S. HRG. 113–830

ACCESS TO JUSTICE: ENSURING EQUAL PAY WITH THE PAYCHECK FAIRNESS ACT

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

ON

EXAMINING S. 84, TO AMEND THE FAIR LABOR STANDARDS ACT OF 1938 TO PROVIDE MORE EFFECTIVE REMEDIES TO VICTIMS OF DISCRIMINATION IN THE PAYMENT OF WAGES ON THE BASIS OF SEX

APRIL 1, 2014

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C O N T E N T S

STATEMENTS

TUESDAY, APRIL 1, 2014

ACCESS TO JUSTICE: ENSURING EQUAL PAY WITH THE PAYCHECK FAIRNESS ACT

TUESDAY, APRIL 1, 2014

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 3:14 p.m., in room SD–430, Dirksen Senate Office Building, Hon. Barbara Mikulski presiding.

Present: Senators Mikulski, Murray, Casey, Franken, Baldwin, Murphy, Warren, and Alexander.

OPENING STATEMENT OF SENATOR MIKULSKI

Senator MIKULSKI. Good afternoon, everybody. The Committee on Health, Education, Labor, and Pensions will come to order. Today, we are holding a hearing on the Paycheck Fairness bill. The topic of the hearing is Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act. We will hear from a distinguished group of visitors who will tell their stories and also, hopefully, will provide us with insights on what is the best way to proceed.

For me, I want to make sure that women have a fair shot, a fair shot at equal pay for equal work. I want to finish the job we began with Lilly Ledbetter in which we kept the courthouse door open so that if you felt Equal Pay rights had been violated, you would have access to the courts without the arbitrary decisions of time limits.

We find that the Equal Pay Act again is thwarted over the years through either retaliation for trying to find out what others are paid in your work place, or that they're increasing loopholes, saying that it's not identical or not comparable work. So we want to finish the job, end the retaliation, end paycheck secrecy, and also close the loopholes that prevent equal pay for equal or comparable work.

In 1963, Lyndon Johnson wanted to pass three major civil rights bills, Equal Pay for Equal Work, the Civil Rights Act, and also the Voting Rights Act. He began with equal pay, because he thought it would be the easiest to pass and the easiest to enforce. And here we are now, 50 years later, in some ways fighting the same battles.

So we hope that through this legislation, we will finally end paycheck secrecy, workplace retaliation if you try to find out or offer any kind of advocacy in your own behalf to get equal pay, and also to close those loopholes. Women are almost half of the workforce. In many instances, 40 percent are now the sole bread winners for families.

And many over the years, for many decades, have said, "Well, we don't have to pay you as much because the guys are the bread winners." Well, now, the women are the bread winners, and they're tired of getting paid in crumbs. So this is what we're trying to do here, to look at the legislation, and to look at the best way forward to continue that legislation.

I know we've had a delayed time in starting this hearing because of the votes. So I'm going to ask unanimous consent that my full statement go into the record, and I'm going to turn to Senator Alexander, who offers such great insight on these issues, for any comments that he has.

[The prepared statement of Senator Mikulski was not available at time of print.]

Senator Alexander.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thank you, Madam Chairman. I appreciate that. I'm not going to take an excessive amount of time, but I do want to make my statement.

I thank you for the hearing, but I think it ought to be on a different subject. I think it ought to be about more flexibility for working parents. This bill is about more litigation, more lawyers, higher income for trial lawyers, and more class action lawsuits whether you want them on your behalf or not.

Let me tell a story to suggest why I believe instead we should be talking about more flexibility for working parents. Years ago, in my private life, I helped start a company with Bob Keeshan, Captain Kangaroo, and my wife and a couple of others that later merged with Bright Horizons and became the largest worksite daycare provider in the country.

We recognized that probably the most important social phenomenon in our country over the last 30 or 40 years are the number of women working outside the home. And, typically, many of them had young children, and the idea was that we would help corporations provide worksite daycare centers that were safe and good for those moms, and dads as well, who worked with young children outside the home.

We did a lot of surveys, and what we found out was that in many cases, more important than pay was flexibility in the workforce, that a mom or a dad with a young child who was working outside the home didn't want to miss the school play, didn't want to miss the football game, wanted to be available to deal with a sick child.

