⁵⁰ Coalition Letter in Support of the Paycheck Fairness Act (January 2019), <https://www.aauw.org/files/2019/01/letter-to-house-supporting-the-paycheck-fairness-act-nsa.pdf>.

votes associated with this bill may be scored in the AAUW Action Fund *Congressional Voting Record for the 116th Congress*. Please do not hesitate to contact me at 202/785-7720 or Anne Hedgepeth, Director of Federal Policy, at 202/785-7724, if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah J. Vagins". The signature is written in a cursive, flowing style.

Deborah J. Vagins
Senior Vice President, Public Policy and Research



Hon. Alma Adams, Chair
 Workforce Protections Subcommittee
 House Education and Labor Committee
 2176 Rayburn House Office Building
 Washington, D.C. 20515

Hon. Suzanne Bonamici, Chair
 Civil Rights and Human Services Subcommittee
 House Education and Labor Committee
 2176 Rayburn House Office Building
 Washington, D.C. 20515

February 12, 2019

RE: Pass the Paycheck Fairness Act (H.R. 7) and the Raise the Wage Act (H.R. 582)

Dear Chair Adams and Chair Bonamici:

On behalf of the National Women's Law Center, we strongly urge you to swiftly pass two pieces of legislation that will advance core values of equity, dignity, and safety for millions of women and families across the country: the Paycheck Fairness Act, H.R. 7, and the Raise the Wage Act, H.R. 582.

In January we marked a number of critical milestones in the effort to ensure women's economic security and equality. We celebrated the historic number of women sworn into the 116th Congress, many of whom—along with their male colleagues—ran and won on issues central to the economic well-being of women and families. Shortly thereafter, the Raise the Wage Act and the Paycheck Fairness Act were introduced, the latter following the tenth anniversary of the enactment of the Lilly Ledbetter Fair Pay Act—a vital law that rectified the Supreme Court's harmful decision in *Ledbetter v. Goodyear Tire & Rubber Company*. The Ledbetter Act helps to ensure that women subjected to unlawful pay discrimination are able to have their day in court and effectively assert their rights under federal antidiscrimination laws. Supporting and advancing the Raise the Wage Act and the Paycheck Fairness Act are appropriate and necessary steps to commemorate and build upon this progress, and we appreciate that the Committee has moved swiftly to hold hearings on both bills.

Today, women across the country—especially women of color—continue to experience a pay gap and a higher risk of poverty than men. Women working full time, year round typically make only 80 percent of what their male counterparts make, leaving a wage gap of 20 cents on the dollar. This wage gap varies by race and is larger for women of color: Black women working full time, year round typically make only 61 cents, Native women only 58 cents, and Latinas only 53 cents, for every dollar paid to their white, non-Hispanic male counterparts. While Asian American and Pacific Islander (AAPI) women make 85 cents for every dollar paid to white, non-Hispanic men, many AAPI communities experience drastically wider pay gaps.

Persistent pay discrimination, often cloaked by employer-imposed pay secrecy policies, is one factor driving these wage gaps. Women's overrepresentation in low-wage jobs is another. Women are close to two-thirds of the workforce in jobs that pay the minimum wage or just a few dollars above it, as well as two-thirds of workers in tipped jobs. Women of color are particularly overrepresented among tipped workers and other low-wage workers. And they are particularly harmed by a \$7.25 federal minimum wage that has not gone up in a decade—and by a \$2.13 tipped minimum cash wage that has been

frozen for an astonishing 28 years. Pay discrimination and poverty-level wages heighten women's economic vulnerability, which in turn heightens their vulnerability to sexual harassment on the job.

Women are increasingly the primary or co-breadwinner in their families, and many are supporting children on their own. They cannot afford to be shortchanged any longer. The Raise the Wage Act and the Paycheck Fairness Act are two critical and complementary tools to boost women's paychecks, combat poverty and persistent pay gaps, and provide the tools to challenge discrimination.

The **Raise the Wage Act** will raise the federal minimum wage from \$7.25 to \$15 an hour by 2024, then index the minimum wage so that it continues to rise along with wages overall. It will also end unfair exclusions for tipped workers, people with disabilities, and youth so that they, too, can benefit from a decent minimum wage. The Economic Policy Institute estimates that increasing the federal minimum wage to \$15 by 2024 would give nearly one in three working women a raise, including 41 percent of Black working women, 38 percent of working Latinas, 29 percent of white working women, and 18 percent of Asian working women. Because women are the majority of workers who would see their pay go up, wage gaps would likely narrow as well; indeed, NWLC research shows that women working full time, year round in states with a minimum wage of at least \$10 per hour face a gender wage gap that is one-third smaller than the wage gap across states with a \$7.25 minimum wage. And in "One Fair Wage" states where employers already have to pay their tipped workers the regular minimum wage before tips, the average poverty rate for women tipped workers is considerably lower than in states that follow the \$2.13 federal standard. One Fair Wage also ensures that women in tipped jobs have a paycheck they can count on, making them less vulnerable to the sexual harassment from customers that women can feel forced to tolerate when they have to rely on tips for nearly all of their income.

The **Paycheck Fairness Act** updates and strengthens the Equal Pay Act of 1963 to ensure that it provides robust protection against sex-based pay discrimination. Among other provisions, this comprehensive bill closes loopholes that have allowed employers to pay women less than men for the same work without a legitimate business justification related to the job. It ensures women can receive the same robust remedies for sex-based pay discrimination that are currently available to those subjected to discrimination based on race and ethnicity. It prohibits employers from relying on salary history to set pay when hiring new employees, so that pay discrimination does not follow women and people of color from job to job. It promotes pay transparency by barring retaliation against workers who voluntarily discuss or disclose their wages, and requiring employers to report pay data to the EEOC. And it provides for much needed training and technical assistance and research.

Women and people of color have been left behind by our economy and our policies far too often, for far too long. Adopting the Raise the Wage Act and the Paycheck Fairness Act would mark a vitally important step toward ensuring they can work with equality and dignity. There is no more fitting way to begin this historic Congress than by making real, concrete progress in ensuring all women receive equal and adequate pay. We urge you to prioritize the Raise the Wage Act and the Paycheck Fairness Act in the 116th Congress by swiftly passing these important bills.

If you have any questions, please do not hesitate to contact Emily Martin, NWLC's Vice President for Education & Workplace Justice, at 202.588.5180 or emartin@nwlc.org.

Sincerely,

A handwritten signature in cursive script that reads "Fatima Goss Graves".

Fatima Goss Graves
President & CEO
National Women's Law Center

**Prepared Statement of Hon. Alma S. Adams, Chairwoman, Subcommittee
on Workforce Protections**

Good morning. I want to share my appreciation to Chairwoman Bonamici, Ranking Members Byrne and Comer, and to the witnesses who have joined us here today for this important discussion.

Thank you for being here today.

It takes the average woman an additional 91 days—three additional months—to earn what her male peers earned in 2018.

That is unacceptable.

From the North Carolina House to the U.S. House, for 3 decades, I have been fighting to close gender and gender-based wage gaps.

Today, I feel like Fannie Lou Hamer Sick and tired of being sick and tired of this ongoing inequality.

Fifty-six years have passed since we signed the Equal Pay Act into law.

And it's been 10 years since President Obama signed into law the Lilly Ledbetter Fair Pay Act.

But today in my District in North Carolina, women still only make about 82 cents for every dollar a man makes.

And nationally, that statistic is even worse 80 cents for every dollar.

Women of color are even less likely to make as much as a man working the same job.

Black women earn only 63 cents for every dollar a man makes.

When women are shortchanged our children, families and our economy are shortchanged.

In fact, it shortchanges us 500 billion dollars annually.

That's why, as the new chair of the Subcommittee on Workforce Protections, I am proud to co-host the subcommittee's first hearing on addressing persistent gender-based wage discrimination through the Paycheck Fairness Act.

We can no longer wait while, every day, women across the Nation are deprived of equal wages for equal work.

Time's up for that.

The Paycheck Fairness Act is an opportunity for Congress to strengthen the Equal Pay Act, bolster the rights of working women, and put an end to gender-based wage disparity once and for all.

It's the right thing to do because it's right!

At this time, I ask unanimous consent to introduce for the record four letters all in support of the Paycheck Fairness Act.

One from the National Partnership for Women & Families, one from the American Bar Association, one from the American Association of University Women, and one from the National Women's Law Center.

I look forward to our discussion today and yield to the Ranking Member, Mr. Byrne.

Chairwoman BONAMICI. Thank you, Madame Chairwoman. I now recognize the distinguished Ranking Member of the Workforce Protections Subcommittee, Mr. Byrne for the purpose of making an opening Statement.

Mr. BYRNE. Thank you, Madame Chairman. Women deserve equal pay for equal work. Congress affirmed this value with the Equal Pay Act of 1963, which made it illegal to pay different wages to employees of the opposite sex for equal work.

Everyone in this room must continue to uphold and defend this important principle but the legislation under discussion today, the so-called Paycheck Fairness Act is the wrong approach to ensure that current equal pay protections are fortified. It may come as a surprise to some that the Paycheck Fairness act offers no new protections against pay discrimination.

Let me repeat that. The legislation under discussion today offers no new protections against pay discrimination. Instead, H.R. 7 imposes a one-size-fits-all mandate for one of the most varied and complex work forces in the world.

Rather than allowing for informed discussion, the Paycheck Fairness Act strictly limits communication between employers and employees on key hiring decisions. Under this bill, the burdens laid on the backs of employers and the lack of clarity for employees are simply unworkable.

The Paycheck Fairness Act is not designed to protect women. It is a false promise that rates opportunities and advantages for lawyers and not for working women. Instead of treating sex discrimination charges with the seriousness they deserve, the Paycheck Fairness Act will make it easier for lawyers to pursue lawsuits of questionable validity for the purpose of syphoning off unlimited pay days from settlements and jury awards, lining their own pockets and dragging women through tedious, never ending legal dramas.

Now I know my fair share of lawyers, having previously practiced law myself. Many of them are great men and women working on behalf of their clients but many of them are also all about the bottom line. And let me tell you, the Paycheck Fairness Act would be a cash cow for lawyers working on a contingency fee basis, some of whom get 40 percent or more of the award.

The changes to the Equal Pay Act in H.R. 7 will also make it extraordinarily difficult, if not impossible, for employers to defend against pay discrimination suits even when pay differences are the results of legitimate factors like experience, education, and performance.

There remain bad actors in the world that engage in pay discrimination. It is repugnant and it is illegal and those bad actors must be held accountable. But if we open the gates to limitless, frivolous lawsuits, we do a disservice to genuine victims seeking justice against offending employers. The best way we can create opportunities for all American workers, especially working women, is through strong economic policy. We know women are reaping the benefits of the present strong economy. More than half the jobs created in the last year have gone to women. Those women and the next generation of women in the work force deserve more than empty promises and deceptively named bills. And I yield back.

[The information referred to follows:]

**Prepared Statement of Hon. Bradley Byrne, Ranking Member,
Subcommittee on Workforce Protections**

Women deserve equal pay for equal work. Congress affirmed this value with the Equal Pay Act of 1963, which made it illegal to pay different wages to employees of the opposite sex for equal work. Everyone in this room must continue to uphold and defend this important principle, but the legislation under discussion today, the so-called Paycheck Fairness Act, is the wrong approach to ensure that current equal pay protections are fortified.

It may come as a surprise to some that the Paycheck Fairness Act offers no new protections against pay discrimination. Let me repeat that: the legislation under discussion today offers no new protections against pay discrimination.

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The best way we can create opportunities for all American workers, especially working women, is through strong economic policy. We know women are reaping the benefits of this strong economy. More than half the jobs created in the last year have gone to women. Those women and the next generation of women in the workforce deserve more than empty promises and deceptively named bills.

Chairwoman BONAMICI. Thank you, Mr. Byrne. Without objection, all other members who wish to insert written Statements into the record may do so by submitting them to the committee clerk electronically in Microsoft work format by 5 p.m. on February 26, 2019. I will now introduce the witnesses for our member panel.

Mr. BYRNE. Madame Chairwoman?

Chairwoman BONAMICI. Yes, Mr. Byrne.

Mr. BYRNE. I have a parliamentary inquiry.

Chairwoman BONAMICI. The gentleman from Alabama will State his parliamentary inquiry.

Mr. BYRNE. Madame Chairwoman, while I appreciate the purpose of this member panel and certainly the distinguished members on it, I would like to point out that under the Democrat majority just last week at the Judiciary Committee, a colleague from our side of the aisle, Mr. Scalise, was denied the opportunity to testify before that committee despite having direct experience perspective on the topic being discussed.

So again, while I am always willing to listen to my colleagues, I think it is a bit of a double standard by the majority to deny a member the right to testify where they disagree what that member only allow—only to allow other members to testify when they happen to agree with them.

Can the Chairwoman explain why under the parliamentary customs of the house, members of the majority are being allowed to speak today but members of the minority were not allowed to speak last week at the Judiciary Committee?

Chairwoman BONAMICI. I cannot speak to what transpired in the judiciary committee. I can only speak to what transpired in the process of planning for this hearing. The majority and minority staff exchanged witness names on February 10, 3 days ago. Minority staff never requested or even expressed interest in having a minority member testify. If they had we would have granted that request.

I will now move to introductions of the witnesses on our member panel. Representative Rosa DeLauro is the author of H.R. 7, the Paycheck Fairness Act. She represents Connecticut's 3d congress-

sional District. She has long fought for America's working women and families. Representative DeLauro has led the effort in Congress to ensure equal pay for equal work, all employees' access to paid sick days and all workers access to paid family and medical leave.

Representative Eleanor Holmes Norton is in her 15th term as the Congresswoman for the District of Columbia. Before her congressional service, President Jimmy Carter appointed her to serve as the first woman to chair the U.S. Equal Employment Opportunity Commission. In Congress, she has been a civil rights and feminist leader.

Congressman Don Beyer is serving his third term as the U.S. representative from Virginia's 8th district. He was the lieutenant Governor for Virginia from 1990 to 1998 and was Ambassador to Switzerland and Liechtenstein under President Obama. Representative Beyer has spent four decades building his family business in northern Virginia.

Briefly some instructions to our witnesses which you probably already know. For the record, we appreciate all of the witnesses being here today and look forward to your testimony. Let me remind the witnesses that we have read your written Statements. They will appear in full in the hearing record. Pursuant to committee rule 7d and committee practice, each of you is asked to limit your oral presentation to a 5 minute summary of your written Statement.

Before you begin your testimony, please remember to press the button on the microphone in front of you so it will turn on and we can hear you. As you begin to speak, the light in front of you will turn green. After 4 minutes, the light will turn yellow to signal you have 1 minute remaining. When the lights turn red your 5 minutes have expired.

I will first recognize Representative DeLauro.

STATEMENT OF THE HONORABLE ROSA L. DELAURO, MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENTATIVES

Ms. DELAURO. Thank you very much, Madame Chair. I am so pleased to be here this morning and to be with my colleagues, Congresswoman Eleanor Holmes Norton and Congressman Beyer. I want to say a thank you to Chairman Bobby Scott, as well as Subcommittee Chair on Civil Rights and Human Services, Suzanne Bonamici, and Subcommittee Chair on Workforce Protections, Alma Adams.

Let me recognize the Ranking Member of the full committee, Virginia Foxx, as well subcommittee Ranking Members James Comer, Bradley Byrne, and all of the members of the committee for welcoming us here this morning.

I might just anecdotally tell you that it was some 12 years ago, in April 2007, where Congresswoman Norton and myself testified before the Education and Labor subcommittee on this topic of paycheck fairness. Also to tell you that we twice passed the Paycheck Fairness Bill in the House of Representatives in 2008 and 2009. And we are now here again and we anticipate that we will be able to once again pass the Paycheck Fairness Bill in the House of Representatives.

For more than two decades, we have pushed, we have battled to strengthen the Equal Pay Act of 1963. We launched side by side into the fray to elevate paid discrimination to emphasize how central its impact is to working families.

I cannot tell you how difficult it has been to break through on something so simple. Men and women in the same job deserve the same pay. Now the issue and the environment have collided. The House of Representatives just welcomed a diverse class in its history, the most diverse class including the most female members ever and equal pay is at the center of the discourse.

The Paycheck Fairness Act would toughen remedies in the Equal Pay Act of 1963 giving America's working women the opportunity to fight against wage discrimination, receive the paycheck that they should have earned.

Whether through Equal Pay Act or Title VII, current law makes it difficult for women to proceed with equal pay cases even if a case proceeds and women are awarded a legal victory, the damages are often insubstantial, providing women with little compensation and employers with little deterrent from practicing future wage discrimination.

Some claim the wage gap is a myth. Women continue to earn 20 percent less than men, on average, according to census data. Women of color, African American women 61 cents. Latinas make only 53 cents on the dollar when compared to white, non-Hispanic men.

We need to recognize the lack of pay equity translates into less income toward calculating pension, retirement, and in some cases Social Security.

The fact is that 60 years after President Eisenhower called for equal legislation and more than 55 years after President Kennedy signed the Equal Pay Act, pay discrimination is still very much a reality in our country. In 2017, there were 25,605 charges of unlawful, sex-based pay discrimination with the U.S. Equal Employment Opportunity Commission and 99—996 Equal Pay Act charges.

Of course, by now, we are all familiar with the case of Lilly

Ledbetter and the Supreme Court decision that closed the court room door to all women. But we reopened that door with the Lilly Ledbetter Fair Pay Act but the underlying issue, of pay

Discrimination remains. It is systemic. It is discriminatory. It is a barrier. And just as our country has done to bring down other discriminatory barriers, we must see—use the collective power of the American people, in the form of the U.S. Congress, to ensure women have the power to gain economic security for themselves and their families.

Under the Paycheck Fairness Act, any employee can sue for compensatory and punitive damages without facing the arbitrary caps they face under Title V—under Title VII.

It protects employees from retaliation for sharing salary information with their co-workers, with some exemptions. It establishes a grant initiative to provide negotiation skills training programs for girls and women.

What it does not do. It does not eliminate key employer defenses against claims of discrimination. It makes clear that when an em-

ployer states that its pay scale is informed by a “factor other than sex,” that it must actually be true, not just an excuse to continue discriminatory practices.

H.R. 7 merely restores Congress’s intent, which has been undermined by court interpretations over the years allowing employers to escape liability in cases in which their decisions were, in fact, based on sex.

I thank the Committee for this opportunity to testify and for addressing this critical issue. When President Kennedy signed the Equal Pay Act over 55 years ago, he said and let me quote, “Add to our laws another structure basic to democracy and affirm our determination that when women enter the labor force they will find equality in their pay envelope.” We have the opportunity to make good on that promise that presidents of both parties have made. Let us seize that opportunity.

I thank the Chair and I thank the committee for allowing me to speak this morning.

[The statement of Ms. DeLauro follows:]

REMARKS OF THE HON. ROSA L. DELAURO
TESTIMONY: PAYCHECK FAIRNESS ACT
JOINT HEARING: SUBCOMMITTEE ON WORKFORCE PROTECTIONS AND
SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES
THURSDAY, FEBRUARY 13TH, 2019

Thank you. I am pleased to be here. I want to thank Chairman Bobby Scott, as well as Subcommittee (on Civil Rights and Human Services) Chair Suzanne Bonamici and Subcommittee (on Workforce Protections') Chair Alma Adams. I am honored to have this opportunity to testify about the Paycheck Fairness Act. Let me also recognize the Ranking Member of the full committee, Virginia Foxx, as well subcommittee Ranking Members James Comer and Bradley Byrne, and all the members of the Committee for welcoming me here this afternoon.

The issue and the environment have collided. The House just welcomed its most diverse class in its history, including the most female members ever. And, equal pay is at the center of the discourse.

For decades, we have pushed and battled to strengthen the Equal Pay Act of 1963 to ensure that women make the same pay for the same work.

And right now, the moment and the Congress have intersected. So, we must seize this moment to make all men and women whole, to enable them to fully contribute to the richness of America, and to pass Paycheck Fairness.

The Paycheck Fairness Act would toughen remedies in the Equal Pay Act of 1963 to give America's working women the opportunity to fight against wage discrimination and receive the paycheck they should have earned.

Whether through the Equal Pay Act or Title VII, current law makes it difficult for women to proceed with equal pay cases. Even if a case proceeds and women are awarded a legal victory, the damages are often insubstantial, providing women with little

compensation and employers with little deterrent from practicing future wage discrimination.

Some claim the wage gap is a myth. Yet, women continue to earn 20 percent less than men, on average, according to Census data. And, women of color suffer most acutely. Latinas make only 53 cents on the dollar when compared to white, non-Hispanic men. Over a career, they could lose over a million dollars. We must also recognize that the lack of pay equity translates into less income toward calculating pension, retirement, and in some cases Social Security benefits.

Opponents also claim that that women who are underpaid are free to find another job, but women having to flee jobs because of discrimination is not the answer, especially, when they may not know for years that their wages have been tainted by discrimination. Changing jobs places the burden on those who have been injured and is certainly cold comfort for those in areas

where job options are limited or for mothers living paycheck to paycheck with no cushion to be able to look elsewhere. We need to give workers new tools to challenge discrimination and provide incentives for employers to comply with the law in the first place.

Others insist that the 20 percent figure does not take into account education and experience. But the truth is that gap barely closes among women with college degrees. Research by the American Association of University Women (AAUW) found that just one year after college graduation, women earn only 82 % of what their male counterparts earn, and when controlling for a variety of factors that influence earnings, there still remains a 7 percent unexplained wage gap.

The fact is that 60 years after President Eisenhower called for equal legislation and more than 55 years after President Kennedy signed the Equal Pay Act, pay discrimination is still very much a

reality in our country.

In 2017, there were 25,605 charges of unlawful, sex-based pay discrimination with the U.S. Equal Employment Opportunity Commission and 996 Equal Pay Act charges.

Of course, by now, we are all familiar with the case of Lilly Ledbetter. Her bosses said, quote, “their plant did not need women. That women did not help and in fact, they caused problems.” Well, a jury found that, YES, Lilly had been discriminated against, and awarded her \$3.8 million in back pay and damages, which the Supreme Court dramatically reduced to zero as it closed the court room door to all women. We reopened that door with the Lilly Ledbetter Fair Pay Act, but the underlying issue, of pay discrimination remains.

It is a systemic, discriminatory barrier. And, just as our country has done to bring down other discriminatory barriers, we

must use the collective power of the American people, in the form of the U.S. Congress, to ensure women have the power to gain economic security for themselves and their families.

Under the Paycheck Fairness Act any employee can sue for compensatory and punitive damages without facing the arbitrary caps they face under Title VII. The bill would also protect employees from retaliation for sharing salary information with their co-workers, with some exemptions. And it would establish a grant initiative to provide negotiation skills training programs for girls and women.

Let me also be clear about what the bill does not do. It does not eliminate key employer defenses against claims of discrimination. The bill simply makes clear that when an employer states that its pay scale is informed by a “factor other than sex,” that must actually be true, and not just an excuse to continue discriminatory practices. HR 7 merely restores Congress’s intent,

which has been undermined by court interpretations over the years allowing employers to escape liability in cases in which their decisions were, in fact, based on sex.

Finally, H.R. 7 does not include any new mandates or federal government guidelines about the relative worth of different types of jobs.

Again, I would like to thank the Committee for this opportunity to testify and for addressing this critical issue.

When President Kennedy signed the Equal Pay Act over 55 years ago, he said that it would [quote]: *“Add to our laws another structure basic to democracy”* and *“affirm our determination that when women enter the labor force they will find equality in their pay envelope.”*

We twice passed Paycheck Fairness: in 2008 and 2009. But, now, in the 116th Congress in which we welcomed the most women in our history, we must get it into law.

We have the opportunity to make good on the promise that presidents of both parties have made. Let us seize it.

Chairwoman BONAMICI. Thank you very much, Representative DeLauro. I now recognize Representative Eleanor Holmes Norton.

STATEMENT OF THE HONORABLE ELEANOR HOLMES NORTON, MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENTATIVES

Ms. HOLMES NORTON. Thank you chairwoman Chair Bonamici, Chairwoman Adams, Ranking Member Comer, Ranking Member Byrne. I appreciate the opportunity to testify on H.R. 7. I will try to summarize my testimony.

I especially welcome H.R. 7 as it bears on my own work when I chaired the EEOC and moved jurisdiction of the Equal Pay Act under a reorganization under President Carter from the Labor Department to the EEOC so that like statutes could be more easily enforced under the same agency.

The Equal Pay Act was the first of the great Civil Rights Acts. And we are way overdue in bringing it up to date and strengthening it as the DeLauro bill does. It—we—this bill makes it easier for complainants to participate in a class challenging pay discrimination.

Now pay discrimination should—class members should once a complainant files should include all who probably make the same or relatively the same amounts of money. That would be a more efficient way to enforce the Equal Pay Act. I appreciate that it improves Labor Department's ability to enforce the EPA through the Office of Federal Contract Compliance.

I particularly appreciate that my good friend, this—the champion of this bill, Representative DeLauro has included my Pay Equity Act for all in H.R. 7.

This act does something that I think most of us don't even, may not even recognize to be discrimination. Some of us may do it ourselves. That is to ask an applicant for his or her employment history. Even though many employers may not intend to discriminate, the effect almost surely is to discriminate when you consider where women are and often people of color are in the workplace.

Evidence shows that the historically disadvantaged groups often start out with unfair and artificially low wages, compared with their white male counterparts. Imagine how this discrimination then is compounded from job to job since you can't build on the salary you should have made because you didn't make the salary you were entitled to in the first place.

Job offers should be based on an applicant's skill, merit, not on salary history. This bill, my own bill would allow the assessment of penalties against employers who ask salary and act on salary as a way of considering salary and hiring. We know what is true because of the verified as studies.

To cite one, a recent study showed that when employers were not allowed to ask the salary history the employee earned 9 percent more than when the employer was allowed to ask that history. I believe this is one of the major reasons for the stubborn gap that we have not been able to move much between the wages of men and women.

The H.R. 7 would also direct the EEOC to collect data on salaries based on a number of criteria including sex. What? We didn't know

until now what the difference was based on sex because we didn't have the data? Everything I did at EEOC depended on the data, most often with class actions where having the data you can bring actions that involve large numbers of people once there is a remedy.

The fact that we have not had the relevant data on sex may be one reason why women and minorities have made more progress in getting jobs than in equal pay once they have those jobs.

I very much appreciate the priority, Madame Chair, that you have given to this long overdue bill.

[The statement of Ms. Holmes Norton follows:]

Testimony of Congresswoman Eleanor Holmes Norton
Committee on Education and Labor
Subcommittees on Civil Rights and Human Services and Workforce Protections
“Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work”
February 13, 2019

Chairwoman Bonamici, Chairwoman Adams, Ranking Member Comer and Ranking Member Byrne, I am pleased to testify on H.R. 7, the Paycheck Fairness Act. I strongly support this critical bill and applaud Chairwoman Bonamici and Chairwoman Adams for making H.R. 7 a priority for this Committee. I would like to thank Chairman Scott for his leadership on this issue as well. As the first woman to chair the U.S. Equal Employment Opportunity Commission (EEOC), I enforced the Equal Pay Act (EPA). I particularly appreciate that H.R. 7 would bring long awaited strength to the EPA. This bill would remove obstacles in the EPA to facilitate a complainant’s participation in class action lawsuits challenging systemic pay discrimination, improve the U.S. Department of Labor’s ability to enforce the EPA, and direct the EEOC to survey wage information to help with analysis and enforcement. I would have appreciated all these tools when I chaired the EEOC.

I particularly appreciate that Representative Rosa DeLauro, a great champion for equal pay, has included my Pay Equity for All Act in H.R. 7, which I will focus on in my testimony. The Pay Equity for All Act would prohibit employers from asking job applicants their salary history. Even though many employers may not intentionally discriminate against applicants or employees based on gender, race or ethnicity, setting wages based on salary history is routinely done in the workplace and can reinforce the wage gap. Evidence clearly shows that members of historically disadvantaged groups often start out their careers with unfair and artificially low wages compared to their white male counterparts, which itself may reflect discrimination, and these disparities are compounded from job to job throughout their careers.¹

Job and salary offers should be based on an applicant’s skill and merit, not salary history. The Pay Equity for All Act addresses this problem by assessing penalties against employers who ask applicants for their salary history during the interview process or as a condition of employment. The bill would also provide job applicants and employees with a private right of action against employers who violate these provisions. One study has shown that in cases where bargaining over salary occurred, when employers were not allowed to ask the salary history of an applicant, the applicant was offered and accepted wages 9% higher than the applicant’s initial bid compared to wages offered by control group employers who were allowed to ask about salary history.² Employers also tend to interview more applicants when they cannot ask about

¹ See, e.g., Deborah Ashton, *Does Race or Gender Matter More to Your Paycheck?*, Harvard Bus. Review (2014), <https://hbr.org/2014/06/does-race-or-gender-matter-more-to-your-paycheck>; Sarah Jane Glynn, Ctr. for Am. Progress, *Fact Sheet: The Wage Gap for Women* (2012), <https://www.americanprogress.org/issues/economy/news/2012/08/16/12029/fact-sheet-the-wage-gap-for-women/>.

² E.g., Moshe A. Bache and John J. Horton, *How Do Employers Use Compensation History?: Evidence from a Field Experiment* (June 21, 2017), at 2, 27-28, <http://moshebarach.com/wp-content/uploads/2017/06/WageHistory.pdf>.

salary history.³ Making my bill, the Pay Equity for All Act, a provision of H.R. 7 is an important step toward closing the pay gap and making sure all qualified applicants are able to be considered for positions.

H.R. 7 would also direct the EEOC to collect data on salaries based on several criteria, including sex, to help assist federal agencies in enforcing labor and employment laws. Use of objective data was key to my own work at the EEOC, which was most successful when the data enabled us to bring class actions, achieving remedies for large numbers of complainants at once. This may be one reason women and minorities have made more progress getting jobs than getting equal pay once they have those jobs.

We must work to close the pay gap in this country, both the pay differences between men and women and the pay differences that negatively affect racial minorities. I look forward to working with you to enact H.R. 7.

³ See, e.g., *id.*

Chairwoman BONAMICI. Thank you very much for your testimony, Representative. I now recognize Representative Don Beyer from Virginia.

**STATEMENT OF THE HONORABLE DONALD S. BEYER, JR.,
MEMBER OF CONGRESS, U.S. HOUSE OF REPRESENTATIVES**

Mr. BEYER. Thank you Chairman Bonamici, Chairman Adams, Ranking Member Comer, Ranking Member Byrne. Thank you very much for inviting me to participate in this important discussion on equal pay for equal work.

We know when women succeed, America succeeds. Women are running in unprecedented numbers, they are marching in unprecedented numbers, and they are winning in unprecedented numbers, with I think 131 women now in Congress.

And I am incredibly grateful to play a supportive role in this effort that Rosa DeLauro and Eleanor Holmes Norton have been pursuing for decades.

My priority is women's empowerment and the elevation of women's voices and concerns. We have made progress. The Lily Ledbetter Fair Pay Act, the Survivors' Bill of Rights Act, but there is still much more to do because persistent pay gaps exist in the U.S. work force that correlate specifically with sex, race, and ethnicity.

Unequal pay for unequal work—for equal work exists over a spectrum of jobs, regardless of educational level, regardless of geographic location. Economists have found that 62 percent of the wage gap can be explained by three factors. Experience, industry, and occupation, but the remaining 38 percent cannot be explained by such differences.

Although Federal law specifically prohibits compensating men and women differently for the same work, the law must be strengthened. The effective enrollment of this mandate is impeded by a lack of sufficiently robust and reliable data on compensation, including data by sex and race.

Just this weekend, we spent time with our middle daughter who is a senior front end web designer manager. She likes to emphasize that last word. And so she is a woman who codes. And she had just discovered to her dismay that her male counterparts were making money for doing exactly the same job. It is this lack of data that acts as a barrier to closing the persistent pay gap for women and people of color.

As a business owner and an employer, I understand the value of data because the aphorism is you can't manage what you don't measure. We like to think we are driven by data. Data exposes trends in hiring, paying and promoting employees, which can inform the appropriate interventions. Data can reveal sex in racially segregated jobs, or a lack of women or people of color in upper management, and disparate salaries, benefits, or bonuses.

Literally it can arm businesses with the information that they need to remedy unjustified pay gaps. It can wake many of us up who are leading businesses to understand what is happening within our own work force and it can provide a lens to examine the intersectionality of issues that can contribute to wage gaps.

Since the enactment of the Civil Rights Act in 1964, the EEOC has been empowered to collect employment data to identify these discriminatory employment patterns based on race, gender, and national origin. And for over 50 years, companies have used the EEO-1 form to report this important demographic data.

So as we look to ensure true paycheck fairness, it is only natural that we ask the EEOC to improve upon its system of data collection and help with wage data to identify wage disparities. Only then will businesses have the tools to better identify, correct, and eliminate illegal wage disparities.

You know, in business we are constantly thinking about how we can innovate, provide a better product, keep or create an ever better culture. Guaranteeing that men and women receive equal pay for equal work is a principle rooted in our Nation's commitment to equality and fairness.

The Paycheck Fairness Act has been introduced in every Congress since the 105th. The time has come to pass this legislation. Today is an important day for us to move forward together, for us to make that difference we all know is needed for us to break through for change.

Thank you Madame Chair, I yield back.
[The statement of Mr. Beyer follows.]

REMARKS OF THE HON. DONALD S. BEYER JR.

JOINT SUBCOMMITTEE HEARING: WORKFORCE PROTECTIONS & CIVIL RIGHTS AND HUMAN SERVICES

ED & LABOR COMMITTEE TESTIMONY: PAYCHECK FAIRNESS ACT

THURSDAY, FEBRUARY 13TH, 2019

Thank you to the Chairs of the subcommittees Congresswoman Alma Adams and Congressman Suzanne Bonamici and to the Ranking Members Congressman James Comer and Congressman Bradley Byrne for inviting me to participate in this important discussion on equal pay for equal work.

We know when women succeed, America succeeds. Women are running in unprecedented numbers, they are marching in unprecedented numbers, and they are winning in unprecedented numbers – with 131 women in Congress.

I am incredibly grateful to play a supportive role in this movement both on a policy level and politically. My aim is to prioritize women's empowerment and elevate women's voices and concerns. We have made progress – like the Lily Ledbetter Fair Pay Act and the Survivors' Bill of Rights Act - but there is still so much left to do.

Persistent pay gaps exist in the U.S. workforce that correlate with sex, race, and ethnicity. Unequal pay for equal work exists over a spectrum of jobs, regardless of education level and geographic location.

Economists have found that 62 percent of the wage gap can be explained by three factors: experience, industry, and occupation, but the remaining 38 percent of the gap cannot be explained by such differences.

Federal law specifically prohibits compensating men and women differently for the same work. But as you will hear today, the law must be strengthened. Effective enforcement of this mandate is impeded by a lack of sufficiently robust and reliable data on employee compensation, including data by sex and race. This lack of data acts as a barrier to closing the persistent pay gap for women and people of color.

As a business owner and an employer, I understand the value of data – because you cannot improve what you don't measure. Data exposes trends in hiring, paying, and promoting employees, which can inform appropriate interventions. Data can reveal sex and racially segregated jobs, a lack of women or people of color in upper management, and disparate salaries, benefits, or bonuses. It can arm businesses with the information that they need to remedy unjustified pay gaps and it provides a lens to examine the intersectionality of issues that can contribute to wage gaps.

Since the enactment of the Civil Rights Act in 1964, the U.S. Equal Employment Opportunity Commission (EEOC) has been empowered to collect employment data to identify discriminatory employment patterns, including those based on race, gender, and national origin.

For over 50 years, companies have used the EEO-1 form to report important demographic data to the EEOC. So as we look to ensure true paycheck fairness, it is only natural for the Equal Employment Opportunity Commission (EEOC) to improve upon its system of data collection

and help with wage data and identify wage disparities. Only then will businesses have the tools to better identify, correct, and eliminate illegal wage disparities.

As a businessman, I consistently think of how I can innovate and provide a better quality product. Guaranteeing that women and men receive equal pay for equal work is a principle rooted in our nation's commitment to equality and fairness.

The Paycheck Fairness Act has been introduced every Congress since the 105th Congress. The time has come to pass this legislation. Today is an important day for us to move forward, together; for us to make that difference we all know is so needed; and for us to break through for change.

Chairwoman BONAMICI. Thank you very much Congresswoman DeLauro, Congresswoman Holmes Norton and Congressman Beyer. As we transition to the next panel, which we will do immediately, I want to remind my colleagues that pursuant to committee practice materials for submission for the hearing record must be submitted to the committee clerk within 14 days following the last day of the hearing, preferably in Microsoft Word format. The materially submitted must address the subject matter of the hearing. Only a member of the committee or an invited witness may submit materials for inclusion in the hearing record.

Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the committee clerk within the required timeframe. Please recognize that years from now the link might no longer work.

Again I want to thank the witnesses for their participation today. What we have learned is very valuable. We will now seat the second panel. Thank you for joining us. I will now introduce our witnesses for the second panel.

Ms. Fatima Goss Graves is the President and CEO of the National Women's Law center. Ms. Goss Graves has served in numerous roles at the National Women's Law Center for more than a decade and has a distinguished track record of working across a broad set of issues central to women's lives including income security, health and reproductive rights, education, access and workplace justice.

Ms. Camille Olson is a partner at the law firm Seyfarth Shaw LLP. Since 2013, Ms. Olson has served as chairperson of the United States Chamber of Commerce's Equal Employment Opportunity, EEO, Subcommittee. She has represented companies nationwide in all areas of litigation.

I am pleased to recognize my colleague Ms. Pramila Jayapal to briefly introduce Ms. Kristin Rowe-Finkbeiner.

Ms. JAYAPAL. Thank you so much, Madame Chair, for this opportunity. It is my great honor to introduce Kristin Rowe-Finkbeiner who is the Executive Director and CEO and the co-founder of Moms Rising who is joining me or joining us from my home State of Washington.

We are so proud of the work that Moms Rising has done not just in Washington State but around the country. Kristin has been deeply involved in grassroots engagement and policy analysis for more than 2 decades and Moms Rising now has over 1 million members and works to increase family economic security, to decrease discrimination against women and mothers and to build a nation where businesses and families can thrive.

Thank you so much for joining us and we are—you continue to make us proud in Washington.

Chairwoman BONAMICI. Thank you Rep Jayapal. Now I want to introduce Ms. Jenny Yang. She served as the Chair of the U.S. Equal Employment Opportunity Commission or EEOC from 2014 to 2017 and as a member of the commission from 2013 to 2018. She is currently a partner with Working Ideal which advises employers on building inclusive work places, recruiting diverse talent and ensuring fair pay. She is also a fellow at the Urban Institute where

she examines the impact of changing workplace structures on low wage workers. Prior to her time at the Commission she spent 15 years litigating equal pay and other discrimination cases on behalf of employees.

We appreciate all the witnesses for being here today. We look forward to your testimony. Let me remind the witnesses that we have read your written Statements and they will appear in full in the hearing record.

Pursuant to committee rule 7D and committee practice, each of you is asked to limit your oral presentation to a 5 minute summary of your written Statement. Let me remind the witnesses that pursuant to Title 18 of the U.S. Code, Section 1011—1001 it is illegal to knowingly and willfully falsify any Statement, representation, writing, document or material fact presented to Congress or otherwise conceal or cover up a material fact.

Before you begin your testimony, please remember to press the button on the microphone in front of you so it can turn on and all members can hear you and as you begin to speak, the light in front of you will turn green. After 4 minutes the light will turn yellow to signal that you have 1 minute remaining. When the light turns red, your 5 minutes have expired and we ask that you wrap up.

We will let the entire panel make their presentations before we move to member questions. When answering a question also please remember to turn on your microphone. I will first recognize Ms. Goss Graves for your testimony.

**STATEMENT OF FATIMA GOSS GRAVES, PRESIDENT AND CEO,
NATIONAL WOMEN'S LAW CENTER**

Ms. GOSS GRAVES. Thank you, Chair Bonamici, Chair Adams, Ranking Member Comer, Ranking Member Byrne, Chair Scott and Ranking Member Foxx, and all the members of the committee. Thank you for the opportunity to submit testimony today. I am Fatima Goss Graves, President and CEO of the National Women's Law center.

It has been a decade since Congress passed the Lilly Ledbetter Fair Pay Act and in that time, the push for equal pay across this country has only increased. And Congress unfortunately has failed to keep up.

States and cities have responded accordingly by attempting to fill the gaps in Federal law. Since 2016, 6 States have prohibited employers from relying on prior salary history, information from job candidates in order to set their new salaries. Three have tightened legal loopholes that allow employers to justify paying women less for equal work.

And because pay discrimination is so often cloaked in secrecy and seldom obvious to the person who is actually directly affected, States and localities across this country have taken measures in recent years to bring pay practices into the light through pay data reporting requirements and laws protecting employees' rights to talk about how much they make with each other.

In fact, 18 States and the District of Colombia have enacted provisions to stop employers from retaliating against employees who discuss their own pay with each other. Corporate leaders have also recognized that equal pay just makes business sense. More than

100 major companies took the White House Equal Pay Pledge and companies from Excentra to Gap to Raytheon and many more have followed through by instituting measures to identify and close pay gaps.

And the push for equal pay doesn't stop at the U.S. borders with United Kingdom being one of the companies that has recently found that public and private employers in the UK, its 250 employers or more are more required to annually publish the difference between the average pay of their male and their female employees. This new requirement has already prompted companies to outline action plans for how they are going to reduce their and address their pay gaps.

But in the face of this giant cultural shift that has added new urgency to calls for equal pay around this country, Congress still has failed to act. And it is not enough for some States to pass laws or for some employers to do the right thing or for global corporations to fill indirect pressure because of laws in other countries are stronger.

Every woman in this country, especially the black women and Latinas and native women who experience the most yawning pay gaps deserves robust, baseline, equal pay protections in a Federal law that actually work. So we are talking about a gender wage gap that has not dramatically changed over the last decade and that follows women into retirement.

It is a gap that means Latinas lose over the course of a 40 years career over \$1 million compared to white non-Hispanic men. That is really life changing money. And it is the sort of money that has the potential to transform opportunities for individuals and for families and for communities.

So you will hear from some skeptics that the wage gap is just about women's choices or that it is impossible to actually abandon practices that have meant again and again that women make less over time or that more than 50 years after the Equal Pay Act was passed there is no need to update our kind of ineffective laws but I just believe that we can do better.

It is time to match the seriousness of the women in this country who are calling for change. The Paycheck Fairness Act is a part of a response to this urgent call to shift the ways of doing business that have persistently devalued women's work.

The bill promotes pay transparency by borrowing retaliation against workers who voluntarily discuss or disclose their own wages and requires employees to report paid data to the EEOC. It prohibits employers from relying on salary history to set pay when hiring new employees so that pay discrimination doesn't follow women and people of color from job to job and employers are paying based on the job not based on the fact that women and people of color tend to generally make less. And it closes loopholes that have allowed employers to pay women less than men for the same work without a legitimate business justification related to the job. And it ensures women can receive the same robust remedies for sex based pay discrimination that are currently available to those who are subjected to race and ethnicity discrimination under other laws.

So by updating our equal pay laws to reflect our reality today, the Equal Pay Act could be the sort of statute that would really

advance equity and dignity for women at work. So thank you for the opportunity to testify today. As you said my full testimony is in—will be submitted for the record and I look forward to any questions.

[The statement of Ms. Goss Graves follows:]

Testimony of Fatima Goss Graves

President and CEO

National Women's Law Center

House Committee on Education & Labor

Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce
Protections

Joint Subcommittee Hearing on the Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work

February 13, 2019

Thank you for the opportunity to submit testimony to the Committee and the Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections on H.R. 7, the Paycheck Fairness Act. The National Women's Law Center has worked for more than 45 years to advance and protect women's equality and opportunity, and has long worked to remove barriers to women in the workplace. Protecting against pay discrimination is key to addressing longstanding inequality.

I. INTRODUCTION

Over the past decade, the push for equal pay has shifted laws across the country and transformed the way companies do business, but Congress has failed to keep up. When in 2007 five members of the Supreme Court held that the law provided no remedy to Lilly Ledbetter for the pay discrimination she suffered for years at Goodyear, because she had not filed a charge within 180 days of Goodyear's first discriminatory pay decision, it sparked a new movement for equal pay. In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, rejecting the Supreme Court's decision and making clear in law what is clear to every woman who has been shortchanged by pay discrimination—that every time you receive a paycheck that is smaller because you are a woman, that is a new discriminatory act. But rather than the end of the fight, this was the beginning of a new opportunity to finally make the promise of the Equal Pay Act a reality.

In recent years, polling has consistently shown that equal pay is a priority for voters, regardless of party.¹ The Me Too movement and its focus on gender inequity at work has only heightened public attention to the gender wage gap and increased demand for solutions.² Given this, it is perhaps no surprise that in recent years, states and cities have sought to fill the gaps left by

federal law by strengthening protections against pay discrimination.³ For example, since 2016, six states have enacted legislation prohibiting employers from seeking prior salary history information from job candidates and employees.⁴ Since 2017, New Jersey, Oregon, and Washington have all passed laws to tighten and clarify court-created legal loopholes in employers' ability to justify pay differentials based on a "factor other than sex" defense, ensuring that any such pay differentials are job-related.⁵ Additionally, these states have increased available relief for employees, recognizing the importance of adequate damages and penalties as a mechanism to incentivize employers to lead the way in tackling wage gaps and to ensure that victims of pay discrimination are fully compensated for their losses.⁶

Key to tackling pay discrimination is increasing pay transparency, including through pay data reporting obligations that allow governments, employers and the public at large to uncover and combat disparities. States and localities across the country have passed laws and adopted executive orders that promote pay transparency, through measures such as pay data reporting requirements⁷, the required provision of salary range information to employees⁸ and protection from retaliation for discussing wages and salaries with coworkers. For instance, eighteen states and the District of Columbia have enacted provisions to stop employers from retaliating against employees who discuss their wages with each other.⁹

Corporate leaders are also increasingly recognizing that equal pay just makes business sense. More than 100 major companies took the White House Equal Pay Pledge in 2016, committing themselves to conducting annual company-wide gender pay analyses across occupations, to combatting unconscious bias and structural barriers to women's advancement, and to including equal pay in broader equity initiatives.¹⁰ Companies from Accenture, to Gap, to Raytheon, to name only a few, have instituted measures to identify and close gender wage gaps and to standardize and rationalize salary setting, and have trumpeted these measures, recognizing that equal pay is core to attracting and retaining the talent that they need to succeed.¹¹ And when companies have failed to lead on equal pay, shareholders have demanded attention to these issues, successfully pushing for companies to conduct and disclose gender pay analyses in multiple high profile efforts across a number of industries.¹² In addition, companies like Glassdoor have not only analyzed and shared information about wage gaps and their plan to close them within their own workforce, they have also created new tools for employees to share and compare pay information.¹³

And the push for equal pay doesn't stop at the borders of the U.S. Countries around the world, from across Europe, to Australia and Canada are also pushing forward on equal pay and adopting legislation mandating pay data reporting and giving employees tools to uncover wage gaps.¹⁴ In the United Kingdom, for instance, since 2017 public and private employers with at least 250 employees are required to annually publish information designed to show whether

there is a difference in the average pay of their male and female employees.¹⁵ Initial data from the first wave of reporting revealed that some large multinational companies, including U.S.-based companies with U.K. operations, have significant gender gaps in earnings and pay.¹⁶ As an early indicator of impact, some companies, including J.P. Morgan, have outlined action plans along with their data, demonstrating that the reporting requirement spurred companies to develop a plan to address disparities.¹⁷

As of 2017, in Germany, employees working for employers with more than 200 employees can request information from their employer about the salaries of their co-workers,¹⁸ and employers with more than 500 employees are required to submit public reports detailing measures the company has taken to promote gender equality and achieve equal pay, along with the impact of any measures.¹⁹ In France, a new measure requires companies with over 50 employees to measure their gender pay gaps, and to disclose steps taken to remedy the gaps.²⁰ Companies are required to measure compliance using a 100-point scale, and the resulting score will be posted on company websites,²¹ with financial consequences for companies that fail to report or that have scores below a certain metric.²² All of these initiatives recognize that requiring employers to collect and report pay data is a powerful tool for fighting pay discrimination and closing the wage gap. Pay data reporting by employers promises to shine light on race and gender pay disparities, identify areas of concern for further investigation by enforcement agencies, and increase the likelihood of employer self-analysis and self-correction.

But in the face of a cultural shift that has imbued new urgency to calls for equal pay across the country and, indeed, across the world, Congress has failed to act. It is not enough for some states to act and for some employers to take voluntary steps to close the gender wage gap. It is not enough for international corporations to feel indirect pressure to address their U.S. pay practices because they are subject to strengthened equal pay laws in other countries. Every woman in this country—especially the Black women, Latinas, and Native women who experience exceptionally large wage gaps—deserves robust, baseline equal pay protections in federal law. The Paycheck Fairness Act would provide these core protections.

