16-15372

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AILEEN RIZO, *Plaintiff-Appellee*,
v.
JIM YOVINO, Fresno County Superintendent of Schools, *Defendant-Appellant*.

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

MOTION OF *AMICI CURIAE* EQUAL RIGHTS ADVOCATES; 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN – CALIFORNIA CHAPTER; ACLU OF NORTHERN CALIFORNIA AND ACLU WOMEN'S RIGHTS PROJECT, ATLANTA WOMEN FOR EQUALITY; CALIFORNIA WOMEN'S LAW CENTER; FEMINIST MAJORITY FOUNDATION; LEGAL AID AT WORK; LEGAL VOICE; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN'S LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; WOMEN EMPLOYED; & WOMEN'S LAW PROJECT TO FILE AN *AMICUS CURIAE* BREF IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

Jessica Stender
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 575-2394
Email: jstender@equalrights.org

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, Equal Rights Advocates; 9to5, National Association Of Working Women; American Association Of University Women; American Association Of University Women – California Chapter; ACLU Of Northern California And ACLU Women's Rights Project, Atlanta Women For Equality; California Women's Law Center; Feminist Majority Foundation; Legal Aid At Work; Legal Voice; National Organization For Women (Now) Foundation; National Partnership For Women And Families; National Women's Law Center; Southwest Women's Law Center; Women Employed; & Women's Law Project (collectively, "*Amici*") submit this motion for leave to file the *amicus curiae* brief attached hereto as Exhibit A in support of the Petition For Rehearing And Rehearing En Banc of the Court's ruling in *Rizo v. Yovino*, No. 16-15372, slip op. at 9 (9th Cir. Apr. 27, 2017) filed on May 10, 2017 by Plaintiff-Appellee Aileen Rizo. Plaintiff-Appellee has provided consent to this filing. Defendant-Appellant has not provided consent.

This Court may grant leave to proposed *amici* to file an *amicus curiae* brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure. *See* Fed. R. App. P. 29(b). Under Rule 29, proposed *amici* are directed to state: (1) their "interest;" and (2) "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." *Id.* at 29(a)(3)(B). This case is

appropriate for rehearing or en banc review because the question of law presented is complex and a matter of first impression in this circuit. The petition therefore involves "novel or particularly complex issues." 9th Cir. R. 29-2 advisory comm. nn. In support of this motion, counsel for Amici state as follows:

INTEREST OF PROPOSED *AMICI*

As set forth in their Statements of Interest, *amici* are organizations from across the United States which have special expertise regarding the application and enforcement of the Equal Pay Act, 29 U.S.C. § 206 ("Equal Pay Act"), the history and nature of gender-based pay discrimination in the United States, and the relationship between the practice of setting pay based on prior salary and the persistent gender wage gap. *Amici* therefore are well-positioned to assist the Court in the question of law at issue regarding proper interpretation of the "factor other than sex" affirmative defense under the Equal Pay Act. *Amici* have an interest in ensuring that this Court interprets the Equal Pay Act in a manner consistent with its prior decisions and so as to effectuate the underlying purpose of the Act, which aims to abolish wage disparity based on sex and codify the right to equal pay for equal work.

DESIRABILITY AND RELEVANCE OF AMICUS BRIEF

Amici's proposed brief provides the Court with additional information and a supplementary analysis on the question of law presented: whether, under the Equal

Pay Act, an employer can defeat a prima facie case and satisfy its burden of proof on the "factor other than sex" affirmative defense by relying on prior salary alone to justify a gender wage differential.

As set forth in the proposed brief, the panel decision erroneously vacated the order of the U.S. District Court for the Eastern District of California denying Defendant-Appellant's motion for summary judgment and remanded the case for further proceedings with instructions that the district court evaluate the four "business reasons" offered by the defendant (for using employees' prior salaries to set starting pay) to determine "whether [the defendant] used prior salary reasonably." *Rizo v. Yovino*, No. 16-15372, slip op. at 11 (9th Cir. Apr. 27, 2017). In reaching this conclusion, the panel misconstrued this Court's prior decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th. Cir. 1982), which did *not* hold that a difference in employees' prior salaries, by itself, could serve as the sole justification for paying an employee of one sex less than another when there is no dispute that they perform equal work.

In misapplying this Court's precedent, the panel sanctioned an interpretation of the Equal Pay Act "factor other than sex" defense which contravenes the underlying purpose of the Act and conflicts with the interpretation of this defense by other Courts of Appeals (in decisions following *Kouba*) and the Equal Employment Opportunities Commission (EEOC). The proposed brief will aid the

Court by analyzing this Court's precedent and relevant case law in relation to the question of whether prior salary alone may justify a wage differential under the Equal Pay Act.

The proposed brief of *amici* will further aid the Court by providing additional context about the nature and scope of the gender wage gap and pay discrimination which the parties have not addressed.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court grant the Motion of Amicus Curiae Equal Rights Advocates et al. for Leave to File Amicus Curiae Brief In Support Of the Petition For Panel Rehearing And Rehearing En Banc and deem the accompanying amicus brief, attached as Exhibit A, filed.

Dated: May 22, 2017

Respectfully submitted,

/s/ Jessica Stender
Jessica Stender
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 575-2394
Email: jstender@equalrights.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this motion:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Times New Roman font in a size equivalent to 14 points or larger, and

(ii) complies with the length requirement of Rule 27(d)(2) because it is 826 words.