I tell that story because I think instead of a law like the one proposed here, which would literally reduce the flexibility that employers have to provide men and women in the workplace with more flexibility to go to the football game or the school play, I think we need more flexibility, not a mandate. We need to enable employers to do that.

Let me give you an example or two. Take a school where an employer might want to say, as we did in Tennessee 30 years ago, "We're going to pay teachers more for teaching well." That's a very subjective thing to do. Or we might be in a situation where we wanted to encourage girls to become more interested in mathe-

matics. And to do that, we might like to hire an outstanding woman teacher of mathematics and science to be in the classroom.

We might have to pay her more than we do a man, because she has so many other opportunities if she has those talents. Or, on the other hand, we might have a rough school where we need a man who is a strong role model for boys who cause a lot of trouble. Sometimes we might have to pay that man more than a woman.

We might be in a situation in another worksite where a mom might say, "Well, I've got two kids. I'd rather have the day shift than the night shift." And for exactly the same work, you might pay a man more for the night shift, or vice versa. Under current law, arguably, you could do many of those things. Under the proposed legislation, it would reduce the flexibility employers may provide in the workforce.

So I would like to see a hearing—and I hope we'll have plenty of opportunities, Madam Chairman, to amend this proposal, and then debate it here in the committee, and then go to the floor where I'll have a number of amendments. I've noticed—and I hope you won't mind my saying this—and I will give my Democratic friends credit for being very forthright about what they're doing here.

Here's a big article in The *New York Times* a few days ago where Senator Schumer announces their 10-part political plan, including this bill, to try to recapture some political ground because of the disaster Obamacare has been. And they say, "Privately, White House officials"—this is The *New York Times*—"say they have no intention of searching for any grand bargain with Republicans on any of the issues." The point isn't to compromise. I give them credit for being straightforward.

But my suggestion would be that the Democratic jobs agenda is more like a war on jobs. Obamacare is causing restaurant companies to reduce their number of employees. We had testimony right here on the minimum wage where the nonpartisan Congressional Budget Office said it will cost 500,000 jobs, and the Paycheck Fairness proposal, so-called, really reduces the flexibility that employers would have to help working parents go to the school play or have other opportunities to be with their children.

So we have great differences of opinion here, and I'm looking forward to hearing the witnesses. I'm looking forward to offering a number of amendments when we mark the bill up. And when it comes to the floor, we'll have a large number of amendments aimed at the goal of giving working parents more flexibility in the workplace so they can be better parents.

Thank you, Madam Chairman.

Senator MIKULSKI. Thank you, Senator Alexander, for your comments. First of all, I personally want to thank you for the very constructive role that you played in enabling us to pass the Child Care Development Block Grant. I remember earlier in our conversations, you had 64 issues that you raised with our staff, and by working through them, we were able to find a way to find that sensible center, and I think we passed a very excellent bill. So we look forward to your comments and your amendments on this.

In terms of whether this committee should hold a hearing on workplace flexibility, I don't chair the committee. I'm chairing this

particular hearing. But I think that we would request our chairman, Senator Harkin, to have just one on workplace flexibility. I think it is a compelling topic that needs to be addressed for families to be able to participate, whether you're a two-parent household, or whether you're a single-parent household headed by a man or a woman.

The framework for the way we do work in our country now needs to be examined, and we need to work in partnerships with the private sector. This hearing is not an adversarial hearing toward the private sector. It is to say, though, we have a bill that passed in 1963, the Equal Pay Act, and now we need to make sure that the impediments for enforcing the bill and people having the opportunity to have equal pay for equal work are removed.

What I'm going to do now is turn to the witnesses, because we are running late. Then I'll turn to my colleagues and ask that their opening statements be submitted in the record and that they can include them.

So we want to turn first to—we'll go right down the aisle. We want to turn to Professor Eisenberg. I'm going to introduce everybody now, and then you can all pick up.

We welcome you, Professor Eisenberg. And it's with great pride that I comment that you're from the Francis King Carey School of Law in Maryland. You have extensive background in studying the impact of pay secrecy policies, have won that wage gap, and you've written extensively about the Pay Discrimination Act. We welcome you.

Ms. ReShonda Young is an actual business owner, a real business owner. We know you took over your business from your dad. You found that in doing so, as you tried to grow the business, that the women were paid less, and there were old fashioned reasons for that. But now we're in a new fashion, new fangled economy, and you took constructive steps, and we'll be interested in how you did that and whether it affected the bottom line.