II. THE WAGE GAP IS REAL, WITH DEVASTATING IMPACTS

A. The Wage Gap Harms Women and Their Families

When comparing women of all races to men of all races, women working full time, year-round typically are paid only 80 cents for every dollar paid to men working full time, year-round.²³ And the wage gap is even worse when looking specifically at women of color: for every dollar paid to white, non-Hispanic men, Black women are paid only 61 cents, Native women 58 cents, and Latinas 53 cents.²⁴ Asian American and Pacific Islander (AAPI) women are typically paid only 85

cents, but that number masks larger disparities among different communities of AAPI women.²⁵ For example, Burmese, Samoan, and Hmong women make just over half—51 percent, 56 percent and 59 percent respectively—of what white, non-Hispanic men make.²⁶

This wage gap has remained stagnant for nearly a decade.²⁷ Women are still paid less than men in nearly every occupation,²⁸ and studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained.²⁹

The gender wage gap significantly diminishes the earning power of women. In 2017, women's median earnings were \$10,169 less per year than the median earnings for men. Put another way: that is equal to about three months of rent, three months of child care payments, three months of health insurance premiums, three months of groceries, four months of student loan payments, and eight tanks of gas.³⁰

The wage gap affects women as soon as they enter the labor force, expands over time, and leaves older women with a gap in retirement income. Over the course of a 40-year career, a woman beginning her career today stands to lose \$406,760 to the wage gap.³¹ To make up this lifetime wage gap, a woman would have to work more than 10 years longer than her male counterpart.³² Women of color stand to lose the most with Asian women losing \$360,400, Black women losing \$946,120, and Latinas losing \$1,135,440 over their lifetime to the wage gap as compared to white, non-Hispanic men.³³

When women are shortchanged, families suffer. More than 24.9 million mothers with children under 18 are in the workforce, making up nearly 1 in 6 – or 26 percent – of all workers.³⁴ The great majority of mothers in the workforce work full time. In 2015, 42 percent of mothers were the sole or primary breadwinners in their families, while 22.4 percent of mothers were co-breadwinners, meaning mothers' earnings are critical to families' financial security.³⁵ And those working mothers also face a wage gap, paid only 71 cents for every dollar paid to fathers, a gap that translates to a typical loss of \$16,000 annually.³⁶

Closing the wage gap would help lift women and children out of poverty. Nearly one in eight women in the U.S. live in poverty, with high rates for women of color, including 11 percent of Asian women, 21 percent of Black women, and 18 percent of Latinas.³⁷ More than 1 in 3 families headed by unmarried mothers lived in poverty in 2017, and over half of all poor children (58 percent) lived in families headed by unmarried mothers.³⁸ Closing the wage gap is not only fair, it is urgently needed.

B. No Matter the Choices They Make, Women Face a Wage Gap

Skeptics of the gender wage gap contend that it exists because of differences in women's education or the occupational "choices" that women make. But just one year after college graduation, women are paid 82 percent of what their similarly educated and experienced male peers were paid.³⁹ Moreover, a wage gap persists across virtually every occupation, whether women work in low-wage jobs like cashiers and retail salespeople; mid-wage jobs like travel agents; or high-wage jobs like lawyers or physicians or surgeons.⁴⁰ Data make clear that discrimination is a major driver of the wage gap.

It is well-documented that women, and especially women of color, face overt discrimination and unconscious biases in the workplace which impact pay. For example, in a recent experiment where scientists were presented with identical resumes—one with the name John and the other with the name Jennifer—the scientists offered the male applicant for a lab manager position a salary of nearly \$4,000 more, and judged him to be significantly more competent and hireable.⁴¹ Racial stereotypes compound these effects for women of color,⁴² contributing to their overrepresentation in low-paying jobs, and underrepresentation in higher-paying jobs⁴³ and leadership positions within organizations.⁴⁴

Women with caregiving responsibilities—and mothers in particular—also face persistent discrimination in the workplace, which leads to lower wages. A 2007 study found that when comparing equally qualified women candidates, women who were mothers were recommended for significantly lower starting salaries, perceived as less competent, and less likely to be recommended for hire than non-mothers.⁴⁵ The effects for fathers in the study were just the opposite—fathers were recommended for significantly higher pay and were perceived as more committed to their jobs than non-fathers.⁴⁶ It is thus not surprising that, in 2016, mothers who worked full time, year-round typically made only 71 cents for every dollar paid to fathers. The wage gap between mothers and fathers exists across education level, age, location, race, and occupation.⁴⁷

The wage gap also persists because women face significant barriers—like harassment and discrimination—to entering higher-wage, nontraditional jobs and thus continue to be overrepresented in low-paying jobs. Women are nearly two-thirds of the workforce in low-wage jobs that typically pay less than \$11.50 per hour.⁴⁸ And all too often, wages in occupations that are made up predominantly of women – "pink collar" occupations such as child care workers, family caregivers, or servers – pay low wages,⁴⁹ in significant part because women are the majority of workers in the occupation and "women's work" is undervalued.⁵⁰ A study of more than 50 years of data revealed that when women moved into a field in large numbers, wages declined, even when controlling for experience, skills, education, race and region.⁵¹

Nor is the answer to the gender wage gap for women to negotiate their way out of it. Women are less likely to negotiate their salaries than men, but in many instances, that is for good reason. Studies show employers react more favorably to men who negotiate salaries, while women who negotiate may be perceived negatively and penalized for violating gender stereotypes.⁵² In addition, when women do negotiate, they are less likely to receive the raises they seek.⁵³ Not surprisingly given the cultural hostility to women's negotiation, women who do negotiate often ask for less when they negotiate than men.⁵⁴

C. A Focus on Pay Equity Is Good for Business

When employers do proactively implement practices to help prevent pay disparities in the first instance and to develop a diverse workforce, they reap rewards. A diverse workforce and equitable employment practices can confer a wide array of benefits on a company, including decreased risk of liability, access to the best talent, increased employee satisfaction and productivity,⁵⁵ increased innovation, an expanded consumer base, and stronger financial performance.⁵⁶ Competitive — and thus equal — pay is critical for recruiting and retaining a diverse workforce and high performers, particularly for younger women workers.⁵⁷ And when workers are confident they are being paid fairly, they are more likely to be engaged and productive.⁵⁸

Significantly, shareholders and potential investors are recognizing these benefits and are increasingly interested in companies' commitment to diversity and equal employment opportunity. They see compliance with antidiscrimination laws — particularly with regard to equal pay — as an important factor impacting risk and profitability, and therefore relevant to investment decisions.⁵⁹

D. Equal Pay Would Provide an Enormous Economic Boost

Addressing discrimination and closing the gender wage gap would have a significant positive impact on the economy. A recent study found that if women received the same compensation as their comparable male co-workers, the poverty rate for all working women would be reduced by half, from 8.1 percent to 3.9 percent.⁶⁰ Moreover, nearly 60 percent of women would earn more if working women were paid the same as men of the same age with similar education and hours of work.⁶¹ Increased wages would augment these workers' consumer spending power and benefit businesses and the economy.⁶² Another recent study by McKinsey estimates that by closing the wage gap entirely, women's labor force participation would increase and \$4.3 trillion in additional gross domestic product could be added in 2025, about 19 percent more than would otherwise be generated in 2025.⁶³

III. CURRENT LAW FALLS SHORT

Pay discrimination remains difficult to detect in the first instance. Because pay often is cloaked in secrecy, when a discriminatory salary decision is made, it is seldom as obvious to an affected employee as a demotion, a termination, or a denial of a promotion.⁶⁴ Moreover, according to the most recent data available, about 60 percent of workers in the private sector nationally are either forbidden or strongly discouraged from discussing their pay with their colleagues.⁶⁵ As a result, employees face significant obstacles in gathering the information that would suggest that they have experienced pay discrimination, which undermines their ability to challenge such discrimination. Punitive pay secrecy policies and practices allow this form of discrimination not only to persist, but to become institutionalized.

Lilly Ledbetter's story demonstrates how the culture of secrecy around pay allows pay discrimination to persist for years, unchecked, and the difficulties workers face in successfully challenging and being made whole for pay discrimination under our current laws. Lilly worked at Goodyear for 19 years before discovering that she was being paid less than her male counterparts, thanks to an anonymous note. When she brought a Title VII pay discrimination suit against her employer, the jury awarded her over \$3 million in damages, which were promptly reduced to \$300,000 due to statutory damages caps. And when her suit came before the Supreme Court, the Court ruled against her, holding that employers could not be sued for pay discrimination under Title VII if the employer's original discriminatory pay decision occurred more than 180 days before the employee initiated her claim.⁶⁶ Congress acted quickly in response, and the Lilly Ledbetter Fair Pay Act of 2009 restored the protection against pay discrimination stripped away by the Court, making clear that each discriminatory paycheck, not just an employer's original decision to engage in pay discrimination, resets the 180-day time period.

The Ledbetter Act has resulted in real, concrete gains for victims of pay discrimination, ensuring that the doors of the courthouse remain open. Because of the Ledbetter Act, workers who learn that they have been paid unfairly — like Lilly Ledbetter — have been able to challenge and remedy pay discrimination that otherwise would have gone unchecked.⁶⁷

But while the Ledbetter Act was a necessary and important victory, it simply restored the law to the status quo that existed before the Supreme Court's *Ledbetter* decision. It did not address the significant deficiencies in our equal pay laws, which are limited in the tools they provide to detect and combat wage discrimination, and have been further weakened by a series of judicial interpretations. For instance, the problems created by pay secrecy are compounded by inadequate remedies under the law that fail to incentivize employers to consistently take proactive steps to address and correct pay discrimination in the first instance. Courts' narrow

interpretations of the required elements of an Equal Pay Act claim have made it exceedingly difficult for workers to prevail. At the same time, and as set out in greater detail below, courts have also opened loopholes in the Equal Pay Act, interpreting it in ways that undermine its basic goal, allowing employers to justify sex-based pay disparities based on practices and factors that have nothing to do with the experience, education, or skills required for the job, such as relying on an applicant's prior salary, negotiation skills, or family economic situation. The remedial purposes of the Equal Pay Act have been gravely undermined over the years, creating an urgent need for the critical reforms in the Paycheck Fairness Act outlined below.

IV. THE PAYCHECK FAIRNESS ACT WOULD PROVIDE CRITICALLY IMPORTANT PROTECTIONS

The Paycheck Fairness Act would update and strengthen the Equal Pay Act in several critical ways to ensure that it provides robust protection against sex-based pay discrimination. The Paycheck Fairness Act promotes pay transparency by barring retaliation against workers who voluntarily discuss or disclose their wages, and by requiring employers to report pay data to the EEOC. It prohibits employers from relying on salary history to set pay when hiring new employees, so that pay discrimination does not follow women and people of color from job to job. It closes loopholes that have allowed employers to pay women less than men for the same work without a legitimate business justification related to the job. It strengthens workers' ability to demonstrate pay discrimination by modifying the "same establishment" requirement, and removing barriers allowing workers to come together as a class to challenge pay discrimination. And finally, the Paycheck Fairness Act ensures women can receive the same robust remedies for sex-based pay discrimination that are currently available to those subjected to discrimination based on race or ethnicity.

A. Pay Transparency Helps Root Out Discrimination and Allows Employers to Take Proactive Preventive Measures

1. Protecting Employees from Retaliation for Discussing Pay

You can't remedy pay discrimination if you have no idea that you are making less than the man across the hall. When workers fear retaliation for talking about their pay, any wage gap they face is likely to continue to grow, undiscovered, in the shadows. By restricting employees' ability to talk about their pay, employers seek to rob employees of the power that pay transparency can unlock.

The Paycheck Fairness Act stops employers from prohibiting or punishing employees for asking about, discussing, or disclosing information about pay and makes clear that employees cannot

contract away or waive their rights to discuss and disclose pay. This reform is necessary because protection for talking about pay shouldn't depend on where you live or whether you work in a particular kind of job. Eighteen states—including Massachusetts, Connecticut, New Hampshire, New York, New Jersey, and Vermont—and the District of Columbia have enacted such protections in recent years.⁶⁸ And under federal law, employees have a patchwork of insufficient protections. Pursuant to Executive Order 13665 of 2014, federal contractors are prohibited from discriminating against employees and job applicants who inquire about, discuss, or disclose either their own or others' compensation – but that rule does not reach all private employers.⁶⁹ The National Labor Relations Act (NLRA) has been interpreted to protect workers' conversations about wages because they are necessary for collective bargaining or other mutual aid or protection; courts and the National Labor Relations Board have also found that pay secrecy rules can be unfair labor practices under the NLRA because they can inhibit protected labor practices.⁷⁰ But NLRA protections do not extend to supervisors, public sector employees, domestic and agricultural workers, and various employees of railways and airlines, and remedies for violations of employee rights under the NLRA are often not robust enough to act as a significant deterrent to employers.⁷¹ As a result, too many employers maintain punitive pay secrecy policies. The Paycheck Fairness Act would ensure that *all* workers enjoy robust protections for talking about their pay.

The significantly narrower gender wage gap for employees working in the public sector – where pay secrecy rules are uncommon and pay is often publicly disclosed – suggests the difference that transparency makes. According to the most recent data available, approximately 60 percent of employees in the private sector report that discussing their wages is either prohibited or discouraged, compared to 11-18 percent of public sector employees.⁷² In contrast to the overall gender wage gap of 20 percent, in the federal government, where pay rates and scales are more transparent and publicly available, the gender wage gap is 13 percent.⁷³

2. Collecting Pay Data to Help Identify and Address Pay Discrimination

Because pay is often cloaked in secrecy, women and people of color can be paid less for doing the same job for many years without knowing it. Receiving equal pay shouldn't have to depend on an anonymous note writer letting you know you are being underpaid. That is why we need strong federal enforcement of pay discrimination laws and why we need employers to look at their own pay practices and close any pay gaps that aren't justified by legitimate factors like differences in qualifications. The Paycheck Fairness Act would forward both goals by requiring employers to report pay data by race, ethnicity, and gender to the EEOC.

Reporting pay data to the EEOC by sex, race, and ethnicity helps ensure employer self-evaluation and correction. It ensures that employers are reviewing wage data by sex, race, and

ethnicity. The reporting requirement provides an opportunity and strong incentive for employers to proactively self-evaluate their pay practices and not only correct unjustified pay disparities, but prevent them from occurring in the first place. Reporting this data also will allow the EEOC to see which employers have racial or gender pay gaps that differ significantly from the pay patterns from other employers in their industry and region. By comparing wage data for firms employing workers in the same job categories, in the same industry, in the same location, in the same year, the EEOC will be able to tell which employers' pay practices may present problems and investigate pay discrimination more efficiently.

The Paycheck Fairness Act's requirement of pay data collection is especially critical because the Trump Administration has blocked the EEOC's efforts to collect this type of pay data on its own initiative. In 2016, the EEOC and OMB approved a requirement that companies with 100 or more employees confidentially report employee pay by job category, sex, race, and ethnicity as part of their annual Employer Information Report (EEO-1) to the EEOC.⁷⁴ The EEOC determined that collecting this pay data was necessary to enforce equal pay law, creating a crucial window into pay practices often shrouded in secrecy. The pay data collection was finalized after a multi-year process involving detailed analysis and revision and multiple opportunities for public notice and comment from stakeholders. But in August 2017, OMB issued a terse one and half page memo indefinitely staying the pay data collection, claiming that it "lacked practical utility" and was "unnecessarily burdensome" to businesses.⁷⁵ The Administration eliminated this essential data tool with virtually no explanation of its rationale. And unlike the EEOC, OMB's decision making transpired in secret, with no opportunity for public comment; rather, several corporate groups, including the U.S. Chamber of Commerce, repeatedly requested review and rescission of the pay data collection, while requests for meetings by equal pay advocates were ignored. The National Women's Law Center, in partnership with Democracy Forward and the Labor Council for Latin American Advancement, had challenged the legality of the stay,⁷⁶ but in the interim the Administration has made it easier to sweep pay discrimination under the rug.

B. Limiting Employers' Reliance on Salary History in the Hiring Process

Relying on a job applicant's salary history in the hiring and pay setting process is an irrational and unfair practice that hurts all working people, but has a disproportionately negative impact on women and people of color, who are typically paid lower wages than white, non-Hispanic men. It also penalizes individuals—predominately women—who reduced their hours in their prior job to care for children or family members, or who are returning to work after a spell out of the workforce for caregiving, or who moving from the nonprofit to the for-profit sector, and whose prior salary, consequently, may not reflect the market value of their qualifications. Setting pay for a new employee by reference to their salary history allows pay discrimination

and wage gaps to follow women, people of color, and others from job to job, hurting working people, their families, and the economy.

The Paycheck Fairness Act prohibits an employer from screening applicants based on their wage history: an employer would no longer be permitted to conclude that certain applicants made too little in their previous job to be considered as candidates for a position. An employer would not be permitted to rely on wage history to determine compensation for a new employee unless the candidate voluntarily offers his or her wage history after an offer of employment and an offer of compensation has been made. In other words, an employee would still be allowed to negotiate a higher offer by reference to salary history, but an employer could not require such information be provided. In addition, the prospective employer would be permitted to verify wage history with a current or former employer only if the prospective employee had volunteered that wage history in order to negotiate for a higher wage.

Ending reliance on salary history—a practice that unjustifiably perpetuates gender and racial wage gaps within a workplace—will help employers decrease their exposure to costly pay discrimination litigation.⁷⁷ It will also help businesses attract and retain diverse and qualified talent who are unjustifiably screened out because their prior salary is too high or too low or they are driven away by this intrusive and unfair practice.⁷⁸ As a human resources professional recently stated, the practice of seeking salary history from job applicants is “intrusive and heavy-handed . . . It’s a Worst Practice . . . It hurts an employer’s brand and drives the best candidates away.”⁷⁹ A recent study demonstrated that employers are limiting their talent pools when they rely on salary history. When salary history information was taken out of the equation, the employers studied ended up widening the pool of workers under consideration and interviewing and ultimately hiring individuals who had made less money in the past.⁸⁰

Some businesses have announced they will abandon this practice. Small and large businesses throughout the country, including Amazon, American Express, Bank of America, Cisco Systems, Facebook, Google, GoDaddy, Progressive, Starbucks, and Wells Fargo, have announced that they are no longer asking applicants to provide their salary history, acknowledging that this practice perpetuates wage gaps, and that employees should be paid based on their experience, skills, track record, and the responsibilities they will be assuming, not on what they happened to be paid in their past job.⁸¹

California, Connecticut, Delaware, Hawaii, Massachusetts, Oregon, Puerto Rico, and Vermont, as well as cities such as New York City and San Francisco have all enacted prohibitions on reliance on salary history in pay setting—in many instances with bipartisan and business support.⁸² The District of Columbia, New York, New Jersey, and the cities of Chicago, New Orleans, Pittsburgh, and Salt Lake City have prohibited the use of salary history by state or city

agencies.⁸³ Similarly, in 2015, the federal Office of Personnel Management (OPM) discouraged federal agencies from considering candidates' prior salary in setting their pay, explaining that "[r]eliance on existing salary to set pay could potentially adversely affect a candidate who is returning to the workplace after having taken extended time off from his or her career or for whom an existing rate of pay is not reflective of the candidate's current qualifications or existing labor market conditions."⁸⁴ Like these initiatives, the Paycheck Fairness Act would end the inequities perpetuated by pay setting based on salary history.

C. Eliminating a Loophole In the "Factor Other Than Sex" Affirmative Defense That Perpetuates Pay Disparities

In cases brought under the Equal Pay Act, a plaintiff has the substantial initial burden of establishing that she is being paid less than a male employee for performing substantially equal work, requiring equal skill, effort and responsibility under similar working conditions. If she makes this showing, an employer still may avoid liability for pay discrimination by proving that a wage disparity is justified by one of four affirmative defenses, including that the employer set wages based on a "factor other than sex."

Some courts have adopted interpretations of this affirmative defense that create a large loophole in the guarantee of equal pay for women. For instance, some courts have interpreted this affirmative defense so broadly that factors such as a male worker's stronger salary negotiation skills or higher previous salary qualify, even if these factors themselves may be "based on sex."⁸⁵ In addition, some courts have accepted the argument that employers can rely on vague, ill-defined "market forces" excuses to justify pay discrimination between men and women doing equal work.⁸⁶ Relying on "market forces" or market value alone as a justification for offering a male employee a higher salary than a similarly situated female employee to prevent him from leaving, or to recruit him from another employer, is the type of compensation practice that invites stereotyping and faulty assumptions about women's competence and value. In contrast, other courts have scrutinized employers' proffered justifications for sex-based wage disparities, and have recognized that the Equal Pay Act requires that any "factor other than sex" that justifies paying a woman less than a man for the same work must be closely tied to an employer's business needs.⁸⁷

The Paycheck Fairness Act would resolve the uncertainty in the law and ensure that employers would no longer be able to justify paying women less for the same work as men based on faulty and invalid justifications that are not related to the job or any business necessity. The Paycheck Fairness Act closes the "factor other than sex" loophole by adding a requirement that the factor proffered by the employer be "bona fide," ensuring that the

factor actually is neutral and unrelated to sex. It makes clear that the “factor other than sex” affirmative defense only excuses a pay differential when that factor is related to the position in question, forwards a business necessity, and accounts for the entire pay differential. In addition, the Paycheck Fairness Act would ensure that if an employee demonstrates that there is an alternative practice that would serve the employer’s same business purpose without producing the pay disparity, which the employer has refused to adopt, the employee can succeed in her Equal Pay Act claim. A growing chorus of states have taken similar steps to close the legal loopholes courts have created in this defense, including Maryland, New Jersey, New York, Washington, and California.⁸⁸

Through these robust protections, the Paycheck Fairness Act would help ensure that the Equal Pay Act’s promise of equal pay for equal work is not swallowed by a loophole that allows the wage gap to persist.

D. Modifying the “Establishment” Requirement to Strengthen Employees’ Ability to Prove Pay Discrimination

The Paycheck Fairness Act prevents an employer from paying a male employee more than a female employee who is doing the same job for the employer on the other side of town—because a few miles’ distance is no justification for pay discrimination. Currently, in order to succeed in an Equal Pay Act claim, not only must the employee show that the employer paid her less for performing substantially the same work as a male employee working in the “same establishment.”⁸⁹ The term “same establishment” is not defined, but courts have interpreted it to mean “a distinct physical place of business.”⁹⁰ This can be an obstacle for an employee who seeks to compare her job to a male employee who does the same work in a different physical location for the same employer in the same town. The Paycheck Fairness Act clarifies that comparisons may be made between employees in workplaces in the same county or similar political subdivision as well as between broader groups of workplaces in some commonsense circumstances.

E. Facilitating Class Action Equal Pay Act Claims

Class actions are important for ending workplace discrimination because they reduce the barriers to seeking justice and decrease the likelihood of disparate results. When workers can come together to challenge systemic discrimination, they are less likely to face retaliation, are better able to find legal representation and share information and resources, gain strength from each other’s experiences, and can obtain a uniform resolution that will benefit many workers.

But procedures for enforcing the Equal Pay Act make it difficult for plaintiffs to come together as a class to prove systemic wage discrimination. The Equal Pay Act, which was enacted prior to adoption of the current Federal Rule of Civil Procedure governing class actions, requires that all plaintiffs *opt in* to a suit.⁹¹ Unlike in other civil rights claims, in which class members are automatically considered part of the class until they choose to *opt out*, Equal Pay Act plaintiffs are subjected to a substantial burden that can dramatically reduce participation in wage discrimination cases. Some women may decline to opt into Equal Pay Act cases due to fear that the notice they must provide to their employer of an interest in participating in the case will subject them to retaliation. The Paycheck Fairness Act ensures that workers can come together to challenge an employer's company-wide pay discrimination in court in conformity with other civil rights laws. Under the Paycheck Fairness Act, class members are automatically considered part of the class until they choose to opt out, consistent with the Federal Rules of Civil Procedure.

F. Providing Strengthened Penalties That Deter Discrimination and Make Workers Whole

When a woman is paid less than a man for doing the same work, she is getting a second-class salary. We shouldn't add insult to injury by giving her a second-class remedy for discrimination, as the law does today. She deserves to be made whole.

Robust remedies for violating equal pay laws are also essential to incentivizing employers to lead the way in tackling the wage gap and to fully compensating victims of pay discrimination. Weak remedies for pay discrimination mean that employers that discriminate in pay can come out ahead by gambling that they won't get caught. And when paired with pay secrecy they likely will not get caught. Unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full compensatory and punitive damages pursuant to Section 1981, successful plaintiffs who challenge sex-based wage discrimination under the Equal Pay Act may receive only back pay and, in limited cases, an equal amount as liquidated damages.⁹² Even where liquidated damages are available, moreover – in cases in which the employer acted intentionally and not in good faith – the amounts available to compensate plaintiffs tend to be insubstantial. Furthermore, because plaintiffs with Equal Pay Act claims are not entitled to compensatory or punitive damages, they will not be made whole for out-of-pocket expenses caused by the discrimination — like a new job search or medical expenses — and for any emotional harm and pain and suffering caused by the discrimination, such as humiliation, anxiety, or depression.

Workers also may challenge sex-based pay discrimination under Title VII, which does provide for the recovery of compensatory and punitive damages. However, an individual's recovery of compensatory and punitive damages is capped under federal law depending on the size of the

employer. These caps were set in 1991 and have not been adjusted for inflation or any other reason in the last 25 years. For a plaintiff succeeding in a pay discrimination case against an employer with 15-100 employees, for example, damages are capped at \$50,000, regardless of the magnitude of harm experienced or the culpability of the employer. Even for employers with more than 500 employees, damages are capped at \$300,000.⁹³ This means that in the most egregious cases of sex-based pay discrimination, if a jury awarded a plaintiff millions of dollars in compensatory and punitive damages, the most she could recover from a large employer is \$300,000, which could be insufficient to compensate her for the injuries she suffered. It's what happened to Lilly Ledbetter – a jury found in her favor and awarded her back pay and approximately \$3.3 million in compensatory and punitive damages. However, due to the damages caps, her award was reduced to \$300,000. She subsequently lost that award when the Supreme Court adopted a restrictive interpretation of the statute of limitations that prevented recovery.

These limitations on remedies not only deprive women subjected to wage discrimination of full relief – they also substantially limit the deterrent effect of the Equal Pay Act. Limited remedies and damages caps mean that employers can refrain from addressing, or even examining, pay disparities in their workforces without fear of substantial penalties for this failure.⁹⁴ Arbitrary limits on damages also encourage employers to frame the discrimination faced by women of color as only sex-based, and therefore subject to limitations – ignoring the complex nature of the discrimination employees have suffered. These are all reasons why an increasing number of states have recognized the need for robust remedies and penalties for pay discrimination, including Utah, Illinois, and Oregon,⁹⁵ which have all taken steps to increase damages and penalties for equal pay violations in the last few years.

The Paycheck Fairness Act would ensure that victims of pay discrimination could be made whole and would make it less likely that employers would conclude that pay discrimination was worth the risk. It would make compensatory and punitive damages available under the Equal Pay Act, ensuring that those experiencing sex-based pay discrimination have access to the same remedies as those experiencing race-based pay discrimination.

V. THE PAYCHECK FAIRNESS ACT IS AN ESSENTIAL PART OF A BROADER POLICY AGENDA PROMOTING ECONOMIC SECURITY FOR WOMEN AND FAMILIES

The Paycheck Fairness Act is an essential tool to prevent, identify, and fight against pay discrimination. But it is only one piece of a broader policy agenda we need to help close the gender wage gap and advance equity, dignity, and safety for women and families.

Gendered and racist stereotypes and outdated workplace structures and policies, including low wages, lack of accommodations for pregnant workers, paid leave and predictable work schedules, access to affordable child care, and union support make it hard for women to get and keep good jobs, and advance and become leaders at work. This leaves women with less power in the workplace, increasing their vulnerability to discrimination and exploitation, including sexual harassment.

Sexual harassment widens the wage gap by negatively impacting women's wages and lifetime earnings. Sexual harassment can hurt employee health, productivity, and morale, and push women out of their jobs or lead them to leave an industry or profession altogether. Reporting harassment can lead to retaliation, such as demotion, denial of career advancement opportunities, and being labelled as a troublemaker or "difficult," all of which damage career prospects and advancement. And for male-dominated jobs, like those in construction or STEM fields, the pervasiveness of sexual harassment and sex discrimination keeps women from entering and staying in these jobs and earning the higher wages they offer, pushing them instead into lower-paying female-dominated jobs. All of this decreases women's earnings relative to those of men. The pervasive and insidious nature of workplace harassment highlighted by the MeToo movement demands comprehensive reform to strengthen and expand protections against workplace harassment,⁹⁶ including the EMPOWER Act⁹⁷ and more. Only then will we begin to redress the power imbalance that has allowed harassment to flourish.

Raising the minimum wage and eliminating the unjust two-tiered minimum wage system for tipped workers also will help boost pay for women, especially women of color. One factor driving the gender wage gap is women's overrepresentation in low-wage jobs: women are close to two-thirds of the workforce in jobs that pay the federal minimum wage or just a few dollars above it,⁹⁸ and make up more than two-thirds of workers in tipped jobs for whom the federal minimum cash wage is just \$2.13 per hour.⁹⁹ Women of color are particularly overrepresented in these jobs—and they would particularly benefit from the wage increase proposed by the Raise the Wage Act. Nearly 40 percent of Black and Latina working women across the country would get a raise under the bill, and in 30 states, more than half of Black and Latina working women would benefit.¹⁰⁰ With a \$15 minimum wage and one fair wage for tipped workers, millions more women would have paychecks they can count on, and tipped workers would be less vulnerable to sexual harassment from customers because they would not have to rely on tips for nearly all of their income.¹⁰¹

The fact that women still shoulder the majority of caregiving responsibilities also impacts the gender wage gap. Outdated workplace structures and a lack of critical workplace supports for workers means that many women are losing wages because they are forced to cut back on their hours, take leave without pay, or leave their jobs altogether in order to maintain a healthy pregnancy or meet caregiving responsibilities.

Requiring that pregnant workers with a medical need have reasonable accommodations so they can keep working will help close the gender wage gap by making it less likely that pregnancy will mean a loss of income and a long spell of unemployment. Pregnant workers are still too often forced to choose between a paycheck and the health of their pregnancies, as employers continue to force pregnant workers off the job rather than providing modest accommodations.¹⁰² The Pregnant Workers Fairness Act would ensure pregnant workers have access to accommodations at work when they need them, such as the opportunity to sit on a stool during a long shift or avoid heavy lifting for a few months.

Adopting nationwide paid family and medical leave and paid sick days will further help close the gender wage gap. Because there is no comprehensive nationwide paid family and medical leave program or guaranteed ability to earn paid sick days, women with caregiving responsibilities often lose wages because they are forced to cut their hours, take leave without pay, or leave their jobs altogether in order to care for themselves and their families.¹⁰³ New parents need paid family leave to care for their newborns or to recuperate themselves, and parents with young children need paid time off from work to take their children to doctor's appointments and to account for unanticipated illnesses in their families.¹⁰⁴ Caregivers need paid time off to take care of ill or injured family members, and everyone should have time to care for themselves when they face a serious illness.¹⁰⁵ Low-wage workers are not only least likely to have access to paid family or medical leave, but they are also least likely to be able to afford to take unpaid time off from work.¹⁰⁶ Adopting comprehensive nationwide paid family and medical leave proposed by the FAMILY Act and paid sick days proposed by the Healthy Families Act would make it easier for individuals to meet caregiving responsibilities without facing a pay penalty.

Providing workers with more predictability, stability, and voice in their work schedules could also help close the gender wage gap. Parents in the low-wage workforce, most of whom are women, often have unpredictable and unstable work schedules over which they have little control, which can wreak havoc on transportation and child care arrangements. Insufficient work hours, together with low wages, can also deprive parents of the income they

need to provide for their children. Legislation such as the Schedules That Work Act would help workers meet their obligations on and off the job by granting a right to request work schedules that work for their lives and discouraging the last-minute schedule changes that are rampant in industries like retail and food service, in which women represent the majority of the workforce.¹⁰⁷

Providing access to affordable, high quality child care will help close the gender wage gap. Because women shoulder the majority of caregiving responsibilities, women are often pushed out of work or into lower-paying jobs to take care of their children, since they struggle to find high-quality, affordable child care that matches their work schedules or to even afford the cost of average-priced care, much less higher-quality—and typically higher-cost—care.¹⁰⁸ At the same time, our child care workforce, which is disproportionately women of color, typically earns just \$11.42 an hour,¹⁰⁹ often leaving them in poverty and unable to afford high-quality child care themselves. Legislation, such as the Child Care for Working Families Act, would help families with the cost of high-quality child care, and enable child care workers to earn a wage that would allow them to support themselves and their families.

Strengthening workplace protections for LGBTQ individuals would also affect the gender wage gap. According to the most recent analysis available, women in same-sex couples have a median personal income of \$38,000, compared to \$47,000 for men in same-sex couples and \$48,000 for men in different-sex couples.¹¹⁰ One study found that the average earnings of transgender women workers fall by nearly one-third after transition.¹¹¹ The Equality Act would strengthen critical federal civil rights laws to make clear that in prohibiting sex discrimination they protect individuals from discrimination based on sexual orientation and gender identity, while adding new protections against sex discrimination.¹¹²

Finally, union membership is critical for closing the gender wage gap. Less than 11 percent of the workforce belongs to a union, but those women who are members of unions experience greater wage equality. Female union members make 88 cents for every dollar paid to male union members, compared to female non-union members who make only 82 cents for every dollar paid to their male counterparts.¹¹³ Legislation to restore and strengthen workers' rights to come together to organize and collectively bargain – including workers who traditionally have been excluded from the protection of workplace laws, such as domestic workers, who are predominantly women of color -- is critical for achieving equal pay for women.

* * *

Women in the U.S. are loudly demanding a change in the systems that have shortchanged us for far too long. The Paycheck Fairness Act is part of the response to our urgent call for a shift in the ways of doing business that have persistently devalued women's work. By updating our equal pay laws to reflect our world today, the Equal Pay Act will advance equity and dignity at work for all women.

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⁸ NWLC, REQUIRING TRANSPARENCY AROUND SALARY RANGES REDUCES THE GENDER WAGE GAP (Jun. 2018), <https://nwlc.org/resources/requiring-transparency-around-salary-ranges-reduces-the-gender-wage-gap/>.

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⁶⁴ As Justice Ginsburg has noted:

Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen

as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves. Pay disparities are thus significantly different from adverse actions “such as termination, failure to promote, ...or refusal to hire,” all involving fully communicated discrete acts, “easy to identify” as discriminatory.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J. dissenting).

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⁶⁷ See NWLC, THE LILLY LEDBETTER FAIR PAY ACT OF 2009: EMERGING ISSUES (Apr. 2011), https://www.nwlc.org/wp-content/uploads/2015/08/4.11.11_ledbetter_act_current_status_and_emerging_issues_1.pdf (collecting cases recognizing or restoring workers’ pay discrimination claims in instances in which the claims had not yet been filed, were pending, or were on appeal at the time of the Ledbetter Act). See e.g., *Mikula v Allegheny Cty.*, 583 F.3d 181, 186 (3d Cir. 2009) (reversing grant of summary judgment to employer on plaintiff’s Title VII sex discrimination claim for failure to respond to request for pay increase, because post-Ledbetter Act each discriminatory paycheck renewed the time for filing a pay discrimination claim); *Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564 (S.D. Miss. 2009) (denying employer’s motion for summary judgment on professor’s Title VII claim alleging sex discrimination, brought two years after denial of tenure and corresponding pay increase, because denial of tenure constituted discriminatory “other practice” within meaning of the Ledbetter Act).

⁶⁸ PROGRESS IN THE STATES, *supra* note 5. Research indicates that some workers fared better in states that passed such laws. See Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, INDUSTRIAL RELATIONS (Oct. 2015) (finding that “women with higher education levels who live in states that have outlawed pay secrecy have higher earnings, and that the wage gap is consequently reduced”), https://www.researchgate.net/publication/281769563_Pay_Secrecy_and_the_Gender_Wage_Gap_in_the_United_States.

⁶⁹ DEP’T OF LABOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions*, 80 Fed. Reg. 54934 (Sept. 11, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-09-11/pdf/2015-22547.pdf>.

⁷⁰ NWLC, COMBATING PUNITIVE PAY SECRECY POLICIES (Apr. 2011), https://www.nwlc.org/sites/default/files/pdfs/4.11.11_pay_secrecy_fact_sheet.pdf.

⁷¹ *Id.*

⁷² *Id.* Sixty-two percent of women and 60 percent of men working for private employers report that wage and salary information is secret, while 11 percent of men in the public sector and 18 percent of women in the public sector report that wage discussion is discouraged or prohibited.

⁷³ U.S. OFFICE OF PERSONNEL MGMT, GOVERNMENTWIDE STRATEGY ON ADVANCING PAY EQUALITY IN THE FEDERAL GOVERNMENT (Apr. 2014), <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/reports/governmentwide-strategy-on-advancing-pay-equality-in-the-federal-government.pdf> (gender wage gap was 13 percent for all “white collar” workers (all pay plans) and 11 percent for workers on the GS scale only).

⁷⁴ U.S. OFFICE OF MGMT AND BUDGET, NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION (Sept. 29, 2016), <https://www.reginfo.gov/public/do/DownloadNOA?requestID=275763>.

⁷⁵ U.S. OFFICE OF MGMT AND BUDGET, EEO-1 FORM, REVIEW AND STAY MEMORANDUM (Aug. 29, 2017), https://www.reginfo.gov/public/isp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

⁷⁶ See NWLC *et al.*, v. *Office of Mgm’t and Budget, et al.*, No. 1:17-cv-02458-TSC (D.D.C.), *complaint available at* <https://nwlc.org/resources/nwlc-sues-to-stop-illegal-trump-administration-rollback-of-equal-pay-rule/>.

⁷⁷ See, e.g. *Beck v. Boeing*, 203 F.R.D 459 (W.D. Wash. 2000) (\$72.5 million dollar settlement in class action suit alleging pay discrimination based on Boeing setting salaries of new hires based on past salary plus hiring bonus leading to significant gender pay disparities).

⁷⁸ Liz Ryan, *When Someone Demands Your Salary History, Give Your Salary Requirements Instead*, FORBES (Jan. 16, 2017), <https://www.forbes.com/sites/lizryan/2017/01/16/when-they-demand-your-salary-history-give-your-salary-requirement-instead/#afb43625a8bb>.

⁷⁹ *Id.*

⁸⁰ Moshe A. Barach & John J. Horton, *How do Employers Use Compensation History: Evidence From a Field Experiment*, CESifo, Working Paper No. 6559 (2017), <http://moshebarach.com/wp-content/uploads/2017/06/WageHistory.pdf>.

⁸¹ Madison Alder, *Amazon, BoFA Join Employers That Won't Ask for Pay History*, BLOOMBERG BNA (Jan. 30, 2018), <https://www.bna.com/amazon-bofa-join-n73014474798/>; Kate Tornone, *After helping overhaul GoDaddy's culture, its VP of inclusion sets out on her own*, HRDIVE (Nov. 16, 2017), <https://www.hrdiver.com/news/after-helping-overhaul-godaddys-culture-its-vp-of-inclusion-sets-out-on-h/510923/>; Courtney Connley, *Starbucks has closed its pay gap in the US—here are 4 other companies that have done the same*, CNBC (Mar. 23, 2018), <https://www.cnbc.com/2018/03/23/5-companies-that-have-reached-100-percent-pay-equity-in-the-u-s.html>.

⁸² See ASKING FOR SALARY HISTORY, *supra* note 4.

⁸³ NJ Exec. Order No. 1 (Jan. 16, 2018), <https://nj.gov/infobank/eo/056murphy/pdf/EO-1.pdf>; NY Exec. Order No. 161 (Jan. 9, 2017), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_161.pdf; New Orleans Exec. Order No. MJL 17-01 (Jan. 25, 2017), <https://www.nola.gov/mayor/news/archive/2017/20170125-pr-mayor-issues-executive-order-to-address/>; Pittsburgh Ordinance No. 2017-1121 (Jan. 30, 2017), <https://pittsburgh.legistar.com/LegislationDetail.aspx?ID=2931161&GUID=E45D1721-68E5-4BEC-9989-59C275B74AA7&FullText=1>; Salt Lake City Dep't of Human Resources Pol'y 3.01.10 (Mar. 1, 2018), <https://static1.squarespace.com/static/5682fba7bfe8733044495b6f/t/5a985d8908522926f70e05aa/151993485864/3.01.09+Gender+Pay+Equity+%28Final%29.pdf>; DC Dep't of Human Resources, District Personnel Instruction No. 11-92 (Nov. 17, 2017), https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_11B_92_salary_history_instruction.pdf; Chicago Exec. Order No. 2018-1 (Apr. 10, 2018), <http://www.chicityclerk.com/legislation-records/journals-and-reports/executive-orders>.

⁸⁴ Jul. 30, 2015 Letter from Beth F. Cobert, Acting Director, U.S. Office of Personnel Mgm't, CHCO Council (Jul. 30, 2015), <https://www.chcoc.gov/content/additional-guidance-advancing-pay-equality-federal-government>.

⁸⁵ See *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017) (holding that pay disparity between male and female employees based on their prior salary was justified by a “factor other than sex,” and following Seventh Circuit precedent “that a difference in pay based on the difference in what employees were previously paid is a legitimate ‘factor other than sex’”); *Muriel v. SCI Ariz. Funeral Servs., Inc.*, No. CV-14-0816, 2015 WL 6591778 (D. Ariz. Oct. 30, 2015) (holding that pay disparity between male and female employee was justified by “a factor other than sex” because male employee had a prior higher salary and negotiated his higher salary).

⁸⁶ See *Drury v. Waterfront Media, Inc.*, No. 05 Civ. 10646, 2007 WL 737486, at *4 (S.D.N.Y. Mar. 8, 2007) (accepting the employer's argument that higher pay for the male comparator was necessary to “lure him away from his prior employer”).

⁸⁷ See *Thibodeaux-Woody v. Houston Cmty. Coll.*, 593 F. App'x 280, 283 (5th Cir. 2014) (holding salary negotiation could not be a bona fide “factor other than sex” where female job applicant was not allowed to negotiate for higher salary and male applicant for same position was allowed to negotiate); *Dreves v. Hudson Group (HG) Retail, LLC*, No. 2:11-cv-4, 2013 WL 2634429 (D. Vt. Jun. 12, 2013) (rejecting employer's proffered justification for sex-based pay disparity and finding employer's argument that it had to pay male successor more to induce him to take the job and to relocate his family to a new city, and to satisfy his demands when he negotiated for more money than initially offered, was not related to the job itself or the general business of the company); *Sauceda v. Univ. of Texas at Brownsville*, 958 F.Supp.2d 761 (S.D. Tex. Jul. 26, 2013) (finding evidence regarding faculty salary levels -- such as the school's practice of paying less to non-tenure track professors -- could be inconsistent with the school's assertion that it paid more purely to attract professors with the necessary qualifications for accreditation, and that the University failed to show that the market for new faculty was not shaped by sex discrimination and stereotyping).

⁸⁸ H.B. 1003, 2016 Gen. Assemb. (Md. 2016) (amending Md. Lab. & Emp. Code §§ 3-301, 3-304, 3-306, 3-307 (2015)); S. 1, 2015 Gen. Assemb. (N.Y. 2015) (amending N.Y. Lab. Law §§ 194, 198 (Consol. 2015)); H.B. 1506, 65th Leg., Reg. Sess. (Wash. 2017) (amending Wash. Rev. Code § 49.12.175; adding a new chapter to Wash. Rev. Code, Tit. 49); S.B. 358, 2015 Reg. Sess. (Cal. 2015) (amending CAL. LAB. CODE § 1197.5 (West 2015)); S. 104, 218th Leg., Reg. Sess. (N.J. 2018) (amending N.J. Rev. Stat. § 34:11-56.1 et seq.).

⁸⁹ 29 U.S.C. § 206(d)(1).

⁹⁰ *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945); 29 C.F.R. § 1620.9(a).

⁹¹ 29 U.S.C. § 216(b).

⁹² 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33.

⁹³ 42 U.S.C. § 1981a(b)(3).

⁹⁴ See, e.g., Equal Employment Opportunity Commission, Press Release, *Royal Tire Will Pay \$182,500 for Wage Discrimination Against Female Executive* (Aug. 4, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/8-4-14.cfm>. In that case, the EEOC alleged the employer violated Title VII and the Equal Pay Act when it paid its female human resources director \$35,000 a year less than a male employee in the same position, and \$19,000 less than the minimum salary for the position under the employer's own compensation system. The employer failed to address the pay disparity even after the female employee complained and asked to be compensated fairly. The consent decree resolving the case required the employer to evaluate its pay structure to ensure compliance with the Equal Pay Act and Title VII, and correct any pay disparities by raising wages for the employees negatively affected.

⁹⁵ S.B. 185, 2016 Gen. Sess. (Utah 2016) (amending Utah Lab. Code Ch. 5 §§ 104, 107); H.B. 3619, 99th Gen. Assem. (Ill. 2015) (amending 820 ILL. COMP. STAT. ANN. 112 § (West 2015)); H.B. 2005, 2017 Reg. Sess. (Or. 2017) (amending Or. Rev. Stat. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885).

⁹⁶ See *A Call For Legislative Action To Eliminate Workplace Harassment* (Dec. 2018), <https://nwlc.org/resources/a-call-for-legislative-action-to-eliminate-workplace-harassment/>.

⁹⁷ Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting Act (EMPOWER Act), H.R. 3728, S. 2994 and 2988, 115th Congress (2018).

⁹⁸ Women are 62.8 percent of workers paid the federal minimum wage or less. NWLC calculations based on BUREAU OF LAB. STAT. (BLS), CHARACTERISTICS OF MINIMUM WAGE WORKERS, (Table 1)

(2017), <https://www.bls.gov/opub/reports/minimum-wage/2017/home.htm>. Women are 65.9 percent of the workforce in jobs with median wages of \$11.50 or less per hour. NWLC, WOMEN IN THE LOW-WAGE WORKFORCE BY STATE (Jul. 2018), <https://nwlc-ci49tixgw5ilbab.stackpathdns.com/wp-content/uploads/2018/06/women-in-low-wage-workforce-by-state-2018-2.pdf>.

⁹⁹ NWLC calculations based on U.S. Census Bureau, American Community Survey 2017 one-year estimates (ACS 2017) using IPUMS USA. Women make up 69.1 percent of tipped workers. Figures include employed workers only and use the same definition as the Economic Policy Institute (EPI) in its analysis of the beneficiaries of the Raise the Wage Act. See EPI, MINIMUM WAGE SIMULATION TECHNICAL METHODOLOGY (forthcoming Feb. 2019).

¹⁰⁰ See ECONOMIC POLICY INSTITUTE AND OXFAM AMERICA, TEN YEARS WITHOUT A RAISE: A SIMPLE INCREASE IN THE FEDERAL MINIMUM WAGE WOULD BENEFIT MILLIONS OF AMERICAN WORKERS (Feb. 2019), https://www.oxfamamerica.org/static/media/files/Raise_the_Wage-How_women_of_color_would_benefit.pdf.

¹⁰¹ See, e.g., Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html>; NWLC, OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN (Aug. 2018), <https://nwlc-ci49tixgw5ilbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>; RESTAURANT OPPORTUNITIES CTR. UNITED (ROC UNITED) & FORWARD TOGETHER, ET AL., THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (Oct. 2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.

¹⁰² NWLC, PREGNANT WORKERS FAIRNESS ACT: MAKING ROOM FOR PREGNANCY ON THE JOB (Oct. 2018), <https://nwlc.org/resources/pregnant-workers-fairness-act-making-room-pregnancy-job/>.

¹⁰³ See NWLC, THERE'S NOTHING EQUAL ABOUT #MOMSEQUALPAYDAY (May 23, 2017), <https://nwlc.org/blog/theres-nothing-equal-about-momsequalpay-day/>.

¹⁰⁴ See NWLC, STEPPING UP: NEW POLICIES AND STRATEGIES SUPPORTING PARENTS IN LOW-WAGE JOBS AND THEIR CHILDREN (Aug. 2018), <https://nwlc.org/resources/stepping-up-new-policies-and-strategies-supporting-parents-in-low-wage-jobs-and-their-children/>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ NWLC, FAIR WORK SCHEDULES ARE CRITICAL FOR WORKING PARENTS AND THEIR CHILDREN'S WELL-BEING (Sept. 2017), <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/New-Set-Up-For-Success-Why-Fair-Schedules-Are-Critical-for-Working-Parents-and-Their-Childrens-Well-Being-Sept.pdf>.

¹⁰⁸ See STEPPING UP: NEW POLICIES, *supra* note 104.

¹⁰⁹ U.S. DEP'T OF LABOR, BUREAU OF LAB. STAT., OCCUPATIONAL EMPLOYMENT STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2017, 39-9011 CHILDCARE WORKERS (Mar. 2018), <https://www.bls.gov/oes/2017/may/oes399011.htm>.

¹¹⁰ GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY 2005-2011 (Feb. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf>. Figures only include people in labor force. Due to data limitations, they do not include lesbian or gay individuals who are not part of a couple. These figures are median annual personal income for all workers in the labor force – these figures differ from the median annual earnings for full-time, year round workers reported for the wage gap and are not directly comparable.

¹¹¹ Kristen Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, THE B.E. J. OF ECONOMIC ANALYSIS & POLICY 1 (Sept. 2008), <http://www.degruyter.com/view/i/bejeap.2008.8.1/bejeap.2008.8.1.1862/bejeap.2008.8.1.1862.xml>.

¹¹² H. R. 2282, S. 1006, 115th Congress (2017); NWLC, THE EQUALITY ACT OF 2017: GROUNDBREAKING PROTECTIONS AGAINST SEX DISCRIMINATION (May 2017), <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/05/Equality-Act.pdf>.

¹¹³ See THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO, *supra* note 23.

Chairwoman BONAMICI. Thank you for your testimony. I now recognize Ms. Olson for your testimony.

**STATEMENT OF CAMILLE OLSON, PARTNER, SEYFARTH SHAW
LLP**

Ms. OLSON. Good morning Subcommittee members. As an employment attorney at Seyfarth Shaw, I work with companies nationwide analyzing compensation practices to ensure that pay differences between employees performing equal work are job related. I have also litigated nationwide numerous cases analyzing and alleging violations of Title VII, the Equal Pay Act, and State equal pay laws.

My written testimony describes opportunities to strengthen the Equal Pay Act. It also details a number of significant concerns that I have with H.R. 7. I would like to share three of those opportunities and those concerns with you today. H.R. 7 presumes that the reported wage gap and all employee current pay rates result from employer discrimination and rewrites existing legal requirements, remedies and class action procedures contained in the Equal Pay Act. Specifically, H.R. 7 effectively eliminates the factor other than sex defense, prohibits an employer from seeking or relying on an applicant's current pay when extending a job offer, and imposes unlimited compensatory and punitive damages while inserting a more attorney-friendly class action device among other amendments described in my written testimony. First, H.R. 7 de facto eliminates the factor other than sex defense. Under the Equal Pay Act, most courts currently require the employer prove that any pay difference is job-related. If the employer cannot do so, the plaintiff prevails. A plaintiff is not required to make any showing of discriminatory intent under the Equal Pay Act.