Dated: May 22, 2017

/s/ Jessica Stender

Jessica Stender
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 575-2394
Facsimile: (415) 621-6744
Email: jstender@equalrights.org

CERTIFICATE OF SERVICE

I certify that on May 22, 2017, the foregoing motion was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

Dated: May 22, 2017

/s/ Jessica Stender

Jessica Stender
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 575-2394
Email: jstender@equalrights.org

Counsel for Amici Curiae

16-15372

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AILEEN RIZO, *Plaintiff-Appellee*,
v.
JIM YOVINO, Fresno County Superintendent of Schools, *Defendant-Appellant*.

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

BRIEF OF *AMICI CURIAE* EQUAL RIGHTS ADVOCATES; 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN – CALIFORNIA CHAPTER; ACLU OF NORTHERN CALIFORNIA AND ACLU WOMEN'S RIGHTS PROJECT, ATLANTA WOMEN FOR EQUALITY; CALIFORNIA WOMEN'S LAW CENTER; FEMINIST MAJORITY FOUNDATION; LEGAL AID AT WORK; LEGAL VOICE; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN'S LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; WOMEN EMPLOYED; & WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

Jessica Stender
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 575-2394
Email: jstender@equalrights.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

LEGISLATION

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

Dated: May 22, 2017

/s/ Jessica Stender
Jessica Stender
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 575-2394
Facsimile: (415) 621-6744
Email: jstender@equalrights.org

Counsel for *Amici Curiae*

INTERESTS OF *AMICI CURIAE*[1]

Amici are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of women in the United States. Detailed statements of interest are included in Appendix A.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Plaintiff-Appellee's petition for panel rehearing and rehearing *en banc* of the Court's ruling in *Rizo v. Yovino*, No. 16-15372 (9th Cir. Apr. 27, 2017). In this case, it is undisputed that Defendant-Appellant paid Plaintiff-Appellee Aileen Rizo less than her male counterparts for the same job, although they had no additional duties or responsibilities, nor any additional relevant experience prior to the job. In fact, Ms. Rizo had *more* experience. The only justification set forth by Defendant-Appellant for this pay differential is that Ms. Rizo made less than her male counterparts in her previous job.

Accordingly, the question in this case is whether, under the Equal Pay Act, an employer can defend paying a woman less than a man for equal work, pursuant to the "factor other than sex" affirmative defense, based solely on the fact that her

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

prior salary was lower than his. The district court correctly held that, consistent with this Court's precedent, prior salary alone cannot be used to justify a gender wage differential pursuant to that affirmative defense. In vacating the district court's decision, the panel misinterpreted and improperly expanded this Court's prior holding in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th. Cir. 1982).

En banc review is appropriate if "(1) necessary to secure or maintain uniformity of the court's decisions" or "(2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. Both prongs are satisfied. First, the panel misinterpreted and improperly expanded the court's prior holding in *Kouba*. Second, there is a circuit split on the question of law at issue. In misapplying precedent, the panel sanctioned an interpretation of the Equal Pay Act "factor other than sex defense" which contravenes the very purpose of the Act, and if left to stand, would effectively swallow up the rule – a result that Congress clearly did not intend. For these reasons, *amici* respectfully request that the Court reconsider its ruling through panel rehearing or en banc review.

ARGUMENT

I. En Banc Review Should be Granted Because The Panel Misinterpreted The Holding in *Kouba v. Allstate Insurance Co.*

A. Kouba Did Not Hold That Prior Salary Alone Can Constitute A "Factor Other Than Sex" Under The Equal Pay Act.

On appeal, the panel focused its analysis almost entirely on the proper interpretation of its prior decision in *Kouba.* The panel did not agree with the district court that *Kouba* left open the question of whether a salary differential based *solely* on prior earnings violates the EPA, stating that this "was exactly the question presented and answered in *Kouba*." *Rizo v. Yovino*, No. 16-15372, slip op. at 9 (9th Cir. Apr. 27, 2017). *Amici* urge the Court to reconsider this conclusion. The *Kouba* court held only that "the EPA does not impose a strict prohibition against the use of prior salary." *Kouba*, 691 F.2d at 878. The court did not analyze, and did not even consider, whether prior salary can be the *only* factor justifying a gender wage differential.

In *Kouba*, the employer, Allstate, relied on multiple factors in computing the minimum salary guaranteed to new sales agents, making this determination "on the basis of ability, education, experience, and prior salary." *Id.* at 874. While the plaintiff contended that prior salary caused the wage differential, in fact the defense questioned whether prior salary caused the difference and the court left that issue for the district court to determine on remand. *Id.* at 877 n. 5. Therefore, the court in *Kouba* was aware that there may have been other factors that Allstate relied on that caused or contributed to the wage differential. Indeed, the court took note of the fact that Allstate argued that prior salary "corresponds roughly to an employee's ability" and claimed that it "use[d] prior salary to predict a new

employee's performance as a sales agent." *Id.* at 878. Therefore, the *Kouba* court's analysis involved combining prior salary with another "factor other than sex" – in that case, the employee's ability. This is precisely why *Kouba* cannot stand for the much broader holding on which the panel based its decision in the present case. While the *Kouba* court held that an employer is not *per se* prohibited from asserting prior salary as another factor other than sex, it acknowledged the possible use of other factors to help support or explain the difference in prior salaries between the male and female employees.