We want to turn to Kerri Sleeman, herself a mechanical engineer who was a design supervisor and worked very hard in her company and, as I understand, received outstanding reviews. But when for a variety of reasons the company failed, and there was the bankruptcy hearing, she was startled to find that the very men she supervised made more than her. So we'd like to hear your story, Ms. Sleeman, and what you did to try to address that grievance, which we should learn.

And then we want to also welcome Ms. Olson from the Chamber of Commerce. We know you have an extensive detailed policy. I kind of read through it this morning, but I will read it again. We want you to know you are most welcome at this hearing, and we'd like the insights from the Chamber on this bill and perhaps ideas on how to improve it. So we want you to know that you're most cordially welcomed.

Professor Eisenberg, why don't you kick it off? We'll go down the table, and Ms. Olson will be last person at the bat. Then we'll move to questions.

STATEMENT OF PROFESSOR DEBORAH THOMPSON EISENBERG, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW, BALTIMORE, MD

Ms. EISENBERG. Thank you, Chairwoman Mikulski and members of the committee. I am honored to testify in support of the Paycheck Fairness Act. As a scholar, I've studied the current failure of Federal law to provide an effective remedy for many women who have experienced pay discrimination. And as an employment lawyer and now mediator, I've witnessed the profound impact that pay discrimination can have.

My written testimony explains why gender pay discrimination is still a serious problem, how it happens in the modern economy, and why the Paycheck Fairness Act is critical legislation that should be passed. I want to highlight three points.

First, the Paycheck Fairness Act recognizes, in the words of Louis Brandeis, that sunshine is the best disinfectant. As we know from Lilly Ledbetter's story, most unlawful pay discrimination is hidden from sight. This can allow unlawful pay disparities to snowball over time, undetected and undeterred. Many women do not know that drastic pay disparities exist between them and their male cohorts until they find out by accident.

Many employees are afraid to compare notes or ask about the pay of their counterparts out of fear of getting fired. One study found that half of all American workers are either strictly forbidden or strongly discouraged from discussing their pay with coworkers. This is a problem, because studies show that if women are armed with better information about appropriate pay rates, gender pay disparities can be reduced or eliminated all together.

The act lets in just a little bit of sunshine, while balancing confidentiality concerns. It prohibits retaliation against employees who simply ask about or discuss their wages in the workplace. It also facilitates better data collection and study about pay rates to better understand the causes of pay discrimination and to better assist employers with best practices.

This is a balanced, proactive approach. The goal is to motivate employers to correct unlawful pay disparities before they turn into fodder for litigation.

Second, the Paycheck Fairness Act will make the Equal Pay Act a more effective remedy against those who, 50 years later, still flout the law. The act amends the any-act-other-than-sex defense in the Equal Pay Act, which a minority of Federal courts have interpreted to be a gaping loophole, to an anything-under-the-sun defense, which has swallowed the Equal Pay for Equal Work rule.

The act fixes that problem by adding the common sense fairness notion that a wage disparity between two employees who perform the same jobs should be based on a factor related to the business, the job, and the employees in those jobs. That standard is not only fair, but it's smart business. This standard is already working well in a majority of Federal circuits and has been adopted by the EEOC.

To be clear, the act does not get the government involved in wage setting at all. The act does not dictate to employers which factors should be used in setting pay. Employers have the sole discretion

to set pay, based on anything that matters for their business and those jobs, a limitless array of factors such as skills, qualifications, performance, seniority, extra responsibility, and the list goes on.

Third, the act puts gender pay discrimination on equal footing with remedies for racial and national origin pay discrimination under section 1981 by permitting compensatory damages in appropriate cases and punitive damages for especially egregious and malicious violations. It also allows women who are affected by a widespread common discriminatory pay practice to join together in one representative action.

These changes will promote voluntary compliance by employers and provide a more effective remedy against those that break the law. Opponents who suggest that strengthening the Equal Pay Act will somehow open the flood gates to frivolous claims and runaway jury verdicts do not understand the realities of equal pay litigation. These cases are extremely hard to win.

As my research explains, employees are less likely to prevail on equal pay claims today than at any other time in the act's history. Very few equal pay claims are filed in Federal court, and those that are filed are typically dismissed on summary judgment and never make it to a jury, often for reasons that have nothing to do with the merits of the pay disparity itself.