Under H.R. 7, an employer would be required to prove with respect to every pay differential between employees not only that the reason was job-related but also that it paid one employee more because it was a business necessity, that the business necessity necessarily covered 100 percent of the pay difference, and that business necessity was not derived by a sex-based differential in compensation.

And even if an employer does that, it still loses if years later a plaintiff's attorney identifies an alternative employment practice that would have served the same purpose without a wage difference.

But what if the alternative offered in litigation is less efficient, more costly, or an unproven alternative on a time-sensitive project that needs—needed immediate staffing? Is the employer's proven business necessity now rejected? Under H.R. 7, the answer is yes.

Similarly, H.R. 7 requires employers to ignore an employee's competitive job offer unless it can prove that the higher competitive wage offer is not the result of historical wage discrimination by the other employer. This is an impossible burden and it would require the employer to prove the other employers wage rate was not set discriminatorily.

Second, under H.R. 7, employers must ignore an applicant's current pay when making an offer. If it doesn't, it is a per se violation of Federal law. Few applicants leave their current job for a lesser

paying job and current pay provides valuable information regarding a candidate's actual experience, performance or expertise.

The EEOC's compensation manual describes justifiable reasons for considering an applicant's prior salary. H.R. 7 keeps both sides in the dark about the expectations that each party has regarding pay to—at the job at issue.

Third, H.R. 7's expansion of available damages and class actions under the Equal Pay Act is unwarranted. H.R. 7's unlimited compensatory and punitive damages far exceed remedies available under Title VII and are in addition to the significant penalties that already exist.

In addition, the changes to the class action methodology would significantly expand the class size because employees would be required to opt out of the—to opt in—to opt out of the class as opposed to opt in.

Despite these Stated concerns, there are opportunities to improve the Equal Pay Act. For example, adding language that expressly States that pay differences between workers performing the same work must be based on job-related measures providing employees with an express protection within the Equal Pay Act against retaliation and finally providing employers what incentives to engage in voluntary, self-critical compensation analyses that encourage self-evaluation to eliminate any unjustified pay discrepancies without the need for litigation.

In summary, H.R. 7 is based on false premises and is unworkable as a practical and legal matter.

Subcommittee members, thank you for the opportunity to share some of these concerns and opportunities with you today.

[The statement of Ms. Olson follows:]

STATEMENT

ON THE

**PAYCHECK FAIRNESS ACT (H.R. 7):
EQUAL PAY FOR EQUAL WORK**

**TO: THE HOUSE SUBCOMMITTEE ON CIVIL
RIGHTS AND HUMAN SERVICES**

**THE HOUSE SUBCOMMITTEE ON
WORKFORCE PROTECTIONS**

**BY: CAMILLE A. OLSON
SEYFARTH SHAW LLP**

DATE: FEBRUARY 13, 2019

TESTIMONY OF CAMILLE A. OLSON
BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES
AND
THE HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS
THE PAYCHECK FAIRNESS ACT: EQUAL PAY FOR EQUAL WORK
FEBRUARY 13, 2019

Good morning Education & Labor Committee Chair Scott and Ranking Member Foxx; Civil Rights and Human Services Subcommittee Chair Bonamici and Ranking Member Comer; Workforce Protections Subcommittee Chair Adams and Ranking Member Byrne; and members of the Subcommittees. Thank you for inviting me to testify on H.R. 7, the “Paycheck Fairness Act” (“PFA” or “H.R. 7”).¹

I am a partner with the law firm Seyfarth Shaw LLP,² where I chair the Labor and Employment Department’s Complex Discrimination Litigation Practice Group and am a core leader within the Firm’s Pay Equity Practice Group. I testify today as an attorney committed to ensuring that there are equal employment opportunities for all applicants and employees; and, specifically, that any differences in pay between employees performing equal work under similar working conditions be based on job-related factors.

I have represented companies nationwide in all areas of proactive workplace compliance and litigation matters involving the issues of legally compliant and appropriate compensation practices. I provide counsel to employers designing, reviewing, evaluating, and, as appropriate, taking remedial steps with respect to their pay practices, to ensure compliance with federal and local equal employment opportunity laws. My litigation practice has specialized in representing employers in individual, multi-plaintiff, and class action litigation in federal and state court involving claims of employment discrimination, including claims of pay discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, as amended by the Civil Rights Act of 1991, PL 102-166, 105 Stat. 1071 (“Title VII”) (*see* 41 U.S.C. Sections 12117(a), 1981a(2), the Equal Pay Act of 1964, 29 U.S.C. Section 206(d)(1) (“EPA”) and state equal pay laws.

I have also represented business and human resource organizations as *amicus curiae* in landmark employment cases, including *Dukes v. Wal-Mart*, and testified before the Equal

¹ I would like to acknowledge Seyfarth Shaw LLP attorneys Annette Tyman, Richard B. Lapp, Lawrence Z. Lorber, Randel K. Johnson, Matthew Gagnon, Christine F. Hendrickson, Michael L. Childers, Andrew Cockcroft, Hillary Massey, Rhandi C. Anderson and Amy L. Stoklasa, Seyfarth labor economist Dr. Christopher L. Haan, as well as Korin T. Isotalo and Peter Newman, for their invaluable assistance in the preparation of this testimony. Special thanks to Dr. Michael DuMond of Economists Inc. for his insights.

² Seyfarth Shaw LLP is a global law firm of over 900 attorneys specializing in providing strategic, practical legal counsel to companies of all sizes. Nationwide, over 400 Seyfarth attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.

Employment Opportunity Commission on issues involving non-discrimination in compensation. I also frequently speak and write on equal employment opportunity law topics.³

I. EMPLOYERS ARE DEDICATED TO ENSURING COMPLIANCE WITH THE EQUAL PAY ACT AND WHILE ADDITIONAL STEPS CAN BE TAKEN TO FURTHER ENHANCE COMPLIANCE, H.R. 7 IS UNWORKABLE FOR LEGAL AND PRACTICAL REASONS

Reflecting on my experience in counseling employers regarding compensation practices, at the highest levels of organizations, employers have a deep commitment to paying all employees based on bona fide, job-related factors. Many employers across the country are proactively evaluating and modifying their pay practices, policies, and procedures, through voluntary compensation reviews and implementing educational programs to ensure compliance with the law. In doing so, they are identifying, and if necessary, correcting unexplained pay differentials that are not a function of job related factors. Compensation is an evolving concept designed to keep the enterprise productive, successful and able to attract and retain competent employees.

The focus that employers have on creating and maintaining compensation systems that pay employees based on the work performed under similar conditions and job-related factors is not surprising. Key objectives of sound compensation systems include: (1) attracting qualified talent through competitive wages that recognize an applicant's potential based on past experiences, education and other job-related factors; (2) retaining and rewarding current employees for their contributions and dedicated service to the company; (3) driving motivation and performance to boost employee engagement; (4) enhancing job satisfaction, commitment and productivity; (5) optimizing company resources; and (6) compliance with applicable laws and collective bargaining agreements.

Employers seek predictability and clear guidance in applying legal standards to their employment policies and practices. Thus, adding the proposed language to the EPA that expressly states that an employer's differences in pay between workers performing the same work under similar work conditions must be based on job-related reasons would further this objective and the goals of the Equal Pay Act. Providing employees with an express protection within the Equal Pay Act against retaliation for engaging in reasonable discussions and gathering information regarding compensation for the purpose of determining whether an unlawful wage disparity exists promotes informed compensation discussions and is also consistent with existing protections in Title VII and other employment laws. The PFA could go even further, though, in promoting the policies underlying the EPA. For example, providing employers with incentives to engage in voluntary self-critical compensation analyses would be effective for encouraging self-evaluation and the implementation of concrete steps to eliminate unjustified pay discrepancies without the need for litigation.

However, H.R. 7 seeks to provide a rigid, one-size-fits-all solutions to one of the most complex issues facing U.S. employers. The American workforce is among the most varied workforces in the world. Because there is no one-size-fits-all workplace, there is no one-size-fits-all

³ I am a member of the Board of Directors of Inland Press Association and the University Club of Chicago Foundation, and Chairwoman of the Equal Employment Opportunity Subcommittee of the United States Chamber of Commerce's Labor and Employment Policy Committee. The views expressed in my written and verbal testimony are those personally held by me, and should not be attributed to Seyfarth Shaw LLP, or any other organization or private employer.

compensation program. Employers need flexibility in making key decisions about their businesses, including compensation decisions. With limited exception, existing workplace protection laws such as Title VII and the ADEA acknowledge this need and allow employers the latitude to make employment decisions that best fit the particular employer's workplace and prohibit the second guessing of these kinds of decisions.

Compensation is dynamic and complex; driven by job, business and local and national economic factors. Employers place different values on worker skills, experience, education, certifications and abilities.⁴ Employers have different components of compensation.⁵ These differences are, in fact, the core strength of the American economy, not a flaw. Employers and employees flourish because of the diversity of the American workplaces. H.R. 7, if passed in its current form, would not ensure greater equal pay compliance but would, instead, blunt the very diversity that is a core asset of the United States' economy.

For these reasons and others contained in my written testimony, I express my significant concerns with respect to certain components of H.R. 7. Chairman and other Members of the Committee, I thank you for the opportunity to share some of those concerns with you today.

In today's testimony I discuss the application and impact of H.R. 7 on the Equal Pay Act. If enacted, H.R. 7 would alter the Equal Pay Act significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise – namely, that throughout the United States of America, all wage disparities existing between men and women are necessarily the result of discrimination by employers and that employer and employee discussions regarding their wage expectations will perpetuate and lead to inherently discriminatory pay practices.⁶

⁴ CONTEMPORARY LABOR ECONOMICS, BY CAMPBELL R. MCCONNELL, STANLEY L. BRUE AND DAVID A. MACPHERSON, CHAPTER 4, "LABOR QUALITY: INVESTING IN HUMAN CAPITAL" (11th edition).

⁵ CONTEMPORARY LABOR ECONOMICS, BY CAMPBELL R. MCCONNELL, STANLEY L. BRUE AND DAVID A. MACPHERSON, CHAPTER 7, "ALTERNATIVE PAY SCHEMES AND LABOR EFFICIENCY" AND CHAPTER 8, "THE WAGE STRUCTURE" (11th edition).

⁶ Over the years, labor economists and scholars have observed that wage differences between men and women are attributable to a number of factors, including the identification of numerous business-related factors that are unrelated to any alleged employer discrimination. *See, e.g.*, BUREAU OF LABOR STATISTICS REPORT 1045, HIGHLIGHTS OF WOMEN'S EARNINGS (2013); JOINT ECON. COMM., INVEST IN WOMEN, INVEST IN AMERICA (2010); and AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN Commissioned by the U.S. Dep't of Labor, Office of Employment Standards Administration, and prepared in conjunction with CONSAD Research Corp. (2009) (when accounting for factors such as: occupation, human capital development, the quality and quantity of relevant work experience, industry, health insurance, fringe benefits, and overtime work, the 2009 Report found that the unexplained hourly wage differences were between 4.8 and 7.1 percent). Complex factors that have been identified in social science research to explain the differences in wage rates between men and women include the following, many of which are the function of employee choice: the availability of other non-economic benefits provided by the employer; an employees' pay history; the number of hours worked; an employee's willingness to work during certain shifts and in certain locations; certifications and training obtained by the employee; the amount and type of education achieved; the quality and quantity of prior experience; length of time in the workforce; length of service with the employer; time in a particular job; the frequency and duration of time spent outside the workforce; job performance; personal choices regarding other family or social obligations; occupational choice, self-selection for promotions and the attendant status and monetary awards; and other "human capital" factors. Indeed, the EPA already recognizes that there may be lawful pay differences between jobs which are caused by compensation systems that govern seniority, merit pay, and productivity and quality.

On the unsupported assertion that many pay disparities “can only be due to continued intentional discrimination or the lingering effects of past discrimination,” H.R. 7 would impose harsh penalties upon all employers, essentially eliminate the “factor other than sex” defense, restrict employer speech and make available a more attorney-friendly class action device. For example, revisions to the “factor other than sex” defense contained within H.R. 7 would render the defense a nullity, allowing judges and juries to second guess employers and the marketplace as to the relative worth of job qualifications in individual pay decisions. H.R. 7, in effect, will require employers to implement a civil service philosophy with respect to all pay decisions, eliminating individual pay advancements unless an employer can prove its pay raise was a business necessity. H.R. 7 contends that these changes are necessary to ensure equal pay for women.

While, as noted above, certain clarifications and incentives may be useful in enhancing compliance with the Equal Pay Act, in its current enforcement structure, the Equal Pay Act, along with Title VII, already provides robust protections and significant remedies to protect applicants and employees against gender-based pay discrimination.⁷ Plaintiffs are taking advantage of the multiple forms of redress available to remedy pay discrimination through both the filing of discrimination charges as well as federal and state court individual lawsuits and class actions.

The proposed changes to the EPA are also contrary to its most fundamental underpinnings: the requirement of *equal pay for equal work* balanced against the mandate that government not interfere with private companies’ valuation of a worker’s qualifications, the work performed, and more specifically, the setting of compensation. The proposed changes are also inappropriate given the EPA’s distinguishing features, relative to other anti-discrimination legislation. Perhaps the most notable difference is the lack of any requirement that a prevailing EPA plaintiff prove intentional employer discrimination. This feature separates the EPA from Title VII, as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.⁸ These statutes allow for the imposition of compensatory and punitive damages, but only upon a finding of intentional discrimination by the employer. In contrast, the EPA currently imposes liability on employers for unlimited compensatory damages without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency of proof in the EPA as rendering employers “strictly liable” for any pay disparity between women and men for substantially equal work, which is not the result of: a seniority system; a merit system; a system measuring quality or quantity of work; or any other factor other than sex. The irrelevancy of an employer’s intent is a defining feature of the EPA, and must be remembered as the significant amendments to the EPA suggested by H.R. 7 are debated. By effectively eliminating the “factor other than sex” defense, and replacing it with an unattainable standard of an affirmative employer showing that any individual wage difference is: (1) job-related and required by “business necessity” and (2) not “derived from a sex-based differential in compensation,” H.R. 7 imports a business necessity “plus” standard for an employer to defend every individual pay decision even where no evidence of intentional discrimination is required to be shown.⁹

⁷ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended by the Civil Rights Act of 1991, PL 102-166, 105 Stat. 1071. *See* 42 U.S.C. §§ 12117(a), 1981a(2) (“Title VII”).

⁸ 42 U.S.C. §§ 1981 and 1983, respectively.

⁹ Under H.R. 7, market forces would effectively be excluded from consideration when an employer sets an individual’s pay rates unless an employer is able to prove a negative – that the market rate used was not derived or

For these reasons, and all of the reasons set forth below, I urge the Committee to carefully reconsider certain concepts proposed by H.R. 7.

II. CERTAIN CONCEPTS IN H.R. 7 CREATE BURDENS ON EMPLOYERS THAT ARE UNTENABLE

The Equal Pay Act imposes strict liability on employers found to have violated the law. In other words, employees are not required to show that the employer intended to discriminate based on gender, only that the employer engaged in an impermissible disparate pay practice. Employees who prove a violation of the EPA are entitled to double damages, attorneys' fees and costs.

The EPA provides that no employer shall pay employees of one sex at a rate less than the rate at which the employer pays employees of the opposite sex for equal work, unless the difference in pay is the result of: a seniority system; a merit system; a system which measures earnings by quantity or quality of production; or "any factor other than sex."¹⁰ To meet her burden of proof under the EPA, an employee must demonstrate that: (1) different wages were paid to employees of the opposite sex; (2) the employees performed equal work requiring equal skill, effort, and responsibility; and (3) the employees shared similar working conditions.¹¹ If the employee makes that showing, the burden of persuasion then shifts to the employer, who can only avoid liability by proving that the wage differential is pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any factor other than sex.¹² Critically, there is no requirement under the EPA for a plaintiff to identify a specific employment policy that is being challenged, or to prove any discriminatory intent or animus on the part of the employer.¹³

H.R. 7 does not change the EPA's first three affirmative defenses. Pay differences based on seniority and merit pay systems or compensation based on productivity or quality of work are job-related and appropriate factors upon which to base differences in pay for employees performing equal work. However, it changes the "factor other than sex" defense by narrowly limiting its application to only those situations where an employer proves that the factor (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related and consistent with business necessity; and (3) accounts for the entire differential in compensation at issue." Finally, the proposed change would alter the burden-shifting mechanism of the EPA by requiring that "[s]uch defense shall

influenced by a sex-based differential in pay. Under H.R. 7, an employee's request for higher pay to match a competitor's offer could not be "matched" unless, first, the employer proved the competitor's offer was not influenced by a sex-based differential (practically, a very difficult burden) and second, the employee's increase was a business necessity (how does an employer prove that one employee's retention is a business necessity?). Imposing this significant additional burden on employers is also unnecessary. Under the EPA the catch all defense must be a factor *other than sex*. If the employer's asserted explanation for a pay disparity was actually sex-based, the defense would fail. See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (employer failed to carry its burden of proof on the factor other than sex defense where the evidence showed the employer paid males who worked the night shift more than females who worked the day shift, when the differential arose simply because men would not work at the low rates paid women inspectors, and reflected a job market in which Corning could pay women less than men for the same work).

¹⁰ 29 U.S.C. § 206(d).

¹¹ *Id.*; *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).

¹² 29 U.S.C. § 206(d)(1).

¹³ See *id.* (making clear only relevant inquiry is whether alleged disparity resulted from "any factor other than sex"); *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1310-11 (10th Cir. 2006).

not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.”

In so doing, H.R. 7 pushes the EPA to heights that would essentially obliterate the “factor other than sex” affirmative defense out of the statute. That is because employers would have to demonstrate that a pay difference is not only based on a job-related reason, but is also consistent with business necessity, not based on or derived on a “sex-based differential” and accounts for the entire wage differential. And these showings are required for a factor that is – by definition – *not* gender-based. Even if the employer is able to meet such a heightened standard, H.R. 7 would still permit an employee to prevail by pointing to an alternative practice that the employer did not adopt. The practical result is that employer burdens are so high, that any plaintiff bringing an EPA claim will prevail by simply showing a wage differential for employees doing the same work, unless the employer can demonstrate the differential was based on (1) a seniority system, (2) a merit system, or (3) a system which measures earnings by quantity or quality of production.

The “factor other than sex” affirmative defense forms the crux of the EPA.¹⁴ It provides that, where a wage differential exists, the employer has not engaged in sex discrimination under the EPA if the reason for the wage differential is a job-related factor other than sex.¹⁵ This affirmative defense properly enables employers to consider a wide range of permissible, i.e., non-discriminatory, bona fide, job-related factors in setting salaries. For example, employers may consider an applicant’s or employee’s education, experience, special skills, seniority, and expertise, as well as other external factors such as competitive bids and marketplace conditions, in setting salaries.

If enacted, H.R. 7’s proposed restrictions would upset the delicate balance that the drafters of the EPA sought to maintain between the goals of the EPA – requiring differences in pay amongst employees performing equal work be limited to bona fide, job-related factors – and the need to allow managers to exercise their own business judgment and discretion without undue and unnecessary interference by the courts.

A. The EPA’s “Factor Other Than Sex” Is a Business or Job-Related Factor, as Expressly Defined by Courts and Rules of Statutory Construction

While the text of the EPA does not use the words “business-related” or “job-related” it is already part of the EPA as construed by a majority of courts of appeal across the United States and the general rules of statutory construction. The so-called “catch-all” defense is not without existing limiting principles. Indeed, under ordinary rules of statutory interpretation the “factor other than sex” defense should be consistent with the first three specifically enumerated defenses (seniority, merit pay, and productivity).

¹⁴ 109 CONG. REC. 9198 (1963) (statement of Rep. Goodell, principal exponent of the EPA) (“We want the private enterprise system, employer and employees and a union . . . to have a maximum degree of discretion in working out the evaluation of the employee’s work and how much he should be paid for it. . . . Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction”).

¹⁵ See, e.g., *Fallon*, 882 F.2d at 1211-12 (7th Cir. 1989) (ruling that the district court prematurely rejected the State’s asserted affirmative defense that Veterans Service Officers’ requisite war-time veteran status was a factor other than sex justifying the pay differential).

As a rule of statutory construction, or interpretation, where a class of things is followed by general wording, the general wording is usually restricted to things of the same type as the listed items. This rule of statutory construction is sometimes referred to in Latin as *ejusdem generis* or “of the same kind.” As the Supreme Court stated in *Circuit City Stores Inc. v. Adams*, 532 U.S. 105 (2001), *ejusdem generis* is a situation in which “general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” Here, the Equal Pay Act requires that any differential in pay between individuals performing the same work must be proven by the employer to be the result of a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any factor other than sex. The language “or any factor other than sex” follows three job-related differentiators used by employers in compensation decisions. Under the doctrine of *ejusdem generis*, the general words are construed to include job-related differentiators in pay.

The majority of circuit courts of appeals have held that the “factor other than sex” defense must be business or job-related. The business or job-related factor other than sex test used by circuit courts includes the following:

The Second Circuit explains that, “. . . to successfully establish the ‘factor other than sex’ defense, an employer must also demonstrate that it had a **legitimate business reason** for implementing the gender-neutral factor that brought about the wage differential.”¹⁶

Applying the current EPA’s “factor other than sex” test, the Third Circuit explained: “the district court was correct to hold in this case that economic benefits to an employer can justify a wage differential”; because the differential was based on a **legitimate business reason**.¹⁷

The Sixth Circuit requires a “**legitimate business reason**” against which to measure the “factor other than sex” defense.¹⁸ Similarly, the Ninth Circuit defines the “factor other than sex” as follows: “An employer thus cannot use a factor which causes a wage differential between male and female employees absent an **acceptable business reason**.”¹⁹

The Eleventh Circuit Court of Appeals defines the “factor other than sex” in the EPA as including job-related factors such as the “unique characteristics of the same job; . . . an individual’s *experience*, training or ability; or . . . **circumstances connected with the business**.”²⁰

Given the above, to expressly provide that the factor other than sex in the EPA be job-related, would provide employers with specific guidance as to the application of the EPA’s legal standards to their employment policies and practices. Most importantly, inserting “job-related” into the “factor

¹⁶ *Belfi v. Prendergast*, 191 F.3d 129, 136 (2nd Cir. 1999).

¹⁷ *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 596 (3rd Cir. 1973).

¹⁸ *E.E.O.C. v. J.C. Penney Co., Inc.* 843 F.2d 249, 253 (6th Cir. 1988) (citations omitted).

¹⁹ *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876-77 (9th Cir. 1982) (“The Equal Pay Act entrusts employers, not judges, with making the often uncertain decisions of how to accomplish business objectives.”)

²⁰ *Steger v. General Electric Company*, 318 F.3d 1066, 1078 (11th Cir. 2003) (citations omitted).

other than sex” defense does not force the federal court system to function as a “super personnel department,” inquiring into the reasonableness of employers’ day-to-day compensation decisions.²¹

B. Requiring That the “Factor Other Than Sex” Defense Satisfy the Concept of Business Necessity Is Unworkable

Requiring that employers demonstrate a “factor other than sex” is also “consistent with business necessity” is an impossibly high standard.

If a “business necessity” requirement is imported into the EPA “factor other than sex” defense, then even if an employer proved an applicant’s job experience or education was the factor considered when paying a male applicant more than a female applicant, the employer would still face liability if it cannot prove that the reason for the pay differential (i.e., greater job experience or education) was a matter of “business necessity.” Job or business-related is fundamentally different from business necessity. Business or job-related requires that a nexus should be shown between a compensation decision and the job the employee is performing and its relationship to the business enterprise. Business necessity suggests that the very viability of the business is dependent upon the compensation decision. Requiring an employer to prove that a *wage differential* between two individuals is a business necessity is unworkable. It would require an employer to meet an impossible threshold – to prove that it is a *business necessity* for the employer to pay one person more than another based on innumerable intangible criteria such as relative levels of education, experience, or job performance. A few examples may be instructive for demonstrating the unworkable nature of H.R. 7’s business necessity requirement with respect to all factors employers use to differentiate pay amongst employees performing the same work. They are contained in Appendix 1.

Both practically and analytically, this “business necessity” showing cannot be done with respect to an individualized employee pay decision every time a pay decision is made (i.e., engage an expert to perform a study or otherwise prove it is a business necessity to pay Employee A X dollars more than Employee B because of Employee A’s greater experience or education, for example).

Put differently, applying H.R. 7’s “consistent with business necessity” test to the EPA would require employers to prove – as to each wage differential – the ultimate business goal achieved by the higher pay is significantly correlated with the job’s requirements and bears a demonstrable relationship to the successful performance of the job. This highly onerous standard would place an unrealistic burden on employers that would be virtually impossible to achieve.

C. Requiring That the “Factor Other than Sex” Defense Be the Least Impactful in Terms of Pay Disparities Is Unworkable

Under the proposed amendments to the EPA, even if an employer could demonstrate that the “factor other than sex” was bona fide, *and* job related, *and* consistent with business necessity, it

²¹ *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003) (court noted its function is not to sit as a “super personnel department” and that inquiring into the reasonableness of an employer’s decision would narrow the exception beyond the plain language of the statute). *Smith v. Leggett Wire Co.*, 220 F.3d 752, 763 (6th Cir. 2000) (“[I]t is inappropriate for the judiciary to substitute its judgment for that of management.”). See also *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir. 2006) (holding that courts do not “sit as super-personnel department with authority to review an employer’s business decision as to whether someone should be fired or disciplined because of a work-rule violation.”).

could still be held liable if the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing a wage differential. In other words, liability would still be imposed because the employer paid a male applicant a higher wage rate that was job-related, consistent with business necessity, and not the result of sex discrimination, because in retrospect, years later, a judge or jury determined it could have chosen an alternative employment practice. This just encourages after-the-fact second-guessing and creates uncertainty for employers.

Under H.R. 7, plaintiffs' lawyers will no doubt argue that employer liability attaches every time they second-guess an employer's employment practice by identifying another employment practice that doesn't produce the differential in pay between a male and female employee. This is true even where the employer shows that the factor other than sex justifying the differential in pay is education, training, or experience. H.R. 7 does not describe any examples of alternative employment practices that would suffice to defeat the employer's burden. If a plaintiff countered an employer's justification of education, training, or experience by suggesting that the employer had the financial ability to raise everyone's pay in the same job – is financial ability to raise another employee's wage rate an alternative employment practice that would defeat the employer's defense (in every case, so that the Equal Pay Act's "factor other than sex" defense is in fact a complete illusion)? In effect, H.R. 7 suggests that the universal alternative would be to "round up" any wage distinction. No answer is found in H.R. 7; yet, this one issue would lead to considerable uncertainty and litigation.

The proposed changes to the EPA would invite such disputes into courtrooms, forcing the judiciary to weigh the merits of countless economic judgments of employers. In this sense, the proposed changes represent an unprecedented intrusion of government into the independent business decisions of private enterprises.

D. Requiring Employers to Explain 100% of Any Differential Is Undefined and Unworkable

H.R. 7 requires employers to explain the "entire" pay differential between male and female employees. Such an exacting standard is unworkable. Advancing the obligation to employers to explain the "entire pay differential" assumes that compensation decisions are modeled after a civil service system whereby all jobs are compressed into distinct pay grades and each pay grade is compensated at the same wage rate.

Compensation decisions in the private sector are made based on a variety of factors that are not capable of an exact dollar-for-dollar comparison. Differences in experience, education and performance, among other job-related factors, matter significantly for purposes of setting compensation. How would an employer ever be able to explain that it credited an employee with X dollars for their 6.3 years of prior experience, and Y dollars because the candidate went to a top tier school verses Z dollars for a mid-tier school? It will be virtually impossible for employers to meet such a standard.

In analyzing compensation across organizations, employers with large workforces rely on statistical analyses to test whether pay is correlated with gender. A finding of 1.96 standard deviations (assuming a "normal distribution" manifested by the familiar bell curve graphic) indicates that a given pay difference would be expected to occur by chance 5% of the time if pay was set in a sex-neutral environment and if the regression model correctly incorporates all of the job-related

determinants of pay. Courts have approved this statistical standard in employment discrimination cases.²²

When statistical analyses show a pay difference of fewer than 1.96 standard deviations, then labor economists, statisticians and courts generally conclude that the statistical evidence do not give rise to an inference that a gender pay difference exists, even though the same analyses do not explain 100% of all pay differences between male and female employees.

Relying on statistical significance when measuring pay differences is critically important. That is, because a statistical analysis can never capture or precisely account for all of the factors that influence pay, the effect of a factor like gender on pay is necessarily measured by using a margin of error. For example, in political polling, a voter survey reveals 60% of voters are likely to vote for a candidate in the next election, usually accompanied by a phrase such as “plus or minus 3%.” What that means is that there is a 3% margin of error surrounding the estimate of 60% of voters choosing to vote for your re-election. More precisely, it is expected that somewhere between 57% and 63% of the voters will end up voting for the candidate—the 60% reported estimate is simply the middle of that range.

A statistical analysis of pay differences between male and females also includes a margin of error. For example, a statistical analysis could find that female employees at Company XYZ are paid 1% less than comparable male employees, but this difference is not statistically significant (e.g., -1.00 standard deviations). This means that the margin of error surrounding this pay discrepancy includes the possibility that female employees are actually paid more than comparable males: a 3% margin of error surrounding a pay difference of negative 1% means that the likely gender pay difference is somewhere between -4% and +2%.

To the extent the “entire differential” is interpreted to mean that 100% of the wage differences must be explained – i.e., that all employees performing equal work must be paid *exactly the same* regardless of the statistical significance of any differences across the group – that standard is untested and unworkable. State laws that have recently adopted similar “entire differential” language do not provide any guidance and will result in considerable litigation. For example, the California, Massachusetts, New Jersey and Oregon laws similarly require employers to explain the entire differential, but courts in those states have not yet interpreted those laws. While the Massachusetts Attorney General’s office has taken the position that “eliminating unlawful pay disparities means adjusting employees’ salaries or wages so that employees performing comparable work are paid equally,” the Guidance does not address whether statistical significance may be considered.

Requiring employers to explain *every cent* of difference among a group of employees performing the same work is unworkable because such differences could have occurred by legitimate factors. Indeed, multivariate regression models are specifically designed to determine if there is a pattern that suggests a discriminatory motive, (i.e., gender discrimination) is at play. The absence of

²² *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 424 (7th Cir. 2000) (noting that in employment discrimination cases, “[t]wo standard deviations is normally enough to show that it is extremely unlikely ... that [a] disparity is due to chance.”); *Cullen v. Indiana Univ. Bd. of Trustees*, 338 F.3d 693, 702 (7th Cir. 2003) (explaining in an Equal Pay case that “generally accepted principles of statistical modeling suggest that a figure less than two standard deviations is considered an acceptable deviation”).

a statistical finding suggests that differences are likely occurring by random chance and not as a pattern that is based on gender.

If enacted as proposed, employers would be forced to concoct a precise equation to determine pay, by assigning a base pay to each level in each job family and assigning a precise dollar amount to each year of experience, educational degree, and performance rating, along with every other factor used to determine pay. This would require a radical overhaul in approach and general compensation philosophies for most private employers across the country. For this reason, H.R. 7's requirement that employers explain 100% of any differential should be rejected.

III. OTHER PARTS OF H.R. 7 ARE UNWORKABLE

A. H.R. 7 Restricts Employers from Legitimate Speech That Is Essential to the Hiring Process

Information about an applicant's salary history has long been used by employers to make informed decisions about candidates during the hiring process. For instance, salary history information, in combination with other information provided by applicants, provides employers with a holistic view of the relative qualifications, experience levels, and performance of candidates. It is also useful for assessing real time information about the competitive market wage for a given job. It is also often a critical factor in an applicant's decision as to whether to apply for, interview for, and accept a new job. Few applicants voluntarily change employers for lower-paying positions.

Without any stated reason or justification, H.R. 7 would prohibit employers from seeking this vital information during the hiring process. It would also prohibit employers from relying on prior salary information, unless (1) it is provided voluntarily after an offer of employment that includes compensation is extended, and (2) it may be used for the sole purpose of supporting a wage that is higher than the wage offered by the employer. Such prohibitions raise serious concerns for the employer community and will hamper their ability to compete for talent in a competitive labor market.

1. H.R. 7's Ban on Seeking Prior Salary History Information Is Unconstitutional

H.R. 7 proposes to amend the EPA by severely limiting an employer's right to seek wage history information from a prospective employee. The proposal violates an employer's First Amendment right to engage in free speech without appropriate justification. A similar restriction on an employer's right to seek salary history information from applicants was recently deemed an unconstitutional restraint on free speech.²³ The Court's decision was based, in part, on the lack of evidence to conclude that a ban on seeking salary history information would do anything to "directly advance" the government's interest in reducing discriminatory wage disparities and promoting wage equity.²⁴

In reaching its conclusion, the Court analyzed the expert testimony produced in support of the salary history ban but found that it was "riddled with conclusory statements, amounting to

²³ *Chamber of Commerce For Greater Philadelphia v. City of Philadelphia et al.*, 319 F. Supp. 3d 773, 800 (E.D. Penn. April 30, 2018), *appealed*, 18-2175 (3d Cir. May 30, 2018).

²⁴ *Id.* at 798.

various tidbits and educated guesses” that were insufficient to support a restraint on speech.²⁵ Moreover, most of the evidence failed to address the possibility that alleged disparate wages “could also be based on factors having nothing to do with discrimination, such as qualifications, experience, or any number of other factors.”²⁶

The same principles apply here. While the government has a compelling interest in eliminating gender-based pay discrepancies that are in fact caused by discrimination, the prohibition on seeking wage history does not serve this interest.²⁷ H.R. 7 is devoid of any rationale to support a restriction on an employer’s constitutional right of free speech.

2. Employers Should Not Be Prohibited from Considering Prior Salary for Legitimate Job-Related Reasons

As the EEOC and courts have noted, prior salary information can be a legitimate factor other than sex. However, while the EEOC has noted that prior salary information “can” reflect sex-based compensation disparities, it has also noted that an employer could be justified in relying on prior salary information if it “accurately reflected the employee’s ability based on his or her job-related qualifications” or that it “considered the prior salary, but did not rely solely on it in setting the employee’s current salary.”²⁸ Other courts have reached similar conclusions.²⁹

Employers routinely rely on prior salary information for competitive purposes as a way to gather real time market data. It is also used to benchmark against the pay of current employees or to target offers to top performing employees at competitor firms. It can also be used as an indicator of a candidate’s experience, performance or level of expertise in an area.

Prohibiting employers from relying on prior salary information, even if it’s voluntarily provided, until after an offer that includes compensation information has been extended will invoke an unnatural cadence that does not reflect the realities of the workforce. Indeed, human resources representatives will be forced to issue “Miranda-type” warnings to applicants advising them that they cannot provide information regarding prior salary. And that even if they do, the employer must make a salary offer unrelated to their prior salary.

The only effect that the current proposal is guaranteed to have are steeper recruiting costs which will be borne by both employers and applicants. Employers, particularly small businesses that lack access to expensive third-party market data, and applicants will be forced to proceed through the hiring process without an understanding of whether an applicant’s pay is in line with what the employer is willing to pay. This disconnect would normally be addressed early on in the hiring

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802-04 (2011)(finding that a statute which was “wildly underinclusive” and “vastly overinclusive” does not meet the First Amendment’s requirement that statutes restricting speech be narrowly tailored).

²⁸ EEOC, Compliance Manual, No. 915.003 §10-IV.F.2.g (Dec. 2000).

²⁹ *Lauderdale v. Ill. Dep’t of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (citing *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005); *Dey v. Colt Constr. & Dev’t Co.*, 28 F.3d 1446 (7th Cir. 1994); *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987); *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987)).

process and would allow both the employer and the candidate to proceed if there is at least some mutual understanding of the salary range for the position.

In the United States, prices of goods and services are based on the fundamental economic principles of supply and demand. Highly competent, qualified and talented employees – whether male or female – are in greater demand, yet in smaller supply, which creates competition for their services. Employers should not be restricted from seeking and relying upon critical information that fosters competition under our free market system.

B. Prohibiting Retaliation Against Employees Who Request or Discuss Wage Data to Enforce the Non-Discrimination Provisions of the Equal Pay Act Is Important but Must Be Balanced Against Legitimate Privacy Interests

Section 3 of H.R. 7 creates new non-retaliation provisions which, while seemingly benign, are in fact overly broad and can have adverse consequences when one considers their application to common workplace situations. While everyone supports the concept of non-retaliation, certain unintended consequences need to be discussed. Moreover, this new language may not be necessary given the breadth and matrix of existing laws providing protections against retaliation, as discussed below.

Existing equal employment opportunity laws on the federal and state level prohibit employees from being retaliated against for asserting their rights to be free from discrimination in compensation. These protections include protection for discussions relating to compensation, including discussions and gathering information regarding compensation with management or coworkers for the purpose of determining whether an unlawful wage disparity exists. Title VII of the Civil Rights Act of 1964³⁰, the Age Discrimination in Employment Act³¹, Title V of the Americans with Disabilities Act³², Section 501 of the Rehabilitation Act³³, the Equal Pay Act³⁴, and Title II of

³⁰ Title VII states, “[n]o person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting.” 42 U.S.C. § 1997d

³¹ The Age Discrimination in Employment Act states, “[i]t shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.” 29 U.S.C. § 623(d).

³² The Americans with Disabilities Act states, “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.” 42 U.S.C. § 12203(a).

³³ §501 of the Rehabilitation Act states, “[t]he standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, 1 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.” 29 U.S.C. § 791(f); *Coons v. Sec’y of the Treasury*, 383 F.3d 879, 887 (9th Cir. 2004). (liability standards the same as those under the ADA)

³⁴ The Equal Pay Act states, “it shall be unlawful to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding

the Genetic Information Nondiscrimination Act³⁵ all currently prohibit retaliation and related conduct against an employee for engaging in protected activity by engaging in an equal employment opportunity process or reasonably opposing conduct made unlawful by an equal employment opportunity law.

Applicants and employees who assert these rights are engaged in what is called “protected activity” which can take many forms. Examples of protected activity described on the Equal Employment Opportunity Commission’s website³⁶ include protections against an applicant or employee being retaliated against for:

- Reasonably opposing conduct made unlawful by any EEO law (including the EPA);
- Raising an internal complaint of wage discrimination;
- Filing an EEOC charge or lawsuit (or serving as a witness, or participating in any other way in an equal employment opportunity matter) even if the underlying pay discrimination allegation is unsuccessful or untimely; and
- Filing a lawsuit alleging wage discrimination.

The EEOC has provided guidance that employers must not retaliate against an individual for “opposing” an employer’s perceived unlawful EEO practice, including unequal pay for equal work³⁷. Opposition is protected even if it is informal or does not include the words unequal pay or discrimination. Instead, the communication or activity is protected under federal equal employment opportunity laws as long as the circumstances show that the activity is in relation to perceived unlawful wage discrimination. For example, it is currently unlawful for an employer to retaliate against an applicant or employee for:

- Talking to coworkers to gather information or evidence in support of an employee’s claim of an unlawful compensation disparity;
- Threatening to complain about alleged wage discrimination against oneself or others;
- Providing information in an employer’s internal investigation of an alleged unlawful wage disparity; or

under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee[.]” 29 U.S.C. § 215(a)(3).

³⁵ The Genetic Information Nondiscrimination Act states, “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.” 42 U.S.C. § 2000ff-6(f).

³⁶ EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (Aug. 25, 2016), available at https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#A_Protected.

³⁷ *Id.*

- Complaining to management about sex-based compensation disparities.

Additional protections against retaliation for asserting rights to discuss wages with other employees can also be found in the National Labor Relations Act (“NLRA”).³⁸ The NLRA protects non-supervisory employees and applicants from employer retaliation when they discuss their wages or working conditions with their colleagues as part of a concerted activity, even if there is no union or other formal organization involved.³⁹

Under existing federal law, protections against retaliation apply to conduct that is conducted in a reasonable manner (for example, without threats of violence, or badgering a subordinate employee to give a witness statement) by those with a reasonable good faith belief that an unlawful wage disparity may exist (for example, that a woman is being paid less than a man who is performing equal work).

However, Section 3(b) of H.R. 7 would extend unprecedented anti-retaliation protections to employees who inquire about, discuss, or disclose the wages of themselves or others. This Section of H.R. 7 is written so broadly that employees would have the right to inquire about, discuss, or disclose wage information **without limitation**. Under Section 3(b)(1)(A) an employee who has served or is planning to serve on an “industry committee” also specifically enjoys this right to disclose the wages of other employees without limitation.

There is no consideration of the reasonableness of the employee’s actions with respect to their inquiries, discussions, or disclosures, nor is the permissibility of such action tethered to the alleged underlying pay disparity. Further, the proposed bill does not take into account or protect the privacy rights of other employees with respect to publicly disseminating information about their pay, nor does it contain a mechanism for balancing and protecting employers’ legitimate business concerns in maintaining confidentiality of certain compensation information.

Under H.R. 7, an employee who chooses to post on social media the wages of all other employees, by name, would be deemed to be engaging in protected activity, against which other employees and the employer would have no recourse. An employee whose compensation information is made public in this manner who felt their right to privacy had been violated would have no ability to stop this co-worker’s protected activity. The employer would also have no ability to object to such a broad disclosure of data, notwithstanding the potential proprietary nature of such information and the potential disadvantage that could result from a competitor’s possession of the identity and current compensation of its employees. H.R. 7 expands an employee’s right to inquire, discuss and disclose wages of other employees such that it trumps legitimate privacy and confidentiality rights of other employees and the employer.

H.R. 7 further extends employees’ rights to discuss their pay and that of others’ by failing to connect the protected activity of discussing pay information with a permissible purpose. The broadness of the proposal protects employees from retaliation for inquiring about, discussing, or sharing pay information regardless of whether they do so with the intent to identify or remedy an unlawful pay disparity that is attributable to sex. For example, as currently written, the bill would

³⁸ 29 U.S.C. § 158(a)(4).

³⁹ *N.L.R.B. v. Lloyd A. Fry Roofing Co. of Delaware*, 651 F.2d 442, 445 (6th Cir. 1981) (“Employees may engage in concerted activities protected by section 7 regardless of whether the employees are members of a union.”).

allow an employee who is angry at their manager to survey co-workers to obtain compensation information and publish it in a public forum – without any connection to a desire to remedy a discriminatory pay practice or other unlawful employment practice.

Finally, unlike existing federal law, H.R. 7 does not attach any standard of “reasonableness” to an employee’s activity to be deemed protected activity. An employer would have no remedy against an employee who undertook a mass mailing of pay information, or took out an ad in the local paper, for example, even though most would not consider such activity a reasonable disclosure of employer information – again, even if such activity were not in connection with a good faith concern of an unlawful pay disparity.

This language goes far beyond any rights enjoyed by non-unionized and unionized employees under other federal employment laws.⁴⁰

In contrast, here, H.R. 7 provides an open door for an employee’s inquiries and disclosures of the wages of all employees, both within and outside the company, without any balancing of the privacy rights of other employees, an employer’s need for confidentiality, and other legitimate concerns. As noted, current law establishes a broad protection to employees or applicants who inquire about general compensation practices or compensation for similar employees, but H.R. 7 stretches these protections unnecessarily to the potential detriment of employees and employers.

C. The PFA Inappropriately Expands EPA Remedies for Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

The EPA provides a mechanism under which aggrieved employees can seek damages and employers will be deterred from engaging in practices that perpetuate unequal pay for equal work. An employee adversely affected by a violation of the EPA is entitled to backpay for the wages not properly paid as well as an amount equal to such backpay as liquidated damages. An employer may avoid liability for liquidated damages under certain conditions where it shows its actions, or its failures to act, were in good faith, believing it was never in violation of the EPA. Reasonable attorney’s fees and costs may also be awarded. The EEOC can enforce the EPA on behalf of an employee or an employee can bring a private lawsuit in court with jury trials. The EEOC may request injunctive relief and an employer that willfully violates the EPA is subject to criminal prosecution and fines up to \$10,000. H.R. 7 would layer upon these provisions an award of unlimited compensatory and punitive damages. H.R. 7 would not require a showing of intent to support an award of unlimited compensatory damages. This expansion would be inappropriate and provide a level of damages far exceeding those available under Title VII of the 1964 Civil Rights Act as recently amended in 1991 by the Congress.

In passing the Civil Rights Act of 1991, Congress expanded the forms of relief available to an individual who is the victim of *intentional discrimination* under Title VII so as to include compensatory and punitive damages, capped at certain levels (depending on the size of the employer). Importantly, one of the key compromises which led to the 1991 CRA’s passage was to limit these damages to intentional cases of discrimination. (In disparate impact cases, where intent need not be shown, damages are limited to lost backpay.) And yet the Bill before you would provide

⁴⁰ For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but this right is not without boundaries and not without safeguards.

for unlimited compensatory damages without proof of intent. The required showing for proof of an EPA violation is lower than under Title VII, but the available damages are higher. What is more, H.R. 7 would also allow for uncapped punitive damages in addition to the EPA's existing double recovery of economic damages.

The current damage mechanisms under the EPA serve their intended purpose of eliminating wage disparities, making employees whole, compensating employees with an equal amount of special liquidated damages, and paying all attorneys' fees and costs. These remedies are appropriately proportional as a remedy for an employer's actions that produce unintentional, unlawful wage disparities. To upend this design through a contortionist's attempt to carry over parts of Title VII's remedial scheme in a selected manner, and expand damages under lower proof requirements is not appropriate.

D. The EPA's Collective Action Mechanism in Section 216(b) Should Not Be Amended to Incorporate Fed. R. Civ. P. 23

Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by individuals on behalf of themselves and others similarly situated under the collective action mechanism of Section 216(b) require interested parties to file with the court a consent that they wish to "opt-in" to the case before becoming part of the action. This is a mechanism that gives these individuals the choice of whether to become affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. The other benefit to Section 216(b) collective action plaintiffs in cases brought under the FLSA, ADEA, and EPA is that courts generally impose a more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees in order for their claim to survive the early phases of litigation. This standard is more stringent under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under Title VII, and under H.R. 7, would also apply to multi-plaintiff cases under the EPA. The proponents of H.R. 7 have not articulated a compelling reason for any change in the current collective action mechanism available to plaintiffs under the EPA.

Under Rule 23, to bring a class action a plaintiff must first meet all of the "strict requirements" of Rule 23(a) and at least one of the alternative requirements of Rule 23(b). Under Rule 23(a), a plaintiff must show: the class is too numerous to join all members; there exist common questions of law or fact; the claims or defenses of representative parties are typical of those of the class members; and the representative parties will fairly and adequately represent the class. Once these requirements are satisfied, a plaintiff must also satisfy one of the subsections of Rule 23(b). Rule 23(b) requires that a plaintiff show either: that prosecution of individual actions would result in inconsistent holdings or that adjudications would be dispositive of the interests of those not named in the lawsuit; that the party opposing the class has acted on grounds applicable to the entire class making relief appropriate for the class as a whole; or that questions of law or fact common to the members of the class predominate over questions affecting only the individual members of the class and that certification is superior to other available methods for fairness and efficiency purposes. When conducting the required analysis

under Rule 23, courts must perform a “rigorous analysis” of plaintiff’s ability to meet each of these enumerated requirements.⁴¹

Conversely, under Section 216(b), while some courts use the Rule 23 approach to the extent those elements do not conflict with Section 216 (such as numerosity, commonality, typicality and adequacy of representation), many courts use a less stringent standard, requiring plaintiff to show only that she is similarly situated to other employees.⁴² The similarly situated requirement is met through sufficiently pleading and offering evidence obtained in early phases of discovery that discrimination occurred to a group of employees. Courts generally apply a lenient standard to conditional certification of an EPA claim. A person is considered a member of a collective action under Section 216(b) and is bound by and will benefit from any court judgment upon merely filing a written consent with the court and affirmatively “opting into” the suit. This requirement was added to collective actions under Section 216(b) to ensure that a defendant would not be surprised by their testimony or evidence at trial.⁴³

Courts regularly face and grant requests to certify both Federal Rule of Civil Procedure 23(a) class actions alleging wage disparity based on sex as a form of sex discrimination under Title VII, as well as Rule 216(b) collective actions under the EPA.⁴⁴ When faced by facts presenting a close call as to whether a purported class of workers is similarly situated under the EPA’s Section 216(b) and Title VII’s Rule 23 mechanisms, and otherwise appropriate for mass action treatment, it is generally the EPA collective claim that survives opposition to a motion to certify a class alleging sex discrimination in pay.⁴⁵ The reason is clear – Section 216(b) contains a more lenient standard for a plaintiff who is attempting to bring a claim on behalf of herself and other similarly situated women for unequal pay. Specifically, it is viewed by many courts as encompassing a more liberal standard for conditional certification relative to Rule 23. For these reasons, this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by H.R. 7, as the current mechanism sufficiently balances the interests of employers and aggrieved employees, and the proponents of the bill have not sufficiently demonstrated a need for such a procedural overhaul.

⁴¹ *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

⁴² See *Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1217 (11th Cir. 2001) (at the notice stage, the court makes a decision using a fairly lenient standard that typically results in “conditional certification” of a collective or representative action); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Garza v. Chicago Transit Auth.*, No. 00 C 0438, 2001 U.S. Dist. LEXIS 6132, at *5 (N.D. Ill. 2001), citing *Woods v. New York Life Ins. Co.*, 686 F.2d 578 (7th Cir. 1982).

⁴³ Portal-to-Portal Pay Act, 29 U.S.C. §256(b); *Allen v. Atl. Richfield Co.*, 724 F.2d 1131, 1134 (5th Cir. 1984).

⁴⁴ See, e.g., *Jarvaise v. Rand Corp.*, No.96-2680 (RWR), 2002 U.S. Dist. LEXIS 6096, at *5 (D.C.C. Feb. 19, 2002) (class certification granted under EPA and Title VII to all female employees in exempt positions who did not make compensation decisions); *Garner v. G.D. Searle Pharm. & Co.*, 802 F. Supp. 418, 422-24 (M.D. Ala. 1991) (EPA collective action motion granted on behalf of female medical sales representatives).