Moreover, the *Kouba* court directed the district court on remand to consider, "in evaluating the reasonableness of this practice . . . (1) whether the employer also uses other available predictors of the new employee's performance, (2) whether the employer attributes less significance to prior salary once the employee has proven himself or herself on the job, and (3) whether the employer relies more heavily on salary when the prior job resembles the job of sales agent." *Id.* In other words, the court in *Kouba* directed the district court to consider, *inter alia*, the degree to which prior salary may have been used in combination with and/or as a gauge of other factors such as ability.

Therefore, because the court in *Kouba* remanded the determination of reasonableness of using prior salary, it could not have answered the question of

whether a salary differential based *solely* on prior earnings violates the EPA.[2] As further explained below, had the panel conducted this analysis, we believe it would have concluded, like other Courts of Appeals, that reliance on prior salary alone is simply another form of the "market forces theory,"[3] which has consistently been rejected by the Supreme Court. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

B. The Panel Decision Fails to Distinguish Between Considering Prior Salary in Setting Pay and Relying On Prior Salary Alone To Justify a Wage Differential Under the Equal Pay Act.

The question of law at issue is whether prior salary alone can justify a gender wage differential. In the example provided by the panel (a male and a female employee have the same education and experience, but the male employee had a higher prior salary), the conclusion was that "prior salary alone is responsible for the disparity [and] requiring an employer to consider factors in addition to prior

[2] As the Eleventh Circuit has recognized "*Kouba* does not stand for the proposition that prior salary alone can justify pay disparity. In *Kouba*, the Ninth Circuit held that "'the Equal Pay Act does not impose a strict prohibition against the use of prior salary.'" *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 n. 9 (11th Cir. 1988) (quoting *Kouba*, 691 F.2d at 878).

[3] *See e.g.*, *Glenn*, 841 F.2d at 1571 ("The flaws of the *Covington* decision are that the Seventh Circuit implicitly used the market force theory to justify the pay disparity and that the Seventh Circuit ignored congressional intent as to what is a 'factor other than sex.' Consequently, we reject *Covington* because it ignores that prior salary alone cannot justify a pay disparity.").

salary cannot resolve the problem that the EEOC and the plaintiff have identified." *Rizo,* slip op. at 10. This example demonstrates how the question at issue was misconstrued by the panel.

The question was not whether prior salary can be the only factor *considered* by an employer in setting pay, but rather, if it can be the only factor that *caused* the gender wage differential, even if other factors were considered at the front end.[4] This distinction is paramount because as the panel pointed out, when the question is framed in the way that it was, employers could simply consider other factors (as most employers do) in order to "cure" the problem. *Rizo,* slip op. at 10, n. 3. Of course, that would lead to a result that contravenes the underlying purpose of the EPA. Therefore, this Court should reconsider the proper question at issue: whether prior salary alone can be the only factor that *caused* the gender wage differential.

Given the existence of a gender wage gap in virtually every occupation and industry, as set forth infra Section IV, prior salary should only be accepted as a "factor other than sex" if the wage difference can be explained or supported by some other factor. If the employer can show no other factor that correlated to the

[4] The framing of the question of law in the interlocutory appeal certification may have led to confusion. The question was presented as "whether, as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary." 2015 U.S. Dist. LEXIS 163849, at *34. However, the relevant question is whether, the employer can overcome the burden of proof on the affirmative defense of relying on "any other factor other than sex" by resting on prior pay alone.

lower prior salary, then there is a strong likelihood, "indeed . . . the virtual certainty," *Rizo v. Yovino*, 2015 U.S. Dist. LEXIS 163849, at *26 (E.D. Cal. Dec. 4, 2015), that the pay differential is a result of past pay discrimination, making it a sex-based factor – precisely what is prohibited by the EPA.

This interpretation is consistent with the position of the EEOC that "prior salary cannot, by itself, justify a compensation disparity."[5] In its Compliance Manual, the EEOC explains that an "employer could, for example, show that it: (1) determined that the prior salary accurately reflected the employee's ability based on his or her job-related qualifications; and (2) considered the prior salary, but did not rely solely on it in setting the employee's current salary."[6] Other circuits have also properly adopted this reasoning. *See e.g.*, *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005) ("Consideration of a new employee's prior salary is allowed as long as the employer does not rely solely on prior salary to justify a pay disparity."); *Angove v. Williams-Sonoma, Inc*., 70 Fed. Appx. 500 (10th Cir. 2003) ("The EPA only precludes an employer from relying solely upon a prior salary to justify pay disparity."); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995) ("[A]n employer may not overcome the burden of proof on the affirmative defense of relying on 'any other factor other than sex' by resting on prior pay alone.").

[5] U.S. Equal Employment Opportunity Comm'n, Compliance Manual, No. 915.003 § 10-IV.F.2.g (Dec. 2000), https://www.eeoc.gov/policy/docs/compensation.html.
[6] *Id.*

As set forth above, the court in *Kouba* did not analyze or make a holding on the specific question of law at issue and for that reason, the district court certified its decision for interlocutory appeal, noting that "[t]he question is one of first impression in the Ninth Circuit." 2015 U.S. Dist. LEXIS 163849, at *33-34 (citing 28 U.S.C. § 1292(b)). Because the panel decision conflicts with *Kouba*, rehearing or *en banc* review is appropriate in order to maintain uniformity of this Court's decisions. *See Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1187 (9th Cir. 2013) (en banc rehearing appropriate to **"**secure or maintain uniformity of our decisions or because a question of exceptional importance is involved").

II. The Issue Of Whether Prior Salary Alone Can Justify A Wage Differential Under The Equal Pay Act Is Of Exceptional Importance And Should be Reconsidered.