Rest assured that the women of America do not want to sue their employers. They simply want to be paid fairly. The Paycheck Fairness Act will help to ensure that the promise of equal pay for equal work is not an empty one.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Eisenberg follows:]

PREPARED STATEMENT OF DEBORAH THOMPSON EISENBERG

SUMMARY

The Paycheck Fairness Act is critical legislation that addresses several gaps in the Equal Pay Act. Federal equal pay laws have become an empty promise for many women who experience pay discrimination. This Act sets forth a balanced approach—with both proactive strategies and a more workable legal remedy—that will ensure "equal pay for equal work."

Most importantly, the Act amends the "any factor other than sex" defense—a gaping loophole which has swallowed the "equal pay for equal work" rule in some cases—with the common sense fairness notion that a wage disparity between two employees who perform the same jobs should be based on a bona fide factor related to the job or business. This standard is already used in a majority of Federal courts and has been adopted by the Equal Employment Opportunity Commission. Two Federal circuits have interpreted this defense as "anything under the sun," even if unrelated to the job or business. The idea that differences in pay should relate to the job and business is not only a matter of basic fairness; it is simply smart business. The Act leaves it to the employer's sole discretion *which* factors should be used to determine pay.

Second, the Act recognizes, to paraphrase Justice Brandeis, that "sunshine is the best disinfectant." Pay secrecy has allowed unlawful pay disparities between men and women performing the same jobs to flourish, undetected and undeterred. To address this problem, the Act prohibits employers from retaliating against employees who ask about or discuss wage information and facilitates the collection and study of pay data so we better understand the causes of pay discrimination. This reinforces that the law's requirement of equal pay for equal work cannot be ignored simply because no one knows about unlawful pay disparities. It will motivate employers to correct unjustified pay disparities *before* they turn into fodder for litigation. The Act also creates an award for employers who demonstrate best practices and encourages negotiation training for women and girls. These provisions provide a balanced, proactive approach to combating wage discrimination.

Third, the Act addresses the difficulties that women have in remedying the multiple harms of pay discrimination by allowing compensatory and punitive damages in appropriate cases and permitting employees to join together in a class action to address systemic violations. These provisions will put gender pay discrimination on equal footing with Federal law regarding pay discrimination based on race under 42 U.S.C. § 1981 and be a stronger deterrent against the subset of employers that flout the Nation's equal pay laws.

Chairwoman Mikulski and members of the Senate Committee on Health, Education, Labor and Pensions, I am honored to have the opportunity to testify before you in support of the Paycheck Fairness Act. This issue is important to me as a scholar who has studied the current failure of Federal law to provide a workable remedy for most women who experience pay discrimination in the modern economy; as a former employment litigator and now mediator who has witnessed first-hand the profound impact that compensation discrimination has on women, and the difficulties they have seeking a remedy for that harm; and as a proud mother of two daughters.

The Paycheck Fairness Act is critical legislation that expresses our Nation's commitment to equal pay for equal work and addresses several gaps in the Equal Pay Act. It should be passed for four main reasons:

1. Most importantly, the Paycheck Fairness Act amends the "any factor other than sex" defense—a gaping loophole which has swallowed the "equal pay for equal work" rule in some jurisdictions—with the common sense fairness notion that a wage differential between two employees who perform the same jobs should be based on a bona fide factor related to the job or business. This standard is already working well in a majority of Federal circuit courts and has been adopted by the Equal Employment Opportunity Commission, but two Federal circuits have interpreted this defense to mean "anything under the sun," even if unrelated to the job or business. The idea that differences in pay should bear some relation to the job and business should be an uncontroversial proposition. It is not only a matter of basic fairness (for all employees) and equal opportunity for women; it is simply smart business and good corporate governance for an employer to be more thoughtful about how its pay awards relate to the job and business.

2. The Paycheck Fairness Act recognizes, in the words of Justice Brandeis, that "sunshine is the best disinfectant" by prohibiting employers from retaliating against employees who simply ask about, discuss, or disclose wage information. As described below and in my scholarship, pay secrecy has allowed unlawful pay disparities between men and women performing the same jobs to flourish, undetected and undeterred. The Act also facilitates the collection and analysis of pay data so we better understand the causes of pay discrimination. It will reinforce that the law's requirement of equal pay for equal work cannot be ignored simply because no one knows about unlawful pay disparities. And it will motivate employers to correct unjustified pay disparities before they turn into fodder for Federal litigation. This is a balanced, proactive approach.