⁴⁵ See, e.g., *Rochlin v. Cincinnati Insurance Co.*, No. IP 00-1898-C H/K, 2003 U.S. Dist. LEXIS 13759, at *49-51, 64 (S.D. Ind. July 8, 2003) (Rule 23 class certification of sex discrimination in pay claim denied, but § 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

E. Requiring the EEOC to Collect Disaggregated Pay Data from Employers Raises Significant Concerns

The unquenched interest of the government in collecting reams of data from the regulated community is an ongoing issue. Data collection is often viewed as a mere ministerial act by which employers can access an HR information system and automatically prepare reports containing the most intimate details of their employees. Such a mindset is reflected in Section 8 of H.R. 7 which would establish a significant new data collection obligation to be administered by the EEOC. This new requirement does not provide adequate protection for the privacy and confidentiality of employee personnel and compensation information.

H.R. 7's Section 8 proposes that the EEOC "issue regulations to provide for the collection from employers of compensation data and other-employment-related data (including hiring, termination and promotion data) disaggregated by the sex, race, and national origin of employees." This sweeping, new authority is based on an amendment to Title VII.⁴⁶ H.R. 7 has been premised on alleged weaknesses of the Equal Pay Act. The data to be collected under Section 8, however, has very little to do with the Equal Pay Act. Rather, it is a new provision designed to greatly enhance the data collection of the EEOC in support of its Title VII authority. The implications are substantial.

The core element of the Equal Pay Act is that where substantially similar jobs are compensated differently between sexes, the reason must be job-related. The requirements of Section 8 ignore this basic focus. Rather, by compelling employers to create new personnel data collection systems for information generally not relevant to the Equal Pay Act, H.R. 7 will impose new vastly expensive and intrusive obligations on employers unrelated to the Equal Pay Act's purposes.

The Equal Pay Act does not address race or national origin discrimination, nor does H.R. 7 as a whole. There are no findings supporting a broad new assertion of data collection authority relating to the race or national origin of employees. What's more, employers under Title VII have never been required to collect, let alone maintain or submit, data on the national origin of employees. H.R. 7 does not contain any reference to an empirical study to support the collection of such data or any official estimates of its costs. And, perhaps most importantly, there are no outer boundaries limiting the reach of this data collection requirement.

For these reasons Section 8 of H.R. 7 should not be inserted into the Equal Pay Act.

F. H.R. 7's Mandates Regarding OFCCP's Investigative Techniques and Methods Is Inappropriate

Statutes provide relatively broad policy goals and enforcement schemes in which the agencies with subject matter expertise are delegated the power to fill in the details, monitor compliance, investigate potential violations, and enforce H.R. 7.⁴⁷ Enforcement policies and

⁴⁶ The current survey tool used by the EEOC under Title VII, the EEO-1 report which collects only demographic employee workforce counts is limited to employers with 100 or more employees or government contractors with 50 or more employees. In contrast, the Equal Pay Act covers employers with 2 or more employees and business volume of \$500,000 or more. While this new data collection is technically authorized under Title VII, as part of the Paycheck Protection Act, it is not hard to envision an expansion to these smaller employers at some time in the future.

⁴⁷ Enforcement of the Equal Pay Act's mandate that any differences in pay between men and women performing equal work under similar working conditions, must be explained by job-related reasons such as a seniority system,

procedures are left to the responsible agencies who engage in rulemaking pursuant to the Administrative Procedures Act. Those requirements ensure the public has an opportunity to participate in a meaningful way in the rulemaking process.⁴⁸ In contrast, H.R. 7 rejects these fundamental principles and micromanages how the OFCCP should conduct its investigations and the procedures it and the regulated contractor community must follow.

Section 9(b)(2) of H.R. 7 mandates that the OFCCP follow the EEOC Compliance Manual with respect to defining “similarly situated employees,” even though the EEOC’s current Compliance Manual definition is not otherwise included in any statute, and it therefore seems inappropriate to be codified into law and prescribed for the OFCCP to follow. The EEOC Compliance Manual is not law, nor regulation, and can be changed at any time by the EEOC. The Supreme Court has repeatedly declined to give *Chevron* deference to EEOC Guidance.⁴⁹ H.R. 7 would effectively codify EEOC guidance that could be changed at any time at the EEOC’s discretion, without legislative, court, or public comment. This is inappropriate.

Also, in a change that would upend the OFCCP’s neutral selection system, H.R. 7 would also mandate a compensation data collection survey to be collected annually from at least half of all non-constructor *establishments* each year for purposes of developing a target list of companies to audit. Such a change implicates Fourth Amendment concerns that require either “evidence” of a violation or a neutral administrative plan to select contractors for audit.⁵⁰ To this end, the OFCCP already has in place a robust mechanism for selecting contractors for audit that comports with applicable Fourth Amendment Standards.⁵¹

Indeed, the collection of data on this scale would be a monumental burden on federal contractors with minimal benefit. In 2015, the OFCCP estimated that a proposed rule would impact over 500,000 federal contractors based on the number of contractor companies registered in the

merit system or a system which measures earnings by quantity or quality of work, was allocated to the Secretary of Labor and then - by Reorganization Plan 1 of 1978, to the EEOC. Similarly, Reorganization Plan 1 consolidated enforcement of the executive orders requiring affirmative action to the Department of Labor, but did not change any of the enforcement procedures of the OFCCP.

⁴⁸ United States Attorney General’s Manual on the Administrative Procedure Act, p. 1 (1947).

⁴⁹ See e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517, Slip. Op. at 21 (2013) (“Respondent and the Government also argue that applying the motivating-factor provision’s lessened causation standard to retaliation claims would be consistent with longstanding agency views, contained in a guidance manual published by the EEOC. It urges that those views are entitled to deference under this Court’s decision in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944) The weight of deference afforded to agency interpretations under *Skidmore* depends upon “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” 323 U. S., at 140; see *Vance*, post, at 9, n. 4. . . . [The explanations provided] lack the persuasive force that is a necessary precondition to deference under *Skidmore*.”); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S.Ct. 2162, 2177 n. 11 (2007), dissenting position adopted by legislative action on other grounds (“*Ledbetter* argues that the EEOC’s endorsement of her approach in its Compliance Manual and in administrative adjudications merits deference. But we have previously declined to extend *Chevron* deference to the Compliance Manual. *Morgan*, supra, at 111, n. 6, and similarly decline to defer to the EEOC’s adjudicatory positions.”).

⁵⁰ *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946); *Marshall v. Barlow’s Inc.*, 436 U.S. 307 (1978).

⁵¹“Contractors can expect OFCCP to use a neutral selection system to identify contractors for compliance evaluations that meets applicable Fourth Amendment standards. OFCCP’s neutral process for selecting contractors for compliance evaluations relies on multiple information sources and analytical procedures.”
https://www.dol.gov/ofccp/regs/compliance/posters/FS_WhatFedContractorsCanExpect-v2ESQA508c.pdf

System for Award Management (SAM).⁵² While H.R. 7 is limited to non-construction contractors (i.e., service and supply contractors), the report would be required from at least half of service and supply *establishments*, not just contractors. As a result, this number would apply to an exponentially greater number of federal contractors. However, in 2018, the OFCCP audited only 785 service and supply contractors and in 2017, they only audited 735 contractors.⁵³ Thus, to mandate a survey system that would create unduly burdensome requirements applicable to hundreds of thousands of employers, and to expect the agency to then scour the survey data as a method for identifying contractors for evaluation is simply nonsensical and a waste of government resources.

Moreover, there are no identified protections or standards for determining whether the burden of collecting and producing the requested data is appropriate in light of the utility of the data, and that employee privacy and employer confidentiality and trade secret considerations with respect to an employer's compensation data have been addressed before the data is collected. H.R. 7's recordkeeping obligations should not be considered without a thorough analysis of the Fourth Amendment implications, along with the benefit, burden and privacy considerations with respect to compilation and production of sensitive wage data.

G. H.R. 7's Definition of Establishment Is Overly Broad

Currently, the EPA requires that an employee compare their wages against other employees within the same physical place of business in which they work. According to the regulations issued by the EEOC interpreting the EPA, the term *establishment* "refers to a distinct physical place of business" within a company. "[E]ach physically separate place of business is ordinarily considered a separate establishment" under the EPA. The regulations contrast this with the entire business which "may include several separate places of business."⁵⁴ Courts presume that multiple offices are not a "single *establishment*" unless unusual circumstances are demonstrated.⁵⁵ H.R. 7 assumes the opposite, and the expansion of the definition of *establishment* will lead to inappropriate comparisons of employee pay.

H.R. 7 broadens the definition of *establishment* to include "workplaces located in the same county or similar political subdivision of a State." H.R. 7's proposed expansion of the definition of *establishment* within which to consider compensation decisions redefines and expands "equal work performed under similar working conditions" in a way that is inconsistent with rational business decisions. Shouldn't employees who experience a higher cost of living as well as higher commuting costs and longer commuting distances be paid more than other employees performing the same job? Under H.R. 7 an employee bringing an EPA claim could compare their pay to that earned by an employee who performs work outside their physical place of business, but at a completely separate place of business within the same county (or similar political subdivision). For example, H.R. 7 would allow a male employee working in an employer's office in Sauk Village, Illinois, a small

⁵² 80 Fed. Reg. 54933, at 54951 (September 11, 2015). While the OFCCP suggested the number could be overstated because of the monetary threshold of \$10,000 for OFCCP covered, they conceded the number might be understated because it may not capture all of the subcontractors over which the OFCCP also has jurisdiction.

⁵³ OFCCP By the Numbers, Supply and Service Compliance Evaluations Conducted, available at <https://www.dol.gov/ofccp/BTN/index.html>, last viewed Feb. 9, 2019.

⁵⁴ 29 C.F.R. §1620.9(a).

⁵⁵ *Chapman v. Fred's Stores of Tennessee*, No. 08-cv-01247, at 2013 W.L. 1767791, at *11 (finding relevant establishment was all stores in the nation because there was centralized control applicable to the one job at issue).

suburban village on the outskirts of Cook County, Illinois (with low commuting costs) to that of a female employee who performs the same work in a downtown Chicago, Illinois high rise office building (in a dense urban environment with high commuting costs). It would come as no surprise that an employer might pay the male employee working in Sauk Village with lower commuting costs less compensation for equal work performed by a female employee who experiences higher commuting costs to travel to her worksite each day in downtown Chicago, Illinois. Yet, H.R. 7 would compare their compensation without regard to this geographic difference that explains a difference in pay between the two employees.

H.R. 7's new definition of *establishment* is contrary to the EEOC's regulations that treat the definition of *establishment* as the specific circumstances of the work environment would dictate, including defining *establishment* as beyond one physical location in the presence of "unusual circumstances."⁵⁶ H.R. 7's expanded definition to include all physical locations within a county (or similar political subdivision) as one *establishment* should be rejected because it operates on a faulty assumption that all physical locations within a county or political subdivision present similar working conditions for purposes of setting employee compensation. H.R. 7's assumption that all locations within a county should be aggregated as one *establishment* ignores the many geographically-based reasons locations within a county do not present similar working conditions as a result of different costs of living, average commuting distances, and commuting costs. The EEOC's regulations are consistent with the EPA's purpose of ensuring equal pay for equal work, under similar working conditions. Those regulations acknowledge that "unusual circumstances" may exist that require the application of *establishment* across more than one physical location.

IV. CONSIDER PROVIDING EMPLOYERS INCENTIVES TO PROACTIVELY EVALUATE THEIR PAY PRACTICES TO ENSURE COMPLIANCE WITH THE EQUAL PAY ACT

The most efficient and long lasting improvements in employment practices emanate from voluntary efforts by employers to critically review and implement improvements to those practices. Today, many employers improve their compensation practices through intense voluntary reviews of employee pay to ensure that differences amongst employees who perform the same work are accounted for by explanatory, job-related variables. And, if the differences cannot be explained by those variables, by revising their pay practices.

These compensation reviews are voluntarily undertaken by employers to ensure compliance with law and to ensure a sound compensation system. Proactive voluntary employer self-evaluations and related pay adjustments can ensure an employer's compliance with the EPA's mandate that differences in pay between employees performing equal work under similar working conditions are explained by job-related reasons, even though an undertaking of that analysis may require significant resources and third party expertise. Today, across the country, employers are motivated to undertake

⁵⁶ Courts interpreting this provision have held that such circumstances may be present when pay and promotion decisions across different locations are controlled from a centralized location. See, e.g., *Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 591-92 (11th Cir. 1994) ("A reasonable trier of fact could infer that because of centralized control and the functional interrelationship between plaintiff and the comparators . . . a single establishment exists for purposes of the EPA."); *Brennan v. Goose Creek Consol. Ind. Sch. Dist.*, 519 F.2d 53, 57-58 (5th Cir. 1975) (treating schools within the same school district as one establishment).

these reviews to ensure sound compensation systems that reward employees based on legitimate job-related reasons.

However, some employers hesitate to perform those reviews for fear that those self-critical analyses may increase their legal risk and exposure if they are subject to disclosure to plaintiffs' attorneys (who may use the information gathered in these self-audits out of context or in other misleading ways to support litigation against the employer), and are not treated as confidential privileged analyses. This disincentive to employer voluntary compensation reviews could be solved through enactment of a safe harbor encouraging employers to perform compensation audits, and protecting those employers who engage in voluntary audits that meet certain specific requirements from having those audits used against them in any future litigation.

Subcommittee members may wish to consider the positive impact of incentivizing employers to voluntarily perform self-evaluations of compensation practices by including safe harbors and limitations on their disclosure, admissibility, or use in future litigation and other proceedings. For example, employers would be even more likely to perform periodic compensation audits if the performance of such a self-evaluation provided the employer: (1) a safe harbor against disclosure of the results of the audit, and (2) other possible affirmative relief (such as the elimination of liquidated damages) where the employer conducts the self-evaluation in good faith to assess pay practices and discrepancies in pay between employees performing equal work, and takes prompt appropriate action to eliminate pay discrepancies that are not explained by job-related factors.⁵⁷

The Massachusetts Equal Pay Act, as amended, effective July 1, 2018, M.G.L. Ch. 149, § 105A, provides similar incentives to employers who perform self-evaluations; and it has, in fact, encouraged self-evaluations. The Massachusetts Attorney General has explained that self-evaluations should not be used to second guess employers, noting that whether an employer is eligible for either a safe haven or affirmative defense does not "turn on whether a court ultimately agrees with the employer's analysis of whether jobs are comparable or whether pay differentials are justified under the law, but rather turns on whether the self-evaluation was conducted in good faith and reasonable in detail and scope."⁵⁸ I urge Subcommittee members to consider including a similar safe haven for employers who engage in good faith self-evaluations of their pay practices under the Equal Pay Act and Title VII.⁵⁹

⁵⁷ Similarly, an employer's decision to implement only part of the recommendations of a voluntary audit should not be able to be used to demonstrate willful unlawful action.

⁵⁸ Office of the Attorney General, Overview and Frequently Asked Questions, at 17 (March 1, 2018).

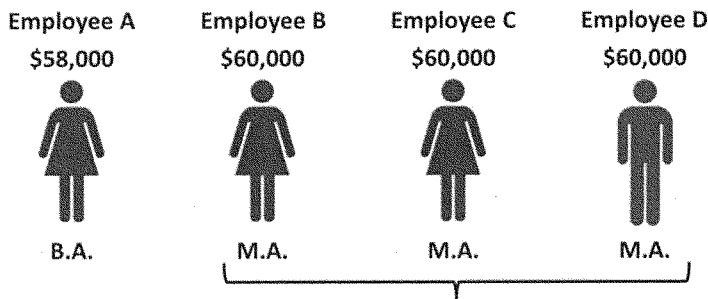
⁵⁹ Existing incentives to employers under Title VII have spurred the formulation of enhanced employer non-harassment and non-discrimination policies and practices. Under Title VII, an employer may avoid liability for harassment that does not involve an adverse employment action if the employer can demonstrate: (1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and (2) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures. *See, Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth* 524 U.S. 742 (1998). *See, also, Kolstad v. American Dental Association*, 527 U.S. 526 (1999) (employer may avoid liability for punitive damages if a discriminatory decision by a manager was made contrary to the employer's good faith efforts to comply with Title VII). After these cases were decided employers focused on the development and enhancement of policies and enhanced procedures to protect employees against workplace harassment and discrimination.

Conclusion

In conclusion, I have concerns with certain components of the Paycheck Fairness Act. Education & Labor Committee Chair Scott and Ranking Member Fox, members of the Civil Rights and Human Services Subcommittee and Subcommittee on Workforce Protections Subcommittee, thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me if I can be of further assistance in this matter.



APPENDIX I

Example 1: Minimum Requirements

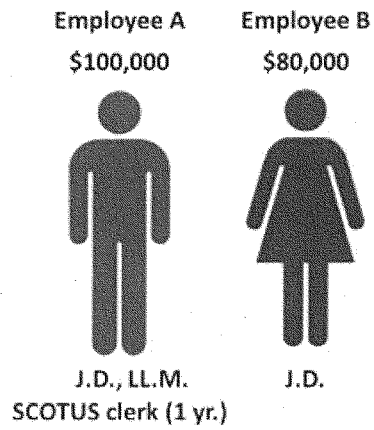


In this first example, an employer has chosen to pay higher salaries to all employees (men and women) who have higher educational qualifications for a marketing manager position; here a Master’s degree as opposed to a Bachelor’s degree. In this example, that job-related decision has an overall positive effect on female employees’ salaries. If a Bachelor’s degree is the minimum requirement for this position, then an employer may have a difficult time establishing that its decision to pay higher salaries for a more advanced degree is “consistent with business necessity.” And yet, individuals with higher level degrees will command higher compensation in the market and thus a higher salary may be necessary to employ the applicant (and their higher education qualification may provide enhanced contributions to the business). In this example, Employee A may have a claim under the PFA when she compares her salary to Employee D. This is true, even though Employees B and C, who are also females with Master’s degrees, are being paid the same salary as Employee D because a Master’s degree that is not a job requisite may not be viewed by some courts as a “business necessity”. Such a finding is a realistic outcome given that courts have found that an employee need only identify a single comparator of the opposite sex who is paid more for the same position.

Example 2: Additional Qualifications

Employee A	Employee B
\$65,000	\$70,000
	
M.A.	J.D.

In this example, an employer has chosen to pay a higher salary to a female Law Firm Office Administrator who has a J.D. degree. The job duties for that position do not include legal work. Nevertheless, in the employer's judgment, the performance of those job duties will be enhanced by the additional qualifications of a J.D., justifying the higher salary. But under a "business necessity" framework, that job-related reason may not qualify as a business necessity, as the job could be done without it. The employee may have a claim even if the advanced degree does actually improve performance or serve another legitimate business goal, where it was not absolutely "required" for the job.

Example 3: Additional Experience

In this third example, two second-year associates are paid differently based on their different levels of experience. A male associate who holds an LL.M. degree and was a Supreme Court clerk, is paid \$20,000 more than a female associate who holds only a J.D. degree. As with the other examples, the employer's judgment that Employee A's additional experience (and qualifications) improves job performance or serves another legitimate business goal (e.g., impressing prospective clients) may not qualify as a "business necessity" since, technically, both employees are performing equal work as second-year associates, but present job-related reasons for the difference in compensation between these two associates.

Chairwoman BONAMICI. Thank you for your testimony. I next recognize Ms. Rowe-Finkbeiner for your testimony.

STATEMENT OF KRISTIN ROWE-FINKBEINER, CEO/EXECUTIVE DIRECTOR, MOMS RISING

Ms. ROWE-FINKBEINER. Thank you Chairs Bonamici and Adams and thank you also—

Chairwoman BONAMICI. Please press your microphone button.

Ms. ROWE-FINKBEINER. Oops, sorry. Thank you to Chairs Bonamici and Adams and thank you also to Ranking Members Comer and Byrne for the opportunity to speak today. At Moms Rising, an organization with over a million members including members in every state in the Nation, we regularly hear from women who are experiencing unfair pay, who fear retaliation in the workplaces and therefore cannot speak up. And who need the protection the Paycheck Fairness Act would provide including freedom from retaliation, making it easier to come together to collectively challenge pay discrimination and end to the use of prior salary histories to set current salaries and the additional protections provided that would move us closer to pay parity.

Stories like this one from Laura. Laura and her husband met at Columbia University and graduated with the same degree. They both got jobs at the same agency in the exact same position. However, she was paid \$5,000 less than he was. When Laura asked the agency about the discrepancy, she was told to accept the pay or they would give the job to someone else. Laura is not alone.

More women are graduating from college than men right now but after only 1 year in the labor force, women are making less money. Unfair pay and the fear of losing wages you depend on in retaliation for speaking out is much too common. That is why not only directly prohibiting retaliation but also making it easier to come together to collectively challenge pay discrimination is vitally important.

Let me tell you too about Felicia. Felicia experienced blatant wage discrimination while working at a technical support center for a large retail corporation. Felicia was hired to work the exact same job as her brother in law and discovered she was being paid about \$4 less an hour to do the same work. She went on to find out that all the male employees were also making more in the same job and as it turned out, the women were making less.

Felicia is not alone either. And her experience demonstrates why preventing retaliation against employees who discuss their wages with other employees is critical. As well as why prior earning history should never be used to set current earning rates because that compounds unfair pay over time, takes money out of women pockets and out of our economy and significantly increases poverty.

But this isn't just about Laura or Felicia. This is about the women of America, our families, our economy and our children's future. It is time. Our country has changed but our public policies haven't kept up. Women became half of the paid labor force for the first time in the last decade. Three quarters of moms are now in the labor force, more than half of whom are the primary bread winner. Yet women are experiencing unfair pay every day with moms

and women of color experiencing the highest levels of wage and hiring discrimination.

Keep in mind, that a full 81 percent of women become mothers which means this double wage hit and sometimes triple wage hit if you're a mother of color, is impacting the vast majority of women in our Nation.

Take Valerie, a mom who discovered her male coworker who was hired on the same day with the same title was being paid substantially more even though she had more duties and responsibilities. Valerie went to the owner to request equal pay. She was told because her coworker was married and male he needed a higher income. Valerie pointed out that since he was married and had a wife also working outside the home he actually had two incomes while she only had one. Her boss was cordial but adamant. She had no choice but to live with it. The sad truth is that right now dads are getting wage boosts and moms are getting pay cuts.

The other sad truth is that being a mom is now a greater predictor of wage and hiring discrimination than being a woman. Our country which claims to love, adore, and respect motherhood pays women with children just 71 cents to every dollar it pays dads. And moms of color as well as single moms and moms in low wage work experience increased wage hits on top of that. Subconscious, negative assumptions are hurting women, children, businesses and our economy. This is an urgent matter.

Wage hiring and advancement discrimination is happening every day despite numerous studies showing businesses tend to make higher profits with women in leadership and that better decisions are made with diverse decisionmakers.

For instance, a study of all Fortune 500 companies found higher levels of women in leadership correlated with higher profits.

It's time to stop treating women unfairly in the United States of America. It's time for women to be able to join together, to be able to share information and to demand that current pay not be set by past pay without fear of retaliation. It's time to pass the Paycheck Fairness Act. Thank you.

[The statement of Ms. Rowe-Finkbeiner follows:]

Testimony of Kristin Rowe-Finkbeiner

**CEO/Executive Director and Co-Founder
MomsRising**

**House Committee on Education & Labor
Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce
Protections**

**Joint Subcommittee Hearing on the Paycheck Fairness Act (H.R. 7): Equal Pay for Equal
Work
February 13, 2019**

Thank you, Chairs Suzanne Bonamici and Alma Adams, thank you also ranking Members James Comer and Bradley Byrne, as well as members of the Committee, Subcommittee on Civil Rights and Human Services, and Subcommittee on Workforce Protections for the opportunity to speak and to submit testimony on H.R. 7, the Paycheck Fairness Act.

I'm Kristin Rowe-Finkbeiner, Executive Director/CEO of MomsRising, an organization with more than a million members, including members in every state in the nation, working to increase family economic security, decrease discrimination, and to build a nation where everyone can thrive.

At MomsRising we regularly hear from women experiencing unfair pay, who fear retaliation in their workplaces and therefore can't speak up, and who need the protections the Paycheck Fairness Act would provide, including: freedom from retaliation; making it easier to come together to collectively challenge pay discrimination; an end to the use of prior salary histories to set current salaries; and the additional protections that would finally move us closer to pay parity.

Stories like this one from Laura: Laura and her husband met at Columbia University and graduated with the same degree. They both got jobs at the same agency in the exact same position. However, they were dumbfounded by the difference in their salaries. She was paid \$5,000 less than he was. When Laura asked the agency about the discrepancy, she was given the runaround. She was told to accept the pay or they would give the job to someone else.

Laura's not alone. Unfair pay and the fear of losing the wages you depend on in retaliation for speaking out is real and much too common. That's why not only directly prohibiting retaliation but also advancing automatic inclusion in class action lawsuits is so important. To put it simply: There's strength in numbers and many women can't stand up and speak out if being the only one speaking out puts their own job at risk—but they can be part of a class action. For lower-wage women workers, automatic inclusion in class action lawsuits also is vitally important.

Put yourself in Laura's shoes: If your employer was paying you \$5,000 less a year because you're a woman, that's a \$50,000 loss over ten years. That's not all: You also lose retirement income and risk being overlooked for promotions you deserve; and if you file an individual lawsuit, you risk being fired or facing other retaliation, not to mention the added time and expenses that come with any lawsuit. So if the company is discriminating against many of its female employees, a class action becomes key to achieving fairness; and if companies are systemically paying women less, then there is a systemic problem, not an individual issue, that should be addressed as a class. That's why the ability to join together with automatic opt-in to class action without fear of retaliation is so important.

Let me tell you, too, about Felicia. She experienced blatant wage discrimination while working at a technical support center for a large retail corporation. She was hired to work the exact same job as her brother-in-law, and after talking to him she discovered that she was being paid about \$4 an hour less to do the exact same work. She went on to find out that all of the male employees, working the same job, with the same amount of experience, were making \$4 an hour more than she was. And, as it turns out, all the women were making a lower wage.

Felicia's not alone either; and her experience demonstrates why preventing retaliation against employees who discuss wages with other employees is critical, as well as why prior earning history should never be used to set current earning rates. Using prior wage history compounds unfair pay over time, takes money out of women's pockets and out of our economy, and increases poverty. To see the impact of compounded unfair pay, flip the frame to review what

having fair pay would do: If women received pay parity, it would cut poverty by more than half for women and families and add \$512.6 billion to our national economy.ⁱ

Having pay parity, studies also find, would also increase our gross domestic product by at least 3 percent.ⁱⁱ Why? When women don't have funds to spend in our consumer-fueled economy, businesses have fewer customers and there is lower economic activity across our nation. And the lower wages don't just reduce economic activity now. Reduced wages also reduce retirement savings, leading to poverty in women's sunset years.

But this isn't just about Laura or Felicia. It's about the women of America, our families, our economy, and our children's future. Every single story gives a glimpse of a real-life experience with unfair pay, but the patterns in the overall numbers show how universal the unfair pay experience is for the women in our nation, and how critically important it is to our economy and communities for Congress to pass the Paycheck Fairness Act right now.

It's time. Our country has changed, but our public policies haven't kept up. Women and moms are in the labor force to stay. Our families need our wages to make ends meet and to survive economically. In fact, women became half of the full-time labor force in our nation for the first time in the last decade,ⁱⁱⁱ and three-quarters of moms are now in the labor force, more than half of whom are the primary breadwinners for their families.^{iv} Yet women are experiencing unfair pay every day in our country, with moms and women of color experiencing the highest levels of wage and hiring discrimination.^v As this is happening, we can't ignore that 81% of women become mothers, which means this double wage hit – and sometimes triple wage hit if you're a mom of color -- is impacting the majority of women in our nation.^{vi}

Take Valerie, who discovered that the male co-worker who had been hired on the same day she was hired was being paid substantially more, even though they had the same job title and she had more duties and responsibilities. Valerie went directly to the owner to request an increase to match her co-worker's wage. She was told because her co-worker was married and male, he 'needed' a higher income than she did. Valerie pointed out that since he was married and his wife also worked outside the house, he actually had two incomes to cover his bills; while she was

single and struggling to keep her head above water. Her boss was cordial but adamant that that was his policy, and she had no choice but to live with it.

The sad truth is that right now, in the United States of America, dads get wage boosts and moms get pay cuts.^{vii} Being a mom is now a greater predictor of wage and hiring discrimination than being a woman.^{viii} Our country, which claims to love, adore, and respect motherhood, pays women with children just 71 cents to every dollar it pays to dads.^{ix}

To get a real picture of what's going on with moms in our nation, here are the specific numbers: Latina mothers are paid just 46 cents; Native mothers are paid 49 cents; Black mothers are paid 54 cents; white, non-Hispanic mothers are paid 69 cents; and Asian/Pacific Islander mothers are paid just 85 cents for every dollar paid to white, non-Hispanic fathers.^x

(Overall, the U.S. Census reported in 2017 that women, on average, earned just 80 cents to a man's dollar for all year-round full-time workers.^{xi} That being said, women of color, on average, experience significant increased wage hits:^{xii} Latina women earn only 53 cents; Native American women only 58 cents; Black women only 61 cents; and Asian women earn only 85 cents on average for every dollar earned by white, non-Hispanic men.^{xiii xiv})

What's happening with moms? One series of studies painted a stark picture of hiring, workplace, and wage discrimination: Moms were hired 80 percent less often than women with *equal* resumes who didn't have children; and when moms were hired, they were offered salaries \$11,000 lower on average than those offered to non-moms. On the other hand, dads with equal résumés were offered \$6,000 more than non-dads,^{xv} proving that the antiquated and false idea that only men need paychecks large enough to support their families persists, causing intense damage, and keeping many families poor and hungry. Studies have also shown that mothers are judged more harshly in the labor force, even when they have the same credentials as non-mothers.^{xvi}

Discrimination is at work when it comes to the motherhood pay penalty. Michelle J. Budig, writing in *Third Way*, reports that the motherhood penalty, "Cannot be explained by human

capital, family structure, family-friendly job characteristics, or differences among women that are stable over time...This motherhood penalty is larger among low-wage workers while the top 10% of female workers incur no motherhood wage penalty.^{xxvii}

Further, while moms overall are paid just 71 cents to every dollar that dads are paid, the discrimination in pay compounds for single moms and their children.^{xxviii} Paid just 55 cents for every dollar paid to all fathers,^{xxix} single mothers are among those who face the worst wage discrimination in our nation.^{xxx} This impacts a tremendous and growing number of women and children. A study from Johns Hopkins University found that 57 percent of babies born to millennials were not born within a marriage. Technically these are “single mothers” by many people’s definition, but that doesn’t mean there isn’t a partner present. These and other numbers demonstrate the extensive nature of deeply unfair pay gaps that women and moms are facing in our nation.

Unfair pay causes grave and lasting harm to those who are in low-income jobs in particular: Mothers in low-wage jobs are paid just 66 cents for every dollar paid to fathers in low-wage jobs;^{xxxi} and we can’t forget that 90 percent of women earn less than \$75,000 a year, and more than half of them earn less than \$30,000 a year.^{xxxii} Too many women and moms are working hard, being paid unfairly, surviving paycheck to paycheck, and falling into poverty as they struggle to raise families and open doors for their children to thrive.

To be clear: It is essential that we reach pay parity. As we reach toward this goal we must keep in mind that the wage gap is not the “fault” of women: Women are actually graduating from college in higher numbers than men.^{xxxiii} But after only one year in the workforce, young women are already being paid less than equally qualified young men in many occupations.^{xxxiv} This can’t be explained away by women’s job choices. Claudia Goldin, a labor economist at Harvard University, has found in studying age, race, work hours, and education that people working in the exact same sectors experience wage gaps. For instance, women doctors and surgeons earn 71 percent of men’s wages. Women financial specialists earn 66 percent of men’s wages.^{xxxv}

Unfair pay results largely from subconscious negative assumptions about women and work which add up to a massive amount of money lost for women and our economy over time. It also stems from the fact that our nation lags behind other industrialized nations when it comes to access to paid family and medical leave for people of all genders, access to affordable childcare and sick days, a living minimum wage that also covers tipped workers, and other economic security measures. Ultimately, one thing is clear: When this many women are facing the same barriers at the same time, we don't have an epidemic of personal failures, we have structural issues that we can and must solve together. One such solution is for Congress to pass the Paycheck Fairness Act as soon as possible.

Without this Act, too many women are struggling: Julia's employer used her salary history as an excuse to reduce her pay. Julie was offered a job at \$65,000 per year but when her offer letter arrived, she was offered just \$55,000. It was for the same job, but not at the same salary. Julia was told the reason was her salary history. She decided to take the job anyway. In time, she asked a male colleague about his salary and learned he was being paid \$62,000 for *the same* job. When Julia asked about the disparity, she was told her male colleague was fresh out of college and that's what they decided to start him at. So he benefited from having no experience and no salary history, while her seven years of relevant experience was used against her. Salaries at her next two jobs were premised on her salary there, so the harm compounded over time. She's lost tens of thousands of dollars to this discrimination, as have millions of other women in similar situations.

This is an urgent matter. Study after study has shown that wage, hiring, and advancement discrimination is happening against women like Laura, Felicia, Valerie, and Julia in real time right now,^{xxvi} even though studies also show the work contributions of women and moms aren't any less valuable than contributions from men and dads. Not even a little bit. In fact businesses tend to make *higher* profits with women in leadership and better decisions are made when there are diverse decision-makers. For instance, a 19-year study of all Fortune 500 companies by Pepperdine University found a direct correlation between high levels of women in leadership and higher profits—and that promoting women meant outperforming the competition.^{xxvii} But despite

those facts, women are still treated unfairly: Women – particularly women of color and moms -- are judged more harshly, paid unequally, and discriminated against in the labor force.

It's time to stop treating women unfairly. It's time for women to be able to join together, to be able to share information, and to demand that current pay not be set by past pay, without fear of retaliation. It's time to pass the Paycheck Fairness Act.

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- ^{vi} U.S. Census, Facts for Features, Special Edition, https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-fb08.html
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- ^{viii} The Motherhood Penalty in Cross-National Perspective: The Importance of Work-Family Policies and Cultural Attitudes Michelle J. Budig, Joya Misra and Irene Bückmann, University of Massachusetts-Amherst, <https://paa2012.princeton.edu/papers/120033>

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- ^{xii} National Partnership for Women and Families, America’s Women and the Wage Gap, April 2017, <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>.
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Chairwoman BONAMICI. Thank you for your testimony. I now recognize Ms. Yang for your testimony.

STATEMENT OF JENNY YANG, PARTNER, WORKING IDEAL

Ms. YANG. Members of the committee, thank you for the opportunity to testify today. For over 50 years, pay discrimination has been illegal but our existing laws have not lived up to their promise. The Paycheck Fairness Act provides a balanced, workable and much needed approach to better combat pay discrimination.

While my testimony today is informed by my experience at the EEOC and litigating cases on behalf of workers, it is also informed by my experience at Working Ideal where we advise employers on building inclusive workplaces, recruiting diverse talent and ensuring fair pay. And while I'm a Fellow with the Urban Institute, examining the changing workplace, my views here today are my own and should not be attributed to these organizations, their boards or funders.

To illustrate some of the challenges workers face under existing law, I would like to share one case that has stuck with me from my time at the EEOC. Margaret Thibodaux Woody was an adjunct professor who Houston Community College hired for one of two open faculty positions. The man hired for the second position had the same degree, from the same university and similar work experience.

Initially the college offered them both the same starting salary. When Margaret tried to negotiate she was told she could not. Yet the male candidate was permitted to negotiate a salary \$10,000 higher. When Margaret learned of this and approached human resources, she was told nothing could be done. Indeed, her supervisor urged her to rely on her husband's salary for additional income.

In addition, Margaret alleged she faced retaliation, receiving a lower performance evaluation and unfair discipline. The District Court dismissed her case and the EEOC filed a friend of the court brief in support of her appeal. Although the 5th Circuit rejected Margaret's retaliation claim, it reinstated her pay claim. This was 6 years after she began work at the college.

Unfortunately, experiences like Margaret's are all too common. Her fight for equal pay highlights three broad themes that underscore the need for the Paycheck Fairness Act.

First, the lack of clarity in existing law has created unjustifiable barrier for workers.

Second, a culture of pay secrecy hides the problem.

And third, employers need greater incentives to evaluate their pay practices.

First, courts have interpreted the Equal Pay Act in ways that have made it extraordinarily difficult for employees. The EPA provides employers with a defense where disparities are based on a factor other than sex. This has become an expansive catch all under which some courts have allowed employers to rely on arbitrary and often discriminatory considerations.

The Paycheck Fairness Act would make clear that an employer must rely on a reason that actually relates to the job as a business necessity. In addition, the Act would prohibit employees from relying on prior salary to set pay.

As we saw with Margaret's experience, if a new employer were to rely on her prior college salary which was \$10,000 less than a man performing the same job, that new employer would carry forward past discrimination. The Paycheck Fairness Act also takes an important step to clarify when workers can compare jobs within any establishment.

Some courts have interrupted this provision of the Equal Pay Act in a manner that is out of step with the realities of today's work place by limiting comparisons to a single brick and mortar facility. The Paycheck Fairness Act ensures that employees can challenge discrimination that extends to at least the county or similar subdivision when they perform equal work at different locations.

Second, the culture of secrecy has surrounded pay which has kept employees from learning about pay disparities. The Act addresses this in two ways. Although existing law provides limited protections for workers who discuss pay, the Paycheck Fairness Act would provide a coherent set of rules to protect employees from retaliation.

The Act also directs EEOC to collect pay from employers. During my tenure as chair, the agency moved forward to collect summary pay data, a vital tool to better identify discrimination and strengthen enforcement. The current administration abruptly halted this data collection. Reporting pay data provides a catalyst for employers to review their pay practices and make necessary corrections.

Finally, the Paycheck Fairness Act provides much needed incentives for compliance.

In closing, to ensure that the promise of equal pay becomes a reality, our laws must change. Thank you.

[The statement of Ms. Yang follows:]

Testimony of Jenny R. Yang

House Committee on Education and the Workforce

Subcommittee on Civil Rights and Human Services and
Subcommittee on Workforce Protections

Joint Subcommittee Hearing

Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work

February 13, 2019

Chair Bonamici, Chair Adams, Ranking Member Corner, Ranking Member Byrne, Chair Scott and Ranking Member Foxx, Members of the Committee: Thank you for this opportunity to submit testimony to the Committee and the Subcommittee on Civil Rights and Human Services and the Subcommittee on Workforce Protections.

For over 50 years, it has been illegal to discriminate based on pay. But, despite the passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, our existing laws have not lived up to their promise. We continue to face profound challenges as a society in addressing pay inequality, and it is vital that Congress act to provide stronger tools to combat pay discrimination.

I. Introduction

In providing this testimony, I draw upon my service as Chair of the U.S. Equal Employment Opportunity Commission (EEOC) from September 2014 to January 2017, and as a member of the Commission from 2013 to 2018. In addition, I am currently a Partner with Working Ideal, which advises employers on building inclusive workplaces, recruiting diverse talent, and ensuring fair pay. I am also a Fellow at the Urban Institute, where I am examining the impact of changing workplace structures on low wage workers.¹ Prior to my time at the Commission, I spent 15 years litigating equal pay and other discrimination cases on behalf of employees.

In light of the limitations in current laws, it is not surprising that gender-based pay disparities have persisted for decades, notwithstanding a growing national consensus that such conduct is wrong. Pay discrimination remains a persistent problem that spans industries and geographic locations. Research shows that even when we control for factors such as education, occupation, industry, and work experience, significant gaps in earnings remain by gender, race, and ethnicity that cannot be explained.² Pay discrimination has significant consequences for

¹ Although I have several affiliations in the work I do, today I am testifying on behalf of Working Ideal. The views here are my own and should not be attributed to any organization with which I am affiliated, their boards or funders.

² Francine D. Blau & Lawrence M. Kahn, The Gender Wage Gap: Extent, Trends and Explanations, National Bureau of Economic Research (Jan. 2016), <http://www.nber.org/papers/w21913.pdf>; National Women's Law Center,

America's families. Eliminating the pay gap would reduce the number of working poor, improve the financial security of many families, and strengthen the nation's economy.³

The problems with existing law can be categorized into three broad themes. First, courts have interpreted provisions of the Equal Pay Act in ways that are unjustifiable and that have made it extraordinarily difficult for employees to prevail. Second, a culture of secrecy has surrounded pay, which has kept employees from learning about pay disparities. And even when women learn of pay discrimination, they are often silenced by a fear of retaliation. Employees do not have a nationally consistent set of rules to protect discussions of pay. In addition, the EEOC, which is charged with interpreting and enforcing the Equal Pay Act, Title VII and other anti-discrimination statutes, has very limited information on employer pay practices, which undermines effective enforcement. Finally, under the Equal Pay Act, the remedies are inadequate to address the full range of harm suffered, and the opt-in enforcement mechanism provided by the statute ignores the realities of the modern workplace. As a result, insufficient incentives exist for employers to take meaningful action to identify and correct pay disparities.

While states and localities have stepped in to provide stronger pay equity protections, federal law lags behind. Several countries, including the United Kingdom, France, Germany, and Iceland, already have enacted laws aimed at reducing gender pay disparities by requiring employers to report pay information. The Paycheck Fairness Act would provide much needed tools to strengthen federal law by eliminating legal loopholes, fostering pay transparency, and promoting compliance.

During my tenure at the EEOC, combating pay discrimination was one of the agency's national strategic enforcement priorities, yet it was one of the most challenging areas in which make progress. Between 2010 and 2016, individuals filed with the EEOC tens of thousands of charges alleging pay discrimination,⁴ and the agency recovered over \$85 million in monetary relief for victims of sex-based pay discrimination. Yet, we know these resolutions are just the tip of the iceberg. More often, pay disparities remain hidden from view. People typically have no idea they are paid less than others doing the same job. Without this knowledge, they are unable to report these problems to the EEOC. Even when employees learn – often by chance – of a pay disparity, it can take a tremendous toll to have to come forward, face a real likelihood of retaliation, find and pay for a lawyer, and then endure years of litigation. This burden on

"Frequently Asked Questions about the Wage Gap," (Sept. 2018); <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/09/Wage-Gap-FAQ.pdf>.

³ National Partnership for Women & Families, "The Paycheck Fairness Act" (Jan. 2019), <http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/the-paycheck-fairness-act.pdf>.

⁴ Claims of sex-based pay discrimination can be made under the Equal Pay Act and Title VII. Under Title VII, an individual filing a charge of discrimination must first file a charge of discrimination with the EEOC. By contrast, an individual alleging a violation of the Equal Pay Act may go directly to court and is not required to file an EEOC charge beforehand. Thus, the EEOC sees only a subset of Equal Pay Act claims, because some individuals take their claims directly to court. See Equal Employment Opportunity Commission, "Equal Pay/Compensation Discrimination," <https://www.eeoc.gov/laws/types/equalcompensation.cfm>.

victims, combined with a lack of sufficient remedies, leads to significant underreporting of the problem.

Across workplaces nationwide, the EEOC sees pay discrimination and retaliation against those who oppose unfair pay practices. In one such case, a female worker at a food distribution facility learned that a newly hired male colleague, with far less experience and skill, was given a higher salary.⁵ The EEOC alleged that the employer fired her when it learned that she planned to file a charge of pay discrimination. In another case, the EEOC obtained relief for a female human resources executive who was paid \$35,000 less per year than her male predecessor, and \$19,000 less than the minimum salary for the position under the employer's own compensation system.⁶ These cases tell a common story, which affects far too many Americans.

The Paycheck Fairness Act would remedy many of the problems in existing law by closing judicially-created loopholes, creating clear and consistent anti-retaliation protections for discussion of pay, and putting the onus where it should be -- on employers to take action to prevent, identify and correct pay disparities, thus minimizing the hardship and risks faced by workers in coming forward. Specifically, this legislation would:

- Prohibit employers from using prior salary to justify pay differentials;
- Require employers to prove that the reason for pay disparities is job-related and consistent with a business need;
- Clarify the interpretation of "within any establishment" to ensure a broader reading that makes clear that comparisons can be made beyond the same physical facility;
- Prevent retaliation against workers who discuss their pay and combat pay secrecy policies that keep workers in the dark about pay discrimination;
- Require employers to report summary pay data, which would promote voluntary compliance and enable the EEOC to better identify discrimination and enforce the law; and;
- Provide greater incentives for employers to take action to address pay disparities by authorizing compensatory and punitive damages as well as an opt-out class action mechanism.

⁵ Equal Employment Opportunity Commission, "Hearn-Kirkwood Will Pay \$63,500 to Resolve EEOC Pay Discrimination and Retaliation Lawsuit: Food Service Distributor Unlawfully Disciplined and Later Fired Female Worker Who Complained about Unequal Wages, Federal Agency Charged," (Jan. 1, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/1-5-16.cfm>.

⁶ Equal Employment Opportunity Commission, "Royal Tire Will Pay \$182,500 for Wage Discrimination against Female Executive: EEOC Lawsuit Charged St. Cloud Tire Company Underpaid HR Director for Years in Violation of Federal Law," (Aug. 4, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/8-4-14.cfm>.

II. The Equal Pay Act's "Factor Other Than Sex" Defense has Made it Extraordinarily Difficult for Employees to Prevail.

Since 1963, the Equal Pay Act has required that men and women in the same workplace be afforded equal pay for equal work.⁷ The jobs need not be identical, but they must be substantially equal for the Equal Pay Act to apply. Job content, rather than job titles, must determine whether jobs are substantially equal.

The Equal Pay Act provides employers with four defenses to a claim of pay discrimination, including on the basis of "(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."⁸

Courts have interpreted the last "factor other than sex" defense broadly, permitting employers to escape liability when women and men are paid differently for the same work. The ambiguity of this catch-all defense has made it unjustifiably difficult for workers to challenge pay discrimination.

Courts are divided on how to interpret this language. In some cases, employers have successfully defended differential pay based on factors that can be tainted by gender bias, such as salary history and success in pay negotiations. Courts also have permitted employers to defend pay differentials based on factors unrelated to the job in question. State and local laws have sought to fill the gaps created by ineffectual federal law, leaving national and multistate employers to contend with a patchwork of complex compliance issues.

In interpreting the "factor other than sex" defense, some courts have ruled that employers need not show that those factors are related to a legitimate business purpose.⁹ The United States Court of Appeals for the Seventh Circuit has even ruled that an employer can defend pay differentials between men and women performing substantially equal work on the basis of a "random decision."¹⁰

Some courts have permitted employers to set different pay for employees performing substantially equal work based on consideration of prior salary. But what a person earned at a prior job generally is not an appropriate way to determine what is fair at a different employer. If the new employer has decided to pay a certain wage to existing male employees, they should not be allowed to underpay a new female employee for doing equal work, just because another employer used a different salary scale or criteria. Salary surveys

⁷ 29 U.S.C. § 206(d).

⁸ *Id.*

⁹ See *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the eighth) and those that required an 'acceptable business reason' is established, and we are not even slightly tempted to change sides.").

¹⁰ *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 475 (7th Cir. 2012) ("Random decision is a factor other than sex.").

often provide a range to describe market pay for a particular role. Some organizations pay higher or lower salaries in the market, but each employer should pay women and men fairly and consistently for the same work based on its actual salaries. Employees moving from a lower to a higher cost of living area, or from a nonprofit or small business to a larger employer, should not be paid less than others for the same work because their prior salary was at a lower level. Trying to justify unequal pay for equal work based on a decision made by another employer is an end run around the protections of the Equal Pay Act. Reliance on salary history in setting starting pay also runs the risk of perpetuating past discrimination that occurred in previous jobs. Because women’s earnings are lower than men’s in nearly all occupations,¹¹ reliance on prior pay systematically disadvantages women. For these reasons, many states and localities prohibit the consideration of salary history in setting pay.¹²

Courts have provided conflicting answers to the question of whether employers can rely on prior salary in setting pay to justify sex-based pay differentials. Two circuits allow employers to rely on prior pay if they also consider another sex-neutral factor.¹³ By contrast, the United States Court of Appeals for the Ninth Circuit recently ruled that employers may never rely on prior pay.¹⁴ The EEOC filed a friend-of-the-court brief in support of the employee, Aileen Rizo, who discovered she was paid less than her male counterparts doing the same job as a result of the employer’s practice of simply adding a five percent increase to the employee’s previous salary.¹⁵ Rizo had moved to California from Arizona, and the employer’s rigid reliance on previous salary failed to account for any difference in the cost of living. This case demonstrates how reliance on prior pay can compound unjustified pay differentials between men and women performing the same job.

Courts have continued to permit employers to defend equal pay claims based on market forces or differences in prior experience and qualifications, despite Supreme Court precedent to the contrary. In 1974, the Supreme Court rejected the argument that employers should be permitted to pay women less than men on the basis of market forces.¹⁶ In *Corning Glass Works v. Brennan*, the Court recognized that the pay “differential arose simply because men would not work at the low rates paid women inspectors, and reflected a

¹¹ Institute for Women’s Policy Research, “The Gender Wage Gap by Occupation 2017 and by Race and Ethnicity,” (Apr. 9, 2018), <https://iwpr.org/publications/gender-wage-gap-occupation-2017-race-ethnicity/>.

¹² American Association of University Women, State and Local Salary History Bans (Sept. 18, 2018), <https://www.aauw.org/article/state-local-salary-history-bans/> (California, Delaware, Oregon, and Puerto Rico passed bills to prohibit employers from using a job applicant’s salary history during the hiring process. Dozens of other states introduced similar legislation.).

¹³ *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (“[A]n individual’s former salary can be considered in determining whether pay disparity is based on a factor other than sex.”); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (“there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience”); *White v. ThyssenKrupp Steel USA, LLC*, 743 F. Supp. 2d 1340, 1354 (S.D. Ala. 2010) (“prior pay plus experience establishes an affirmative defense under the [Equal Pay Act]”).