The U.S. Supreme Court has declared that "Congress' purpose in enacting the [EPA] was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry - the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (citing S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)). As explained in *Corning Glass*, "[t]he Equal Pay Act is broadly remedial,

and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Id.* at 208.

Given the existence of a gender wage gap, prior salary alone cannot constitute a "factor other than sex" to justify a wage differential, because without some correlation to another factor or attribute to explain it, the lower prior salary is likely a result of past discrimination, despite appearing gender neutral on its face. Indeed, if a woman's prior salary was on its own sufficient justification for an employer to pay her less than a man for the same work, it is hard to imagine what factor would not be acceptable. While Congress intended the "factor other than sex" exception to be sufficiently broad to accommodate legitimate business practices, it is nonsensical to conclude that Congress intended to allow a factor that allows employers to benefit from a "bargain" caused by historical wage inequities. Indeed, "[t]he argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected." *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1570 (11th. Cir. 1988) (citing *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1037 (11th Cir. 1985)).

A helpful analogy is the treatment of job titles in evaluating "equal work" under the EPA. Courts have recognized that job titles may be helpful in determining whether jobs generally require similar skill, effort, and responsibility,

but they are not controlling and therefore cannot be relied upon on their own. *See e.g.*, *EEOC v. Universal Underwriters Ins. Co.*, 653 F.2d 1243, 1245 (8th Cir. 1981); *Gunther v. Cty. of Wash.*, 623 F.2d 1303, 1309 (9th Cir. 1979). Just as an employer must be able to point to some difference in job-related duties that supports or explains different job titles, an employer should similarly be required to point to some factor that supports the difference in prior salary.

III. The Gender Wage Gap Is A Persistent Problem That Costs Women and Families Billions of Dollars A Year.

In enacting the Equal Pay Act, Congress recognized that unjustified wage differentials between men and women "depress[] wages and living standards for employees necessary for their health and efficiency." Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) ("EPA"). More than 50 years later, women continue to earn less than their male counterparts in virtually every industry and occupation. This gender wage gap exacts a heavy toll not only on women, but on families, communities, and the economy as a whole. As set forth herein, the Equal Pay Act will be undermined unless this Court prescribes the proper use and consideration of prior salary and definitively rejects the use of prior salary to justify paying a woman less than a male counterpart when no other job-related qualification or factor can support or explain it.

The pay gap is a persistent feature of the labor market in the United States that has not changed in a statistically significant way since 2007.[7] In 2015, the disparity between the median earnings of women and men stood at 20 percent, meaning that women working full-time year round typically earned 80 cents for every dollar earned by men.[8] For women of color, the gaps are much larger.[9] Collectively, the gender wage gap costs women in the U.S. over $840 billion a year.[10]

Persistent inequality in earnings of working women translates into lower lifetime pay for women, less income for families, and higher rates of poverty. By the time a college-educated woman turns 59, she will have lost almost $800,000 throughout her life due to the gender wage gap.[11] The pay gap increasingly affects men and children as more families rely on women's wages. Today, more than 42 percent of mothers with children under the age of 18 are their families' primary or

---

[7] Bernadette D. Proctor, Jessica L. Semega, and Melissa A. Kollar, *Income and Poverty in the United States: 2015 Current Population Reports* P60-256 at 10, U.S. Census Bureau (2016), https://goo.gl/pfzijQ. At the current rate of change, it will not close until the year 2059. *See* INSTITUTE FOR WOMEN'S POLICY RESEARCH (IWPR), PROJECTED YEAR THE WAGE GAP WILL CLOSE BY STATE 1 (2017), https://goo.gl/612AW7.

[8] Proctor, *supra* note 7, at Table A-4.

[9] *See* IWPR, THE GENDER WAGE GAP: 2016 EARNINGS DIFFERENCES BY RACE AND ETHNICITY (2017), https://goo.gl/VKXE9l.

[10] *See* NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AMERICA'S WOMEN AND THE WAGE GAP 1 (2017), https://goo.gl/SLEcd8.

[11] STATUS OF WOMEN, EMPLOYMENT & EARNINGS, https://goo.gl/PXkOJP (last visited May 19, 2017).

sole breadwinners.[12] Eliminating the gender wage gap would reduce the poverty rates of working women and their families by more than half.[13]

IV. Women Earn Less Than Men In Nearly Every Occupation, Industry, and Education Level.

The disparity between women's and men's earnings persists across industries,[14] occupations,[15] and education levels.[16] Women's median earnings are lower than men's in almost all occupations, whether they are predominantly performed by women, by men, or have an even mix of men and women.[17]

Although women are now more likely than men to attain a college education[18] and have earned the majority of doctoral degrees for seven straight years,[19] women earn less than men starting just one year out of college, even when

---

[12] CENTER FOR AMERICAN PROGRESS, BREADWINNING MOTHERS ARE INCREASINGLY THE U.S. NORM (DEC. 2016), https://goo.gl/B7iKd6.
[13] IWPR, THE ECONOMIC IMPACT OF EQUAL PAY BY STATE 1 (2017), https://goo.gl/u3wQcN.
[14] AMERICA'S WOMEN AND THE WAGE GAP, *supra* note 10, at 2 (citing U.S. Census Bureau Survey).
[15] *Id.*
[16] *Id.*; Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, NBER Working Paper No. 2193, National Bureau for Economic Research (2016), http://www.nber.org/papers/w21913 (last visited May 16, 2017).
[17] IWPR, THE GENDER WAGE GAP BY OCCUPATION 2016 AND BY RACE AND ETHNICITY 1 (2017), https://iwpr.org/wp-content/uploads/2017/04/C456.pdf.
[18] Kurt Bauman, *Shift Toward Greater Educational Attainment for Women Began 20 Years Ago*, U.S. Census Bureau (March 29, 2016), https://goo.gl/RCqxdY.
[19] COUNCIL OF GRADUATE SCHOOLS, GRADUATE ENROLLMENT AND DEGREES: 2005 TO 2015 9-13 (2016), https://goo.gl/LGzBpt.