3. The Paycheck Fairness Act provides an incentive for voluntary compliance and the development of best practices by employers by establishing a National Award for Pay Equity in the Workplace, while empowering women and girls with negotiation training so they can better navigate the often difficult and risky process of salary negotiations.

4. The Paycheck Fairness Act addresses the difficulties that women have in remedying the multiple harms of pay discrimination by providing compensatory and punitive damages and permitting them to join together in a class action to address systemic violations. These provisions will put gender pay discrimination on equal footing with Federal law regarding pay discrimination based on race under 42 U.S.C. § 1981 and be a stronger deterrent against the subset of employers that flout the Nation's equal pay laws.

At the outset, I want to dispel some common myths about the Paycheck Fairness Act.

Myth #1: This will open the floodgates to frivolous lawsuits by "jack-pot" trial lawyers

Opponents who suggest that this legislation will somehow open the floodgates to frivolous EPA claims by "trial lawyers" do not understand (or are not being forthright) about the realities of equal pay litigation. In addition to being expensive and extremely difficult to win, pursuing an employment discrimination lawsuit can damage a plaintiff's mental and physical health and often results in career suicide. In addition, this area of the law is complicated and tends to be litigated on both the

employee and management sides by sophisticated attorneys who understand that most plaintiffs in Federal employment discrimination cases do not prevail, and that employers will win most cases at the summary judgment stage.

Rest assured: most women do not want to sue their employers—they want the law to express a stronger commitment to equal pay for equal work so employers will have an incentive to pay them fairly without the need for litigation. Moreover, employee-side attorneys who handle employment discrimination cases tend to do this work out of a sense of a public interest mission as a "private attorney general," enforcing our Nation's equal opportunity laws. Filing "frivolous" cases will not keep the lights on in their law offices. The idea that attorneys would put their law licenses and reputations on the line by filing "frivolous" cases—and that our smart Federal judges would allow those "frivolous" cases to proceed to a jury, and then juries would award astronomical damages for unmeritorious claims—is a fantastical red herring.

Myth #2: This Changes the "Equal Work" Standard into "Comparable Worth"

Nothing in the Paycheck Fairness Act permits the concept of "comparable worth" to be used in the EPA. The *prima facie* standard of "equal work" remains.

Myth #3: The Government Will Interfere in Pay Decisions

Employers are already obligated under the Equal Pay Act and title VII to refrain from pay discrimination and ensure equal pay for substantially equal jobs. The problem is that pay secrecy and the lack of effective workable remedies has allowed unlawful pay discrimination to flourish undetected and unaddressed in some workplaces. The Paycheck Fairness Act reaffirms our commitment to equal pay for equal work by encouraging employers to give more attention to ensuring that their pay practices honor that promise—but it leaves pay decisions entirely up to the employer's sole discretion.

To be clear: this Act does not get the government involved in wage-setting at all. The Act does not dictate to employers which factors should be used in setting pay. It merely requires that pay decisions bear some relation to the job and business. This is not only about basic fairness for employees performing the same jobs and equal opportunity for women: it is simply smart business. As generally accepted in the executive compensation context, it is good corporate governance to relate pay to performance and the goals of the job and business. In addition to helping to reduce the gender pay gap, studies have also shown that employees who understand how pay is determined are more likely to be productive and loyal to their employers.[1]

As described below, in some industries there is an "anything goes" approach to wage setting—facilitated by pay secrecy—that has permitted wildly divergent and unfair pay rates between employees doing the same job. We can, and must, do better than that if "equal pay for equal work" is ever going to be a reality.

The rest of my testimony explains how pay discrimination manifests itself in the modern economy, describes how existing equal pay laws have failed to provide an effective remedy for women who experience pay discrimination, and examines how the Paycheck Fairness Act will help to deter pay discrimination against women.