¹⁴ *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) en banc, cert. petition filed Sept. 4, 2018.

¹⁵ *Id.*

¹⁶ *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (employer violated the Equal Pay Act when it “took advantage” or the market by paying women less than men for the same work).

job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."¹⁷

Despite this ruling, courts have continued to permit employers to defend sex-based pay differentials based on a "market forces" theory.¹⁸ For example, courts have approved subjective considerations of the assumed market rate for a position or for an employee of certain experience or education level.¹⁹ Consideration of market forces shifts focus from the central question of whether an employer is providing equal pay for equal work. Bias can taint pay decisions when the employer assesses an artificially higher or nebulous "market value" to male candidates.

The EEOC filed a friend-of-the-court brief in a case before the United States Court of Appeals for the Sixth Circuit in which a woman alleged that she was paid substantially less than men who performed the same job of account manager.²⁰ In considering whether the employer met its burden to prove an affirmative defense, the trial court approved the employer's alleged consideration of factors including "market value." The EEOC argued that the employer failed to provide evidence that the pay differential was actually based on market value, or other considerations like skill, education, and experience. Nevertheless, the Sixth Circuit affirmed summary judgment for the employer.

Some courts have permitted employers to defend pay discrimination claims based on differential success in the pay negotiation process, despite research demonstrating that women and racial minorities are more likely to face backlash in pay negotiations.²¹ Employers tend to penalize women who initiate negotiations for higher compensation more than they do men, as women are often judged more harshly for seeking higher pay than men.²² In addition, the pay negotiation process and outcomes are often arbitrary and fail to provide an objective, job-related criteria to justify pay differentials.

The EEOC participated in one such case illustrating how the salary negotiation process can play out differently for men and women. In 2014, the EEOC filed a friend-of-the-court brief in the case of *Margaret Thibodeaux-Woody v. Houston Community College*.²³ Houston Community College hired Margaret, an adjunct professor, for one of two open program manager positions. The man hired for the second position had the same degree from the same

¹⁷ *Id.* at 205.

¹⁸ See *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 697 n. 6 (7th Cir. 2006).

¹⁹ See *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 703 (7th Cir. 2003); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1322 (9th Cir. 1994).

²⁰ *Foco v. Fruedenberg-NOK General Partnership, Vibracoustic N.A.*, No. 12-2174 (6th Cir. 2013).

²¹ Bowles, H. R., Babcock, L., & Lai, L. (2007). Social incentives for gender differences in the propensity to initiate negotiations: Sometimes it does hurt to ask. *Organizational Behavior and Human Decision Processes*, 103(1), 84-103.

²² *Id.*

²³ No. 13-20738 (5th Cir. 2014).

university and similar work experience. Initially, the college offered them the same starting salary of about \$41,000. When Margaret tried to negotiate, she was told that she could not. Yet, when the male candidate sought to negotiate, the college paid him over \$10,000 more. About a year later, when Margaret learned of the pay disparity and approached human resources, she was told that nothing could be done. Instead, her supervisor urged her to rely on her husband's salary as an additional source of income. After filing a charge of discrimination with the EEOC, Margaret alleged that her employer retaliated with a lower performance evaluation and unfair discipline.

Margaret filed a lawsuit under the Equal Pay Act and Title VII. The district court dismissed her claims, relying on the college's defense that the man negotiated a higher salary. Six years after she started her job, the U.S. Court of Appeals for the Fifth Circuit reinstated her pay claims but rejected her retaliation claims. The hurdles faced by Margaret in pursuing her right to be paid equally for equal work illustrate many of the problems that the Paycheck Fairness Act would address.

III. The Paycheck Fairness Act Takes a Measured Approach to Strengthen Protections for Equal Pay.

Gaps and ambiguities in the law have led to a lack of clarity regarding employers' obligations and workers' rights to equal pay for equal work. Consistent with the original intent of the Equal Pay Act, the Paycheck Fairness Act would address these gaps to combat pay discrimination more effectively.

A. Employers would be Prohibited from Using Prior Salary to Justify Pay Differentials.

Questions about salary history run the risk of perpetuating lower pay for women, particularly women of color who have historically been paid less than men.²⁴ Reliance on salary history simply exacerbates existing pay inequities.²⁵ Workers who have faced discrimination because of sex or race, may be paid less than the market rate for their position.²⁶ The pay gaps between women of color and white men within the same occupational groups are generally higher than the gap between white women and white men in the same occupational groups,²⁷ reflecting the intersectional nature of pay discrimination for women of color. For these reasons, consideration of prior pay fails to offer a useful or equitable tool to set future pay.

²⁴ Payscale, "The Salary History Question: Alternatives for Recruiters and Hiring Managers."

²⁵ *Id.*

²⁶ *Id.*

²⁷ Institute for Women's Policy Research, "The Gender Wage Gap by Occupation 2017 and by Race and Ethnicity," (Apr. 9, 2018), <https://iwpr.org/publications/gender-wage-gap-occupation-2017-race-ethnicity/> (Among women who hold full-time, year-round jobs in the United States).

A significant number of states and localities prohibit employers from requesting salary history information from job applicants.²⁸ Section 10 of the Paycheck Fairness Act would update federal law to prohibit employers from perpetuating past discrimination by relying on prior pay.

B. Employers Would be Required to Prove that the Reason for Pay Disparities Is Job-Related and Consistent with a Business Need.

There is no reason to allow, as some courts now do, arbitrary and sometimes even frivolous reasons to justify gender-based pay disparities simply because they may qualify as “a factor other than sex.”²⁹ Section 3 of the Paycheck Fairness Act would clarify that sex-based pay differentials cannot be justified by arbitrary criteria that have nothing to do with job performance or business needs.

Title VII of the Civil Rights Act of 1964 also prohibits discrimination in compensation on the basis of sex and provides an established standard for evaluating the lawfulness of neutral practices that have an adverse effect on the basis of sex. That standard has been the subject of judicial interpretation for more than four decades. In 1971, the Supreme Court in the landmark case, *Griggs v. Duke Power Co.*,³⁰ upheld the disparate impact method of proving discrimination. In *Griggs*, the Supreme Court recognized that Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. In amending Title VII, with the passage of the Civil Rights Act of 1991, Congress acted to codify the burden of proof standards set forth in *Griggs* and embedded the disparate theory in the law.³¹

In enacting our civil rights laws, Congress has recognized that discrimination can operate in many different ways, and the consequences of actions matter, not just motives. The Equal Pay Act holds employers responsible for the harms they create as a result of inequitable pay practices. It is not sufficient for an employer to disclaim responsibility for arbitrary rules or systems that operate in an unfair manner on the grounds that it did not intend to discriminate. To be effective, our laws must provide employers with sufficient incentives to examine and understand the consequences of their pay practices.

²⁸ HRDive, “Salary history bans: A running list of states and localities that have outlawed pay history questions,” (Feb. 6, 2019), <https://www.hrdive.com/news/salary-history-ban-states-list/516662/> (noting provisions in California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Oregon, Pennsylvania, and Vermont, as well as the Commonwealth of Puerto Rico and ten localities that regulate inquiries into pay history).

²⁹ See, e.g., *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d at 475.

³⁰ 401 U.S. 424 (1971).

³¹ Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071.

C. The Paycheck Fairness Act Would Ensure that the Interpretation of “Establishment” Incorporates Workplace Realities.

The Equal Pay Act allows for the comparison of jobs “within any establishment.”³² As workplaces have changed dramatically over the past half century, more employers have multiple facilities at which the same jobs are performed, and more employees work remotely, performing the same work from different geographic locations. Interpreting “any establishment” to mean a single physical facility, as some courts have done, is out of step with the realities of today’s workplace. For example, when women work in jobs where the only comparators are located in other facilities, a narrow judicial interpretation of this provision can elevate form over substance, leading to untenable constraints on job comparisons. Indeed, in cases challenging systemic discrimination, larger sample sizes lead to a more powerful and accurate analysis.

The Paycheck Fairness Act takes a step in the right direction by recognizing that employees may perform substantially equal work in different physical locations. The legislation would make clear that workers who perform work within the same county, or similar political subdivisions, “shall be deemed to work in the same establishment” and can serve as comparators for pay rate comparisons.³³ This provision adapts the law to the realities of the modern workplace by ensuring employees have an effective means to challenge discrimination that extends beyond a single brick and mortar location.

The Paycheck Fairness Act makes clear that it sets a floor and not a ceiling for appropriate geographic comparisons by providing that the above language “shall not be construed as limiting broader applications of the term ‘establishment’” consistent with EEOC guidance.³⁴ The EEOC’s Compliance Manual, issued nearly 20 years ago in December 2000, provides that while “establishment” ordinarily means a physically separate place of business, “[t]wo or more physically separate portions of a business should be considered one ‘establishment’ if personnel and pay decisions are determined centrally and the operations of the separate units are interconnected.”³⁵ As the EEOC and courts have recognized, appropriate comparisons can extend across geographic units beyond the county or similar subdivisions where there is a central administrative unit that hires the employees, sets the compensation, and assigns work locations.³⁶ As courts have explained, it does not make sense to permit an employer to rely on geographic boundaries in applying the “establishment” language where the

³² 29 U.S.C. § 206(d).

³³ Paycheck Fairness Act of 2019, H. R. 7, 116th Cong. § 3(c) (2019).

³⁴ *Id.*

³⁵ Equal Employment Opportunity Commission, EEOC Compliance Manual, Section 10: Compensation Discrimination, § IV(D), https://www.eeoc.gov/policy/docs/compensation.html#N_44_.

³⁶ *See id.*, citing, *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 592-93 (11th Cir. 1994) (plaintiff who worked for a security services company, and her comparators who worked at military facilities pursuant to the security company’s contracts, were employed at the same “establishment” because of centralized control and the functional interrelationship between the plaintiff and the comparators); *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53, 58 (5th Cir. 1975) (school district was one “establishment”).

employer itself has adopted a uniform pay policy that does not depend on geography.³⁷ The primary focus is on whether workers are actually similarly situated, thus making it reasonable to compare their pay.³⁸

D. Employers Would be Prohibited from Utilizing Pay Secrecy Policies and from Retaliating Against Workers Who Discuss Pay.

The Paycheck Fairness Act also will help to bring pay practices into the sunlight by providing coherent and consistent anti-retaliation protections for employees. A 2010 survey found that about half of all employees report they are formally barred or discouraged from discussing or disclosing information about their pay, with an even greater proportion of private sector employees indicating that pay information at their workplace is secret.³⁹ A significant number of states and localities have passed laws prohibiting pay secrecy policies.⁴⁰ It is time for federal law to foster greater transparency about salary – a critical first step in identifying pay disparities.

Current federal anti-retaliation statutes make it unlawful for employers to take adverse action because an individual has engaged in protected activity such as opposing a discriminatory practice or participating in an EEO process. Section 3 of the Paycheck Fairness Act would bring clarity to the anti-retaliation provision of the Equal Pay Act with an express prohibition of pay secrecy policies. This provision also would explicitly prohibit employers from taking adverse action against employees for discussing pay.

In 2016, the EEOC issued updated guidance on retaliation. This guidance notes that taking adverse action against an employee “for discussing compensation may implicate the EEO anti-retaliation protections as well as a number of other federal laws”⁴¹ Pay secrecy policies may impede employees from learning of discrimination and may deter employees from engaging in protected activity. The EEOC guidance provides that “talking to coworkers to gather information or evidence in support of a potential EEO claim” is protected activity.⁴²

Consistent with this guidance, the Paycheck Fairness Act would expressly prohibit employers from retaliating against workers who discuss pay, ensuring protection for workers who have not yet complained of pay discrimination or participated in an investigation. The EEOC guidance also addresses the protections of the National Labor Relations Act (NLRA)⁴³

³⁷ *Grumbine v. United States*, 586 F. Supp. 1144, 1148 (D.D.C. 1984).

³⁸ *Brownlee v. Gay and Taylor, Inc.*, 642 F. Supp. 347, 352 (D. Kan. 1986).

³⁹ Ariane Hegewisch, et al., “Pay Secrecy and Wage Discrimination,” Institute for Women’s Policy Research (2011), <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>.

⁴⁰ See National Women’s Law Center, “Workplace Fairness: Progress in the States for Equal Pay” (Sept. 2016), <https://nwlc.org/wp-content/uploads/2016/01/Progress-in-the-States-for-Equal-Pay-9.26.16.pdf>.

⁴¹ Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm#fig12>.

⁴² *Id.*

⁴³ 29 U.S.C. §§ 151-169.

regarding employees' discussions of pay. The NLRA protects non-supervisory employees from employer retaliation when they discuss wages with colleagues as "concerted activity."⁴⁴ The NLRA prohibits employers from discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants. However, the NLRA protections for pay discussions do not cover all workers – for example, they do not extend to supervisors, managers, agricultural workers, and employees of rail and air carriers. In addition, remedies are limited, as the NLRA does not provide workers with a private right of action.⁴⁵

Although the Equal Pay Act, Title VII, the NLRA, and a patchwork of state and local laws provide certain protections for workers who discuss pay, the Paycheck Fairness Act would provide a coherent and nationally consistent set of rules addressing employees' discussions of pay and the consequences when employers violate those rules.

E. Employers Would Report Pay Data.

Section 8 of the Paycheck Fairness Act would require the EEOC and the Department of Labor to collect pay data from employers. This reporting requirement would assist employers in evaluating their pay practices to prevent discrimination and would strengthen the enforcement of equal pay laws.

During my tenure as Chair, the EEOC moved forward in September 2016 to collect summary pay data from employers with 100 or more employees to more effectively combat pay discrimination.⁴⁶ The data collection would have required these employers to provide confidential annual reports to the EEOC about employee pay, broken down by job category, sex, race, and ethnicity. Because the data would be disaggregated by sex, race, and ethnicity, the information would help to address the intersectional nature of pay discrimination for women of color. The data would help to address discrimination in the form of occupational segregation in lower paying jobs. Collecting this information would be a significant step forward in addressing pay discrimination.

In assessing a charge of discrimination during an investigation, the EEOC could consider pay data together with other evidence gathered to determine how to focus the investigation

⁴⁴ See, e.g., *NLRB v. Main St. Terrace Care*, 218 F.3d 531 (6th Cir. 2000) (employer violated the NLRA by imposing a rule prohibiting pay discussions and improperly fired plaintiff because she discussed wages with coworkers to determine whether they were being paid fairly); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510 (9th Cir. 1993) ("an unqualified rule barring wage discussions among employees without limitations as to time or place is presumptively invalid under the Act."); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (employer's rule prohibiting wage discussions was an unfair labor practice under the NLRA, because "wage discussions can be protected activity" and "an employer's unqualified rule barring such discussions has the tendency to inhibit such activity").

⁴⁵ *National Licorice Co., v. NLRB*, 309 U.S. 350, 362, 364, 366 (1940) (National Labor Relations Board proceedings are "not for the adjudication of private rights").

⁴⁶ Equal Employment Opportunity Commission, "EEOC to Collect Summary Pay Data" (Sept. 29, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm>.

and whether to request additional information from the employer. When EEOC enforcement staff requests information from an employer, the employer has the opportunity to explain its practices, provide additional data, and explain any non-discriminatory reasons for its pay practices and decisions. For example, the employer can provide more detailed information about pay by occupation and legitimate factors that could explain any apparent pay disparities. After considering all of this information and data, along with other relevant evidence, the EEOC makes a finding as to whether discrimination was the likely cause of the pay disparities.

The collection of employer pay data would support and enhance voluntary compliance by motivating employers to strengthen their systems and practices to collect and review compensation data. Many organizations still do not regularly collect and analyze pay data by demographics for potential disparities and have inconsistent or non-existent formal reviews. Because employers would need to compile and file this report, many more employers would establish a regular practice of reviewing their pay data by demographics at least at a summary level every year. Formalized and institutionalized pay data reporting would encourage employers to identify and address pay equity on their own – increasing the positive impact of reporting requirements. EEOC also would publish aggregate pay information to enable employers to evaluate their pay data against industry benchmarks, consistent with its longstanding practice of reporting aggregate workforce demographic data.

Through extensive consultation with stakeholders, the EEOC sought to minimize the burden on employers by building on existing annual reporting requirements. The pay data collection enhances the existing Employer Information Report, also known as the EEO-1 report, to include pay information along with the workforce demographic information that has been collected for over fifty years. The EEOC and the Department of Labor have long used EEO-1 workforce demographic data to identify trends, inform investigations, and focus resources. To report pay information, employers would provide data electronically, drawing from their existing human resources databases without incurring significant burden.

Despite this extensive process with two opportunities for public comment, the Trump administration, after consulting with business groups, announced a “review and immediate stay” of the EEO-1 pay data collection in August 2017.⁴⁷ The Paycheck Fairness Act would address the critical need for better pay data by codifying a requirement for employers to report pay data, which would provide the EEOC with a powerful tool to better focus its resources to combat pay discrimination. The United States already lags behind several countries, including the United Kingdom, France, Germany, and Iceland, which have already enacted laws aimed at reducing gender pay disparities by requiring employers to report pay information. American companies doing business in those countries have demonstrated that they can comply, since they are already reporting pay information across the globe.

⁴⁷ Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs to Acting Chair Victoria Lipnic, Equal Employment Opportunity Commission (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

IV. Stronger Incentives are Needed to Promote Proactive Efforts to Address Pay Equity.

Section 3 of the Paycheck Fairness Act would create stronger incentives for employers to take proactive steps to address pay equity by allowing employees to pursue class actions and to seek compensatory and punitive damages.

A. Employees Should be Able to Join Together in a Class Without the Need to File a Notice with the Court.

Pay discrimination is often a systemic problem, which is most effectively proven and remedied by adjudicating the claims of all those adversely affected. The Equal Pay Act's collective action provision creates a significant barrier to tackling systemic pay discrimination because each employee must publicly file a notice with the court in order to participate in the case. Placing this burden on workers has a chilling effect on employees reluctant to notify their employer and go public with their concerns. This typically results in only a small fraction of those adversely affected actually recovering for pay discrimination. Many employees cannot afford the risk of retaliation for joining a lawsuit. Other employees may not have direct knowledge of what others are paid, so they may not feel comfortable opting-in to the case at the outset.

Virtually every other employment discrimination law allows employees to pursue class actions under Rule 23 of the Federal Rules of Civil Procedure, which generally apply to cases brought in federal court. Rather than be required to notify their employer and the court of an interest in opting-in to an action, employees are permitted to choose to opt-out of the class, resulting in significantly higher participation. In opt-in collective actions, it would not be unusual to have only about 20% of eligible participants choose to file a notice in court.

In 1963, when the Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"), there were no other federal laws addressing sex discrimination at work. Since the Federal Rules of Civil Procedure were not enacted until 30 years later, the Equal Pay Act borrowed the procedures governing multi-party claims from the FLSA §216(b) collective action provisions.

By limiting the financial exposure of employers who violate the Equal Pay Act to the differences in pay because of sex for only those workers who join the lawsuit, the current law reduces even further the incentive for employers to take steps affirmatively to detect and promptly remedy gender-based pay disparities. Section 3 of the Paycheck Fairness Act would address this shortcoming in the Equal Pay Act by permitting employees to utilize the Rule 23 class structure. This permits all workers adversely affected by the unlawful pay practices to be encompassed within the certified class, unless they elect to opt out. This procedural update would modernize the Equal Pay Act, provide greater protection for workers, and strengthen

incentives for compliance. This change will make it far more effective to combat systemic sex-based wage discrimination and provide relief to all those affected.⁴⁸

B. Compensatory and Punitive Damages are Needed to Make Victims Whole and Deter Violations.

Although as discussed further below, a number of employers are taking steps to adopt fair and transparent pay policies -- recognizing they are good for business -- many other employers have avoided evaluating their pay practices to identify potential discrimination.

The Paycheck Fairness Act would strengthen the remedies available under the Equal Pay Act to provide compensatory and punitive damages. The goals of our anti-discrimination laws are to put victims of discrimination in the same position that they would have been in if the discrimination had not occurred as well as to deter future violations. The Equal Pay Act remedies are far too limited to meet these objectives. Under the Equal Pay Act, successful plaintiffs typically recover the difference in wages they were paid compared to those of the opposite sex who performed equal work for the two years before the complaint was filed. Where employees can prove the violation was willful, they can receive three years of back pay. Where an employer fails to demonstrate that the challenged pay disparities were the product of good faith, then the plaintiffs may also recover liquidated damages in the amount of the pay disparity.

Title VII of the Civil Rights Act of 1964 was amended in 1991 to authorize compensatory and punitive damages for victims of intentional discrimination. Section 3 of the Paycheck Fairness Act would permit prevailing plaintiffs to recover compensatory damages and, as an alternative to liquidated damages, an award of punitive damages, in addition to backpay. Compensatory damages include out-of-pocket expenses resulting from the discrimination, such as medical expenses or costs incurred in finding a new job, as well compensation for non-economic damages, including mental anguish or loss of reputation. Punitive damages would be allowed when the employer engaged in intentional discrimination, acting with malice or reckless disregard for the law. To be eligible for these damages, plaintiffs will need to satisfy high standards of proof.

Strengthened remedies for discrimination are needed to more effectively deter violations and promote affirmative incentives for employers to be more vigilant in detecting and promptly correcting gender-based pay disparities. Current law principally provides victims of unequal pay practices simply payment of the wages they should have been paid. In many cases, these limited remedies do not fully compensate workers for discrimination by failing to permit recovery for the adverse consequences of being subject to pay disparities caused by one's gender. Workers also encounter burdens and obstacles in detecting and trying to remedy

⁴⁸ American Bar Association, "The Paycheck Fairness Act," https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/discrimination/the-paycheck-fairness-act/.

pay disparities. As such, current law provides little incentive for many workers to seek to enforce their rights and challenge practices causing gender-based pay disparities.

Current law also provides little incentive to employers to expend resources to detect and rectify pay disparities since the primary penalty for violating the law simply requires them to pay the wages they should have paid years earlier. We need protections against gender-based pay disparities that will have a greater likelihood of ending this pernicious conduct.

V. Transparent and Fair Pay Practices Strengthen Organizations and Benefit All Workers.

The Paycheck Fairness Act offers supports for both employees and employers. All workers benefit from fair and transparent pay practices. Section 9 of the Act directs the Department of Labor to research and share effective methods to identify and address pay discrimination, which will provide a valuable resource for employers. Unfair pay practices are bad for business. Pay discrimination can expose employers to legal challenges, lost productivity, and low staff morale. Recognizing these concerns, many employers have made commendable efforts to thoroughly examine their pay practices.

Companies like Microsoft, Amazon, American Express, Cisco, and Bank of America have adopted policies to refrain from asking questions about salary history.⁴⁹ Increasingly, businesses recognize that unequal pay fails to inspire trust, confidence, or loyalty in their employees.⁵⁰ In fact, it undermines these critical components of positive company culture and can impact recruiting and retention.

Whole Foods took steps to ensure equal pay for equal work by building transparency into compensation practices. In 1986, CEO John Mackey implemented an open pay policy that allows staff to easily look up anyone's salary or bonus from the previous year.⁵¹ The policy was adopted to promote a culture of shared information and to create a sense of a "shared fate" among employees.⁵² Mackey explained, "If you're trying to create a high-trust organization, an organization where people are all-for-one and one-for-all, you can't have secrets."⁵³

⁴⁹ National Public Radio, "More Employers Avoid Legal Minefield by Not Asking about Pay History (May 3, 2018), <https://www.npr.org/2018/05/03/608126494/more-employers-avoid-legal-minefield-by-not-asking-about-pay-history>.

⁵⁰ Payscale, "Should the Salary History Question Be Banned by Federal Law?" (Feb. 9, 2018), <https://www.payscale.com/career-news/2018/02/should-salary-history-question-be-banned-by-federal-law>.

⁵¹ Alison Griswold, "Here's Why Whole Foods Lets Employees Look Up Each Other's Salaries," *Business Insider* (Mar. 3, 2014).

⁵² *Id.*

⁵³ *Id.*

Salesforce has drawn attention for its commitment to review employee compensation on an annual basis.⁵⁴ The company spent \$6 million to make adjustments to ensure equal pay for equal work, considering differences in pay not only for gender, but also race and ethnicity.⁵⁵ Major employers are also taking the previously unprecedented step of publicly disclosing data on their pay equity analysis – with companies like Salesforce, Microsoft, Amazon, and the Gap publishing their findings and plans on company websites or putting them in public press releases.⁵⁶

When companies comply with the law and ensure pay equity, they not only mitigate their liability risks, they also avoid costs in morale and turnover and reputational harm. Gender pay equity boosts workforce diversity, which is associated with a host of benefits such as increased innovation and stronger financial performance.⁵⁷ Voluntarily publishing pay equity numbers stands to benefit corporate brands.⁵⁸

Employee pay has become increasingly transparent with platforms like Glassdoor⁵⁹ that allow individuals to anonymously share salary information and review companies and their management. Millennials have helped to lead the way with more open discussions of pay in the workplace and online.⁶⁰ Employers are increasingly aware of the reputational harm that can result from outdated and discriminatory pay practices. Businesses that set pay fairly find it easier to attract and retain talent when people are paid what they are worth. Additionally, research has shown that pay transparency has beneficial effects for the labor market.⁶¹

During my tenure as Chair, the EEOC provided training on equal pay issues across the country, reaching tens of thousands each year. The EEOC's training encouraged employers to take a hard look at their compensation practices annually and to take action to correct

⁵⁴ Cindy Robbins, "2018 Salesforce Equal Pay Assessment Update," Salesforce (Apr. 17, 2018), <https://www.salesforce.com/blog/2018/04/2018-salesforce-equal-pay-assessment-update.html>.

⁵⁵ *Id.*

⁵⁶ See Diversity at Amazon, https://www.amazon.com/b/ref=tb_surl_diversity/?node=10080092011; Salesforce, Equality at Salesforce: The Equal Pay Assessment Update (March 8, 2016), <https://www.salesforce.com/blog/2016/03/equality-at-salesforce-equal-pay.html>; Cora Lewis, These Companies are Eliminating Their Gender Pay Gaps, Buzzfeed (March 14, 2016), https://www.buzzfeed.com/coralewis/companies-are-eliminating-their-gender-pay-gaps?utm_term=.ek1I5WEXv#nkGVy6reK.

⁵⁷ See Catalyst, "Why Diversity Matters," (July 2013),

https://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf

⁵⁸ See Payscale, "Want to Build a Great Employer Brand? Focus on Your Pay Brand First," (Mar. 12, 2018), <https://www.payscale.com/compensation-today/2018/03/employer-brand-pay-brand>.

⁵⁹ See <https://www.glassdoor.com/index.htm>.

⁶⁰ Lauren Weber and Rachel Emma Silverman, "Workers Share Their Salary Secrets," Wall Street Journal (Apr. 16, 2013), <https://www.wsj.com/articles/SB10001424127887324345804578426744168583824>; Jen Doll, "Could Millennials End Salary Secrecy? One long-held taboo of office life is that you're not supposed to talk about what you make. It appears that may be changing." (Apr. 17, 2013), <https://www.theatlantic.com/business/archive/2013/04/could-millennials-end-salary-secrecy/316182/>.

⁶¹ Zoë B. Cullen and Bobak Pakzad-Hurson, "Equilibrium Effects of Pay Transparency in a Simple Labor Market," (Apr. 2018), <https://www.hbs.edu/faculty/Pages/item.aspx?num=52648>.

problems. The agency asked employers to be part of the solution by putting policies in place to ensure equal pay for equal work – and by adopting best practices for fair, consistent, and nondiscriminatory compensation. Individuals should be designated to monitor pay practices. Training should be provided to supervisors involved in setting pay. Job-related criteria should be used to determine base pay, raises, overtime, and bonuses as well as in making other decisions affecting pay such as performance evaluations, job assignments, and promotions. Pay gaps should not arise from consideration of prior salary or differential success in salary negotiations.

By adopting promising practices and making an organizational commitment to equal pay, employers can take major steps toward making pay discrimination a thing of the past. The Paycheck Fairness Act would encourage employers to take those steps by spurring increased voluntary compliance with the law.

VI. Conclusion

To ensure that the promise of equal pay becomes a reality, our laws must change. The Paycheck Fairness Act takes a measured approach to strengthen the Equal Pay Act to provide meaningful solutions to the persistent problem of pay discrimination. Robust laws and enforcement of protections against pay discrimination create accountability, which is a key factor to disrupt bias in the workplace. It is time for Congress to pass this legislation and take a critical step forward in the fight to ensure equal pay for equal work.

JENNY R. YANG

Jenny R. Yang served as Chair of the U.S. Equal Employment Opportunity Commission from September 2014 to January 2017 and as Vice-Chair and a member of the Commission from 2013 to 2018. Under her leadership, the Commission launched the Select Task Force on the Study of Harassment in the Workplace to identify innovative solutions to prevent harassment at work and led efforts to strengthen the EEOC's annual data collection to include employer reporting of pay data. As Chair, Ms. Yang created new procedures for public input on guidance documents to promote transparency and launched digital systems to facilitate online charge information.

Currently, Ms. Yang serves as a Partner with Working Ideal where she advises employers in applying evidenced-based research in the design and implementation of employment practices to prevent harassment, foster diverse and inclusive workplaces, and advance pay equity. In addition, as a Fellow with the Urban Institute in the Center on Labor, Human Services, and Population, and an Open Society Foundations Leadership in Government Fellow, Ms. Yang is studying the impact of structural changes in the workplace on employment protections – including anti-harassment protections – for the growing number of Americans working as independent contractors, subcontractors, temporary workers, and in the gig economy. She is also an adjunct professor at Georgetown University Law Center teaching a seminar on the history and evolution of Title VII, examining how social change, evolving ideas of race and gender, globalization, and technology will continue to shape Title VII.

Prior to joining the EEOC, Ms. Yang spent a decade representing workers in civil rights and wage and hour actions nationwide as a partner at Cohen Milstein Sellers & Toll PLLC. From 1998 to 2003, she served as a Senior Trial Attorney with the U.S. Department of Justice, Civil Rights Division, Employment Litigation Section. Prior to that, Ms. Yang was a fellow at the National Employment Law Project. Ms. Yang clerked for the late U.S. District Judge Edmund Ludwig in the Eastern District of Pennsylvania. A graduate of Cornell University, she earned a B.A., with distinction, in Government. She received her J.D., cum laude, from New York University School of Law, where she served as an editor of the Law Review and a Root-Tilden Public Interest Scholar.

Jenny R. Yang is a fellow at the Open Society Foundations (OSF) and the Urban Institute as well as adjunct faculty at Georgetown University Law Center. However, this testimony is not a product of OSF, the Urban Institute or Georgetown University Law Center. The views expressed are those of the author and should not be attributed to OSF, the Urban Institute, Georgetown University Law Center, its trustees, or its funders.

Chairwoman BONAMICI. Thank you for your testimony. Now we are going to move to member questions and under committee rule 8A, we will be under the 5 minute rule. As chair I will go first followed by the ranking member of the Civil Rights and Human Services Committee, Mr. Comer and then the chair of the Workforce Protections Committee, Ms. Adams and the ranking member of the Workforce Protections Subcommittee, Mr. Byrne and then the chair of the full committee, Mr. Scott. And then we will move to members.

I now recognize myself for 5 minutes for the purpose of questioning the witnesses.

Ms. GOSS GRAVES. in your testimony you discussed data that demonstrates pay discrimination as a significant cause of the gender wage gap for women, especially women of color. And you mentioned that women with caregiving responsibilities face persistent discrimination in the work place resulting in lower wages. Yet pay discrimination remains difficult to detect. Provisions in the Paycheck Fairness Act would require the EEOC and the Department of Labor to collect information from employers on compensation disaggregated by sex, race, and nationality. How would these provisions help detect discrimination and how would detecting this discrimination affect the lives of working families?

Ms. GOSS GRAVES. So we basically have two problems. One is a transparency problem because workers who are experiencing pay discrimination very rarely know that is the case. And we also don't have the right incentives in place.

And so the idea is if an employer is collecting and then reporting that data to the EEOC, the first thing that it's going to do is going to look to make sure that if there are problems it's going to address it. It is unlikely that it is going to hand over to the EEOC data that reflects that—the ongoing case of discrimination. So it gives them a chance and an opportunity to do the right thing first.

But it also gives the EEOC the opportunity to have more effective enforcement which is especially important because of the high rates of retaliation that come to people who try to exercise their rights whether it is around pay discrimination or any other form of discrimination.

Chairwoman BONAMICI. Thank you. Ms. Yang, in your testimony you discussed the reporting burden on workers facing pay discrimination which combined with the lack of sufficient remedies leads to under reporting. You also mentioned when you were at the EEOC you worked on updating the guidance on retaliation. In what ways are the Equal Pay Act, Title VII of the Civil Rights Act and the National Labor Relations Act insufficient to provide workers with the rights and tools they need and how would the Paycheck Fairness Act help address systemic pay discrimination and provide relief to workers affected?

Ms. YANG. Thank you for that question. Currently, under Federal law, there is a limited protections for employees who discuss pay. Under the Title VII anti-retaliation provision, that discussion needs to be considered protected activity opposing or participating in an investigation.

The Paycheck Fairness Act provides one consistent and coherent standard that everyone can understand. So workers will not be

afraid to share information that is vitally needed to identify pay discrimination.

Chairwoman BONAMICI. Thank you. And this is a question for both Ms. Goss Graves and Ms. Yang. In her testimony, Ms. Olson cites a District Court decision in the Chamber of Commerce for Greater Philadelphia v. City of Philadelphia case as evidence that prohibiting employers from asking workers about salary history is an unconstitutional impairment of fair speech, excuse me, free speech.

Ms. Goss Graves and Ms. Yang, do you know the status of this case and in your opinion after having worked in this field for a long time, was the case correctly decided and does the prohibition on asking about salary history prior to an offer of employment in the Paycheck Fairness Act raise constitutional concerns?

Ms. GOSS GRAVES. I don't think that the Paycheck Fairness Act raises conditional concerns. First, that District Court decision itself said that relying on salary history, having a provision that says you can't rely on salary history itself doesn't raise constitutional concerns.

I have to say that case is right now on appeal and I think the district court got the second part of it wrong where they said it did raise constitutional concerns to ask, to prohibit people from asking about salary information. This is sort of a common thing in Federal law where the underlying provision, you know, say the ADA, where the underlying provision is that you can't discriminate based on disability, you also can't go around asking people if you are disabled.

And the reason is so that people can when they are making those employment decisions be really clear that they're not actually back door violating the law as well.

Chairwoman BONAMICI. Ms. Yang, do you agree with that analogy?

Ms. YANG. I agree with that and it is quite common under many of our Federal laws to have prohibitions for asking about certain information, such as our Disability and Genetic Nondiscrimination Acts which explicitly prohibit certain pre-employment inquiries.

Chairwoman BONAMICI. Terrific. And I did want to followup on the rest of my question to Ms. Goss Graves about how the Paycheck Fairness Act would affect especially families. I am about to run out of time so I am going to ask you, I know some of it is in your written testimony to perhaps followup on that at another opportunity.

I would like to request unanimous consent to enter into the record a letter from a coalition of many stakeholders highlighting the importance of passing the Paycheck Fairness Act to address pay discrimination.

And because I want to be a good role model and stick to my time, I am going to yield back and recognize Ranking Member Comer for 5 minutes for the purpose of questioning the witnesses.

Mr. COMER. Thank you, Madame Chair. Ms. Olson, thank you for your testimony. As you have noted, private-sector businesses do not have rigid pay scales like the Federal Government has for civil servants. And most businesses today do not have hundreds of jobs

that are exactly the same as a factory may have had 100 years ago or even 50 years ago.

Based on your experience advising businesses on compensation issues, would the provisions relating to business necessity in H.R. 7 be workable and effective in today's vibrant and changing economy? And can you provide examples to support your view?

Chairwoman BONAMICI. Please turn on your microphone.

Ms. OLSON. Thank you very much for your question. The concept of business necessity as applied in H.R. 7 is unworkable and it is an impossibly high standard to meet. It says basically that a job-related or business-related factor has to be judged against if you didn't do it, what? There is no specific definition here. But what?

If you didn't do that, if you didn't pay the worker more, would the business continue without the employee being hired? Without the employee being retained? The fact that there are so many different variables that are job-related and support differences in qualifications and experience in production, in contributions and also in the ability to retain employees who may get competitive offers from others requires employers to be able to respond to those to motivate, to retain, to reward employees.

And to do so with respect to factors that are job-related, which is what the majority of courts say and what the statute really requires based on the statutory construction of the way it is drafted is a standard that is workable and does not allow pay discrimination to be inserted. But instead, if an employer is required to say I have got to prove it is a business necessity not just related to the job, how do I do that? And even if I do that, I've got to explain that business necessity covers 100 percent of any difference.

And if in litigation later, a plaintiff's lawyer said well, did you consider this particular example of another way that you could have done it? For example, raising the pay of all employees, if that was financially feasible. Is that an example that an employer then would have to face a jury with in connection with that issue? What will it really leave employers doing? Really not making distinctions. Employees lose. Employees with different, with better, with higher qualifications that relate to the job they're performing aren't going to be rewarded for those things.

Mr. COMER. Ms. Olson, I noted H.R. 7's mandate that businesses provide employee pay data to the EEOC. Among other concerns, I have little confidence in the Federal Government's ability to keep this data confidential and I worry that workers privacy would be breached.

Do you share these concerns? Can you also comment on how large a burden it would be for employers to submit hiring, termination, and promotion data in addition to pay data, all disaggregated by sex, race, and national origin. Is this provision necessary and practical or do the bill's sponsors have other motivations in mind?

Ms. OLSON. I can't really speak to the motivations on these particular issues but what I can speak to is what burden it would be and the lack of the benefit and the concerns I have with respect to the confidentiality.

With respect to the issue of burden, employers don't collect today. There is no Federal law or record keeping requirement that they collect information regarding the national origin of employees. So this is an entirely new obligation based on a law related to sex discrimination and I didn't see any directives that relate to the issues of including national origin and race-related to this issue.

In addition, employers don't collect in a digitized or well documented way necessarily the promotions in their systems that relate to pay differences. So that would be a complete review and trying to reorder and restructure the way their own record keeping is done. And unless an employer is a Federal contractor, they're not required to keep information regarding terminations. So those are all new record keeping requirements that at this point have no limits in H.R. 7 and there are no descriptions of the privacy or confidentiality protections that would be applied.

And let me just mention, H.R. 7 describes generally that the data collected will be disaggregated data. Does that mean by employee? Or does that mean by group? We don't know from H.R. 7. And I would just tell you that the privacy and confidentiality concerns if in fact it is by employee are even more significant.

Mr. COMER. Thank you. Madame Chair, I yield back.

Chairwoman BONAMICI. Thank you. I now recognize Chairwoman Adams, the chair of the Workforce Protections Subcommittee for 5 minutes for the purpose of questioning the witnesses.

Ms. ADAMS. Thank you, Chairwoman Bonamici, and thank you all of your testimony. Ms. Yang, in your testimony you stated that reliance on salary history and setting starting pay also runs the risk of perpetuating past discrimination that occurred in previous jobs. Can you expound on this a little bit?

Ms. YANG. Yes. Thank you. That's a very important question, Congresswoman. The problem that we have seen is that historically where employers rely on past salary they can be carrying forward past discrimination as in the situation of Margaret's that I shared with you before. It can be in fact both discriminatory as well as arbitrary what prior employers may pay individuals.

For example, if in a particular field, women tend to work in the public interest, social sector and they are moving into the private sector, women would be at a lower salary in a previous job. In fact, they may have had more experience because they had a lower budget and were actually doing more. But, in moving to that new private sector job, a man coming from private sector may be paid more even though they are performing the same work of an equal skill and responsibility. So that's what this Paycheck Fairness Act provision really is intended to root out.

Ms. ADAMS. Thank you. Ms. Olson agreed with the district court's decision in the Philadelphia case that banning an employer from asking about salary history is unconstitutional. However, Ms. Olson disagreed with the court's decision that employers should be prohibited from relying on pay history when determining pay. Once asked, you know, how can one be sure that an employer isn't relying on salary history when determining salary? Ms. Yang?

Ms. YANG. Well, the employer with the Paycheck Fairness Act, the employer would not be permitted to ask for that information or

utilize that information. And there are many more ways for employers to set starting pay that is actually based on the work being performed and that is the ultimate goal of the Equal Pay Act and the Paycheck Fairness Act.

And that, the starting salary is where we see the most significant disparities that get perpetuated through time so that is a very important part to make sure employers are really carefully checking assumptions, stereotypes that may be in their process and ensuring that it is truly job related.

Ms. ADAMS. Thank you. Ms. Goss Graves, the Paycheck Fairness Act clarifies that if an employer justifies pay disparity based on a factor other than sex, such defense must be based on a bonafide job related factor such as education, training or experience that is consistent with a business necessity. Can you give us examples of how this business defense has historically been applied in ways that perpetuate gender based wage discrimination?

Ms. GOSS GRAVES. So what has happened in some of the cases is that some courts have allowed employers to have vague references to the market to point to the fact that the guy was a better negotiator so that's why—or perceived as a better negotiator so that's why they paid them more. Or relying on the fact that the woman made less in the past to sort of salary match, to match that past salary and saying that's why we are paying them more. You know, those sorts of justifications or any old reason as long as they're not saying sex, you know, so it has become this giant loophole in the law.

And so what the Paycheck Fairness Act would really do is ask two different questions. So, you know, one is the reason that you're offering actually related to the job? Are you pointing to something to pay them more that actually is not related to the job? And then second, is it something that you actually need to do or is there some alternatives that would work better?

So perhaps you had been salary matching and as your way because that was your way of assessing the market but there is lots of ways to assess the market. There is standardized things that give you information about the assessing the market. There is Glass Door, there's Pay Scale, there is a lot more than salary matching to assess your market.

So it really requires an employer to think hard about am I paying someone fairly and am I paying them for the job that I'm actually asking them to do. So you actually make the Equal Pay Act's promise of equal pay a reality.

Ms. ADAMS. Yes. Ms. Olson suggests that employers should be given incentives like the elimination of liquidated damages for conducting self-audits to address pay inequities. Why is this insufficient in your mind, in your thinking?

Ms. GOSS GRAVES. You know, its—we are more than 50 years after Congress said we should start paying people equally for the same work so, you know, the idea that we need incentives to comply with a law that is 5 decades old is a little bit troubling when people have been harmed along the way in all these many decades.

Ms. ADAMS. Thank you very much. Madame Chairman, I am going to yield back, I am out of time.

Chairwoman BONAMICI. Thank you very much, Congresswoman Adams. And I now recognize the ranking member of the Workforce Protections Subcommittee, Mr. Byrne, for 5 minutes for questioning the witnesses.

Mr. BYRNE. Thank you, Madame Chair. Ms. Olson, I really appreciate your being here today. You are recognized among the labor and employment bar in the United States of America as one of our leaders. You have been participating in this area since 1983. You were one of the first women to practice in this area so you bring a wealth of experience spanning many years and I appreciate your vantage point on it. You know, we all want to see equal pay for equal work. But as Federal policymakers up here in Congress, our question is what is the best way to achieve that? So we have this proposed bill, H.R. 7, in front of us which I know you are familiar with. And I want you to use your experience, many years of experience in equal pay cases and discuss whether the new remedies and the new class action provisions in that bill will actually achieve the outcome we all want to achieve. And I also want you to address if you will your own experience in this area and what you think it will do to both employers and employees. Press the button.

Ms. OLSON. Thank you very much. First of all, let me talk about the current Equal Pay Act. Even in—with reference to the cases that were described today by other witnesses, you heard them describe those cases worked. The cases continued. They were sent back.

The law today does not say an employer can just articulate a reason, any reason, a reason they don't consistently apply, a reason that's really not related to a job. The employer has the burden of proof under the Equal Pay Act. It is different than Title VII. It's much harder in that sense. And the burden of proof is to demonstrate a consistent bona fide job-related factor as being used.

And in cases that are cited in my testimony and some that were cited today by others, the courts looked at that proof and said it's not enough to just articulate something that you're not consistently applying. That's not bona fide. And it's not enough if it's not directly related to the job. You've got to show a nexus that matters.

In terms of the issues of what's currently available to an employee who files a claim under the Equal Pay Act? You've got back pay, injunctive release and relief in terms of front pay, double damages in terms of the back pay, attorney's fees, costs, interest, a much longer statute of limitations. The limitations in Title VII is 300 days. Under the Equal Pay Act it goes back 3 years if there is a willful violation.

So the employer who may have not been found to have ever discriminated on the basis of someone's sex but just can't explain the entire difference in terms of the differences in pay, could be held to unlimited punitive and compensatory damages. That's a windfall for plaintiff's lawyers and will not allow—I know from my experience in litigating these cases, these cases to be resolved because of the endless, limitless potential for damages as opposed to the realities of what you are looking at. So that's one point.

And then on the issue of class actions and I litigate class actions around the country. The class action mechanism that currently exists here is the same one that exists for wage and hour laws in our

country. The same on that exists for the age discrimination claims that are brought and its one that in my experience moves much faster for the employee who is aggrieved because conditional certification benefits plaintiffs, employees in the cases and the way it is currently being done because conditional certification under the Equal Pay Act is a very low standard to be certified.

So almost immediately in these cases, notices are sent out to employees, all employees saying who wants to opt in? Who wants to be part of this case? If you do, all you have to do is sign this form and you're part of it and you move very quickly to the merits and trying to resolve the issue. What H.R. 7 would do is it completely changes that to a rule 23 situation where you're going to debate for years whether those standards are appropriate and then if so look at mass groups of data for employees who never signed a form, who never said they wanted to be part of it but didn't affirmatively opt out on a court document that they were given.

Mr. BYRNE. Very quickly, speak to the Chamber of Commerce v. Greater Philadelphia case. Would it apply to H.R. 7? If so what would it do?

Ms. OLSON. It absolutely would. It is on appeal to the Third Circuit that's absolutely correct. But part, there are part—the part of H.R. 7 that has the same flaw that was recognized by the court in Philadelphia is the part that says an employer can't ask.

Mr. BYRNE. So it is a free speech issue.

Ms. OLSON. Absolutely. It's unconstitutional.

Mr. BYRNE. Thank you. I yield back, Madame Chairman.

Ms. ADAMS. Thank you, Mr. Byrne. At this time I want to recognize the chair of the committee on education and labor Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Madame Chair. Ms. Yang, in terms of EEOC pay data, what is reported now and what would be reported under the bill?

Ms. YANG. Thank you, Chairman Scott. The EEOC has for over 50 years collected data from employers with 100 or more employee's on—based on race, gender, ethnicity and job category to understand the total demographics of the workplace by a particular job.

What the EEOC moved forward to do with the pay data collection was to strengthen that reporting so the agency would have a much more effective tool to identify potential pay disparities that the agency could then use its resources more effectively to investigate.

And to answer the earlier point, the agency has robust confidentially and security protocol in place and the information that would be collected is in the aggregate. So it is not an individual persons pay information, it is just the total number of women for example in a particular job category with that pay.

Mr. SCOTT. And how logistically difficult would it be to provide this information?

Ms. YANG. We had an extensive process while I was chair of the EEOC with public comment. Two rounds of public comment. We also conducted our own pilot looking at these issues and heard from many sources. And we found that the burden on—what we worked to do is to minimize the burden of employers while also en-

sureing the pay data is useful for the agency's enforcement purposes.

And I do believe the proposal of the EEOC move forward with struck a reasonable balance that imposed not a significant burden on employers.

Mr. SCOTT. Thank you. And we have talked about class actions, Ms. Yang. What is the present law on class actions and how does the bill change it and why is that important?

Ms. YANG. Thank you for that question. My understanding is the bill will actually strengthen workers protections by giving them the choice to choose either the collective action provision that currently exists or to utilize the more modern rule 23 procedure that applies to virtually all other types of claims in Federal court.

And the challenge with existing law is under the collective action opt in procedure, it requires employees to file a notice with the court which can be very difficult for employees to do because of fear of retaliation or at the time they're required to file they may not have any information about how their pay compares to other people and they may not be comfortable filing that on record with the court. As a result you often see perhaps 20 percent of all eligible women opting into the case.

In contrast, a rule 23 class action allows the class to be certified and gives individuals an opportunity to opt out later. The problem with currently law is that it is often much less expensive for employers to just wait, to not look at their pay and then if they're found responsible for discrimination just to fix it later because the penalties are insufficient. And it shouldn't pay to discriminate but unfortunately under our current law it does.

Mr. SCOTT. Thank you. And there is a change in damages allowed under the bill. How would damages in present law under the Equal Pay Act different for gender cases than the race, religion, national origin?

Ms. YANG. The Equal Pay Act covers discrimination only based on gender. It provides the ability to get back pay. So the difference typically between the pay a woman received compared to the pay a comparable male received. And so in the cases where you can show there were willful actions, there is the opportunity to get higher damages but it is still quite limited.

So what the Paycheck Fairness Act does is provide meaningful remedies that will actually compensate workers for the full spectrum of harms that they suffer and that includes compensatory damages, expenses that may have been incurred due to having to search for a new job or medical expenses related to distress from the experience.

Mr. SCOTT. How does that compare for cases involving race discrimination, religion or national origin?

Ms. YANG. So there a number of protections under Title VII. Title VII prohibits discrimination based on race, ethnicity, national origin and it provides compensatory and punitive damages. There are statutory caps that have not been adjusted so those are well behind where they should be.

And you also have the reconstruction era statutes including section 1981 that prohibits discrimination in contracting that provides a full scope of damages for compensatory damages as well as puni-

tive damages without a statutory cap for intentional discrimination based on race and ethnicity but there is no comparable provision based on gender.

Mr. SCOTT. And so this bill would just conform gender discrimination recovery to other cases?

Ms. YANG. Yes. So this bill will fill that gap by ensuring that women who are facing pay discrimination have a full scope of relief.

Ms. ADAMS. Thank you. I would like to recognize the gentlelady from New York, Ms. Stefanik for 5 minutes.