controlling for factors like major, occupation, and hours worked.[20] The same holds true for female graduates of business school, who start at lower salaries than men with MBAs despite having "similar career paths, performance and education."[21]

V. Use of Prior Salary in Setting Pay Perpetuates the Gender Wage Gap.

Because women frequently begin their careers earning lower salaries than men, they remain at a stark disadvantage throughout their working lives. Women who start with lower salaries will continue to earn less than their male counterparts if employers set pay based only on prior salaries.[22] The U.S. Equal Employment Opportunities Commission (EEOC) therefore advises employers to avoid basing

---

[20] CHRISTIANNE CORBETT & CATHERINE HILL, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 2 (2012), https://goo.gl/tijC4x.

[21] *See* Taylor H. Cox & Celia V. Harquail, *Career Paths and Career Success in the Early Career Stages of Male and Female MBAs*, 39 J. VOCATIONAL BEHAV. 54, 71 (1991).

[22] Researchers have also found that, when requested in salary negotiations, the prior salary of a prospective employee often acts as an "anchor" on which new salary offers are based, thereby perpetuating, and exacerbating, the gender wage gap. *See e.g.*, Todd J. Thorsteinson, *Initiating Salary Discussions With an Extreme Request: Anchoring Effects on Initial Salary Offers*, 41 J. APPLIED SOC. PSYCHOL. 1774, 1779-81 (2011); Hannah Riley Bowles, et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask*, 103 ORG. BEHAV. & HUM. DECISION PROCESSES 84, 85 (2006).

salary decisions on prior salary[23] and recognizes that such a practice would perpetuate "inequality in compensation among genders."[24]

In recognition of the ways that questions about prior salary perpetuate past pay discrimination, some legislatures are going a step further to prevent employers from asking about prior salary at all. At the federal level, the Paycheck Fairness Act and the Pay Equity for All Act, now pending, would prohibit employers from seeking or relying on salary history.[25] Laws or executive orders limiting or banning inquiry into and/or reliance on prior salary have been enacted in three states,[26] four cities,[27] and Puerto Rico.[28] In this year alone, legislation has been introduced in twenty-one states and localities that would ban and/or limit employer inquiry into prior salary.[29] Finally, some employers are taking steps to address the persistent gender wage gap by pledging to eliminate questions on prior salary from

---

[23] U.S. Equal Employment Opportunity Comm'n (EEOC), *Tips for Small Businesses*, https://goo.gl/D1cgzO (last visited May 18, 2017).
[24] EEOC, Compliance Manual, *supra* note 5.
[25] H.R. 1869, S.819, 115th Cong. (2017); H.R. 2418, 115th Cong. (2017).
[26] Mass. Gen. Laws ch. 149, § 105A (2016) (effective July 1, 2018); N.Y. Exec. Order No. 161 (2017); Cal. Labor Code § 1197.5 (2016).
[27] N.Y.C. Admin. Code § 8-107 (2017); Phila. Admin. Code § 9-1131 (2017); Pittsburgh, Pa., Code Ordinances tit. 1, art. XI, § 181.13 (2017); N.Y. Exec. Order No. 161 (2017); New Orleans Exec. Order MJL17-01 (2017).
[28] H.B. 9, Act 16-217, 2017-18 Sess. (P.R. 2017).
[29] *See* Exhibit 1 for a list of legislation introduced as of May 19, 2017.

their hiring processes[30] and moving away from basing wage determinations on prior salary.[31]

CONCLUSION

As set forth herein, the specific question of whether prior salary, by itself, can justify a gender wage differential under the EPA was not addressed in *Kouba* and is therefore an issue of first impression in this Circuit. We therefore urge the Court to revisit this question and consider the positions of other courts of appeals, the EEOC, and national, state and local legislative bodies that have recognized that to allow reliance on prior salary alone to justify a gender wage differential would render the Act meaningless.

For the foregoing reasons, *amici* respectfully request that this Court grant panel rehearing or rehearing en banc in this matter.

Dated: May 22, 2017

Respectfully submitted,

/s/ Jessica Stender
Jessica Stender
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Telephone: (415) 575-2394
Email: jstender@equalrights.org

Counsel for Amici Curiae

[30] Emma Hinchliffe, *Kickstarter joins NYC effort to close wage gap by not asking about employee salary history*, MASHABLE (Jan. 16, 2017), https://goo.gl/nVF3Ne.
[31] *See e.g.*, Laszlo Bock, *How the "What's your current salary?" question hurts the gender pay gap*, WASH. POST (Apr. 29, 2016), https://goo.gl/RwXfHG.