1. STATUS OF WOMEN'S WAGES IN TODAY'S MARKET

Equal pay laws have undoubtedly increased women's earning power and encouraged most employers to take pay equity seriously. Yet, the pay gap between men and women who perform substantially equal jobs remains widespread, persistent, and systemic in our economy. The rhetoric about the "gender pay gap" tends to be heated and polarizing but one thing is clear: study after study that has examined the pay gap has demonstrated that unexplained pay disparities between men and women performing substantially equal jobs remain even after controlling for so-called "choice" factors—such as education, years of work experience, age, hours worked, occupational field, and jobs held.[2]

I have written about how the gender pay gap is more complex—and in many job categories much worse—than the aggregate statistic that women who work full-time, year round earn about 77 cents for every dollar earned by their male peers.[3] The overall wage gap is only the tip of the iceberg. The problem is even more alarming when one examines data regarding men and women who have similar qualifications and perform similar jobs, especially women who try to climb the economic ladder and move into higher-paying jobs.

Women at every wage level and in nearly every industry experience a wage gap. Consider these statistics:

• Women in the 10 largest low-wage occupations are paid an average of about 10 cents less than men in those occupations for full-time work.[4]

• Although women generally are becoming better educated than men—earning more college and advanced degrees—women with higher education levels experience a *greater* pay gap than women who have less educational attainment.[5]

• Contrary to the notion that more education and experience will decrease the wage gap, the disparity *increases* for women who attain the highest levels of education and professional achievement, such as lawyers (female lawyers earn 74.9 percent as much as their male peers),[6] physicians and surgeons (64.2 percent),[7] securities and commodities brokers (64.5 percent),[8] accountants and auditors (75.8 percent),[9] and managers (72.4 percent).[10]

• A wage gap exists for men and women who have the same education and enter the same jobs at the start of their careers. For example, a recent study of starting salaries of graduates of medical residency programs in New York found that male physicians made on average $16,819 more than their female cohorts. The regression models in the study controlled for 10 variables that could potentially affect wage rates, including specialty choice, practice setting, work hours, geographic location, and other characteristics.[11] According to the researchers, "We honestly tried everything we could to make it go away, but it wouldn't."[12]

• The wage gap between men and women performing the same jobs starts small, but balloons throughout their careers. A regression analysis by the American Association of University Women found that, after controlling for choice factors that could affect pay, about one-quarter of the pay gap (5 percent) remained for recent college graduates—that is, men and women with exactly the same education entering the same job at the same time—but 10 years after graduation the unexplained pay gap grew to 12 percent.[13]

• Some say that the gender pay gap can be explained because men work more hours than women. But women who work the greatest number of hours experience a higher disparity.[14]

• The wage gap exists even in professions in which women have long dominated, such as education,[15] nursing,[16] social work,[17] and clerical work.[18]

In sum, 50 years after the passage of the Equal Pay Act, pay discrimination is still a serious problem for too many women in America. Based on my research and experience, I believe there are several reasons this is still happening.

First, it is my firm belief that most employers try to comply with the law and do not set out to *intentionally* discriminate against women. Nevertheless, there is no question that pay discrimination remains. In some cases, that discrimination is as blatant as it was during the 1960s, with some employers professing that men deserve to be paid more. For example, women who worked at Walmart reported that managers told them that male employees would always make more because "God made Adam first, so women would always be second to men" and "[y]ou don't have the right equipment. . . . [Y]ou aren't male, so you can't expect to be paid the same."[19] When one plaintiff asked her manager why a male co-worker in the same position was making $10,000 more per year, the manager told her to bring in her household budget so he could decide whether she deserved as much as the man.[20] Examples of these sexist attitudes exist in other pay discrimination cases.[21]

Second, the stereotype that working mothers do not need to be paid as much, and that working fathers deserve more pay, sometimes creeps into the wage setting process, often unconsciously. Working mothers tend to experience a "motherhood penalty" in wages that cannot be explained by human capital or occupational factors.[22] In one study, participants evaluated application materials for a pair of same-gender, equally qualified job candidates who differed only on parental status.[23] The study found that "mothers were judged as significantly less competent and committed than women without children."[24] In addition, "[t]he recommended starting salary for mothers was $11,000 (7.4 percent) less than that offered to nonmothers, a significant difference."[25] In contrast, fathers were offered significantly higher salaries than nonfathers."[26]