Ms. STEFANIK. Thank you, Chairwoman Adams, and thank you to all of our witnesses today for your thoughtful testimony. Women deserve equal pay for equal work and in the United States, this is the law of the land.

Since 1963, it has been illegal to pay different wages to employees of the opposite sex for equal work. Additionally, Title VII of the Civil Rights Act codified nondiscrimination rules for employment, making it illegal to discriminate including through wages based on race, color, national origin, religion, or sex.

The good news is that we have a strong story to tell of women's empowerment in today's economy. The number of women working in America is at a historic high of 74.9 million and of the 2.8 million jobs created last year, nearly 60 percent went to women. We know that women are graduating college at higher rates than men and are increasingly their family's primary breadwinners.

Let me reiterate my support of equal pay for equal work and voice my desire to strengthen this principle. To do this we must understand what is actually happening. If you account for factors such as hours worked over week, rate of leaving the labor force, specific industry occupation and length of time out of the work force, the wage gap shrinks but it is not completely eliminated. We must focus on closing this remaining gap.

My concern with H.R. 7 is not with the overall goal, which I strongly support, but with how it goes about achieving this goal. I am concerned that aspects of H.R. 7 appear to be prioritizing trial lawyers and in some cases it makes it more difficult for business that are acting in good faith to rectify past wrongs and prevent future pay disparity. Despite these concerns, I want to lay out the principles of H.R. 7 that I strongly support although I have some concerns about the current drafting.

The principles I support are the following. I support the principle of allowing a job applicant to negotiate on the merits of themselves without being saddled by previous salary history. I support the principle of enforcing non-retaliation for pay disclosure by employees. I support the concept of providing workplace negotiation skills training to women.

In addition to these principles, I support policies that I believe will help close this remaining wage gap and we can look at particular Governors who have effectively passed bipartisan legislation. I want to build on those current laws and I want to ask a few questions to Ms. Olson.

Ms. Olson, you discussed that today's employees are looking for flexibility in employment and that increasingly means alternative forms of compensation outside of traditional wages. Could you

elaborate on the potential benefits that allowing businesses to have protection for alternative compensation models would have?

Ms. OLSON. Absolutely. It allows it to, you know, in sum attract, motivate, and retain in the work force longer men and women all who may have unique needs, that may not all be compensation-based, it may be based on other benefits of their working life as well as their personal life and that is not a male, female issue. That's just a worker issue today.

And in terms of that employers are doing along those lines, is they're looking not just to have different types of payments in terms of wages and other elements of compensation but also different benefit plans and different opportunities in terms of leave and other issues.

And what employers are doing with respect to their own pay audits is really, you know, many, many things. One being really looking at a lot of the data that is used. It's not necessarily digitized. Making sure that they do audits and it creates systems so that they actually can go back and be able to account for what are the differences in pay, reviewing it, also reviewing starting pay against what have you been paying people in those jobs that are in the work force that haven't moved? Don't just pay the new people who are coming in because the market is high and people who have been with you for a number of years so there is a holistic view of pay that's being done across workplaces today.

Ms. STEFANIK. I want to followup on that, Ms. Olson. As you just did in your testimony point out that many businesses are looking internally to review their pay practices. And specifically in your opening statement, you discussed certain state laws that incentivize employers to self-audit their pay systems. Can you elaborate on that and why that is a successful model to close this remaining wage gap?

Ms. OLSON. Yes. It really is successful. A number of employers unfortunately are concerned that their own individual, self-critical analyses or views and the way they categorize for statistical reasons different jobs and individuals, et cetera, could be used against them later. No good deed by trial lawyers who say well, you categorized it that way without maybe the benefit of all the information so if an employer has to build their audit model toward is this going to be subject to legal challenge or is it perfect in terms of that way, it's just so costly. You are using third-party statisticians and a lot of outside consultants to do that.

Whereas, if instead an employer in good faith reviews their pay systems and also take and this is what these laws are saying. Take good faith efforts for purposes of that looking at what they have found and taking steps to eliminate pay differences that there ought to be one, a privilege with respect to that so it can't be used against them later and the question isn't did they come to the right answer, but did they do a diligent analysis and in good faith make good faith decisions with respect to it. It will encourage people.

I definitely can represent that to this—these subcommittees. It will encourage more employers to do these audits, to make these changes voluntarily and quickly.

Ms. STEFANIK. Thank you. Thank you for the flexibility on the time, I yield back.

Ms. ADAMS. Thank you. I recognize now the gentlelady from Pennsylvania, Ms. Wild, for 5 minutes.

Ms. WILD. Thank you very much, Madame Chairwoman. Greetings to all of you. By way of background, before I arrived here in Congress just a couple of months ago, I was a litigator for 35 years and have been on both sides of these kinds of disputes. I have represented employers and employees who are claiming an injury in the nature of some form of discrimination. So this testimony has been captivating for me and I read all of your testimonies with great interests.

As a litigator, I was always most interested in making sure that there was a level playing field in the courtroom and that my client, whichever side my client might have been on, was not walking into a court room with the deck stacked against him or her or it, depending upon the case. And that to me seems to be one of the most important criteria for this type of statute.

So I, my questions are—come—are coming from that angle. So let me start with you, Ms. Olson. I wanted to ask you, have you ever represented an employee who has claimed to be injured by way of discrimination?

Ms. OLSON. I have always practiced at business law firms that have represented employers with respect to these issues but also represent them pre-litigation where I view my role as coming to the right decision on behalf of that employer and analyzing all the facts. Not as a person who is defending a position that has been taken, but determining whether in fact there is any evidence of discrimination and I view that as my role pre litigation and during litigation.

Ms. WILD. And when you are in the litigation situation is it fair to say that you have always been there on behalf of companies or corporations?

Ms. OLSON. That's absolutely true.

Ms. WILD. OK. Your clients have a vested interest in this legislation, sit hat fair to say?

Ms. OLSON. I don't know what you mean by vested interest. I believe every American has a vested interest in making sure that we get this right.

Ms. WILD. Well, is it fair to say that the vast majority of your clients would not be happy if this legislation was passed?

Ms. OLSON. I don't believe the vast majority of Americans would benefit from this legislation—

Ms. WILD. OK, well lets stick with my question. OK. Your clients, let's just talk about your clients. Is it fair to say that most of them would be very unhappy if this legislation was passed?

Ms. OLSON. You know, I can't answer for them. I haven't asked them that question. I don't believe the legislation works in today's workplace so my opinion is that I don't believe that it would be beneficial to any small, medium, or large employer.

Ms. WILD. And you believe that the current State of the law provides for a level playing field, don't you? You've stated in your written testimony that plaintiffs already take advantage of the system by filing discrimination charges, therefore the Equal Pay Act must be enough.

Ms. OLSON. I haven't said that the Equal Pay Act is enough. I provided three examples of improvements or enhancements to the Equal Pay Act that I believed would enhance it.

Ms. WILD. OK. Would you agree with me, the data that we have received from the EEOC indicate that employees filed almost 85,000 charges of discrimination in 2017 and the EEOC legal staff filed just 184 merit lawsuits alleging discrimination. Does that sound about right to you?

Ms. OLSON. It absolutely does.

Ms. WILD. OK. And you believe that the rest of those charges that were not accepted by the EEOC evidence some sort of what, frivolous claims, unwarranted claims?

Ms. OLSON. No. No. That, the charges that are filed, many of them continue in investigation, many of them are resolved through settlements and others are dismissed for lack of substantial evidence as found by the EEOC investigators.

Ms. WILD. All right. But you would agree then that just point 2 percent of claims are actually prosecuted by the EEOC. Yes? Say yes or no.

Ms. OLSON. The answer to that is yes.

Ms. WILD. OK. I would like to move on to Ms. Yang if I may. Ms. Yang, can you address the concern articulated by my colleague on the other side of the aisle that the Paycheck Fairness Act will open the floodgates for litigation by providing for uncapped punitive and compensatory damages, even where there is no showing of intentional discrimination?

Ms. YANG. Yes. I know that there is out of time but if I have time, I'm happy to answer that question. I think it's important for us all to step back for a moment and recognize the rigorous prima facie case that a worker needs to establish to even get to the point of the defense.

Courts have required employees not just to show a pay difference between a man and a woman but to show that those jobs are substantially equal in terms of their skill, in terms of their responsibility, in terms of their effort. And that is a rigorous standard to meet.

Employees also need to show that they're working under similar working conditions. So it is only after the employee has shown all of these things which is actually higher than the Title VII burden of proof on a worker under the similarly situated standard. Right. It is only after you have shown that the employer gets to try to put forward this affirmative defense.

And it is appropriate to require that defense is business—a business necessity because the employee has already shown that they're doing the same work. So if the employer is going to justify paying one gender less than the other, it needs to be able to explain a sound business reason for doing that.

Courts have been interpreting that standard of business necessity since 1971 in *Griggs v. Duke Power* case and in 1991 it was codified in the Civil Rights Act of 1991 which amended Title VII. So it is a well-established standard.

Ms. WILD. Thank you, Ms. Yang. And if I just may, I know we are over time, but I, the trial lawyers are the ones that help the employees who claim to be aggrieved, is that right?

Ms. YANG. Absolutely. This Paycheck Fairness Act is about helping workers. Anyone who says this law is working now is not appreciating how much risk employees take on to come forward to sue their employers, to litigate for years and years, to have courts deciding that biased factors justify a pay disparity, right. Even if some courts are getting it right, that is a real hardship for those workers who have to go through that process.

Ms. WILD. Thank you, Ms. Yang. Than you, Madame Chairwoman, for your indulgence.

Chairwoman BONAMICI. Indeed. I next recognize the ranking member of the full committee, Representative Foxx from North Carolina for her questions.

Ms. FOXX. Thank you very much, Madame Chair. I thank the witnesses for being here today and for your testimony on a very important issue for women and all workers across the country. It's a topic of discussion today.

Pay discrimination based on sex is illegal and should not be tolerated. I also strongly agree with previous statements made today that women deserve equal pay for equal work.

Ms. Olson, the Equal Pay Act in Title VII of the Civil Rights Act prohibit pay discrimination on the basis of sex and equal pay for equal work and have been the law of the land for 55 years. From your significant experience in studying this issue and from your legal work in this area, are employers mindful of their legal responsibility not to pay different wages based on the sex of the employee? What steps do businesses of all size take to ensure they're not discriminating based on sex and how much workers are paid?

Ms. OLSON. Thank you. In my experience employers have a deep commitment to ensuring their compensation systems effectively attract, motivate, reward, and retain employees while complying with applicable laws that you've described. Complexities exist because job related factors such as seniority, work performance, prior experience, relevant credentials, competitive offers, and other job-related factors exist between employees who perform the same work.

Some of those are quantitative. Some of those are qualitative issues. Some of those are contained by their nature in HRIS systems. Some of those are not.

So what employers are doing today in terms of taking good faith efforts to comply, I mentioned the conduction of pay audits. That is happening across the country. They are also doing individual employee-level adjustments in connection with those audits. I also mentioned they're reviewing all starting pay decisions in comparison to other pay within the work force. There is also something that I'll describe as the information gap and employers are trying to change that to make sure that they have documented and even digitized in their work force its information regarding what are the variables that are changing and affecting pay. They're educating and developing managers regarding legitimate business reasons that are to be used with respect to particular issues. They're building new compensation structures with ladders within those particular jobs to make sure that everybody understands that maybe a difference in experience or performance is what is putting you in

a ladder going up that relates to the pay you're getting. Those are some of the things that employers are doing.

Ms. FOXX. Thank you. Ms. Olson, H.R. 7 directs the EEOC for the first time ever to collect employee pay data from employers broken down by the sex, race, and national origin of each employee. This provision is a reprise of the rejected Obama Administration proposal to add pay data to the EEO-1 report, which I raised concerns about when it was under reviewed by OMB.

The Obama proposal would have increased the data fields provided by employers in each EEO report 20fold from 180 to 3,660. That is an astonishing figure.

At the time it was also estimated that adding the employee pay data to the EEO-1 would bring the overall cost to employers would have to bear to approximately 700 million annually.

Ms. Olson, do you agree that requiring additional employer reporting to the Federal Government involving employee pay data would not only create huge compliance costs but it will also raise significant privacy and confidentiality concerns for workers and business alike and if so can you expand on these and any other concerns with this mandate?

Ms. OLSON. Thank you, Representative Foxx. I can and I actually was one of those witnesses that testified before the EEOC with respect to the expanded EEO-1 and also relied on specific survey and economic data regarding the actual burden that employers reported that expanded pay data that you described would really impose with a complete lack of utility or benefit.

And let me just give you an example. That form would have required for example a hospital to provide data with respect to men and women within the position of profession without regard to what job they held. They might be a pharmacist, they might be a lawyer, they might be a doctor, they might be a nurse. But if there were any differences generally between pay between men and women within that category without regard to the job they held, that would be used. That's the kind of information that has no utility. That kind of information I just described.

In terms of the burdens, the burden initially estimated by the EEOC when it was introduced was about 5 million. After our testimony, the EEOC increased the burden and said, you know what, I might have been wrong. Maybe it was about 20 million. And the data that we collected showed that it was at least 700 million, the number that you used.

And in terms of privacy concerns, the EEOC's response to those issues which was required under the Paperwork Reduction Act, was that we will get to that.

Ms. FOXX. Thank you. Madame Chairman, I didn't have time to ask a question about the Harvard University study on Massachusetts Bay Transportation but I would like to enter that into the record.

Chairwoman BONAMICI. Without objection.

Ms. FOXX. Thank you, Madame chairman. Thank you for your indulgence.

Chairwoman BONAMICI. Indeed. I now recognize Representative McBath from Georgia for 5 minutes for her questions.

Ms. MCBATH. Thank you to the chairs for holding this hearing today and I would like to thank the witnesses for being here and for your prepared testimonies and remarks. I am proud to be an original cosponsor of the Paycheck Fairness Act and I think most of us can agree that every American should earn equal pay for equal work.

As of January 2019, the median annual wage for women and men in the 6th District of Georgia where I reside was \$53,351 and \$75,837 respectively. That amounts to a \$22,000 difference. This gender gap is most clear. And I am glad the Paycheck Fairness Act would address this issue.

Not only would this legislation help women in Georgia, this will also help families across the Nation. I would like to learn a little bit more about the impact of the gender pay gap and so, Ms. Graves, could you please answer this question for me? What impact does education level, whether that be high schools, secondary or posts secondary have on the gender pay gap?

Ms. GOSS GRAVES. Thank you, Congresswoman. One of the things that has been studied and studied again is whether or not it is possible to totally eliminate the gender pay gap if you control for things like education level, if you control for things like geography, if you control for unionization, you know, a range of things.

And although the pay gap does shrink when you control for education level, it's just impossible to eliminate no matter how much you control for it. There is a large portion of it that remains unexplained and likely due to discrimination. And one of the reasons that we know that is that there is a number of studies that have followed people right out of college, AUW has a study like that where they have looked at people straight out of college, I mean, within a year of graduating from college even when same major still a pay gap.

Ms. MCBATH. Well, thank you. Could you also speak to what impact paid family and medical leave has on the gender pay gap?

Ms. GOSS GRAVES. One of the things that we know is that the pay gap is due to discrimination in the same job but it is also due to other things like the fact that there is a, what we like to call a care giver penalty. And so those, the full suite of solutions to really finally make sure that we don't have a situation where Latinas are losing a million over the course of their lifetime or \$22,000 in Georgia 6 is going to include things like Paycheck Fairness Act but it's also going to include things like finally having a national paid family and medical leave program so passing things like the Family Act will make a difference.

Actually waging—raising wages so that we for the first time in over a decade raised the minimum wage, right, and have one fair wage. All of those things will help to contribute to lowering the pay gaps so that we do not have a situation like we had in the last decade where we have barely budged.

Ms. MCBATH. OK. Thank you. Well, also very struck by the section of the bill that would establish and run grant programs to carry out negotiation skills training programs for girls and for women. So, Ms. Goss Graves, could you expand on the impact this will have on the gender pay gap as well?

Ms. GOSS GRAVES. I mean, one of the things that we know is that a lot of employers rely on negotiation as a part of their salary setting process. And study after study has shown that the problem is that when employers see men and women who negotiate differently, right. When men negotiate they kind of like it. When women try to negotiate it turns out they don't think they do so well. So some of that is bias and stereotypes and stereotyping.

But one of the things that Paycheck Fairness Act would actually do is give women more tools, give people tools so that they understand how they will be perceived when they negotiate.

Ms. MCBATH. Thank you so much. I yield back my time.

Chairwoman BONAMICI. Thank you, representative, and before I recognize the next member for questions, I request unanimous consent to submit for the record a letter from Virginia Lipnic to Donald McIntosh, Kimberly Esserly dated May 25, 2017 with the subject Responses to the Chamber in EEAC critics of the EEO-1 pay data collection. And a letter from Virginia Lipnic to Peggy Mastroianni, legal counsel, titled EEOC's response to EEAC's argument that relevant circumstances have changed after OMB's approval of the EEO-1 report.

In that letter which was recently discovered in response to a FOIA request from the ACLU, Ms. Mastroianni in fact informed Ms. Lipnic that there were in fact no significant change in relevant circumstances that would provide OMB with an independent basis to reconsider and issued a stay. Without objection.

And I now recognize Mr. Johnson from South Dakota for 5 minutes for your questions.

Mr. JOHNSON. Madame Chair, thanks so much. I will start by stating the obvious that equal pay for equal work is just and it is appropriate. I'm proud that it's the law of the land under the Equal Pay Act. That pride doesn't blind my eyes to the fact that there are opportunities for improvement, of course and that is where I would like to start. Ms. Olson, you referenced in your testimony and also alluded to under questioning by Ms. Wild some areas for improvement.

And I guess the one that I want to learn a little bit more about is you talking about making sure that the required—there is a requirement that the pay differential is linked to some job-related or site-related factor. I assume that would add to the predictability and the clarity and the common-sense application of the Equal Pay Act but it would like you to teach me a little bit more about that.

Ms. OLSON. Thanks very much for your question. Yes, the currently the Equal Pay Act language says any other factor after a list of job-related factors, many of them that have been talked about today, and any other factor other than sex. That language based on principles of statutory construction and the majority of circuit courts that have looked at it have said that well that other factor has got to be job related. But there have been a couple of courts that have said well, it's got to be uniformly implied and it's got to be the real reason but I don't know if it necessarily has to be job-related. That's a very, very small minority view.

Employers look to both development and education of managers who do interviews and also human resource executives that they make sure that their decisions are based on what is often times

called LBRs. Legitimate business reasons. And that's really what the courts have looked to and inserting that so that there is no question. It's absolutely expressed in the statute and I believe would be welcome and it is appropriate.

Mr. JOHNSON. So give me some sense now it seems as though maybe the prevailing set of case law has kind of moved away from illegitimate business reasons, right. I mean, give me some sense of what may—

Ms. OLSON. Just—

Mr. JOHNSON. Go ahead, sorry.

Ms. OLSON. You know, I'm sorry. So I think I understand your question. It's not that an illegitimate business reason was ever appropriate. See, to go back to what the Equal Pay Act is, it's a strict liability statute and the only employment discrimination statute in the United States that says show me a difference in pay between two people doing the same thing. You don't have to prove discrimination. Just show me a difference in pay and employer—you don't have the burden of production in the law. You have the burden of persuasion. You have to not articulate a legitimate business reason, you've got to prove it. That's what the Equal Pay Act currently says.

And so here, examples would be job performance. Examples would be experience that would be relevant. But relevant experience isn't something that's usually documented and digitized in a system, it's something you learn from talking to someone or was on their resume.

So emphasizing that those job related reasons are the ones and only the only ones that you can rely on is something that I think will also further the proactive employer actions that I have described in terms of what we all want which is equal pay for equal work.

Mr. JOHNSON. That is very illuminating, thank you. Yes, I want to shift a little bit to retaliation and that is prohibited by the National Labor Relations Act. But I want to get a sense of how the law today around this equal pay issue differs from that and then how the proposed legislation would deal from the National Labor Relations Act.

Ms. OLSON. OK, thank you very much. And it's not just the National Labor Relations Act. There are many, many statues and I have city them in my written testimony including Title VII that says you can't be retaliated against for discussing. It's not just participating or opposing a pay practice and if you go to the EEOC website today, you'll see the long list which I have included in my testimony of all the different type of discussion actions that are, that the EEOC has listed as protected under existing law.

So you've got Title VII you've got other non-discrimination like GINA for example. You've got the National Labor Relations Act that protect reasonable actions taken by employees to—for an appropriate purpose for learning, for discovering, for trying to understand is there a difference. What the—what H.R. 7 does, it says anybody can talk about anybody's pay with no restraints, not for a reasonable purpose, the purpose in terms of furthering equal pay, any reason.

So you could just post everybody's name and pay rate on social media. And if somebody did that, an employer couldn't take action against them? That's what currently H.R. 7 would allow.

Mr. JOHNSON. Thank you very much. Thanks for your courtesy, Madame Chair. I yield back what time I don't have.

Chairwoman BONAMICI. Thank you, Representative. I now recognize Representative Dr. Schrier from Washington for her questions.

Ms. SCHRIER. Thank you. Thank you, Ms. Chairman, and thank you to all of our witnesses. I just, I am very grateful for you coming and I am excited about hearing more about pay equality. This—just this morning I as the first pediatrician in Congress had the opportunity to meet with a whole bunch of groups who all advocate for the welfare of children whether that is education, healthcare, you name it.

And a question came up that was about the intersectionality really between poverty and food insecurity and housing insecurity, education, healthcare, school outcomes, even kindergarten readiness and as—and we all in that room understood that.

And so my question is to you, Ms. Rowe-Finkbeiner, about is there such an advocate for moms if you could talk about poverty in homes where there is a single working mom and what Paycheck Fairness Act would do to change the living situations and the ultimate outcomes for those families and for the kids.

Ms. ROWE-FINKBEINER. Thank you for the question. It is a good one. Right now, in the United States of America when we are looking at women's wages and what is happening with women, we have to take a step back and look at what is happening with pay equality.

So right now, over 90 percent of people who are women are making less than \$75,000 a year and half of those people who are women are making less than \$30,000 a year. Single moms are experiencing the most extreme wage hits. They are making around 55 cents to a man's dollar. And so when we look at what happens with families, we look at what happens with our economy, we see a tremendous problem.

If women had pay parity, we would drop poverty in families by 50 percent. This is huge. This is needed. This is necessary. 1 in 5 children in our country right now are experiencing food scarcity due to family economic limitations and family structure has changed. I want to say that again. Family structure has changed.

A Johns Hopkins University study found that 57 percent of births to millennials were to single mothers. So when we are looking at what happens with the confluence of the wage hit, of what is happening with parenting, of what is happening with children, what is happening with our country, we have to get to pay parity. And we have to get to pay parity because it helps businesses.

Again, remember when we have more women in leadership, businesses thrive. It helps families. When we pull families out of poverty, we have children becoming the leaders of tomorrow. It helps women because when we are actually having enough to spend, we then in turn help our economy.

I want to step back. I love your big question because I always shave big answers but I want to step back and remind people that

women make three quarters of consumer purchasing decisions. An economy that is 72 percent of our GDP is based on consumer spending. So when we have women having such extreme pay hits, we have extreme harms to our children's health to our economy and to women. And this is a really big deal to solve so I'm so excited that we are all here today to solve it and to finally, finally, finally pass the Paycheck Fairness Act. Thank you for your question.

Ms. SCHRIER. Thank you. I may have another one for either you or for Ms. Goss Graves. You can battle this one out.

So this is a personal story that I have for the past many years enjoyed, I think, pay parity because as a pediatrician, my pay was based mostly on my productivity and here I have equal pay.

But I have to tell you that coming out of residency, I was so excited to earn more than \$4 an hour that when I was offered my first job, that is right. When I was offered my first job I just immediately accepted. It didn't, it never occurred to me to negotiate. That was what was offered and that is what I would accept.

So I just have to ask a bit about to either one of you, about the negotiation skills training and what that looks like and how that helps and, you know, do you have any empiric evidence on what kind of gap that could make up for women who are just entering a first job?

Ms. GOSS GRAVES. The negotiation training is important because it is going to give people more tools and remind them to ask and to ask for more for sure. But it is also just important to remind people that we can't fully negotiate our way out of pay discrimination and so it is a piece of a broader approach that ends the many, many practices that employers are giving. You know, I would say that, you know, your employer who set your first salary perhaps far too low probably takes some responsibility there too especially if there was someone doing exactly what you were doing but making a lot more.

Ms. SCHRIER. I will never know the answer to that question. Thank you very much.

Chairwoman BONAMICI. Thank you, representative. I next recognize Representative Hayes from Connecticut for her questions.

Ms. HAYES. Thank you, Madame chair. Actually I am going to yield my time to my colleague, Congresswoman Susan Wild.

Chairwoman BONAMICI. Representative Wild.

Ms. WILD. Thank you, Congresswoman, for yielding your time to me. I am going to continue with my theme of leveling the playing field and I want to elaborate on the last comment that I made after Ms. Yang testified in response to my question.

My experience over 30 plus years of being a litigator, most of which by the way, Ms. Olson, was on the defense side, meaning I represented the companies or people who were being sued by somebody represented by a trial lawyer and for anybody who doesn't know, trial lawyer is commonly used to refer to lawyers who represent plaintiffs. But in my experience, far from being the villains, almost every trial lawyer I encountered was the only hope for a plaintiff who was unsophisticated, didn't understand the law and had no hope of a legal claim without the expertise of his or her lawyer.

Our legal system is dependent on having lawyers who will help individuals, who are unsophisticated in the law or who do not know their legal rights. So for instance, when my colleague on the other side of the aisle, Mr. Johnson, was talking about retaliation being forbidden and Ms. Olson was engaging in the dialog with him, the only way an employee would be able to pursue a claim of retaliation is with the benefit of a trial lawyer to help him or her.

So with that said, I am going to ask Ms. Rowe-Finkbeiner, in your testimony you shared an interesting perspective and we are going to shift gears a little bit to class actions. As you may have ascertained I like to get into the weeds on this legal stuff. But I would like—I was drawn to your testimony on why it is important to amend the Equal Pay Act to change the class action to be an opt out standard similar to the standard under Title VII and under rule 23 of the Federal Rules of Civil Procedure. From the perspective of the women that you have engaged with, why is it important for them to be able to band together in such actions? And maybe you could just explain that a little bit for those who aren't familiar with the opt out standard.

Ms. ROWE-FINKBEINER. Well, we need to remember again who is being impacted the most by unfair pay to your question which is low income women. The lower your income, and three quarters of minimum wage workers are women, the more significant you are going to be impacted by wage gaps.

And so for lower wage women workers, automatic inclusion in class action lawsuits is vitally important. Because it is also in those job positions that you are most vulnerable to retaliation.

The moms of America that we hear from every day are telling us their story about their unfair pay. They're telling each other their story about unfair pay. But they are absolutely afraid to step forward and talk to their employer or to take action or to much less afford an attorney. And this is very important because if we don't have this inclusion, if we can't stand together, then women have to stand up by themselves and say I am experiencing unfair pay.

And let me tell you, that does not go well. We hear from the moms of America what happens when they stand up and they lose their jobs or they're told, you know, it's this or the highway. And so we hear that again and again and again and so what that says is that the current law is not sufficient. What is happening right now is not sufficient.

We have right now experiences where we have moms with equal resumes on pieces of paper, not actually in person, getting hired 80 percent less of the time that non moms. So current law is not sufficient. We need to be able to band together, we need to be able to protect women from retaliation and the way to protect women from retaliation is to have an inclusive group rising together and that's absolutely needed as shown by the horrifyingly horrible pay gap data that we see right now today.

Ms. WILD. And just to be perfectly clear, opt out would mean that they would be included in the class unless they chose to opt out if they were discriminated against, is that correct?

Ms. ROWE-FINKBEINER. I want to defer to Ms. Yang who is an attorney.

Ms. WILD. OK. And I am going to ask Ms. Yang a question anyway so she can address it in response to this. Prior to your time at the EEOC, you spent 15 years litigating equal pay and other discrimination cases on behalf of employees. And litigation is obviously very expensive, especially with the threat of the prevailing party recovering attorney's fees. And that often scares off aggrieved workers. Is that your—would you agree with that?

Ms. YANG. Yes.

Ms. WILD. OK. Could you discuss please how in your experience employers use the prevailing party doctrine to extort or deter aggrieved workers claims and how the Paycheck Fairness Act levels the playing field on that issue. And it—

Ms. YANG. And people—

Ms. WILD [continuing]. at the same time perhaps you could address the question that I asked.

Chairwoman BONAMICI. And before you answer, Ms. Yang, the time has expired and the hour is late so I am going to ask you to submit that response to the record because we still have other members who have not yet asked their questions.

Ms. WILD. Thank you and I apologize—

Ms. YANG. Sure.

Ms. WILD [continuing]. Madame Chairman.

Chairwoman BONAMICI. Nope, no worries. Certainly the response can be submitted for the record.

Ms. YANG. Certainly I will do that.

Chairwoman BONAMICI. I next recognize Representative Stevens from Michigan for her questions.

Ms. STEVENS. Thank you so much and thank you to our distinguished panel today for testifying and sharing your expertise on this critical topic around wage disparities and gender wage disparities.

As somebody who has spent their career in work force development and STEM education and particularly girls STEM education, I couldn't think of a more pertinent topic for our new Congress in this historic moment, 100 years from when women got the right to vote to now having the most number of females serving in the body that we bring this topic to the fore and this legislation to the floor of the U.S. Congress.

And so my first question is for Ms. Goss Graves around the value of work and the value of human driven work. And in particular, in your testimony Ms. Goss Graves, you talked about 60 percent of employees in the private sector report that discussing their wages is either prohibited or discouraged. Why is that the case? How do these policies inhibit workers from adjudicating pay discrimination claims?

Ms. GOSS GRAVES. So pay is, there is a lot of secrecy already around pay even before you add on punitive pay policies that some employers put in place. So if an employee puts a policy in place that says if you talk about your wages with each other, if you report what you are making to anyone, you can be fired or you're violating a rule in some way, it means that people are less likely to do it at all.

That's what happened with Lilly Ledbetter. That's why 20 years went by and she didn't know that she was making so much less

than everybody around her. You know, so for those work places, what you have seen now is some employees really saying I'm ready to talk to people about what I'm making because right now all of the pay information lies in the hands of an employer.

Ms. STEVENS. Well, and we have also seen that we are at some of the lowest levels in union participation and in union organizing and I am wondering depending on your knowledge if you could kind of comment a little bit around the importance of being able to collectively bargain and to have it, having a strong labor unionizing presence in the work place.

Ms. GOSS GRAVES. I mean, one of the things that we know is that union workplaces have lower pay gaps. Right. Have smaller pay gaps. So we know that part of the effect of unionization is having both more transparency around wages and inability to have some collective shifts.

It doesn't eliminate it entirely, right. You still need more. But it is some protection in the fact that we have seen a tax on unions just at the same time that we have seen a wage gap not really budge in so many years is really related.

I just want to raise one more point that I forgot to raise earlier. You know, the anti-retaliation provision in the Paycheck Fairness Act, it not require that workers go around saying their wages, right. It is just that you can't be penalized if you are talking about your wages. There's a big difference there.

Ms. STEVENS. Yes, great. Well, we are certainly here for the working families of this country and the working men and women and to make their lives better. And to protect their tax payer dollars and what is going into their pocket versus what is not. and, Ms. Rowe-Finkbeiner, I was wondering if you could answer quickly for me what is the wage gap between working mothers and working fathers and if you could just delineate between single working moms if you have it and single working fathers and married mothers versus married fathers.

Ms. ROWE-FINKBEINER. That's an excellent question. Moms are making 71 cents to every dollar that dads make and then when you look at what is happening with moms of color, they're experiencing increased and significant wage hits on top of that. And so when we look at the impact of that on the family, we see that we have children significantly suffering as well as moms and families.

Ms. STEVENS. Yes. And why—so just if you could shed a little bit of light from your vantage and your background. Why is it important to encourage negotiating skills and training programs for women and girls as the Paycheck Fairness Act does? Why is it also important that we remedy the flaws in the Equal Pay Act?

Ms. ROWE-FINKBEINER. It's absolutely essential that we eliminate the flaws so that our economy, our families and our businesses can thrive. And I just want to go back to what is happening with moms. Why are we experiencing these wage gaps, what is happening with women, what is happening with women of color? And there are a lot of implicit bias decisions happening over and over and over again. And training can help shine a bright light on that and eradicate that.

So we need things like the Paycheck Fairness Act. We also need to move forward a stronger infrastructure for working families in

the United States of America. That includes passing the Family Act which was introduced yesterday. Passing the Healthy Families Act which is sick days. Making sure childcare is more affordable. Childcare costs more than college in the United States of America right now. Making sure that you have a livable wage for every one including tipped workers.

So we need to move forward an infrastructure that is strong for families that includes the Paycheck Fairness Act and that allows our tax payer dollars to be well spent.

One of the things I didn't mention is that TANF dollars would be significantly decreased if we have pay parity. So we see that if we have pay parity we will save tax payer dollars. Businesses will be happy, I'll be happy. Women will be happy. And everybody will celebrate. So we really hope that you pass the Paycheck Fairness Act yesterday.

Ms. STEVENS. Fabulous. Well, just as I am about to yield back the remainder of my time, I will reemphasize how important and vital your voices are here today. Thank you.

Chairwoman BONAMICI. Thank you representative. Now I recognize Representative Omar from Minnesota for her 5 minutes.

Ms. OMAR. Thank you, Chairwoman. Happiness and prosperity for all is a really exciting conversation to be part of. I am grateful to all of you for being here and for being part of this critical conversation that will move us toward getting prosperity for all.

Ms. GOSS GRAVES. It is great to see you. I know that you brought intersectionality into your testimony and in it, you address that the pay gaps actually greater for women of color. The statistics you shared in increased pay gap for black, Latino, Native American women were quite shocking. 61 cents to the dollar for black women, 53 cents for Latinos and 58 cents for Native American women.

Clearly the pay gap is compounded by racial gap. And it should be obvious to all of us that this is the—this is a problem that extends beyond the work place. You see the impact everywhere you look in our society. Women of color are less likely to have quality of healthcare coverage, a little more than 20 percent of households of color experience hunger and at some point, that doubles the rate of white households.

When it comes to planning for the future, working women of color are much less likely to have access to employer sponsored retirement plan. And home ownership rates among people of color are also comparatively low. In fact in Minneapolis, the city that I represent was listed as having the widest gap when looking at white and black home ownership rates last year.

Minneapolis in Minnesota is also one of the most segregated and, you know, when it comes to the racial disparity gap is among the highest. So I ask you, do you agree that the gender gap is not only holding us back as black women but amplifying racial inequalities?

Ms. GOSS GRAVES. I mean, there is no question. You know, I wake up thinking about this. The idea that black women make only 61 percent of white man's wages, that is an issue for them, yes. It's an issue for their whole families and black women are more likely to be sole or co-bread winners so it is an issue automatically. Their salaries is for them but it's also for their families and its entire communities. It ties to whether or not people have healthcare, it

ties to whether or not people are really able to actually afford the childcare they need to work in the jobs that they need. It ties to whether or not communities can be collectively stable and really thrive.

So we, you know, it is dealing with this issue which is a fundamental issue of discrimination but it is a fundamental issues of economic security and justice more broadly.

Ms. OMAR. And so when we are addressing equality in this country, this is right as an immigrant, as a refugee, all I heard about was the access to justice and equality in the United States.

But it seems like we often forget to address that in our policies. And so by implementing this, how do you see that it will systematically change the way we see ourselves as equal members of society?

Ms. GOSS GRAVES. You know, when Congress first passed the Equal Pay Act, that's really what they were saying. They were saying if you are doing the same job you deserve to be paid the same wage. And what we have learned over the last 5 decades is we did not go far enough. Our law wasn't effective enough.

So part of what passing the Paycheck Fairness Act right now would do, is send a really loud signal not just to employers about their conduct and the requirement that they pay people the first time, but really to women in this country and especially women of color in this country that they are seen, that they are and that their right to be able to work with dignity and with equity is a core value to this country and to this Congress.

Ms. OMAR. Because, you know, I know that we have talked about this before, empowerment really isn't about just saying, right, that we deserve access to equal things but it's also about removing the barriers that allow us not to be empowered and to be equalized in society.

So I thank you all for your testimony and appreciate this critical conversation we are having and bringing prosperity for all. Thank you.

Chairwoman BONAMICI. Thank you, representative. I now recognize Representative Trone from Maryland for 5 minutes for his questions.

Mr. TRONE. I thank you very much, I appreciate you coming out. Mrs. Goss Graves, we heard earlier from Congressman Don Beyer at the first, on the first panel that pay equity makes good business sense and that makes all the sense in the world to me.

But investing in policies that ensure equity between women, men and women is simply good for business. Companies that hire and retain retains key. More women gain a competitive edge, diversity of thought leads to better problems solving, better ideas, better decisions. Basically better results. That's a win for everybody.

So what are some other factors that make pay equity you think good for business? Now we are talking a lot about team member but on the other side also.

Ms. GOSS GRAVES. One of the things that happened a decade ago when this Congress passed the Ledbetter Fair Pay Act is that new attention and awareness to equal pay happened as well. And so now people are thinking about it and concerned about it and employers know that in order to recruit and retain top talent, they

have to be paying fair wages. And so that is an important incentive that is out there and that is driving some employers.

That's why 100, more than 100 employers signed the White House Equal Pay Pledge. It's why you have seen some people not just do pay audit but then announce the results, right. They've said I just wanted to tell everyone that I have looked, I have done an audit and we pay fairly because they know that consumers care about it and that the people they are trying to recruit and retain care about it.

And I wish that you could always just legislate for like the handful of employers who are going to, you know, do the right thing and only be motivated by those things. I think what is happening right now is some employer are making decisions that are not good for business, they are not good for workers by lowering discrimination to thrive.

Mr. TRONE. Excellent. Agreed. Mrs. Yang, no one is arguing we should allow pay differences based on education training, experience, Equal Pay Act already allows it. And the Paycheck Fairness Act would not change that. But the law exists now so without clarifying that factors other than sex must be job related, seems to me that could be used as a pretext for discrimination. Am I wrong about that?

And why is it important that employers use factors other than sex to be connected to legitimate business reasons?

Ms. YANG. Thank you for that question. You are not wrong. Currently courts have allowed employers to justify pay differences between men and women doing substantially the same work in the same working conditions by reasons including random decisions as well as reasons that themselves had bias. And we have heard about some of that today, the ways in which negotiation can be conducted in a way that actually disadvantages women. So even when women try to negotiate, they can face a backlash. You know, she should just be happy she has this job. Who does she think she is? That is very real for women in the workplace.

And when we see prior salary relied upon or other sort of end specified market forces, what you often have is that individuals who may be people of color, they may be under paid in the market for a variety of reasons. So you're introducing those discriminatory factors into the next job as well as random factors.

And all the Paycheck Fairness Act is trying to do is get employers to really pay attention to what is the consequences of the pay system that they set up and are responsible for. So it's important for employers to actually look at whether the skills and experiences they're valuing truly are related to the job because sometimes they're not. And this requires employers to take that step which they should already be taking, but unfortunately not often enough. Often it is easy to rely on legacy practices.

We think we know that this type of personality will be successful but in fact, when you look at the data and what kind of prior experience and skills correlated with say your best sales people, it might tell a very different story than the system you've set up.

So this really just encourages employer who are in the better position to understand how their system works, to take that proactive action and set up fair pay policies rather than putting the burden

on individual workers who are in the last safe position to address these issues.

Mr. TRONE. Excellent. Thank you. I yield the balance.

Chairwoman BONAMICI. Thank you, representative. I now recognize Representative Lee from Nevada for 5 minutes for her questions.

Ms. LEE. Thank you, Chairwoman, for having this hearing and thank all of the witnesses for being here. I am from Nevada. I have had a career in helping our most at risk student's graduate from high school and we have found that the most significant risk factors for students dropping out is poverty.

I actually sat through a hearing yesterday sort of rivaling this one in length. I think it actually beat it. I will get quicker so we can beat it. That focused on investment and education. A number of my colleague across the aisle continually raise concerns that despite increased investment in education our schools still continue to struggle.

A recent study by the National Center for Children and Poverty found that close to 43 percent of children live in families with incomes that are insufficient to meet basic needs. And given that 63 percent of women are in sole bread winner or co-bread winner in their families, I would like to ask Ms. Goss Graves, can you comment on how this wage gap perpetuates inter-generational poverty and ultimately educational outcomes for students?

Ms. GOSS GRAVES. Well, we know that 1 in 8 women live in poverty and those numbers look worse for certain groups of women of color and the ability to have wages that are fair and that and this long standing wage gap that two have that has not shrunk in the last decade in any way that is meaningful is absolutely tied to the ability for people to live out of poverty I'll say.

And that's especially given the extra penalty that people who are mothers or people who are caregiving generally face. So just as people are transitioning into parenthood, as fathers sometimes get a pay bump, mothers get a pay cut, right. When there have been studies that show that people value mothers and value their abilities less and pay them less.

So all of that combined when you add to it the fact that we are lacking the range of policies that would really make it possible for people to work and to care and to thrive. It makes it a real challenge. So the Paycheck Fairness Act is a critical piece of the range of things that we need to do to reduce those poverty rates that you've made.

Ms. LEE. Thank you. Ms. Rowe-Finkbeiner, would you add, like to add anything to that?

Ms. ROWE-FINKBEINER. Yes. I think it is important to look at what is happening with women and wage hits. And so I referenced this study that I love a little bit before. I want to share a little bit more about that because it really shares what is going on in America.

Cornell University did a study. They had two resumes with equal job experiences, equal everything and the mom was hired 80 percent less of the time than the non-mom and to Ms. Goss Graves point, the dad was hired more. The mom for a highly paid job was offered \$11,000 less. The dad was offered \$6,000 more.

Right now when we look at the structure of family in America, the nuclear family is a thing of the past if it ever even was really a thing. And we know that we have to have the wages of women to boost our economy, to lift our children and importantly—now I'm on a roll we have to make sure that our prior wages aren't used to predict our future wages. And this is one of the things that is critically important in this bill.

We cannot have our past salary be used for future wages. Because if we are working our way up, if we are facing an uphill battle and wages and discrimination and there is massive hiring and wage discrimination, then that past salary history being used to predict future history just puts us in a cycle of poverty.

So that is a key essential part of the Paycheck Fairness Act that we 150 percent support at Moms Rising and the million members of Moms Rising are cheering right now just knowing that you are considering it. Thank you.

Ms. LEE. Thank you. I just want to add in Nevada, if the wage gap were closed, women could afford 56 more weeks of food for her family or eight and a half additional months of rent. Given those statistics, could you comment on what the impact of closing the wage gap would be on retirement savings and Social Security? Ms. Rowe.

Ms. ROWE-FINKBEINER. Over a woman's lifetime, depending on where you are in the pay scale, you're losing \$400,000 to \$2 million over your lifetime due to the wage gap. This means that we have a significantly higher number of women who are elderly living in poverty than men who are elderly living in poverty. And so if we close the wage gap, it's actually an intergenerational benefit to women and to our economy and to our families.

And as we look at what is happening with our country, we are facing a silver tsunami where we have a massive aging population and it's time right now to make sure that we close the wage gap before it is too late. I mean, it is already too late for many families but it is getting worse not better. And to the many points that have been raised in this room about is prior law sufficient, it's absolutely not sufficient. And in fact, as we are looking at an economy where we have greater and greater gaps between the very wealthy and everyone else, the wage gap is becoming a more dire, more emergent situation for the families of America that we must solve now. So thank you.

Ms. LEE. Thank you. I yield.

Chairwoman BONAMICI. Thank you, representative. I now recognize Representative Underwood from Illinois for 5 minutes for her questions.

Ms. UNDERWOOD. Thank you, Madame Chair, for the opportunity to join this panel and thank you to our witnesses for being here today. Ms. Goss Graves, I want to thank you and the National Women's Law Center staff who came by to brief me on the Paycheck Fairness Act last week in preparation for the hearing. Thank you for that as well.

The gender pay gap in my district is shockingly bad. For every dollar that men in Lindenhurst or Sugar Grove or even Sherwood make, women make 71 cents. And, Ms. Goss Graves and Ms. Yang,

how quickly are we making progress on closing the gender pay gap?

Ms. GOSS GRAVES. In the last decade we haven't made very much progress at all. You know, it has inched up like a penny. You know, and so what we really need is sort of a bit of a shot in the arm to actually get this going and closing now. So we are not making the progress we need.

Ms. UNDERWOOD. OK. Ms. Yang, did you have anything to add to that?

Ms. YANG. I think that one of the important things that we need to remember about this Paycheck Fairness Act is that right now we are letting equality be left to chance, right. At the EEOC we did not hear from the overwhelming majority of people who were experiencing pay discrimination. You can see the data in your own district that there are problems but we at the agency were hearing about things because of happenstance.

Somebody found a paper on a copier that had salary information. Somebody sent a misdirected email. So we were relying on happenstance to learn about discrimination. So it was vital to me at the EEOC that we move forward with the pay data collection because that would shine a light on the problems.

And to the point earlier Ms. Olson made about the utility of the data, we carefully studied. We had a pilot effort, we had two rounds of public comment to ensure that data would be useful to the agency. And if you had for example a hospital you would see that we have pay bands. So doctors would be at the top higher pay bands. Nurses would be in different pay bands and the EEOC has decades of experience looking at this data.

We have used it to successfully identify patterns of hiring discrimination by looking at demographic differences as well as promotions where often we may see African Americans are hired only at entry level positions and even though they are the most qualified for the next level supervisor, you see very different patterns.

So having that information really is one of the critical solutions to understanding where pay data exists so that we can then fix those problems.

Ms. UNDERWOOD. Thank you. In addition to stronger penalties for gender discrimination at work, we need to offer solutions and resources that do help working families.

Gender discrimination at work does take many forms including pay discrimination, sexual misconduct, harassment and abuse. One of my first actions once I came to Congress was to pass an amendment to the rules package that helps to prevent the misuse of non-disclosure agreements for work place harassment and assault.

I want to talk about measures like secret settlements and mandatory arbitration that are used to silence victims of gender discrimination. Ms. Goss Graves, would—could non-disclosure agreements and mandatory arbitration be used to silence or pressure victims or pay discrimination and if so how do we prevent that?

Ms. GOSS GRAVES. Yes, I mean, discrimination thrives in the dark and that is one of the things that we have seen over the last year with Me Too going viral and Times Up, we have seen a lot of attention around the really serious harm of non-disclosure agree-

ments and forced arbitration and what that has meant and it makes people feel isolated.

They think that they're the only one who is experiencing this sort of discrimination and it allows a—an employer who is doing the wrong thing to continue to do in the dark.

You know, one of the things is, you know, there is a long standing bill called the Arbitration Fairness Act that would actually say you can't force people into these secret settlements. You can't force people into this mandatory type of arbitration. You know, many people—it's a condition of employment, right. The idea is like you start this job, you sign this paperwork and in that paperwork you have no idea you have signed away all of your rights to be able to have your day in court so to speak or sometimes tell anyone about the discrimination that you've experienced. So that has to change.

Ms. UNDERWOOD. Thank you. Yesterday I stood with many of my Democratic colleagues to introduce the Family Act which would ensure that workers have access to paid family leave and medical leave. How would enacting the Family Act affect the gender wage gap, Ms. Goss Graves?

Ms. GOSS GRAVES. Well, we know that there is a motherhood and caregiver penalty, right. And one of the things is the transition to parenthood is that you're already making less and so many people do not have access to paid family and medical leave.

So having a national standard that says that people could actually do what people are doing which is both working and care and have the time off they need to care for themselves, to care for their family members in those serious situations is critical. And we look at it as a suite of issues that need to happen really all at once.

It is overdue to finally raise wages including tipped workers, to finally have the paid family and medical leave, to finally ensure that people who are working aren't experiencing discrimination in the same job and to have things like access to child care and other work support so that people can do what they're doing which is engaging in work and care.

Ms. UNDERWOOD. Thank you so much. Thank you, Madame Chair.

Chairwoman BONAMICI. Thank you, representative. We have now concluded member questions. I want to remind my colleagues that pursuant to committee practice, materials for submission to the hearing record must be submitted to the committee clerk within 14 days following the last day of the hearing, preferably in Microsoft Word format.

The materials submitted must address the subject matter of the hearing. Only a member of the committee or an invited witness may submit materials for inclusion in the hearing record. Documents are limited to 50 pages each and documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the committee clerk with the required timeframe. Please recognize that years from now the link may no longer work.

Again, I want to thank the witnesses so much for your participation today. What we have heard is very valuable. Members of the committees may have some additional questions for you. We ask the witness to please respond to those questions in writing. The

hearing record will be held open for 14 days to receive those responses and I remind my colleagues that pursuant to committee practice, witness questions for the hearing record must be submitted to the majority committee staff or committee clerk within 7 days. The questions submitted must address the subject matter of the hearing.

And I now recognize the distinguished ranking member of the Workforce Protections Subcommittee, Mr. Byrne, for the purpose of making a closing Statement.

Mr. BYRNE. Thank you, Madame Chairman, and let me congratulate you on this hearing. You have done an excellent job and I appreciate your leadership.

Chairwoman BONAMICI. Thank you, representative.

Mr. BYRNE. When I think about this issue, I think about my grandmother. My grandfather was shot and killed when my mother was a baby and my grandmother went to work in the early '20's. Imagine the workplace of the early '20's for a woman. It wasn't just equal pay, many jobs they wouldn't even let her think about applying for.

Then my mom had to work too, and she was a bookkeeper. She may have had marginally better environment than my grandmother but not much, just to be honest with you.

My wife works. I would say she has a much better environment than my mother worked in but still as some of you have talked about today, we haven't gotten to the point where we have gotten exactly where we needed to go.

But when I think about this most, I think about my two daughters and my daughter-in-law, all who work and a 2-year-old granddaughter. And we want for those young women and that little girl who will grow up to be a young woman, the workplace where they are paid for the true value of what they provide. Everybody on this committee wants that. Everybody.