APPENDIX A

STATEMENTS OF INTEREST OF *AMICI*

Equal Rights Advocates

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated numerous class actions and other high-impact cases on issues of gender discrimination and civil rights. ERA cosponsored the California Fair Pay Act (Cal. Labor Code § 1197.5), which amended the state's Equal Pay Act, and which prohibits the use of prior salary as the sole justification for a gender pay differential. ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of anti-discrimination laws, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). ERA has an interest in ensuring that federal courts interpret the federal Equal Pay Act so as to effectuate its intent to ensure equal pay for equal work irrespective of gender.

9to5, National Association of Working Women

9to5, National Association of Working Women is a 44 year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Pay inequities and

discrimination are a major problem for our members and constituents. 9to5 has a long history of supporting corporate, local, state and national measures to combat discrimination and close the pay gap experienced by women and people of color. We have initiated and supported measures to prohibit the use of prior salary history to set wages. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

American Association of University Women

In 1881, the American Association of University Women ("AAUW") was founded by like-minded women who had defied society's conventions by earning 27 college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is increased access to higher education. In adherence with our member-adopted Public Policy Program, AAUW is a staunch advocate for pay equity and seeks to uphold the protections of the Equal Pay Act. Using prior salary alone to calculate current wages perpetuates existing pay disparities and undermines the legislative intent of the Equal Pay Act.

American Association of University Women – California Chapter

AAUW is a nonpartisan, nonprofit organization, founded in 1881 and is the nation's leading organization advocating equity for women and girls, with more than 13,000 members in California and 80,000 members nationwide. Among our interests, and one of our top priorities, is addressing and closing the gender pay gap through legislative advocacy, legal advocacy, community involvement and projects such as our Start Smart salary negotiation workshops. For more than thirty years our Legal Advocacy Fund provides financial and organizational backing for plaintiffs who are challenging gender discrimination in education and the workplace. The LAF contributed funds to assist with Ms. Rizo's legal costs.

American Civil Liberties Union of Northern California & ACLU Women's Rights Project

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1,000,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is the ACLU's regional affiliate for Northern California, including Fresno, and it has approximately 158,000 members. The ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending

discrimination against women in the workplace, including pay discrimination. The ACLU has appeared before the Supreme Court in numerous cases involving women's equality, both as direct counsel and as *amicus curiae*.

Atlanta Women for Equality

Atlanta Women for Equality is nonprofit organization dedicated to providing free legal advocacy for women and girls facing sex discrimination in the workplace or at school, protecting and expanding economic and educational opportunities for women and girls, and helping our community shape our workplaces and schools according to true standards of equal treatment. Ensuring pay equity is crucial to our mission.

California Women's Law Center

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

CWLC as a part of Equal Pay Today worked to get California's 2015 Fair Pay Act passed, one of the toughest equal pay laws in the country.

Feminist Majority Foundation

Founded in 1987, the Feminist Majority Foundation (FMF) is a cutting-edge organization devoted to women's equality, reproductive health, and non-violence. FMF uses research and action to empower women economically, socially, and politically through public policy development, public education programs, grassroots organizing, and leadership development. Through all of its programs, FMF works to end sex discrimination in all sectors of society and to achieve civil rights for all people, including people of color and LGBTQ individuals.

Legal Aid at Work

Legal Aid at Work (formerly Legal Aid Society – Employment Law Center) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women and girls, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972 as well as Title VII of the Civil Rights Act of 1964. LAAW has appeared in

discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g.*, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an amicus curiae capacity. *See, e.g.*, *U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). LAAW's interest in preserving the protections afforded to employees and students by this country's antidiscrimination laws is longstanding.

Legal Voice

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and girls through litigation, legislation, and public education on legal rights. Since its founding in 1978, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations. We have served as counsel and as amicus curiae in numerous cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice also serves as a regional expert advocating for legislation and for robust interpretation and

enforcement of antidiscrimination laws, and has a strong interest in the proper interpretation of the Equal Pay Act in this case.

National Organization for Women (NOW) Foundation

The National Organization for Women (NOW) Foundation is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to assure that women receive equal treatment in the workplace. As an education and litigation organization dedicated to eradicating sex-based discrimination, we believe that the salary history of job applicants often leads to hiring decisions that include discriminatory actions that perpetuate the gender wage gap. Further, we believe that prior salary alone cannot be used to justify a wage differential under the Equal Pay Act.

National Partnership for Women and Families

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National

Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades for equal pay and to combat sex discrimination.

National Women's Law Center

The National Women's Law Center is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and women of color, and has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, including addressing sex discrimination in the workplace. The Center has long sought to ensure that workplace rights and opportunities are not restricted on the basis of sex, and that all individuals enjoy the protection against discrimination promised by federal law.

Southwest Women's Law Center

The Southwest Women's Law Center is a non-profit policy and advocacy law center formed in 2005. The Law Center focuses on advancing positive outcomes for girls and women in the State of New Mexico by ensuring that women and girls are paid equally and fairly. The Southwest Women's Law Center is dedicated to advancing women's economic security by ensuring that all women receive equal pay aligned with their talent, skills and abilities. Accordingly, the Law Center is uniquely qualified to comment on, and inform, the Court about the impact of the decision in *Rizo v.Yovino*, No. 16-15372 (9th Cir. April 27, 2017), and the need for a rehearing en banc.

Women Employed

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed believes that basing pay differentials between men and women on previous salaries should not be allowed as a "factor other than sex" as this is not gender neutral.

Women's Law Project

The Women's Law Project (WLP) is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP's mission is to create a more just and equitable society by advancing the rights and status of women throughout their lives. To meet these goals, the WLP engages in high impact litigation, policy advocacy, public education, and individual counseling. Founded in 1974, the WLP has a long and effective track record on a wide range of legal issues related to women's health, legal, and economic status. Economic justice and equality for women is a high priority for WLP. To that end, WLP has advocated for equal pay for women, a goal that is far from achieved despite the adopted of federal and state equal pay laws more than fifty years ago. We have supported reform to strengthen federal and state equal pay laws and to enact local laws banning reliance on prior pay to set wages in Philadelphia and Pittsburgh. Such laws are necessary to end the insidious perpetuation of pay discrimination by employers who seek to justify pay discrimination solely on the basis of prior pay.

EXHIBIT 1

States That Have Introduced Bills Banning the Use of Prior Salary

State	Bill Information	Summary of Bill
Arkansas	H.B. 1021, 91st Gen. Assemb. (Ark. 2017)	Prohibits employers from asserting an affirmative defense to an equal pay claim based on an employee's prior salary alone. (introduced: 11/22/2016)
California	Assemb. B. 168, 2017-2018 Reg. Sess. (Cal. 2017)	Prohibits an employer, including state and local government employers, from seeking salary history information about an applicant for employment. Requires an employer to provide the pay scale for a position to an applicant for employment. (introduced: 1/17/2017)
Connecticut	H.B. 5210, 2017 Reg. Sess. (Conn. 2017)	Prohibits employers from seeking a prospective employee's wage and salary history before an employment offer with compensation has been negotiated. Prohibits employers from using an employee's previous wage or salary history as a defense in an equal pay lawsuit. (introduced: 1/05/2017)
District of Columbia	B. 22-0016, 22nd Council Period (D.C. 2017)	Amends the Wage Transparency Act of 2014 to prohibit an employer from screening prospective employees based on their wage history or seeking the wage history of a prospective employee. (introduced: 1/09/2017)
Delaware	H.B. 1, 149th Gen. Assemb. (Del. 2017)	Prohibits employers from seeking the salary history of a prospective employee and from screening prospective employees based on their compensation histories. (introduced: 4/4/2017)
Georgia	H.B. 345, 2017-2018 Reg. Sess. (Ga. 2017)	Prohibits employers from seeking the wage or salary history of a prospective employee and from requiring that a prospective employee's prior wage or salary history meet certain criteria. Prohibits employers from using an employee's previous wage or salary history as an affirmative defense to an equal pay claim. (introduced: 2/10/2017)
Idaho	H.B. 71, 64th Leg. (Idaho 2017)	Prohibits employers from seeking applicants' salary history (introduced: 1/30/2017)
Illinois	H.B. 2462, 100th Reg. Sess. (Ill. 2017)	Prohibits employers from screening applicants based on their salary history and from seeking salary history of applicants. (introduced: 2/07/2017)

Iowa	H. File 129, 87th Gen. Assemb. (Iowa 2017) S. File 340, 87th Gen. Assemb. (Iowa 2017)	Prohibits prospective employers from seeking applicants' salary history. Prohibits current employers from releasing salary history to prospective employers. (introduced: 2/23/2017) (introduced: 1/26/2017)
Maine	S.P. 422, 128th Leg. (Me. 2017)	Amends the Maine Human Rights Act to provide that evidence of discrimination with respect to compensation includes an employer seeking information about a prospective employee's prior wage history before an offer of employment, including all compensation, to the prospective employee has been made. (introduced: 4/19/2017)
	H.P. 672, 128th Leg. (Me. 2017)	Prohibits employers from inquiring about a prospective employee's prior compensation history until after an offer of employment that includes all terms of compensation has been negotiated and made to the prospective employee. (introduced: 3/09/2017)
Maryland	H.B. 398, 2017 Reg. Sess. (Md. 2017) S.B. 404, 2017 Reg. Sess. (Md. 2017)	Prohibits employers that employ 15 or more employees from screening an applicant for employment based on salary history and from seeking salary history of prospective or current employees. (introduced: 1/26/2017) (introduced: 1/27/2017)
Mississippi	H.B. 1080, 2017 Reg. Sess. (Miss. 2017) S.B. 2894, 2017 Reg. Sess. (Miss. 2017)	Prohibits employers from seeking the wage or salary history of a prospective employee and from requiring that a prospective employee's prior wage or salary history meet certain criteria. Prohibits employers from using an employee's previous wage or salary history as an affirmative defense to an equal pay claim. (introduced: 1/16/2017)
Montana	S.B. 148, 65th Leg. (Mo. 2017)	Prohibits employers from screening applicants based on their salary history and from seeking salary history of applicants. Prohibits employers from using an employee's previous wage or salary history as a defense in an equal pay lawsuit. (introduced: 1/24/2017)
New Jersey	Assemb. B. 3480, 217th Leg. (N.J. 2016)	Prohibits employers from seeking salary history of certain employees and from releasing the salary history of any current or former employee, without written authorization from the employee. Prohibits employer inquiries about wage and salary history as a condition of being interviewed for employment; prohibits retaliatory action against an employee or prospective employee for opposing such unlawful actions. (introduced: 9/15/2016)