The question is how do we get there? I have just got to say I have looked at this bill and I have listened to Ms. Olson with her substantial expertise and it looks like it was written by and for the plaintiff's layers. That is what it looks like and I practiced in this area for a long time myself.

I want something that is really going to help women, not something that is really going help lawyers. And I think if we work together on this and come up with a bipartisan bill, which this is not, then we actually could improve the environment for those young women in my family.

So I hope over the next several months we can do that important work because at the end of the day we should be about the people and not about the process. With that I yield back.

Chairwoman BONAMICI. Thank you, Mr. Byrne, and I now recognize the chairwoman of the Workforce Protections Subcommittee, Ms. Adams, for the purpose of making a closing Statement.

Ms. ADAMS. Thank you, Madame Chair, and thank you to our ranking member as well and to all of you for your testimony and to all the advocates here in Congress and on the ground working to ensure equal wages for equal work.

Now throughout this hearing, we have heard how women, particularly women of color continue to face gender based wage dis-

crimination even after 10 years of the Lilly Ledbetter Fair Pay Act and 56 years of the Equal Pay Act.

So it is clear from the discussion today that we have got to act now. We can't continue to rob \$5 billion each year from nearly half of our Nation's work force, shortchange families and children by financially penalizing mothers and force women to work 10 years more or up to 23 years more for women of color just to be paid fairly.

Congress has an obligation to pass the Paycheck Fairness Act and end gender based pay discrimination once and for all. I would remind all of my colleagues on both sides of the aisle that if you are a member the U.S. House, if you are member of the Senate, if you are a male or female, we get the same check. So we need to think about that.

Most of us here have—well, everybody here has had a mom. You have one or you have had one and most of us or many of us have had sisters or we have sisters and nieces and daughters and wives. So I just can't imagine that we would not advocate for them to be paid less for the same work just because they are women.

So I want to thank all of you again. I hope that we can maintain a system where your gender can—does not have to determine your salary. The discussion today was an important step toward ending that shameful reality and so I look forward to helping to shape an America where everyone receives equal pay for equal work. Thank you. Thank you, Madame Chair, I yield back.

Chairwoman BONAMICI. Thank you, Representative Adams. I now recognize the distinguished ranking member of the Civil Rights and Human Services Subcommittee, Mr. Comer, for the purpose of making a closing Statement.

Mr. COMER. Thank you, Madame Chair. I want to thank the witnesses for a good discussion today and I want to thank our members for asking some really important questions.

Ms. Olson, I especially want you to know how much your expertise shed light on this bill in particular. This is an important issue, but this is a legislative hearing. Your presentation of opportunities and shortcomings was particularly constructive, so I thank you for that.

I will be brief, but I want to emphasize again that women are changing the workplace for the better and as the economy continues to improve, those contributions are going to become even more important.

Thank you again for being here and, Madame Chair, I yield back

Chairwoman BONAMICI. Thank you, Mr. Ranking Member. And I now recognize myself of the purpose of making my closing Statement. I want to thank the witnesses again for being here for your valuable contributions.

Today women make up nearly half of our work force. 64 percent of mothers in the United States are either the sole family breadwinner or a co-bread winner. Their wages pay for rent, groceries, childcare, healthcare. Closing the wage gap is an economic imperative. It's good for working families and it will help lift families out of poverty.

Today's hearing on persistent gender based wage discrimination addresses the very injustice that is facing millions of working fami-

lies. Our witnesses described how insufficient enforcement and loopholes in the Equal Pay Act and the Title VII of the Civil Rights Act result in barriers to detecting wage discrimination and to holding employers accountable.

We heard how gender wage discrimination has far reaching and long term effects for our economy, our children and our families. Most importantly, we heard how Congress can provide workers with the tools they need to close the gender pay gap and achieve wage equality by passing the Paycheck Fairness Act.

By addressing the problematic loopholes in current law, by empowering workers to better detect and combat wage discrimination and by creating mechanisms for better pay data transparency we can restore the original intent of the Equal Pay Act and finally after all these decades make equal pay for equal work a reality.

There being no further business, without objection, the committee stands adjourned.

[Additional submissions by Chairwoman Bonamici follow:]



Office of
Legal Counsel

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

April 14, 2017

MEMORANDUM

TO: Victoria A. Lipnic
Acting Chair

FROM: Peggy R. Mastroianni /s/
Legal Counsel

SUBJECT: EEOC's Response to EEAC's Argument that Relevant Circumstances Have Changed After OMB's Approval of the EEO-1 Report

I. Introduction

On March 20, 2017, the Equal Employment Advisory Council (EEAC) sent a letter to John M. Mulvaney, the Director of the Office of Management and Budget (OMB), urging him to review, reconsider, and reject the September 29, 2016, approval of a revised EEO-1 report to collect pay band and hours-worked data starting March 31, 2018. This memorandum addresses EEAC's argument¹ that EEOC's release of "partial" data file specifications, which were referenced in EEOC's 30-day Federal Register notice and disclosed after OMB approved the revisions to the EEO-1 report, provides sufficient justification for OMB to reconsider its approval of the revised form.

II. The EEAC Argues That "Relevant Circumstances Have Changed" Because the EEOC Released File Specifications for Data Upload Files That Were Not Submitted to OMB

OMB may *sua sponte* decide to reconsider its approval of an information collection prior to the expiration of the current approval of that information collection under certain

¹ The EEAC also argued in its letter that EEOC's burden estimates for the revised EEO-1 were in material error and urged OMB to reconsider its prior approval of the pay data collection for that reason. The memorandum responding to the Chamber's letter addresses burden issues in detail. The EEAC's only other burden issue was whether burden should be calculated on a per-cell basis. In light of reliance on information technology, and the fact that EEO-1 cells can and are left blank in the absence of data, the EEOC moved away from this methodology for calculating burden in 2016. Finally, the EEAC recommended that OMB consider alternatives to the currently approved collection and suggested that any new revisions to the EEO-1 be subject to a pilot study that includes a representative sample of actual employers to test the burden and utility.

circumstances. One of those “circumstances” is that “relevant circumstances have changed” since the time of OMB’s approval.²

A. The EEAC Argument

EEAC argues that the EEOC’s file specifications, which were published after OMB approved the EEO-1 pay data collection on September 29, 2016, are an indication that relevant circumstances have changed and provide an independent basis for OMB to reconsider its approval of the collection. EEAC contends that the published file specifications will impose an additional burden on employers because employers will be required to create a spreadsheet that does not resemble the approved EEO-1 and that the EEOC did not provide further guidance or instructions that discuss the new file specifications.

B. The EEOC Response

1. Defining when “Relevant Circumstances have Changed”

The regulations implementing the Paperwork Reduction Act (PRA) of 1980 do not define what constitutes a change in relevant circumstances, and OLC’s research of the law did not yield a more detailed definition. The preamble of the 1982 NPRM proposing OMB’s regulations to implement the PRA, which EEAC cites in its letter, does provide some evidence of OMB’s intent in creating the reconsideration process. While the EEAC cites to a paragraph from the preamble affirming OMB’s authority to conduct a review, the immediately preceding paragraph makes clear that OMB should reconsider an approval of a collection of information only “when circumstances have significantly changed . . .” (emphasis added).³ This suggests that OMB did not intend to step in whenever there was a change in circumstances surrounding an approved information collection, but expected to reserve this remedy for cases in which a change had a significant impact.

2. EEOC’s File Specifications

The EEOC’s published file specifications are not a new requirement but rather simply a familiar tool to make it easier for employers to submit EEO-1 data to the EEOC. The EEOC provided this tool to employers for use with the 2016 EEO-1, as evident on the EEOC website, where the file specifications for the 2016 EEO-1 were published at https://www.eeoc.gov/employers/eo1survey/eo1_csv_specifications.cfm. Like those later published for the EEO-1 pay data collection, the 2016 specifications were in comma-separated values format (“csv”), a format that enables employers to convert tabular data (like that in the EEO-1) for importation and exportation to a database. Employers that used data upload technology for their 2016 EEO-1 reports used these csv specifications.

² See 5 C.F.R. §1320.12(h)(2)(i) (*sua sponte* reconsideration of clearance of collections of information in current rules).

³ Office of Management and Budget, Controlling Paperwork Burdens on the Public, Notice of Proposed Rulemaking, 47 Fed. Reg. 39,515, 39,522 (Sept. 8, 1982).

Publication of the file specifications after OMB's approval of the pay data collection is not a "significant" change that warrants OMB's reconsideration. As noted above, EEOC indicated in the 30-day notice its intent to post updated specifications, and stated that it would provide support to employers and HRIS vendors as they transitioned to the new reporting requirements. EEAC had notice of these data specifications, was probably familiar with the 2016 version, and had ample opportunity to raise questions or concerns before OMB's approval of the revised EEO-1, but it did not do so.

Co-Sponsor and Support Swift Passage of the Paycheck Fairness Act

February 11, 2019

Dear Representative:

As members of a broad coalition of organizations that promote economic opportunity for women and vigorous enforcement of antidiscrimination laws, we strongly urge you to co-sponsor and push for swift passage of the Paycheck Fairness Act as a top priority of the 116th Congress. Despite federal and state equal pay laws, gender pay gaps persist. This legislation offers a much needed update to the Equal Pay Act of 1963 by providing new tools to battle the pervasive pay gaps and to challenge discrimination.

In January, we celebrated two major accomplishments. First, an historic number of women were sworn into the 116th Congress, many of whom – along with their male colleagues – ran and won on issues central to the economic well-being of families. Second, on January 29, 2019, we commemorated the tenth anniversary of the enactment of the Lilly Ledbetter Fair Pay Act. That vital law rectified the Supreme Court’s harmful decision in *Ledbetter v. Goodyear Tire & Rubber Company*. The law helps to ensure that individuals subjected to unlawful compensation discrimination are able to have their day in court and effectively assert their rights under federal antidiscrimination laws. But the Lilly Ledbetter Fair Pay Act, critical as it is, is only one step on the path to ensuring women receive equal pay for equal work.

There is no more fitting way to begin this historic Congress than by making real, concrete progress in ensuring all women receive fair pay. The Paycheck Fairness Act updates and strengthens the Equal Pay Act of 1963 to ensure that it provides robust protection against sex-based pay discrimination. Among other provisions, this comprehensive bill bars retaliation against workers who voluntarily discuss or disclose their wages. It closes loopholes that have allowed employers to pay women less than men for the same work without any important business justification related to the job. It ensures women can receive the same robust remedies for sex-based pay discrimination that are currently available to those subjected to discrimination based on race and ethnicity. It prohibits employers from relying on salary history in determining future pay, so that pay discrimination does not follow women from job to job. And it also provides much needed training and technical assistance, as well as data collection and research.

Women are increasingly the primary or co-breadwinner in their families and cannot afford to be shortchanged any longer. Women working full-time, year-round are typically paid only 80 cents for every dollar paid to men, and when we compare women of color to white, non-Hispanic men, the pay gaps are even larger. Moms are paid less than dads. And even when controlling for factors, such as education and experience, the pay gaps persist and start early in women’s careers and contribute to a wealth gap that follows them throughout their lifetimes. These pay gaps can be addressed only if workers have the legal tools necessary to challenge discrimination and when employers are provided with effective incentives and technical assistance to comply with the law.

It’s time to take the next step toward achieving equal pay. We urge you to prioritize the Paycheck Fairness Act in the 116th Congress by co-sponsoring and urging swift passage of this legislation, taking up the cause of Lilly Ledbetter and all those who have fought for equal pay.

If you have any questions, please do not hesitate to contact Deborah J. Vagins, Senior Vice President of Public Policy and Research at the American Association of University Women at (202) 785-7720, Emily Martin, Vice President for Education & Workplace Justice at the National Women’s Law Center at (202) 588-5180, and Vicki Shabo, Vice President for Workplace Policies and Strategies at the National Partnership for Women and Families at (202) 986-2600.

Sincerely,

9to5, National Association of Working Women

9to5 California

9to5 Colorado

9to5 Georgia

9to5 Wisconsin

A Better Balance

ACCESS Women's Health Justice

Advocacy and Training Center

AFL-CIO

PA AFL-CIO

African American Ministers In Action

American Association of University Women (AAUW)

AAUW of Alabama

AAUW of Alaska (AAUW Fairbanks (AK) Branch, AAUW Kodiak (AK) Branch)

AAUW of Arizona

AAUW of Arkansas

AAUW of California

AAUW of Colorado

AAUW of Connecticut

AAUW of Delaware

AAUW of District of Columbia (AAUW Washington (DC) Branch, AAUW Capitol Hill (DC) Branch)

AAUW of Florida

AAUW of Georgia

AAUW of Hawaii

AAUW of Idaho

AAUW of Illinois

AAUW of Indiana

AAUW of Iowa

AAUW of Kansas

AAUW of Kentucky

AAUW of Louisiana

AAUW of Maine

AAUW of Maryland

AAUW of Massachusetts

AAUW of Michigan

AAUW of Minnesota

AAUW of Mississippi

AAUW of Missouri

AAUW of Montana

AAUW of Nebraska

AAUW of Nevada

AAUW of New Hampshire

AAUW of New Jersey

AAUW of New Mexico

AAUW of New York

AAUW of North Carolina

AAUW of North Dakota

AAUW of Ohio

AAUW of Oklahoma

AAUW of Oregon

AAUW of Pennsylvania

AAUW of Puerto Rico

AAUW of Rhode Island
 AAUW of South Carolina
 AAUW of South Dakota
 AAUW of Tennessee
 AAUW of Texas
 AAUW of Utah
 AAUW of Vermont
 AAUW of Virginia
 AAUW of Washington
 AAUW of West Virginia
 AAUW of Wisconsin
 AAUW of Wyoming
 American Civil Liberties Union
 American Federation of Government Employees (AFGE), AFL-CIO
 American Federation of State, County, and Municipal Employees (AFSCME)
 American Federation of Teachers, AFL-CIO
 American Psychological Association
 Americans for Democratic Action
 Anti-Defamation League
 Atlanta Women for Equality
 Bend the Arc: Jewish Action
 Bozeman Business & Professional Women
 California Employment Lawyers Association
 California Federation of Business & Professional Women
 Caring Across Generations
 Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
 Center for Advancement of Public Policy
 Center for Law and Social Policy
 Citizen Action of New York
 Clearinghouse on Women's Issues
 Coalition of Labor Union Women
 California Capital Chapter, Coalition of Labor Union Women
 Chesapeake Bay Chapter, Coalition of Labor Union Women
 Chicago Chapter, Coalition of Labor Union Women
 Derby City Chapter, Coalition of Labor Union Women
 Grand Prairie/Arlington Chapter, Coalition of Labor Union Women
 Greater New Jersey Chapter, Coalition of Labor Union Women
 Greater Oklahoma City Chapter, Coalition of Labor Union Women
 Houston Chapter, Coalition of Labor Union Women
 Ohio Chapter, Coalition of Labor Union Women
 Kentucky State Chapter, Coalition of Labor Union Women
 Los Angeles Chapter, Coalition of Labor Union Women
 Metro Detroit Chapter, Coalition of Labor Union Women
 Michigan Capitol Area Chapter, Coalition of Labor Union Women
 Missouri State Chapter, Coalition of Labor Union Women
 Neshaminy Bucks Chapter, Coalition of Labor Union Women
 Philadelphia Chapter, Coalition of Labor Union Women
 Rhode Island Chapter, Coalition of Labor Union Women
 San Diego Chapter, Coalition of Labor Union Women
 Southwestern PA Chapter, Coalition of Labor Union Women

St. Louis Metro Chapter, Coalition of Labor Union Women
 Western New York Chapter, Coalition of Labor Union Women
 Western Virginia Chapter, Coalition of Labor Union Women
 Congregation of Our Lady of the Good Shepherd, US Provinces
 Connecticut Women's Education and Legal Fund (CWEALF)
 Disciples Women
 Ecumenical Poverty Initiative
 Equal Pay Today
 Equal Rights Advocates
 Friends of the Delaware County Women's Commission
 Futures Without Violence
 Gender Equality Law Center
 Girls For Gender Equity
 Girls Inc.
 Grameen Development Society (GDS)
 Graphic Communications Conference/International Brotherhood of Teamsters Local 24M/9N
 Greater New York Labor Religion Coalition
 Hadassah, The Women's Zionist Organization of America, Inc.
 Holy Spirit Missionary Sisters - USA-JPIC
 Hope's Door
 Indiana Institute for Working Families
 Interfaith Worker Justice
 International Alliance of Theatrical Stage Employees
 International Association of Machinists and Aerospace Workers (IAMAW)
 International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) Local 20
 International Brotherhood of Electrical Workers – 3rd District
 International Brotherhood of Electrical Workers 29
 International Federation of Professional and Technical Engineers (IFPTE)
 International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
 JALSA: Jewish Alliance for Law and Social Action
 Jewish Women International
 Justice for Migrant Women
 Lambda Legal
 The Leadership Conference on Civil and Human Rights
 League of Women Voters of St. Lawrence County, NY
 Legal Aid At Work
 Main Street Alliance
 Maine Women's Lobby
 McCree Ndjatou, PLLC
 Methodist Federation for Social Action
 MomsRising
 Mississippi Black Women's Roundtable
 NAACP
 National Advocacy Center of the Sisters of the Good Shepherd
 National Asian Pacific American Women's Forum (NAPAWF)
 National Association of Letter Carriers (NALC), AFL-CIO
 National Center for Transgender Equality
 National Committee on Pay Equity
 National Council of Jewish Women
 National Domestic Workers Alliance

National Education Association
National Employment Law Project
National Employment Lawyers Association
NELA-Georgia
NELA-Houston
NELA-Indiana
NELA-New Jersey
NELA-New York
NELA-Pennsylvania
NELA-Texas
National Federation of Business and Professional Women Clubs
National LGBTQ Task Force Action Fund
National Organization for Women
Anne Arundel County NOW
Arlington NOW
Baton Rouge NOW
California NOW
Central Phoenix/ Inez Casiano NOW
Charlotte NOW
Chester County NOW
Connecticut NOW
DC NOW
East End NOW
Florida NOW
High Desert NOW
Hollywood NOW
Illinois NOW
Indianapolis NOW
Jacksonville NOW
Louisiana NOW
Maryland NOW
Miami NOW
Michigan NOW
Minnesota NOW
Montana NOW
Morris County NOW
North Carolina NOW
Nevada NOW
New Orleans NOW
New York City NOW
New York State NOW
Northern New Jersey NOW
Northwest PA NOW
Oregon NOW
Pennsylvania NOW
Philadelphia NOW
Seattle NOW
Seminole County NOW
South Jersey NOW — Alice Paul Chapter
Southwest ID NOW

Southwest PA NOW
 Sun Cities/West Valley NOW
 Texas State NOW
 Washington County NOW
 Washington NOW
 Washtenaw County NOW
 West Pinellas NOW
 West Virginia NOW
 Westchester NOW
 Will County NOW
 Williamsport NOW
 Wisconsin NOW
 Worcester NOW
 National Partnership for Women & Families
 National Resource Center on Domestic Violence
 National Women's Law Center
 NC Women United
 NETWORK Lobby for Catholic Social Justice
 New York Paid Leave Coalition
 New York State Coalition Against Domestic Violence
 North Carolina Justice Center
 Oxfam America
 PathWays PA
 People For the American Way
 Planned Parenthood Pennsylvania Advocates
 PowHer NY
 Progressive Maryland
 Public Citizen
 Restaurant Opportunities Centers United
 Service Employees International Union (SEIU)
 SEIU Local 668
 Southwest Women's Law Center
 Texas Business Women Inc.
 Transport Workers Union
 U.S. Women and Cuba Collaboration
 U.S. Women's Chamber of Commerce
 UltraViolet
 Union for Reform Judaism
 Unitarian Universalist Women's Federation
 UNITE HERE! Local 57
 United Church of Christ Justice and Witness Ministries
 United Mine Workers of America
 United Mine Workers of America District Two
 United Nations Association of the United States
 United State of Women
 United Steelworkers (USW)
 United Steelworkers, District 10
 USW Local 1088
 L.U. #1088 USW
 UN Women USNC Metro New York Chapter

Voter Participation Center
Westminster Presbyterian Church
Women Employed
WNY Women's Foundation
Women of Reform Judaism
Women's All Points Bulletin, WAPB
Women's Voices, Women Vote Action Fund
WomenNC
Women's Law Project
YWCA USA
Zonta Club of Greater Queens
Zonta Club of Portland



EXECUTIVE OFFICE OF THE
PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY
AFFAIRS

MEMORANDUM

TO: Acting Chair Victoria Lipnic, Equal Employment Opportunity Commission

FROM: Neomi Rao, Administrator, Office of Information and Regulatory Affairs

DATE: August 29, 2017

SUBJECT: EEO-1 Form; Review and Stay

After careful consideration and consultation with the Equal Employment Opportunity Commission (EEOC), and in accordance with the Paperwork Reduction Act (PRA) and its regulations at 5 CFR 1320.10(f) and (g), the Office of Management and Budget (OMB) is initiating a review and immediate stay of the effectiveness of those aspects of the EEO-1 form that were revised on September 29, 2016. These revisions include new requests for data on wages and hours worked from employers with 100 or more employees, and federal contractors with 50 or more employees. EEOC may continue to use the previously approved EEO-1 form to collect data on race/ethnicity and gender during the review and stay.

The PRA authorizes the Director of OMB to determine the length of approvals of collections of information and to determine whether collections of information initially meet and continue to meet the standards of the PRA. In this context, under 5 CFR 1320.10(f) and (g), OMB may review an approved collection of information if OMB determines that the relevant circumstances related to the collection have changed and/or that the burden estimates provided by EEOC at the time of initial submission were materially in error. OMB has determined that each of these conditions for review has been met. For example, since approving the revised EEO-1 form on September 29, 2016, OMB understands that EEOC has released data file specifications for employers to use in submitting EEO-1 data. These specifications were not contained in the Federal Register notices as part of the public comment process nor were they outlined in the supporting statement for the collection of information. As a result, the public did not receive an opportunity to provide comment on the method of data submission to EEOC. In addition, EEOC's burden estimates did not account for the use of these particular data file specifications, which may have changed the initial burden estimate.

OMB has also decided to stay immediately the effectiveness of the revised aspects of the EEO-1 form for good cause, as we believe that continued collection of this information is contrary to the standards of the PRA. Among other things, OMB is concerned that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.

In these circumstances, the regulations at 5 CFR 1320.10(f) and (g) require EEOC to submit a new information collection package for the EEO-1 form to OMB for review. In addition, the regulations require EEOC to publish a notice in the Federal Register announcing the immediate stay of effectiveness of the wages and hours worked reporting requirements contained in the EEO-1 form and confirming that businesses may use the previously approved EEO-1 form in order to comply with their reporting obligations for FY 2017.

Thank you for your attention to these matters. Please feel free to contact me with any questions.

[Additional submissions by Mrs. Foxx follow:]



U.S. Equal Employment
Opportunity Commission

Home » About EEOC » Statistics » Enforcement & Litigation Statistics

**Charge Statistics (Charges filed with EEOC)
FY 1997 Through FY 2017**

The number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the ten types of discrimination listed.

The data are compiled by the Office of Research, Information and Planning from data reported via the quarterly reconciled Data Summary Reports and compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

This does not include charges filed with state or local Fair Employment Practices Agencies.

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Total Charges	80,680	79,591	77,444	79,860	80,840	84,442	81,293	79,432	75,428	75,768	82,762	95,402	93,277	99,022	99,947	99,412	93,727	88,779	89,385	91,503	94,254
Race	29,199	29,820	28,810	28,945	28,912	29,910	28,526	27,696	26,740	27,238	30,510	33,837	33,579	35,890	36,385	33,512	33,068	31,073	31,027	32,300	28,528
Sex	24,728	24,454	23,907	25,194	25,140	25,538	24,362	24,249	23,094	23,247	24,028	28,372	28,028	29,029	28,534	30,356	27,687	28,027	28,390	26,934	25,605
Sex	30.7%	30.7%	30.9%	31.5%	31.1%	30.2%	30.0%	30.5%	30.6%	30.7%	30.1%	29.7%	30.0%	29.1%	28.5%	30.5%	29.5%	29.3%	29.5%	29.4%	30.4%
National Origin	6,712	6,778	7,108	7,792	8,025	9,046	8,450	8,361	8,035	8,327	9,396	10,601	11,134	11,304	11,833	10,683	10,642	9,579	9,438	9,840	8,209
National Origin	8.3%	8.5%	9.2%	9.8%	9.9%	10.7%	10.4%	10.5%	10.7%	11.0%	11.4%	11.1%	11.9%	11.3%	11.8%	10.9%	11.4%	10.8%	10.6%	10.8%	8.8%
Religion	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,498	2,340	2,641	2,880	3,273	3,386	3,790	4,151	3,811	3,721	3,549	3,502	3,825	3,496
Religion	2.1%	2.2%	2.3%	2.4%	2.6%	3.0%	3.1%	3.1%	3.1%	3.4%	3.5%	3.4%	3.6%	3.8%	4.2%	3.8%	4.0%	4.0%	3.9%	4.2%	4.1%
Color	782	965	1,303	1,280	1,135	1,381	1,550	930	1,069	1,241	1,735	2,699	2,943	2,780	2,832	2,682	3,146	2,758	2,833	3,102	3,240
Color	0.9%	1.2%	1.7%	1.6%	1.4%	1.6%	1.9%	1.2%	1.4%	1.6%	2.1%	2.9%	3.2%	2.8%	2.8%	2.7%	3.4%	3.1%	3.2%	3.4%	3.8%
Retaliation - All Statutes	18,188	19,114	19,694	21,613	22,257	22,768	22,690	22,740	22,278	22,555	26,963	32,690	33,613	36,258	37,334	37,636	38,539	37,955	36,757	42,018	41,097
Retaliation - Title VII only	22.6%	24.0%	25.4%	27.1%	27.9%	27.0%	27.9%	28.6%	29.5%	29.8%	32.3%	34.3%	36.0%	36.3%	37.4%	38.1%	41.1%	42.8%	44.5%	45.9%	48.8%
Age	16,394	17,246	17,883	19,763	20,407	20,814	20,615	20,240	19,429	19,560	23,371	28,668	28,946	30,948	31,429	31,208	31,478	30,771	31,893	33,082	32,023
Age	20.3%	21.7%	23.1%	24.7%	25.2%	24.6%	25.4%	25.5%	25.8%	25.8%	28.3%	30.1%	31.0%	31.0%	31.4%	31.4%	33.6%	34.7%	35.7%	36.2%	38.0%
Disability	15,785	15,191	14,141	16,008	17,405	19,921	19,124	17,837	16,585	16,548	19,103	24,582	22,778	23,264	23,465	22,857	21,399	20,599	20,144	20,857	19,376
Disability	19.6%	19.1%	18.3%	20.0%	21.5%	23.6%	23.5%	22.5%	22.0%	21.8%	23.2%	25.8%	24.4%	23.3%	23.5%	23.0%	22.8%	23.2%	22.5%	22.8%	21.8%
Equal Pay Act	18,108	17,806	17,007	15,864	16,470	15,964	15,377	15,376	14,993	15,575	17,734	19,453	21,451	25,165	25,742	26,379	25,957	25,360	26,968	28,073	26,838
Equal Pay Act	22.4%	22.4%	22.0%	19.9%	20.4%	19.9%	18.9%	19.4%	19.7%	20.6%	21.4%	20.4%	23.0%	25.2%	25.8%	26.5%	27.7%	28.6%	30.2%	30.7%	31.6%
GINA	1,134	1,071	1,044	1,270	1,201	1,290	1,197	1,011	970	861	818	954	942	1,044	819	1,082	1,019	938	973	1,075	990
GINA	1.4%	1.3%	1.3%	1.6%	1.5%	1.5%	1.4%	1.3%	1.3%	1.1%	1.0%	1.0%	1.0%	1.0%	0.9%	1.1%	1.1%	1.1%	1.1%	1.2%	1.2%
															201	245	280	333	333	257	238
																					206

Historical Data



U.S. Equal Employment
Opportunity Commission

EEOC Litigation Statistics, FY 1997 through FY 2017

The table below reflects EEOC enforcement suits filed and resolved in the federal district courts over the past ten years. The table divides the suits by the various statutes enforced by the EEOC and provides aggregate data on monetary relief obtained. Note that many EEOC suits are brought on behalf of multiple aggrieved individuals. The lawsuits are filed under the various statutes enforced by the Commission:

- [Title VII of the Civil Rights Act of 1964 \(Title VII\)](#)
- [The Americans with Disabilities Act of 1990 \(ADA\)](#)
- [The Age Discrimination in Employment Act of 1967 \(ADEA\)](#)
- [The Equal Pay Act of 1963 \(EPA\)](#)

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Suits																					
All Suits Filed	332	414	465	329	428	370	400	421	416	403	352	325	314	271	300	155	148	167	174	114	201
Merits Suits	300	374	438	282	388	342	366	378	381	371	335	290	281	250	261	122	131	133	142	86	184
Suits with Title VII Claims	182	254	341	236	289	268	298	297	295	294	265	224	188	192	162	66	78	79	83	48	107
Suits with ADA Claims	83	87	55	29	65	44	49	46	49	42	46	37	76	41	80	45	51	49	53	36	76
Suits with ADEA Claims	42	44	47	33	42	39	27	46	44	50	32	38	24	29	26	12	7	12	14	2	12
Suits with EPA Claims	4	10	9	9	14	12	12	5	13	10	7	0	2	2	2	2	5	2	7	5	11
Suits with GINA Claims																	3	2	1	2	3
Suits filed under multiple statutes ¹	11	19	13	14	19	19	19	14	17	22	16	9	9	14	9	3	11	7	14	5	24
Subpoena and Preliminary Relief Actions	32	40	27	37	40	28	34	43	35	32	26	35	33	21	39	33	17	34	32	28	17
Resolutions																					
All Resolutions	243	331	350	440	362	381	381	380	378	418	367	366	349	315	312	283	222	144	171	171	125
Merits Suits	214	295	320	407	321	351	351	346	336	383	364	330	321	267	276	264	209	136	155	139	109
Suits with Title VII Claims	132	189	211	315	232	265	275	277	250	295	297	265	251	199	215	182	135	87	87	84	57
Suits with ADA Claims	49	73	74	53	48	65	50	43	41	50	40	47	40	60	42	72	59	47	61	48	48
Suits with ADEA Claims	38	38	51	41	39	26	35	34	45	50	35	41	38	38	26	30	16	13	12	12	3
Suits with EPA Claims	7	4	7	6	15	9	13	9	12	8	14	3	5	0	2	2	4	5	1	7	4
Suits with GINA Claims																	1	1	1	4	1
Suits filed under multiple statutes	12	9	22	8	12	15	21	14	16	17	18	16	13	10	8	12	6	13	6	16	4

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Subpoena and Preliminary Relief Actions	79	36	30	33	41	30	30	34	40	35	23	27	28	28	36	29	13	8	16	22	10
Monetary Benefits (\$ in millions) ²	\$114.7	\$95.6	\$88.7	\$52.2	\$45.8	\$56.2	\$146.6	\$168.6	\$104.8	\$44.3	\$54.8	\$102.2	\$82.1	\$85.1	\$91.0	\$44.2	\$38.6	\$22.5	\$65.3	\$52.2	\$42.4
Title VII	\$65	\$62	\$49.2	\$35	\$33.6	\$26.2	\$85.1	\$166.5	\$98	\$24.2	\$38.9	\$65.6	\$64.0	\$74.0	\$54.3	\$34.0	\$22.0	\$15.3	\$36.5	\$26.8	\$21.7
ADA	\$1.1	\$2.8	\$2.9	\$2.9	\$2.3	\$15.1	\$2.3	\$2.5	\$3.4	\$7.8	\$2.4	\$3.6	\$9.5	\$2.9	\$27.1	\$5.4	\$14.0	\$3.7	\$6.2	\$12.1	\$7.1
ADEA	\$18	\$26.8	\$42.6	\$13.8	\$3.1	\$1.4	\$57.8	\$5.4	\$2.4	\$5.1	\$3.1	\$30.3	\$6.7	\$5.3	\$8.4	\$3.6	\$2.1	\$1.9	\$3.8	\$3.9	\$12.1
EPA	\$0	\$0	\$0	\$0.2	\$0.2	\$0.2	\$0	\$0	\$0	\$0.2	\$0.1	\$0	\$0.0	\$0.0	\$0.0	\$0.2	\$0.2	\$0.1	\$0.0	\$0.4	\$0.2
GINA															\$0.0	\$0.0	n/a ³	n/a ³	n/a ³	\$0.0	\$0.1
Suits filed under multiple statutes ³	\$0.5	\$1	\$3.8	\$0.4	\$10.7	\$10.3	\$1.5	\$2.3	\$1	\$2.1	\$10.2	\$1.7	\$0.9	\$2.8	\$1.1	\$0.9	\$0.2	\$1.5	\$1.3	\$2.3	\$1.1

¹ Suits filed or resolved under multiple statutes are also included in the tally of suits filed under the particular statutes.
² The sum of the statute benefits in some years will be different from total benefits for the year due to rounding.
³ Monetary benefits recovered in suits filed under multiple statutes are counted separately and are not included in the tally of suits filed under any particular statute.

*GINA monetary benefits are counted under the multiple statutes category.

Note that to improve the clarity and completeness of the data on our litigation activities, we have changed the format for presenting the count of cases filed and resolved by statute. Previously, cases were included in a statute's count only if that statute was the only statute involved. Suits filed under multiple statutes were listed in a separate "concurrent" category. The new format includes suits under each statute alleged, resulting in some suits being counted in more than one statute. There is no longer a concurrent category.

In addition, recent data validation efforts have caused changes in some of the counts, and in the annual amounts of monetary benefits.

[Historical Data](#)

Definitions

Merits suits include direct suits and interventions alleging violations of the substantive provisions of the statutes enforced by the Commission and suits to enforce administrative settlements.

Intervention is where the EEQC joins a lawsuit that has been filed by a private plaintiff.

Subpoena enforcement actions are filed during the course of the investigation of a charge of discrimination where the Respondent refuses to provide information relevant to the charge.

Suits to enforce administrative settlements involve a Respondent's breach of an agreement with the EEQC to settle a charge during the administrative process.

[Questions submitted for the record and their responses follow:]

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February 21, 2019

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Ms. Fatima Goss Graves, J.D.
President and CEO
National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036

Dear Ms. Goss Graves:

I would like to thank you for testifying at the February 13, 2019, Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections hearing on "Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work."

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Wednesday, March 13, 2019, for inclusion in the official hearing record. Your response should be sent to Eunice Ikene or Carolyn Ronis of the Committee staff. They can be contacted at the main number 202-225-3725 should you have any questions.

We appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Joint Subcommittees on Civil Rights and Human Services and Workforce Protections Hearing
“Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work”
Wednesday, February 13, 2019
10:15am

Representative Suzanne Bonamici

1. Ms. Goss Graves, what effect, if any, does career selection have on the gender pay gap?
2. Ms. Goss Graves, what does the research show regarding the effect on the economy if we were to close the wage gap entirely? How would Gross Domestic Product be affected?
3. Ms. Goss Graves, the Paycheck Fairness Act expands the damages currently available under the Equal Pay Act. Can you speak to the necessity for removing caps on compensation?
4. Ms. Goss Graves, how would detecting pay discrimination and closing the wage gap affect the lives of working families?

Representative Alma S. Adams

1. Ms. Goss Graves, in your testimony you note that states and localities are enacting laws to strengthen pay equity laws. Why is it important that the federal government also enact law to address these concerns? Should a woman’s zip code dictate the extent to which women receive equal pay for equal work?



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Ms. Kristin Rowe-Finkbeiner
CEO/Moms Rising
401 Lake Avenue West
Kirkland, WA 98033

Dear Ms. Rowe-Finkbeiner:

I would like to thank you for testifying at the February 13, 2019, Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections hearing on "Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work."

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Wednesday, March 13, 2019, for inclusion in the official hearing record. Your response should be sent to Eunice Ikene or Carolyn Ronis of the Committee staff. They can be contacted at the main number 202-225-3725 should you have any questions.

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Chairman

Enclosure

Joint Subcommittees on Civil Rights and Human Services and Workforce Protections Hearing
“Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work”
Wednesday, February 13, 2019
10:15am

Representative Alma S. Adams

1. Ms. Rowe-Finkbeiner, in your oral testimony, you shared an interesting perspective on why it’s important to amend the EPA to change the class action to be an “opt out” standard similar to the standard under Title VII and under Rule 23 of the Federal Rules of Civil Procedure. From the perspective of the women that you’ve engaged with, why is it important for them to be able to band together in such actions?
2. Ms. Rowe-Finkbeiner: In your testimony, you mentioned statistics for the broad category of “Asian women.” That pay disparity seems much lower. Do you happen to have additional statistics which break that category down further so we can get a more accurate picture of wage disparity?



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Ms. Jenny R. Yang, J.D.
Partner
Working Ideal
1875 Connecticut Avenue, NW, 10th Floor
Washington, DC 20009

Dear Ms. Yang:

I would like to thank you for testifying at the February 13, 2019, Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections hearing on "Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work."

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Wednesday, March 13, 2019, for inclusion in the official hearing record. Your response should be sent to Eunice Ikene or Carolyn Ronis of the Committee staff. They can be contacted at the main number 202-225-3725 should you have any questions.

We appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Joint Subcommittees on Civil Rights and Human Services and Workforce Protections Hearing
“Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work”
Wednesday, February 13, 2019
10:15am

Chairman Robert C. “Bobby” Scott

1. Ms. Yang, in Ms. Olson’s testimony she claims that the “current collective action mechanism should not be amended to conform to Rule 23 requirements as the current system sufficiently balances the interests of employers and aggrieved employees.” She goes on to claim that the “proponents of the bill have not sufficiently demonstrated a need for such a procedural overhaul...” Ms. Yang, who are the winners and losers under the current “opt out” provision for class action lawsuits?
2. Ms. Yang, can you address the concern that the Paycheck Fairness Act will “open the flood gates” for litigation by providing for uncapped punitive and compensatory damages, even where there is no showing of “intentional” discrimination?
3. Ms. Yang, it was asserted by the Ranking Member that “the *Paycheck Fairness Act* offers no new protections against pay discrimination” and that it “is a false promise that creates opportunities and advantages for lawyers – not for working women.” What is the validity of this contention? Are women who face gender-based pay discrimination winners or losers under this legislation?

Representative Suzanne Bonamici

1. Ms. Yang, in her written testimony, Ms. Olson claims that “H.R. 7 pushes the EPA to heights that would essentially obliterate the ‘factor other than sex’ affirmative defense out of the statute.” Does the Paycheck Fairness Act obliterate an employer’s defense under the Equal Pay Act? Why should the employer’s use of a “factor other than sex” defense be connected to a legitimate business reason?
2. Ms. Yang, employers have raised some concerns about the burden of reporting pay data and the EEOC’s ability to use the data and the protection and privacy of that data. What is your response? How will the EEOC use that data? How will the EEOC protect the confidentiality of that data?

Representative Alma S. Adams

1. Ms. Yang, there has been pushback from some business representatives, including some Chambers of Commerce, asserting that the *Paycheck Fairness Act* will actually harm businesses. Can you address this issue?
2. Ms. Yang: Ms. Olsen asserted that the cost to employers to comply with the new EEO-1 data collection requirements will be extremely high and impose a great burden on employers. Can you please comment further on the actual costs (financial costs and burden) of implementing the expanded EEO-1 data collection form? Can you also comment on privacy concerns that the federal government will have this additional information?

Responses to Questions for the Record

Fatima Goss Graves

President and CEO, National Women's Law Center

Following the February 13, 2019 Joint Subcommittees on Civil Rights and Human Services
and Workforce Protections Hearing

“Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work”

March 13, 2019

Representative Suzanne Bonamici

1. Ms. Goss Graves, what effect, if any, does career selection have on the gender pay gap?

Data analysis reveals that the wage gap persists across virtually every occupation, whether women work in low-wage jobs like cashiers and retail salespeople; mid-wage jobs like travel agents; or high-wage jobs like lawyers or physicians or surgeons.¹ Studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained,² and discrimination is thought to account for a portion of this unexplained gap.

It is well-documented that women, and especially women of color, face overt discrimination, unconscious biases, and stereotypes in the workplace, which impact women's pay, occupational “choices” and ability to advance in the workplace.

Women with caregiving responsibilities—and mothers in particular—also face persistent discrimination in the workplace, which leads to lower wages. A 2007 study found that when comparing equally qualified women candidates, women who were mothers were recommended for significantly lower starting salaries, perceived as less competent, and less likely to be recommended for hire than non-mothers.³ The effects for fathers in the study were just the opposite—fathers were recommended for significantly higher pay and were perceived as more committed to their jobs than non-fathers.⁴ It is thus not surprising that mothers who worked full time, year-round typically made only 71 cents for every dollar paid to fathers. The wage gap between mothers and fathers exists across education level, age, location, race, and occupation.⁵

Addressing occupational segregation is crucial to closing the wage gap. The wage gap persists in part because women face significant barriers — like isolation, active discouragement, harassment, discrimination, and lack of information about alternative job options — to entering higher-wage, nontraditional jobs and thus continue to be overrepresented in low-paying jobs.⁶ Women are nearly two-thirds of the workforce in low-wage jobs that typically pay less than \$11.50 per hour.⁷

Wages in occupations that are made up predominantly of women — “pink collar” occupations such as child care workers, family caregivers, or servers — often pay low wages,⁸ in significant part because women are the majority of workers in the occupation and “women's work” is

undervalued.⁹ Research consistently shows that “there is a clear penalty for working in female-dominated occupations;”¹⁰ across skill level and educational attainment, women (and men) working in female-dominated occupations are paid less than those working in occupations where men dominate or the gender balance is roughly equal.¹¹

A study of more than 50 years of data revealed that when women moved into a field in large numbers, wages declined, even when controlling for experience, skills, education, race and region.¹² The study found that “women’s occupations” – those that were two-thirds or more female – had wages that were 6 percent to 10 percent lower a decade later than “mixed occupations.” The study concluded that the data demonstrated that “wages follow sex composition rather than the other way around.”¹³

Finally, outdated workplace structures and policies, including low wages, lack of accommodations for pregnant workers, paid leave and predictable work schedules, access to affordable child care, and union support make it hard for women to get and keep good jobs, and advance and become leaders at work.

2. Ms. Goss Graves, what does the research show regarding the effect on the economy if we were to close the wage gap entirely? How would Gross Domestic Product be affected?

Closing the gender wage gap would have a significant positive impact on the economy. A recent study found that if women received the same compensation as their comparable male co-workers, the poverty rate for all working women would be reduced by half, from 8.0 percent to 3.8 percent.¹⁴ Moreover, nearly 60 percent of women would earn more if working women were paid the same as men of the same age with similar education and hours of work.¹⁵ Increased wages would augment these workers’ consumer spending power and benefit businesses and the economy.¹⁶ A study by McKinsey estimates that by closing the wage gap entirely, women’s labor force participation would increase and \$4.3 trillion in additional gross domestic product could be added in 2025, about 19 percent more than would otherwise be generated in 2025.¹⁷

3. Ms. Goss Graves, the Paycheck Fairness Act expands the damages currently available under the Equal Pay Act. Can you speak to the necessity for removing caps on compensation?

The Paycheck Fairness Act would make compensatory and punitive damages available under the Equal Pay Act, ensuring that those experiencing sex-based pay discrimination have access to the same remedies as those experiencing race-based pay discrimination. It would ensure that victims of pay discrimination could be made whole for the harm they suffered, and would make it less likely that employers would conclude that pay discrimination was worth the risk.

Unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full, uncapped compensatory and punitive damages pursuant to Section 1981, successful

plaintiffs who challenge sex-based wage discrimination under the Equal Pay Act may receive only back pay and, in limited cases, an equal amount as liquidated damages.¹⁸ Even where liquidated damages are available, moreover – in cases in which the employer acted intentionally and not in good faith – the amounts available to compensate plaintiffs tend to be insubstantial.

Furthermore, because plaintiffs with Equal Pay Act claims are not entitled to compensatory or punitive damages, they will not be made whole for out-of-pocket expenses caused by the discrimination — like a new job search or medical expenses — and for any emotional harm and pain and suffering caused by the discrimination, such as humiliation, anxiety, or depression.

Workers also may challenge sex-based pay discrimination under Title VII, which does provide for the recovery of compensatory and punitive damages. However, an individual’s recovery of compensatory and punitive damages is capped under federal law depending on the size of the employer. These caps were set in 1991 and have not been adjusted for inflation or any other reason in the last 25 years. Artificial caps on damages mean that victims, who have proven in court that they have been unlawfully discriminated against, are unable to recover for the full extent of their harm.

These limitations on remedies also substantially limit the deterrent effect of the Equal Pay Act. Limited remedies and damages caps mean that employers can refrain from addressing, or even examining, pay disparities in their workforces without fear of substantial penalties for this failure.¹⁹ Arbitrary limits on damages also encourage employers to frame the discrimination faced by women of color as only sex-based, and therefore subject to limitations – ignoring the complex nature of the discrimination employees have suffered.

Removing the caps on damages does not mean employers will be subject to “unlimited” damages. Compensatory damages are limited to the harm suffered by the individual. And under the Paycheck Fairness Act, punitive damages would be available where the employer has “acted with malice or reckless indifference” to a worker’s rights, a standard that the Supreme Court has construed explicitly and very narrowly.

4. Ms. Goss Graves, how would detecting pay discrimination and closing the wage gap affect the lives of working families?

The gender wage gap significantly diminishes the earning power of women, and thereby affects the economic security of the families who depend on their earnings. In 2017, women’s median earnings were \$10,169 less per year than the median earnings for men. Over the course of a 40-year career, a woman beginning her career today stands to lose \$406,760 to the wage gap.²⁰ Women of color stand to lose the most with Asian women losing \$360,400, Black women losing \$946,120, and Latinas losing \$1,135,440 over their lifetime to the wage gap as compared to white, non-Hispanic men.²¹

When women are shortchanged, families suffer. More than 24.9 million mothers with children under 18 are in the workforce, making up nearly 1 in 6 – or 26 percent – of all workers.²² The great majority of mothers in the workforce work full time. In 2015, 42 percent of mothers were

the sole or primary breadwinners in their families, while 22.4 percent of mothers were co-breadwinners, meaning mothers' earnings are critical to families' financial security.²³ And those working mothers also face a wage gap, paid only 71 cents for every dollar paid to fathers, a gap that translates to a typical loss of \$16,000 annually.²⁴

Closing the wage gap would help lift women and children out of poverty. Nearly one in eight women in the U.S. live in poverty, with high rates for women of color, including 11 percent of Asian women, 21 percent of Black women, and 18 percent of Latinas.²⁵ More than 1 in 3 families headed by unmarried mothers lived in poverty in 2017, and over half of all poor children (58 percent) lived in families headed by unmarried mothers.²⁶ A recent study found that if women received the same compensation as their comparable male co-workers, the poverty rate for all working women would be reduced by half, from 8.0 percent to 3.8 percent. The poverty rate for working single mothers would fall by nearly half, from 28.9 percent to 14.5 percent.²⁷

Representative Alma S. Adams

1. **Ms. Goss Graves, in your testimony you note that states and localities are enacting laws to strengthen pay equity laws. Why is it important that the federal government also enact law to address these concerns? Should a woman's zip code dictate the extent to which women receive equal pay for equal work?**

Research consistently shows equal pay is a priority for voters,²⁸ and the Me Too movement has only heightened public attention to the gender wage gap and increased demand for solutions. States, cities, and some companies have been spurred to take action by this cultural shift. But it is not enough for some states to act and for some employers to take voluntary steps to close the gender wage gap. Every woman in this country—especially the Black women, Latinas, and Native women who experience exceptionally large wage gaps—deserves robust, baseline equal pay protections in federal law. By updating our equal pay laws to reflect our world today, the Paycheck Fairness Act will advance equity and dignity at work for all women.

The Paycheck Fairness Act will also benefit businesses, particularly those with operations in multiple jurisdictions. It will create a baseline national standard, providing consistency for companies as they develop and implement compensation structures and pay practices across the country.

¹ NAT'L WOMEN'S LAW CTR. (NWLC), WOMEN EXPERIENCE A WAGE GAP IN NEARLY EVERY OCCUPATION (Apr. 2018), <https://nwlc.org/resources/women-experience-and-wage-gap-in-nearly-every-occupation/>.

² Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, NAT'L BUREAU OF ECONOMIC RESEARCH (Jan. 2016), <http://www.nber.org/papers/w21913.pdf>.

³ Shelley J. Correll, Stephan Benard & In Paik, *Getting A Job: Is There a Motherhood Penalty?*, AMERICAN J. OF SOCIOLOGY, Vol. 11 No. 5 (Mar. 2007), pp. 1297- 1339, https://sociology.stanford.edu/sites/g/files/sbiybj9501/f/publications/getting_a_job_is_there_a_motherhood_penalty.pdf.

⁴ *Id.*

⁵ NWLC, *Mothers lose \$16,000 Annually to the Wage Gap, NWLC Analysis Shows* (May 23, 2018), <https://nwlc.org/press-releases/mothers-lose-16000-annually-to-the-wage-gap-nwlc-analysis-shows/>.

⁶ See ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF LABOR, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION (June 1999), available at <http://www.osha.gov/doc/acsh/haswicformal.html> (explaining that continued isolation, sexual discrimination, and harassment created a hostile environment and affected the safety of construction worksites); see also Phyllis Kernoff Mansfield et al., *The Job Climate for Women in Traditionally Male Blue-collar Occupations*, 25 SEX ROLES: J. RES. 63, 76 (1991) (explaining that women in nontraditional occupations face high levels of sexual harassment and sex discrimination, which is particularly problematic because skills in these occupations "usually are acquired during apprenticeships or on the job, and are dependent on help and support from coworkers").

⁷ NWLC, WOMEN IN LOW-WAGE JOBS MAY NOT BE WHO YOU EXPECT (Aug. 2017),

<https://nwlc.org/resources/women-in-low-wage-jobs-may-not-be-who-you-expect/>.