	S. B. 2536, 217th Leg. (N.J. 2016)	Prohibits employers from screening job applicants based on wage or salary history and from using an applicant's wage or salary history in determining the salary amount for the applicant at any stage in the hiring process. Prohibits employers from seeking the wage or salary history of a job applicant without having received voluntary written authorization from the applicant to do so. (introduced: 9/15/2016)
	Assemb. B. 4515, 217th Leg. (N.J. 2017) S.B. 3014, 217th Leg. (N.J. 2017)	Prohibits employers from using prior salary, by itself, to justify any disparity in compensation or employment opportunity. Requires employers to demonstrate that any pay or employment opportunity differential was pursuant to a seniority or merit system or legitimate bona fide factor other than sex. Employer must also demonstrate that the factors do not perpetuate a sex-based differential and are job-related and based upon legitimate business necessities. (introduced: 1/19/2017) (introduced: 2/13/2017)
New York	Assemb. B. 2040, 2017-2018 Reg. Sess. (N.Y. 2017) S.B. 5532, 2017-2018 Reg. Sess. (N.Y. 2017)	Prohibits employers from seeking salary history from prospective employees; establishes a public awareness campaign. (introduced: 1/17/2017) (introduced: 4/6/2017)
	Assemb. B. 3020, 2017-2018 Reg. Sess. (N.Y. 2017)	Prohibits employers from seeking salary history from a prospective employee as a condition for interview or employment. Prohibits employers from seeking a prospective employee's wage and salary history before an employment offer with compensation has been made to the applicant. (introduced: 1/24/2017)
	Assemb. B. 4240, 2017-2018 Reg. Sess. (N.Y. 2017)	Establishes a state policy of a fair, non-biased compensation structure. Prohibits employers from seeking salary history from prospective employees. Prohibits employers from using an employee's previous wage or salary history as a defense to an equal pay action. (introduced: 2/1/2017)
	Assemb. B. 5669, 2017-2018 Reg. Sess. (N.Y. 2017)	Prohibits employers from screening applicants based on their salary history. Prohibits employers from seeking a prospective employee's wage and salary history before an employment offer with compensation has been made to the applicant. (introduced: 2/14/2017)

	S.B. 5233, 2017-2018 Reg. Sess. (N.Y. 2017) Assemb. B. 6707, 2017-2018 Reg. Sess. (NY 2017)	Prohibits employers from seeking salary history from prospective employees. (introduced: 3/16/2017)
North Carolina	S.B. 537, 2017 Gen. Assemb. (N.C. 2017)	Prohibits employers from screening applicants based on their salary history. Prohibits employers from seeking a prospective employee's wage and salary history before an employment offer with compensation has been made to the applicant. Prohibits employers from using an employee's previous wage or salary history as a defense to an equal pay action. (introduced: 4/3/2017)
Oregon	H.B. 2005, 79th Leg. Assemb. (Or. 2017) S.B. 752, 79th Leg. Assemb. (Or. 2017)	Prohibits employers from screening job applicants based on salary history and from basing salary decision on salary history, other than for internal hires. Prohibits employers from seeking salary history from applicant until after making offer of employment to employee that includes amount of compensation; requires employer to demonstrate business necessity for pay differentials not based on merit, seniority, piece-rate or production-based work. (introduced: 2/6/2017) (introduced: 2/22/2017)
Pennsylvania	H.B. 931, 2017-2018 Reg. Sess. (Pa. 2017)	Prohibits employers from screening applicants based on their salary history. Prohibits employers from seeking a prospective employee's wage and salary history before an employment offer with compensation has been made to the applicant. (introduced: 3/23/2017)
Rhode Island	S.B. 583, 2017 Gen. Assemb. (R.I. 2017)	Prohibits employers from screening job applicants based on wage or salary history and from using an applicant's wage or salary history in determining the salary for the applicant. Prohibits employers from seeking the wage or salary history of a job applicant until after the employer makes an offer of employment including compensation to the applicant. An individual's wage history cannot, by itself, justify an unlawful wage differential. (introduced: 3/22/2017)
Texas	H.B. 209, 85th Leg. (Tex. 2016) S.B. 1160, 85th Leg. (Tex. 2017)	Prohibits employers from screening applicants based on wage or salary history. Prohibits employers from inquiring or seeking the wage or salary history of a prospective employee before an employment offer with compensation has been made to the applicant. (introduced: 11/14/2016)

		(introduced: 2/28/2017)
Vermont	H.B. 294, 2017-2018 Gen. Assemb. (Vt. 2017)	Prohibits employers from screening applicants based on wage or salary history or requiring wage or salary history as a condition for interview or employment. Prohibits employers from seeking a prospective employee's wage and salary history before an employment offer with compensation has been made to the applicant. (introduced: 2/16/2017)
Virginia	H.B. 2190, 2017 Reg. Sess. (Va. 2017)	Prohibits a prospective employer from requiring as a condition of employment that a prospective employee provide or disclose the prospective employee's wage or salary history or seeking the wage or salary history of a prospective employee from the prospective employee's current or former employers. (introduced: 1/11/2017)
Washington	H.B. 1533, 65th Leg. (Wash. 2017) S.B. 5555, 65th Leg. (Wash. 2017)	Prohibits employers from seeking the wage or salary history of a prospective employee and from requiring that a prospective employee's prior wage or salary history meet certain criteria. Prohibits employers from seeking the wage or salary history of a prospective employee until after an offer of employment with compensation has been negotiated and made to the prospective employee. (introduced: 1/23/2017) (introduced: 1/27/2017)
Wisconsin	S.B. 142, 2017-2018 Reg. Sess. (Wis. 2017)	Prohibits an employer from relying on or inquiring about a prospective employee's current or prior compensation and from restricting an employee's right to disclose compensation information and providing a penalty. (introduced: 3/29/2017)

9th Circuit Case Number(s) 16-15372

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 22, 2017 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) Jessica Stender

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)