⁸ NWLC, LOW WAGE JOBS ARE WOMEN'S JOBS: THE OVERREPRESENTATION OF WOMEN IN LOW WAGE WORK (Aug. 2017), <https://nwlc.org/resources/low-wage-jobs-are-womens-jobs-the-overrepresentation-of-women-in-low-wage-work/>.

⁹ Philip N. Cohen, *Devaluing and Revaluing Women's Work*, HUFFINGTON POST (Apr. 3, 2010),

https://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.

¹⁰ Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamic Using 1950-2000 U.S. Census Data*, SOCIAL FORCES (Dec. 2009), <http://sf.oxfordjournals.org/content/88/2/865.short>.

¹¹ Ariane Hegewisch & Heidi Hartmann, INST. FOR WOMEN'S POLICY RESEARCH, *Occupational Segregation and the Gender Wage Gap: A Job Half Done* (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C419.pdf>.

¹² Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamic Using 1950-2000 U.S. Census Data*, SOCIAL FORCES (Dec. 2009), <http://sf.oxfordjournals.org/content/88/2/865.short>.

¹³ *Id.*

¹⁴ Jessica Milli, et al., INST. FOR WOMEN'S POLICY RESEARCH, *The Impact of Equal Pay on Poverty and the Economy* (Apr. 2017), <https://iwpr.org/publications/impact-equal-pay-poverty-economy/>.

¹⁵ *Id.*

¹⁶ See *id.* (finding that the U.S. economy would have produced additional income of more than \$512.6 billion if women received pay equal to their male counterparts).

¹⁷ Kweilin Ellingrud et al., *The power of parity: Advancing women's equality in the United States*, MCKINSEY GLOBAL INST. (Apr. 2016), <http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>. The same study estimates that even if the wage gap was only partially closed, \$2.1 trillion in additional GDP could be added in 2025.

¹⁸ 29 U.S.C. § 216(b); 29 C.F.R. § 1620.33.

¹⁹ See, e.g., Equal Employment Opportunity Commission, Press Release, *Royal Tire Will Pay \$182,500 for Wage Discrimination Against Female Executive* (Aug. 4, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/8-4-14.cfm>. In that case, the EEOC alleged the employer violated Title VII and the Equal Pay Act when it paid its female human resources director \$35,000 a year less than a male employee in the same position, and \$19,000 less than the minimum salary for the position under the employer's own compensation system. The employer failed to address the pay disparity even after the female employee complained and asked to be compensated fairly. The consent decree resolving the case required the employer to evaluate its pay structure to ensure compliance with the Equal Pay Act and Title VII, and correct any pay disparities by raising wages for the employees negatively affected.

²⁰ NWLC calculations based on U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2018 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, <https://www.census.gov/data/datasets/time-series/demo/income-poverty/data-extracts.html>.

²¹ *Id.*

²² *Id.*

²³ SARAH JANE GLYNN, CTR. FOR AMERICAN PROGRESS, *Breadwinning Mothers Are Increasingly the U.S. Norm*, Table 4 (Dec. 2016), <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/>.

²⁴ NWLC, *Mothers lose \$16,000 Annually to the Wage Gap, NWLC Analysis Shows* (May 23, 2018), <https://nwlc.org/press-releases/mothers-lose-16000-annually-to-the-wage-gap-nwlc-analysis-shows/>.

²⁵ NWLC, NATIONAL SNAPSHOT: POVERTY AMONG WOMEN AND FAMILIES, 2018 (Sept. 2018), <https://nwlc.org/resources/national-snapshot-poverty-among-women-families-2018/>.

²⁶ *Id.*

²⁷Jessica Milli, et al., INST. FOR WOMEN'S POLICY RESEARCH, *The Impact of Equal Pay on Poverty and the Economy* (Apr. 2017), <https://iwpr.org/publications/impact-equal-pay-poverty-economy/>.

²⁸See YWCA USA, *What Women Want 2018* (Sept. 2018) (91 percent of women surveyed, of varying political affiliation, agreed that Congress should strengthen equal pay laws for women), https://www.ywca.org/wp-content/uploads/WhatWomenWant2018_final.pdf; Rasmussen Reports, *National Survey of 1,000 American Adults* (Apr. 2018) (67 percent of survey respondents favor "a law which mandates equal pay for men and women if they do 'substantially similar work' for a company even if they have different job titles or work at different locations"), http://www.rasmussenreports.com/public_content/business/jobs_employment/april_2018/most_americans_support_equal_pay_for_men_and_women; *Gallup Poll* (Sept. 2014) (survey respondents said equal pay was the most important issue facing working women), <https://news.gallup.com/poll/178373/americans-say-equal-pay-top-issue-working-women.aspx>.

Responses to Questions for the Record

Fatima Goss Graves

President and CEO, National Women's Law Center

Following the February 13, 2019 Joint Subcommittees on Civil Rights and Human Services
and Workforce Protections Hearing

“Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work”

March 13, 2019

Representative Jahana Hayes

1. **Ms. Goss Graves, in your testimony, you note that some believe the wage gap exists because of differences in women's education or the occupational "choices" that women make. What impact, if any, does career selection have on the gender pay gap?**

Data analysis reveals that the wage gap persists across virtually every occupation, whether women work in low-wage jobs like cashiers and retail salespeople; mid-wage jobs like travel agents; or high-wage jobs like lawyers or physicians or surgeons.¹ Studies show that even controlling for race, region, unionization status, education, experience, occupation, and industry leaves 38 percent of the pay gap unexplained,² and discrimination is thought to account for a portion of this unexplained gap.

It is well-documented that women, and especially women of color, face overt discrimination, unconscious biases, and stereotypes in the workplace, which impact women's pay, occupational “choices” and ability to advance in the workplace.

Women with caregiving responsibilities—and mothers in particular—also face persistent discrimination in the workplace, which leads to lower wages. A 2007 study found that when comparing equally qualified women candidates, women who were mothers were recommended for significantly lower starting salaries, perceived as less competent, and less likely to be recommended for hire than non-mothers.³ The effects for fathers in the study were just the opposite—fathers were recommended for significantly higher pay and were perceived as more committed to their jobs than non-fathers.⁴ It is thus not surprising that mothers who worked full time, year-round typically made only 71 cents for every dollar paid to fathers. The wage gap between mothers and fathers exists across education level, age, location, race, and occupation.⁵

Addressing occupational segregation is crucial to closing the wage gap. The wage gap persists in part because women face significant barriers — like isolation, active discouragement, harassment, discrimination, and lack of information about alternative job options — to entering higher-wage, nontraditional jobs and thus continue to be overrepresented in low-paying jobs.⁶ Women are nearly two-thirds of the workforce in low-wage jobs that typically pay less than \$11.50 per hour.⁷

Wages in occupations that are made up predominantly of women – “pink collar” occupations such as child care workers, family caregivers, or servers – often pay low wages,⁸ in significant part because women are the majority of workers in the occupation and “women’s work” is undervalued.⁹ Research consistently shows that “there is a clear penalty for working in female-dominated occupations;”¹⁰ across skill level and educational attainment, women (and men) working in female-dominated occupations are paid less than those working in occupations where men dominate or the gender balance is roughly equal.¹¹

A study of more than 50 years of data revealed that when women moved into a field in large numbers, wages declined, even when controlling for experience, skills, education, race and region.¹² The study found that “women’s occupations” – those that were two-thirds or more female – had wages that were 6 percent to 10 percent lower a decade later than “mixed occupations.” The study concluded that the data demonstrated that “wages follow sex composition rather than the other way around.”¹³

Finally, outdated workplace structures and policies, including low wages, lack of accommodations for pregnant workers, paid leave and predictable work schedules, access to affordable child care, and union support make it hard for women to get and keep good jobs, and advance and become leaders at work.

2. **Your testimony cites a study that finds that when women move into a professional field in large numbers, wages in that field declined, even when controlling for experience, race, skills and education. Wouldn't you say that the very concept of occupational choice for women is oftentimes a false one — that this research proves that regardless of where women go, lower wages follow them?**

Please see my response to Question 1.

3. **Do you believe that the societal inclination towards gendering professions has led to a devaluation in professions typically dominated by women?**

Please see my response to Question 1.

4. **How can we ensure that women are given both the opportunity to pursue careers that they love while guaranteeing that they are paid fairly for that work?**

In addition to discrimination and implicit bias, gendered and racist stereotypes and outdated workplace structures and policies, including low wages, lack of accommodations for pregnant workers, paid leave and predictable work schedules, access to affordable child care, and union support make it hard for women to get and keep good jobs, and advance and become leaders at work. While the Paycheck Fairness Act is an essential tool to prevent, identify, and fight against

pay discrimination, it is only one piece of a broader policy agenda we need to help close the gender wage gap and advance equity, dignity, and safety for women and families.

Sexual harassment widens the wage gap by negatively impacting women's wages and lifetime earnings. Sexual harassment can hurt employee health, productivity, and morale, and push women out of their jobs or lead them to leave an industry or profession altogether. Reporting harassment can lead to retaliation, such as demotion, denial of career advancement opportunities, and being labelled as a troublemaker or "difficult," all of which damage career prospects and advancement. And for male-dominated jobs, like those in construction or STEM fields, the pervasiveness of sexual harassment and sex discrimination keeps women from entering and staying in these jobs and earning the higher wages they offer, pushing them instead into lower-paying female-dominated jobs. The pervasive and insidious nature of workplace harassment highlighted by the MeToo movement demands comprehensive reform to strengthen and expand protections against workplace harassment and more.

Raising the minimum wage and eliminating the unjust two-tiered minimum wage system for tipped workers also will help boost pay for women, especially women of color. One factor driving the gender wage gap is the overrepresentation of women and women of color in low-wage jobs¹⁴ and in tipped jobs, where the federal minimum cash wage is just \$2.13 per hour.¹⁵ Women of color would particularly benefit from the wage increase proposed by the Raise the Wage Act.¹⁶ With a \$15 minimum wage and one fair wage for tipped workers, millions more women would have paychecks they can count on, and tipped workers would be less vulnerable to sexual harassment from customers because they would not have to rely on tips for nearly all of their income.¹⁷

The fact that women still shoulder the majority of caregiving responsibilities also impacts the gender wage gap. Outdated workplace structures and a lack of critical workplace supports for workers means that many women are losing wages because they are forced to cut back on their hours, take leave without pay, or leave their jobs altogether in order to maintain a healthy pregnancy or meet caregiving responsibilities. Pregnant workers are still too often forced to choose between a paycheck and the health of their pregnancies, as employers continue to force pregnant workers off the job rather than providing modest accommodations. The Pregnant Workers Fairness Act would ensure pregnant workers have access to accommodations at work when they need them, such as the opportunity to sit on a stool during a long shift or avoid heavy lifting for a few months.¹⁸

Because there is no comprehensive nationwide paid family and medical leave program or guaranteed ability to earn paid sick days, individuals with caregiving responsibilities often lose wages because they are forced to cut their hours, take leave without pay, or leave their jobs altogether in order to care for themselves and their families.¹⁹ Low-wage workers are not only

least likely to have access to paid family or medical leave, but they are also least likely to be able to afford to take unpaid time off from work.²⁰ Adopting comprehensive nationwide paid family and medical leave proposed by the FAMILY Act and paid sick days proposed by the Healthy Families Act would make it easier for individuals to meet caregiving responsibilities without facing a pay penalty.

Providing workers with more predictability, stability, and voice in their work schedules could also help close the gender wage gap. Legislation such as the Schedules That Work Act would help workers meet their obligations on and off the job by granting a right to request work schedules that work for their lives and discouraging the last-minute schedule changes that are rampant in industries like retail and food service, in which women represent the majority of the workforce.²¹

Because women shoulder the majority of caregiving responsibilities, women are often pushed out of work or into lower-paying jobs to take care of their children, since they struggle to find high-quality, affordable child care that matches their work schedules or to even afford the cost of average-priced care, much less higher-quality—and typically higher-cost—care.²² At the same time, our child care workforce, which is disproportionately women of color, typically earns just \$11.42 an hour,²³ often leaving them in poverty and unable to afford high-quality child care themselves. Legislation, such as the Child Care for Working Families Act, would help families with the cost of high-quality child care, and enable child care workers to earn a wage that would allow them to support themselves and their families.

Strengthening workplace protections for LGBTQ individuals would also affect the gender wage gap.²⁴ The Equality Act would strengthen critical federal civil rights laws to make clear that in prohibiting sex discrimination they protect individuals from discrimination based on sexual orientation and gender identity, while adding new protections against sex discrimination.²⁵

Finally, union membership is critical for closing the gender wage gap. Less than 11 percent of the workforce belongs to a union, but those women who are members of unions experience greater wage equality.²⁶ Legislation to restore and strengthen workers' rights to come together to organize and collectively bargain — including workers who traditionally have been excluded from the protection of workplace laws, such as domestic workers, who are predominantly women of color -- is critical for achieving equal pay for women.

5. **Do you think that these are all the symptoms of a broader problem — that we undervalue the work of women, whether they be in the emergency room, the boardroom, or the classroom and that regardless of where women work or what women do, they can expect to earn less than men?**

Please see my response to Questions 1 and 4.

- ¹ NAT'L WOMEN'S LAW CTR. (NWLC), WOMEN EXPERIENCE A WAGE GAP IN NEARLY EVERY OCCUPATION (Apr. 2018), <https://nwlc.org/resources/women-experience-and-wage-gap-in-nearly-every-occupation/>.
- ² Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations*, NAT'L BUREAU OF ECONOMIC RESEARCH (Jan. 2016), <http://www.nber.org/papers/w21913.pdf>.
- ³ Shelley J. Correll, Stephan Benard & In Paik, *Getting A Job: Is There a Motherhood Penalty?*, AMERICAN J. OF SOCIOLOGY, Vol. 11 No. 5 (Mar. 2007), pp. 1297- 1339, https://sociology.stanford.edu/sites/g/files/sbiybj9501/f/publications/getting_a_job_is_there_a_motherhood_penalty.pdf.
- ⁴ *Id.*
- ⁵ NWLC, *Mothers lose \$16,000 Annually to the Wage Gap. NWLC Analysis Shows* (May 23, 2018), <https://nwlc.org/press-releases/mothers-lose-16000-annually-to-the-wage-gap-nwlc-analysis-shows/>.
- ⁶ See ADVISORY COMM. ON OCCUPATIONAL SAFETY & HEALTH, U.S. DEP'T OF LABOR, WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE SAFETY AND HEALTH PROTECTION (June 1999), available at <http://www.osha.gov/doc/acsh/haswicformal.html> (explaining that continued isolation, sexual discrimination, and harassment created a hostile environment and affected the safety of construction worksites); see also Phyllis Kernoff Mansfield et al., *The Job Climate for Women in Traditionally Male Blue-collar Occupations*, 25 SEX ROLES: J. RES. 63, 76 (1991) (explaining that women in nontraditional occupations face high levels of sexual harassment and sex discrimination, which is particularly problematic because skills in these occupations "usually are acquired during apprenticeships or on the job, and are dependent on help and support from coworkers").
- ⁷ NWLC, WOMEN IN LOW-WAGE JOBS MAY NOT BE WHO YOU EXPECT (Aug. 2017), <https://nwlc.org/resources/women-in-low-wage-jobs-may-not-be-who-you-expect/>.
- ⁸ NWLC, LOW WAGE JOBS ARE WOMEN'S JOBS: THE OVERREPRESENTATION OF WOMEN IN LOW WAGE WORK (Aug. 2017), <https://nwlc.org/resources/low-wage-jobs-are-womens-jobs-the-overrepresentation-of-women-in-low-wage-work/>.
- ⁹ Philip N. Cohen, *Devaluing and Revaluing Women's Work*, HUFFINGTON POST (Apr. 3, 2010), https://www.huffingtonpost.com/philip-n-cohen/devaluing-and-revaluing-w_b_444215.html.
- ¹⁰ Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamic Using 1950-2000 U.S. Census Data*, SOCIAL FORCES (Dec. 2009), <http://sf.oxfordjournals.org/content/88/2/865.short>.
- ¹¹ Ariane Hegewisch & Heidi Hartmann, INST. FOR WOMEN'S POLICY RESEARCH, *Occupational Segregation and the Gender Wage Gap: A Job Half Done* (2014), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C419.pdf>.
- ¹² Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamic Using 1950-2000 U.S. Census Data*, SOCIAL FORCES (Dec. 2009), <http://sf.oxfordjournals.org/content/88/2/865.short>.
- ¹³ *Id.*
- ¹⁴ Women are 62.8 percent of workers paid the federal minimum wage or less. NWLC calculations based on BUREAU OF LAB. STAT. (BLS), CHARACTERISTICS OF MINIMUM WAGE WORKERS, (Table 1) (2017), <https://www.bls.gov/opub/reports/minimum-wage/2017/home.htm>. Women are 65.9 percent of the workforce in jobs with median wages of \$11.50 or less per hour. NWLC, WOMEN IN THE LOW-WAGE WORKFORCE BY STATE (Jul. 2018), <https://nwlc-ci4w49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2018/06/women-in-low-wage-workforce-by-state-2018-2.pdf>.
- ¹⁵ NWLC calculations based on U.S. Census Bureau, American Community Survey 2017 one-year estimates (ACS 2017) using IPUMS USA. Women make up 69.1 percent of tipped workers. Figures include employed workers only and use the same definition as the Economic Policy Institute (EPI) in its analysis of the beneficiaries of the Raise the Wage Act. See EPI, MINIMUM WAGE SIMULATION TECHNICAL METHODOLOGY (Feb. 2019).
- ¹⁶ See ECONOMIC POLICY INSTITUTE AND OXFAM AMERICA, TEN YEARS WITHOUT A RAISE: A SIMPLE INCREASE IN THE FEDERAL MINIMUM WAGE WOULD BENEFIT MILLIONS OF AMERICAN WORKERS (Feb. 2019), https://www.oxfamamerica.org/static/media/files/Raise_the_Wage_-_How_women_of_color_would_benefit.pdf.
- ¹⁷ See, e.g., Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html>; NWLC, OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN (Aug. 2018), <https://nwlc-ci4w49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.

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¹⁸ NWLC, PREGNANT WORKERS FAIRNESS ACT: MAKING ROOM FOR PREGNANCY ON THE JOB (Oct. 2018), <https://nwlc.org/resources/pregnant-workers-fairness-act-making-room-pregnancy-job/>.

¹⁹ See NWLC, THERE'S NOTHING EQUAL ABOUT #MOMSEQUALPAYDAY (May 23, 2017), <https://nwlc.org/blog/theres-nothing-equal-about-momsequalpay-day/>; NWLC, STEPPING UP: NEW POLICIES AND STRATEGIES SUPPORTING PARENTS IN LOW-WAGE JOBS AND THEIR CHILDREN (Aug. 2018), <https://nwlc.org/resources/stepping-up-new-policies-and-strategies-supporting-parents-in-low-wage-jobs-and-their-children/>.

²⁰ NWLC, STEPPING UP, *supra* note 19.

²¹ NWLC, FAIR WORK SCHEDULES ARE CRITICAL FOR WORKING PARENTS AND THEIR CHILDREN'S WELL-BEING (Sept. 2017), <https://nwlc-ciw49tixgw5lhab.stackpathdns.com/wp-content/uploads/2017/04/New-Set-Up-For-Success-Why-Fair-Schedules-Are-Critical-for-Working-Parents-and-Their-Childrens-Well-Being-Sept.pdf>.

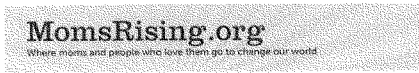
²² See NWLC, STEPPING UP, *supra* note 19.

²³ U.S. DEP'T OF LABOR, BUREAU OF LAB. STAT., OCCUPATIONAL EMPLOYMENT STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2017, 39-9011 CHILD CARE WORKERS (Mar. 2018), <https://www.bls.gov/oes/2017/may/oes399011.htm>.

²⁴ GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY 2005-2011 (Feb. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf>. Figures only include people in labor force. Due to data limitations, they do not include lesbian or gay individuals who are not part of a couple. These figures are median annual personal income for all workers in the labor force – these figures differ from the median annual earnings for full-time, year round workers reported for the wage gap and are not directly comparable; Kristen Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, THE B.E. J. OF ECONOMIC ANALYSIS & POLICY 1 (Sept. 2008), <http://www.degruyter.com/view/j/bejeap.2008.8.1/bejeap.2008.8.1.1862/bejeap.2008.8.1.1862.xml>.

²⁵ NWLC, THE EQUALITY ACT OF 2019: STRENGTHENING OUR FEDERAL CIVIL RIGHTS LAWS (Mar. 2019), <https://nwlc-ciw49tixgw5lhab.stackpathdns.com/wp-content/uploads/2019/03/Equality-Act-2019-v2.pdf>.

²⁶ See NWLC, THE WAGE GAP: THE WHO, HOW, WHY, AND WHAT TO DO (Oct. 2018), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.



March 10, 2019

Committee on Education and Labor
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515-6100

Dear Chairman Scott:

Thank you so much for the opportunity to testify on February 13 before the Subcommittee on Civil Rights and Human Services and the Subcommittee on Workforce Protections on the Paycheck Fairness Act. This legislation is vitally important to moms and families in our country and I was grateful for the opportunity to share my organization's views.

My answers to the additional questions from Rep. Adams follow.

1- QUESTION: "Ms. Rowe-Finkbeiner, in your oral testimony, you shared an interesting perspective on why it's important to amend the EPA to change the class action to be an 'opt out' standard similar to the standard under Title VII and under Rule 23 of the Federal Rules of Civil Procedure. From the perspective of the women that you've engaged with, why is it important for them to be able to band together in such actions?"

ANSWER 1:

Unfair pay and the fear of losing needed pay in retaliation for speaking out is real and much too common. That's why not only directly prohibiting retaliation but also advancing automatic inclusion in class action lawsuits is so important. To put it simply: There is strength in numbers and many women can't stand up and speak out, much less be a part of a class action, if being the only one speaking out puts their own jobs at risk.

An "opt-out" standard is necessary because it makes it easier for people to come together to collectively challenge pay discrimination. An "opt-in" standard is ineffective because then each member who joins has to raise her hand to be a part of the collective action and risk retaliation for speaking up in the moment that she raises her hand.

That's why not only directly prohibiting retaliation but also advancing an "opt-out" standard in class action lawsuits is so important.

To put it simply: There's strength in numbers and many women can't stand up and speak out if being the only one doing so puts their own jobs at risk—but they can be part of a class action. For lower-wage women workers, automatic inclusion in class action lawsuits also is vitally important.

Consider Laura, a MomsRising member, who graduated with the same degree as her husband, got the same job title as he did, but \$5,000 less pay per year: If your employer was paying you \$5,000 less a year because you're a woman, that's a \$50,000 loss over ten years.

That's not all: You also lose retirement income and risk being overlooked for promotions you deserve; and if you file an individual lawsuit, you risk being fired or facing other retaliation, not to mention the added time and expenses that come with any lawsuit.

So if a company is discriminating against many of its women employees, a class action becomes key to achieving fairness; and if companies are systemically paying women less, then there is a systemic problem, not an individual issue, that should be addressed together.

That's why the ability to join together without fear of retaliation is so important.

- 2- **QUESTION:** *"Ms. Rowe-Finkbeiner: In your testimony, you mentioned statistics for the broad category of 'Asian women.' That pay disparity seems much lower. Do you happen to have additional statistics which break that category down further so we can get a more accurate picture of wage disparity?"*

ANSWER 2: Overall, the U.S. Census reported in 2017 that women, on average, earned just 80 cents to a man's dollar for all year-round full-time workers.ⁱ That being said, both moms and women of color experience significant increased wage hits:ⁱⁱ Latina women earn only 53 cents; Native American women only 58 cents; Black women only 61 cents; and Asian women earn only 85 cents on average for every dollar earned by white, non-Hispanic men.ⁱⁱⁱ In addition, moms, in particular moms of color, also experience increased wage hits: Latina mothers are paid just 46 cents; Native mothers are paid 49 cents; Black mothers are paid 54 cents; white, non-Hispanic mothers are paid 69 cents; and Asian/Pacific Islander mothers are paid just 85 cents for every dollar paid to white, non-Hispanic fathers.^{iv}

It should be noted that the broad data category of Asian women doesn't give the whole picture: A closer look at the numbers inside that overall number relating to Asian women, for instance, reveals the following earnings as compared to White, non-Hispanic men's \$1.00: v

- Indian: \$1.21
- Taiwanese: \$1.16
- Chinese: \$1.03
- Sri Lankan: \$1.00
- Japanese: \$0.95
- Korean: \$0.86
- Pakistani: \$0.86
- Filipino: \$0.82
- Indonesian: \$0.81
- Bangladeshi: \$0.69
- Guamanian/Chamorro: \$0.69
- Fijian: \$0.68
- Vietnamese: \$0.64
- Hawaiian: \$0.62
- Samoan: \$0.62
- Cambodian: \$0.60
- Thai: \$0.60
- Laotian: \$0.58
- Hmong: \$0.57
- Burmese: \$0.50

Please note that the data above on Asian American and Pacific Islander (AAPI) women is different from the data in my testimony because new research on AAPI women's wage gaps was released on March 5th, 2019.

Thank you again!

Sincerely,

Kristin Rowe-Finkbeiner
CEO, Executive Director and Co-Founder

i <https://www.census.gov/newsroom/press-releases/2017/income-poverty.html>

ii National Partnership for Women and Families, America's Women and the Wage Gap, September 2018, <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf>

iii National Women's Law Center, The Wage Gap: Who, How, Why, and What, October 2018, <https://nwlc-ciw49tixgw5lbah-stackpathdns.com/wp-content/uploads/2018/10/The-Wage-Gap-Who-How-Why-and-What-to-Do-2018.pdf>

iv National Women's Law Center, Equal Pay for Mothers is Critical for Families, May 22, 2017,
https://nwlc.org/resources/equal-pay-for-mothers-is-critical-for-families/#_edn4

v <https://nwlc.org/resources/equal-pay-for-asian-pacific-islander-women/>

Jenny R. Yang's Answers to Questions for the Record
Following the February 13, 2019 Joint Subcommittee Hearing
Subcommittee on Civil Rights and Human Services and
Subcommittee on Workforce Protections
"Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work"

March 13, 2019

On February 13, 2019, the Subcommittee on Civil Rights and Human Services and the Subcommittee on Workforce Protections held a hearing on "Paycheck Fairness Act (H.R. 7): Equal Pay for Equal Work." This document provides the answers of Jenny R. Yang to the questions for the record submitted by Chairman Robert C. "Bobby" Scott, Representative Suzanne Bonamici, and Representative Alma S. Adams.

Chairman Robert C. "Bobby" Scott

1. Ms. Yang, in Ms. Olson's testimony she claims that the "current collective action mechanism should not be amended to conform to Rule 23 requirements as the current system sufficiently balances the interests of employers and aggrieved employees." She goes on to claim that the "proponents of the bill have not sufficiently demonstrated a need for such a procedural overhaul..." Ms. Yang, who are the winners and losers under the current "opt out" provision for class action lawsuits?

The Equal Pay Act's current collective action procedure requires employees to publicly file a notice with the court to opt in to a lawsuit to challenge pay discrimination. Many individuals experiencing pay discrimination are deterred from take this risk of filing a consent form with the court because of concerns about retaliation for joining a lawsuit. Other employees may not have direct knowledge of what others are paid, so they may not feel comfortable opting in to the case at the outset. As a result, under the opt-in framework, employers may find that it pays to discriminate. Because only a fraction of employees typically opt in to an Equal Pay Act lawsuit, an employer may view resolving such an action as the cost of doing business. Rather than being proactive in addressing a broader pay problem, employers may decide it will cost them less to correct the pay discrimination for a fraction of the workforce who opt in to a collective action than to act affirmatively to correct the system to adjust salaries for all those experience discriminatory pay. By contrast, the opt-out framework provided for class actions in Rule 23 of the Federal Rules of Civil Procedure includes all aggrieved employees in a class unless they affirmatively opt out of the litigation, which protects individuals who may fear retaliation from joining a case.

The Paycheck Fairness Act would update the Equal Pay Act to bring it in line with other civil rights laws that permit class actions in accordance with Rule 23. Aggrieved employees would have the choice to proceed under the collective action framework or the Rule 23 class action procedures. The Act would simply add to the law a provision that is applicable to virtually

every other modern civil rights law to enable individuals who wish to challenge systemic pay disparities to invoke the Federal Rules of Civil Procedure applicable to cases in federal court. This update to the law would play a valuable role in helping workers who confront pay discrimination to obtain meaningful relief.

2. Ms. Yang, can you address the concerns that the Paycheck Fairness Act will “open the floodgates” for litigation by providing for uncapped punitive and compensatory damages, even where there is no showing of “intentional” discrimination?

The Paycheck Fairness Act will help to make the Equal Pay Act work as intended. It will not open the floodgates for litigation. Currently, the Equal Pay Act provides insufficient remedies for victims of pay discrimination and weak incentives for employers to comply with the law. Under the existing law, an employee is entitled to two years of back pay, or in the case of intentional pay discrimination, an employee may recover three years of back pay, as well as liquidated damages equal to the amount of back pay.ⁱ The Equal Pay Act does not permit victims of intentional pay discrimination to recover compensatory or punitive damages. These limitations on the relief available to victims of discrimination provides little incentive for employers to take meaningful steps to ensure that their pay practices are fair.

Under the Paycheck Fairness Act, employers may be liable for compensatory damages to remedy the effects of discrimination, such as pain and suffering, emotional distress, loss of reputation, or loss of enjoyment of life. If the employee demonstrates that the employer acted with malice or reckless indifference, the employer would also be liable for punitive damages. Punitive damages punish egregious misconduct and similar unlawful conduct.

These enhanced remedies and penalties would serve multiple purposes. Victims of pay discrimination would be more fully compensated for the full range of harms suffered. Employers will face appropriate economic penalties when they act with malice or reckless indifference in paying women less than men for the same work. Enhanced remedies act as an effective deterrent by encouraging other employers to take meaningful steps to ensure compliance with the law.

As stated in my written testimony, other employment discrimination statutes, including Title VII of the Civil Rights Act of 1964, provide for compensatory and punitive damages. Section 1981 of the Civil Rights Act of 1866, which prohibits employment discrimination on the basis of race and ethnicity, does not set a statutory cap on damages.ⁱⁱ The remedies authorized by the Paycheck Fairness Act would put gender-based wage discrimination on equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available pursuant to Section 1981. Similarly, other civil rights statutes, including Title IX, the Fair Housing Act, and Section 1983, allow claimants to recover uncapped damages.

In enacting our civil rights laws, Congress has recognized that discrimination can operate in many different ways, and the consequences of actions matter, not just motives. The Equal Pay Act holds employers responsible for the harms they create as a result of inequitable pay

practices. Employers should not be permitted to disclaim responsibility for arbitrary rules or systems that discriminate on the basis of sex. To be effective, our laws must provide employers with sufficient incentives to examine and understand the consequences of their pay practices.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in compensation on the basis of sex and provides an established standard for evaluating the lawfulness of facially neutral practices that have an adverse effect on the basis of sex. That standard has been the subject of judicial interpretation for more than four decades. In 1971, the Supreme Court in the landmark case, *Griggs v. Duke Power Co.*, recognized that Congress was concerned about the consequences of employment practices, not simply the motivation. In amending Title VII, with the passage of the Civil Rights Act of 1991, Congress codified the burden of proof standards set forth in *Griggs* and embedded the disparate impact theory in the law, recognizing that employers may be held liable for practices that have the effect of discriminating, regardless of the employer's intent.

- 3. Ms. Yang, it was asserted by the Ranking Member that “the *Paycheck Fairness Act* offers no new protections against pay discrimination” and that it “is a false premise that creates opportunities and advantages for lawyers -- not for working women.” What is the validity of this contention? Are women who face gender-based pay discrimination winners or losers under this legislation?**

The Paycheck Fairness Act offers many new and significant protections against pay discrimination. The Act would provide greater incentives for employers to comply with the law and more effective means for employees to challenge pay discrimination when it does occur. Arguments from opponents in the business community suggesting that the Act stands to benefit lawyers rather than victims of discrimination are simply misleading.

The Paycheck Fairness Act would prohibit employers from using prior salary to justify pay differentials. This ensures that women are paid equally for the job they are performing, instead of perpetuating pay differentials from prior jobs.

The Act would require employers to prove that the reason for pay disparities is job-related and consistent with a business need. This would ensure that pay differentials can be justified by valid considerations, rather than irrelevant factors.

The Act would clarify the interpretation of “within any establishment” to set a floor to ensure that workers who perform work within the same county, or similar political subdivisions, “shall be deemed to work in the same establishment” and can serve as comparators for pay rate comparisons. This would ensure that women are paid the same as men who do the same job, even if they happen to work on the other side of town.

The Act would create a clear and consistent national standard to prohibit retaliation against workers who discuss their pay. This provision combats a culture of pay secrecy that

keeps workers in the dark about pay discrimination. This provision also empowers workers to better advocate for equal pay and raise concerns without fear of being disciplined or fired.

The Act would codify a requirement for employers to report summary pay data. Enhanced reporting will promote voluntary compliance by encouraging employers to analyze pay practices and remedy discriminatory gaps. Increasing proactive efforts to eliminate pay discrimination benefit workers across the country, across industries and occupations. Additionally, pay data reporting enables the Equal Employment Opportunity Commission (EEOC) and the Department of Labor's Office of Federal Contract Compliance Programs to better identify discrimination and enforce the law.

By authorizing compensatory and punitive damages, the Act would more fully compensate employees for economic and noneconomic harms. Enhanced remedies provide greater incentives for employers to take action to address pay disparities.

In permitting opt-out class actions, the Act would provide more effective means for employees to participate in litigation to challenge widespread, systemic pay discrimination. This provision would also incentivize voluntary compliance. By contrast, the current framework provides perverse incentives for employers to take a "wait and see" approach. Under the current framework, employers may conclude that it is more cost effective to satisfy a judgment if they are faced with litigation rather than to create discrimination-free workplaces.

Representative Suzanne Bonamici

1. **Ms. Yang, in her written testimony Ms. Olson claims that "H.R. 7 pushes the EPA to heights that would essentially obliterate the 'factor other than sex' defense out of the statute." Does the Paycheck Fairness Act obliterate an employer's defense under the Equal Pay Act? Why should the employer's use of a "factor other than sex" defense be connected to a legitimate business reason?**

Plaintiffs must meet a high burden of proof to establish a prima face case of pay discrimination under the Equal Pay Act. The plaintiff must prove that the employer pays different wages to employees of the opposite sex who perform *equal work in jobs requiring equal skill, effort and responsibility*, and the jobs are performed under similar working conditions. This is a higher burden of proof than required under Title VII, which simply requires the plaintiff to prove that the job is *substantially similar* to that of a higher-paid comparator. Equal Pay Act cases are often difficult to prove, and some cases require expert analysis. When plaintiffs satisfy this rigorous standard of proving that they perform equal work in a job requiring equal skill and responsibility, under similar working conditions, the employer should have a good reason for paying a worker of the opposite sex differently.

Ms. Olson's written testimony notes that many courts have held that the "factor other than sex" defense must be business or job-related. However, not all courts require such a showing, and courts that do require a business or job-related explanation have applied

inconsistent and often flawed analyses. Some courts permit employers to defend pay differentials based on ill-defined considerations, factors unrelated to the job in question, or factors that are often tainted by gender bias, such as salary history, success in pay negotiations, or vague notions of market forces or market value. Moreover, other courts have held that a “factor other than sex” does not need to be job-related. The United States Court of Appeals for the Seventh Circuit has even ruled that an employer can defend pay differentials between men and women performing substantially equal work on the basis of a “random decision.”ⁱⁱⁱ

Under the Paycheck Fairness Act, employers will continue to have many ways to defend against a claim of pay discrimination. For example, employers would still be permitted to defend against pay discrimination claims on the basis of a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex.

The Paycheck Fairness Act would clarify that when employers rely on the “factor other than sex” defense, the factor must be a bona fide, job-related factor such as education, training, or experience that is consistent with business necessity. The Act specifies that the factor will not satisfy the affirmative defense if the employee can demonstrate that the employer refuses to adopt an existing alternative business practice that would serve the same business purpose without producing a pay differential. This framework is based on well-established standards, long recognized by the Supreme Court and codified in the 1991 amendments to Title VII. As such, this standard merely extends protections that have already been applied to disparate impact claims under Title VII. Under this framework, employers would be appropriately held accountable when they are unable to provide a bona fide business reason for paying employees unequally for equal work.

2. Ms. Yang, employers have raised some concerns about the burden of reporting pay data and the EEOC's ability to use the data and the protection and privacy of that data. What is your response? How will the EEOC use that data? How will the EEOC protect the confidentiality of that data?

During my tenure as Chair, the EEOC moved forward in September 2016 to collect summary pay data from employers with 100 or more employees after an extensive process that included a public hearing and two opportunities for public comment. In August 2017, the Trump administration, after consulting with business groups, announced a “review and immediate stay” of the EEO-1 pay data collection.^{iv}

Since the Joint Subcommittee hearing on February 13, 2019 on the Paycheck Fairness Act, the U.S. District Court for the District of Columbia issued a decision reinstating the EEOC's pay data collection. On March 4, 2019, the court issued an opinion reinstating the EEOC's collect of pay data as part of the EEO-1 report, ruling that the Office of Management and Budget's stay of the pay data collection was illegal.^v The court concluded that the stay of the

pay data collection was arbitrary and capricious and violated the Paperwork Reduction Act. Despite this favorable decision to reinstate EEOC's collection of pay data through the EEO-1 report, it remains imperative for Congress to codify a requirement for employers to report pay data through the Paycheck Fairness Act.

The data collection requires covered employers to provide confidential annual reports to the EEOC about employee pay, broken down by job category, sex, race, and ethnicity. Because the data will be disaggregated by sex, race, and ethnicity, the information will help to address the intersectional nature of pay discrimination for women of color. The data will help to address discrimination in the form of occupational segregation in lower paying jobs. Collecting this information will be a significant step forward in combatting pay discrimination.

The EEOC can utilize the data to assess charges of discrimination during an investigation. The EEOC could consider pay data together with other evidence gathered to determine how to focus the investigation and whether to request additional information from the employer. When EEOC enforcement staff requests information from an employer, the employer has the opportunity to explain its practices, provide additional data, and explain any non-discriminatory reasons for its pay practices and decisions. For example, the employer can provide more detailed information about pay by occupation and legitimate factors that could explain any apparent pay disparities. After considering all of this information and data, along with other relevant evidence, the EEOC makes a finding as to whether discrimination was the likely cause of the pay disparities.

Reporting pay data will support and enhance voluntary compliance by encouraging employers to review their compensation data and improve pay practices to ensure nondiscrimination. Many employers still do not regularly collect and analyze pay data by demographics to identify potential disparities. Because employers will need to compile and file pay data with the EEO-1 report, more employers will establish a regular practice of reviewing compensation by demographics at least at a summary level every year. Formalized and institutionalized pay data reporting will encourage employers to identify and address pay equity on their own – increasing the positive impact of reporting requirements. The EEOC also can publish aggregate pay information to enable employers to evaluate their pay data against industry benchmarks, consistent with its longstanding practice of reporting aggregate workforce demographic EEO-1 data.

The EEOC sought to minimize the burden on employers by building on existing annual reporting requirements using existing W-2 wage data. To report pay information, employers can provide data electronically, drawing from their existing human resources databases without incurring significant burden. The pay data collection will enhance the existing Employer Information Report, also known as the EEO-1 report, to include pay information along with the workforce demographic information that has been collected for over fifty years. The EEOC and

the Department of Labor have long used EEO-1 workforce demographic data to identify trends, inform investigations, and focus resources.

The EEOC has successfully protected the confidentiality of EEO-1 data for over 50 years. By statute, EEOC officers and employees are generally prohibited from making EEO-1 data public. Any EEOC officer or employee who violates this prohibition is guilty of a misdemeanor. Similarly, the Department of Labor holds EEO-1 data for federal contractors confidential to the maximum extent permitted by law, as required by the Freedom of Information Act Exemption 4 and the Trade Secrets Act.

Representative Alma S. Adams

1. **Ms. Yang, there has been push back from some business representatives, including some Chambers of Commerce, asserting that the *Paycheck Fairness Act* will actually harm businesses. Can you address this issue?**

As I noted in my written testimony, equal pay is good for business. In promoting fair pay and voluntary compliance with the law, the Paycheck Fairness Act offers benefits not only for workers, but for employers as well. Increasingly, businesses recognize that discriminatory pay fails to inspire trust, confidence, or loyalty in their employees. In fact, it undermines these critical components of positive company culture and can impact recruiting and retention. When companies comply with the law and ensure pay equity, they not only mitigate their liability risks, they avoid costs associated with low morale, staff turnover, and reputational harm. Pay equity boosts workforce diversity, which is associated with a host of benefits such as increased innovation and stronger financial performance.^{vi}

Recognizing the business case for equal pay, some employers are taking steps to abandon pay secrecy policies, to build transparency into their pay practices, to prohibit questions about prior salary, and to analyze, publicly report, and remedy pay disparities. These efforts demonstrate that many employers are already implementing aspects of the Paycheck Fairness Act.

Employee pay has become increasingly transparent with platforms like Glassdoor^{vii} that allow individuals to anonymously share salary information and review companies and their management. Millennials have helped to lead the way with more open discussions of pay in the workplace and online.^{viii} Employers are increasingly aware of the reputational harm that can result from outdated and discriminatory pay practices. Businesses that set pay fairly find it easier to attract and retain talent when people are paid what they are worth. That is why companies like Whole Foods have adopted open pay policies that allow staff to easily access compensation data.^{ix}

Employers are also building transparency into pay practices by analyzing their compensation systems and reporting summary pay data. Recognizing that voluntarily publishing pay equity numbers stands to benefit corporate brands,^x major employers including Salesforce,

Microsoft, Amazon, and the Gap are conducting pay equity analyses and publicizing their findings and plans.^{xi} To promote voluntary compliance efforts like these, the Paycheck Fairness Act would direct the Department of Labor to research and share effective methods to identify and address pay discrimination, which would provide a valuable resource for employers.

Similarly, some employers are abandoning the practice of considering prior salary in setting starting salary at the time of hire. Companies like Microsoft, Amazon, American Express, Cisco, and Bank of America have adopted policies to refrain from asking questions about salary history.^{xii}

The Paycheck Fairness Act incentivizes employers to proactively analyze pay, to address discriminatory disparities, to build transparency into pay practices, to abandon pay secrecy policies and inquiries into past pay. Such efforts stand to benefit the interests of employees and employers alike. While some companies are taking proactive steps to ensure fair pay practices, for those employers behind the curve, the Paycheck Fairness Act strikes a thoughtful balance to ensure that our laws create real accountability and fulfill the promise of equal pay for equal work.

- 2. Ms. Yang: Ms. Olson asserted that the cost to employers who comply with the new EEO-1 data collection requirements will be extremely high and impose a great burden on employers. Can you please comment further on the actual costs (financial costs and burden) of implementing the expanded EEO-1 data collection form? Can you also comment on privacy concerns that the federal government will have this additional information?**

Through extensive consultation with stakeholders, the EEOC sought to minimize the burden on employers by building on existing annual reporting requirements. The pay data collection enhances the existing EEO-1 report, to include pay information along with the workforce demographic information that has been collected for over fifty years. To report pay information, employers will provide data electronically, drawing from their existing human resources databases without incurring significant burden.

The EEO-1 pay data collection applies to larger employers with 100 or more employees. The EEOC estimated the costs to employers based on electronic recordkeeping and reporting because nearly all EEO-1 filers already use this technology. The EEOC estimated that each employer that submits the pay data will incur a one-time cost to develop new queries in its existing human resources information system. HR software developers are familiar with how to use pay bands to report pay data. In addition, the EEOC estimated that each employer will incur a minimal increase in its annual cost to report this pay data electronically on the EEO-1.

The EEOC estimated reporting costs incurred at corporate headquarters and at the establishment level, and accounted work from a range of professionals who may be involved in preparing the EEO-1 report. The EEOC estimated that the addition of pay data will increase the annual cost of time spent completing the EEO-1 report by about \$417 per EEO-1 filer. This was

an estimate; some employers will have higher annual costs and others will have lower annual costs. The EEOC also considered one-time implementation costs, which represents the time and expense to employers of changing their EEO-1 reporting systems. The EEOC estimated that the one-time implementation cost will be \$446 per EEO-1 filer. Again, this was an estimate; some employers will have higher implementation costs and others will have lower implementation costs.

The EEOC has successfully protected the confidentiality of EEO-1 data for over 50 years. By statute, EEOC officers and employees are generally prohibited from making EEO-1 data public. Any EEOC officer or employee who violates this prohibition is guilty of a misdemeanor. Similarly, the Department of Labor holds EEO-1 data for federal contractors confidential to the maximum extent permitted by law, as required by the Freedom of Information Act Exemption 4 and the Trade Secrets Act.

The collection protects individual employees' privacy by using pay bands and collecting aggregated data. No individual pay information will be reported. Instead, employers will tally and report aggregate data on the number of employees in 12 pay bands for the 10 job categories listed on the EEO-1 form.

Representative Susan Wild:

[During the hearing, Representative Wild asked a question, which is summarized below, but time expired to provide an answer. A written response is provided here.]

- 1. Prior to your time at the EEOC, you spent 15 years litigating equal pay and other discrimination cases on behalf of employees. And litigation is obviously very expensive, especially with the threat of covering the prevailing party's attorneys' fees that often scares off aggrieved workers. Could you please discuss how, in your experience, the prevailing party doctrine and the Equal Pay Act's opt-in provision deters aggrieved workers' claims? How does the Paycheck Fairness Act level the playing field?**

Many individuals experiencing pay discrimination are not in a position to take the risk of filing a consent form with the court to affirmatively opt-in to an equal pay lawsuit. As a result, this structure can create an incentive for employers to delay correcting a systemic pay discrimination problem. Because only a fraction of employees typically opt in to an EPA lawsuit, an employer may view resolving such an action as the cost of doing business. Rather than being proactive in addressing a broader pay problem, an employer may decide it will cost them less to correct the pay discrimination for a fraction of the workforce who opt-in to a collective action than to act affirmatively to correct the system to adjust salaries for all those experience discriminatory pay.

The Paycheck Fairness Act would level the playing field by permitting victims of pay discrimination to exercise their statutory rights through the class action vehicle. The opt-out framework provided for class actions in Rule 23 of the Federal Rules of Civil Procedure includes

all aggrieved employees in a class unless they affirmatively opt-out of the litigation, which protects individuals who may fear retaliation from joining a case.

Under fee-shifting provisions in federal employment anti-discrimination statutes, a prevailing employee's attorneys' fees are shifted to the losing employer, and the employer pays its own attorneys' fees. However, some employment discrimination statutes provide that a court may award attorney's fees to the "prevailing party," including to a prevailing employer. Courts generally limit employers' ability to recover attorneys' fees to cases in which the employees' claims are proven to be frivolous, unreasonable, or groundless. But for some aggrieved employees, the possibility of having to pay their employer's attorneys' fees and the uncertainty of obtaining a favorable decision may deter them from seeking redress through litigation altogether. Indeed, many plaintiffs with good faith claims do not prevail, not because the discrimination did not happen, but because they were not able to offer sufficient evidence to convince the court that the discrimination happened. The threat of having to pay the attorneys' fees of the prevailing defendant has the unintended effect of some victims of discrimination from seeking redress, contrary to the legislative purposes of empowering victims of discrimination to come forward.^{xiii}

ⁱ 29 U.S.C. § 255(a).

ⁱⁱ 42 U.S.C. § 1981.

ⁱⁱⁱ *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 475 (7th Cir. 2012) ("Random decision is a factor other than sex.").

^{iv} Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs to Acting Chair Victoria Lipnic, Equal Employment Opportunity Commission (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

^v *Nat'l Women's Law Ctr., et al., v. Office of Mgmt. and Budget, et al.*, No. 17-cv-2458 TSC (D.D.C. Mar. 4, 2019).

^{vi} See Catalyst, "Why Diversity Matters," (July 2013), https://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf

^{vii} See <https://www.glassdoor.com/index.htm>.

^{viii} Lauren Weber and Rachel Emma Silverman, "Workers Share Their Salary Secrets," Wall Street Journal (Apr. 16, 2013), <https://www.wsj.com/articles/SB10001424127887324345804578426744168583824>; Jen Doll, "Could Millennials End Salary Secrecy? One long-held taboo of office life is that you're not supposed to talk about what you make. It appears that may be changing." (Apr. 17, 2013), <https://www.theatlantic.com/business/archive/2013/04/could-millennials-end-salary-secrecy/316182/>.

^{ix} Alison Griswold, "Here's Why Whole Foods Lets Employees Look Up Each Other's Salaries," *Business Insider* (Mar. 3, 2014).

^x See Payscale, "Want to Build a Great Employer Brand? Focus on Your Pay Brand First," (Mar. 12, 2018), <https://www.payscale.com/compensation-today/2018/03/employer-brand-pay-brand>.

^{xi} See Diversity at Amazon, https://www.amazon.com/b/ref=tb_surl_diversity/?node=10080092011; Salesforce, Equality at Salesforce: The Equal Pay Assessment Update (March 8, 2016), <https://www.salesforce.com/blog/2016/03/equality-at-salesforce-equal-pay.html>; Cora Lewis, These Companies are Eliminating Their Gender Pay Gaps, BuzzFeed (March 14, 2016), https://www.buzzfeed.com/coralewis/companies-are-eliminating-their-gender-pay-gaps?utm_term=.ek1I5WEXv#.nkGVy6reK.

^{xii} National Public Radio, "More Employers Avoid Legal Minefield by Not Asking about Pay History (May 3, 2018), <https://www.npr.org/2018/05/03/608126494/more-employers-avoid-legal-minefield-by-not-asking-about-pay-history>.

^{xiii} Lawrence D. Rosenthal, *Adding Insult to No Injury: The Denial of Attorney's Fees to "Victorious" Employment and Other Civil Rights Plaintiffs*, 37 Fla. St. U. L. Rev. 49 (2009).

[Whereupon, at 1:04 p.m., the subcommittees were adjourned.]