It is a fallacy today to think that mothers are not working to support their families. A recent study found that a huge majority of middle-income mothers work 40 or more hours per week.[27] About half of all mothers work full-time.[28] Two-thirds of the 21.7 million working mothers are part of a dual-earner family, but one-third—or 7.5 million mothers—"were the sole job-holders in their family, either because their spouse was unemployed or out of the labor force, or because they were heads of households."[29] During the recession, "families where the mother was the only jobholder increased.[30] As a recent congressional report concluded, "[m]ore than ever, families depend on mothers' work."[31]

A third factor that lowers women's wages is that compensation decisions in today's economy tend to be wholly discretionary on the part of certain managers, without company guidance about how pay should be determined and work rewarded. The more discretionary and subjective the process for setting pay—which tends to

be the case for management and professional occupations—the greater the gender pay gap. I saw this in an equal pay case I litigated on behalf of a Chief Technology Officer at a technology startup. Her base salary was less than all of the men on the executive team, but the disparities in discretionary components were extreme: her bonuses were only about one half, and her stock options awards only about one-quarter, of the awards given to all of the men on the executive team.[32]

A large body of social science research demonstrates that sex-stereotyping and unconscious cognitive biases influence pay decisions that are based on subjective, arbitrary, or discretionary assessments.[33] In addition, studies show that significant gender differences in salaries will occur in "high ambiguity" industries—those in which employees are not well-informed about the appropriate amount to request during salary negotiations.[34] A study of MBA students entering their first jobs found that women who entered industries in which salaries were more ambiguous "accepted salaries that were 10 percent lower on average than did the men."[35] This is also reflected in wage statistics. Although a gender wage gap exists in nearly every occupation and industry, it tends to be the lowest for more standardized, low-wage jobs for which the compensation structures are well-defined and non-negotiable.

The problem is that wages in the modern economy are more likely to be the product of a negotiation process, conducted under conditions of pay secrecy with little to no guiding company standards. Rather than the lock-step compensation plans of the industrial era, many job sectors today follow a "winner-take-all" and "anything goes" approach to setting pay. These trends have exacerbated internal pay inequities, resulting in wildly divergent salaries for individuals performing essentially the same jobs.[36]

These dynamics disproportionately disadvantage women's pay. Negotiation experts explain that unconscious gender-stereotypes are more likely to skew results against women when compensation decisions are informal and unguided. Studies show, however, that if pay processes are more transparent and women have adequate information during the negotiation process, gender pay disparities may be reduced or eliminated altogether.[37]

2. CURRENT FEDERAL LAW FAILS TO PROVIDE AN EFFECTIVE REMEDY FOR PAY DISCRIMINATION

My scholarship has analyzed how the Equal Pay Act (EPA), which the Paycheck Fairness Act amends, currently provides an empty promise for many women who experience pay discrimination. Although evaluation of equal pay claims is supposed to be fact-intensive,[38] modern courts increasingly dismiss cases at the summary judgment stage rather than permitting the claims to proceed to a jury trial. In a study I conducted of all cases in which Federal district courts considered whether to grant summary judgment on an EPA claim over the last decade (from January 1, 2000 to December 31, 2011), only about one-third survived summary judgment.[39] In other words, the merits of equal pay claims rarely make it before juries and most women who file equal pay cases are stopped at the summary judgment "starting gate." In addition, employees whose cases make it to an appellate level are less likely to prevail on equal pay claims today than at any other time since the EPA's passage.[40]

There are several reasons for the EPA's ineffectiveness in the modern economy:

The Prima Facie Hurdle: The EPA requires that employees of opposite sexes at the same establishment receive equal pay for equal work. To state a claim under the EPA, plaintiffs must first meet a very strict "*prima facie*" threshold standard. A plaintiff must show that he or she performs substantially "equal work on jobs the performance of which requires equal skills, effort, and responsibility, and which are performed under similar working conditions."[41] My research has explained that this *prima facie* standard has been interpreted by some courts so strictly that it leaves many women in the modern economy—especially those in non-standardized or upper-level jobs—outside of the EPA's protection.[42] The Paycheck Fairness Act does not change the substantially equal work standard and it is likely to continue to be a stumbling block for most plaintiffs in EPA cases.

The "Anything Under the Sun" Defense: If a plaintiff survives the strict *prima facie* standard of showing "equal work," the burden of persuasion shifts to the employer to prove that the pay disparity actually resulted from one of four affirmative defenses: "(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."[43]

Most employers in EPA cases rely on the catch-all "factor other than sex" defense and rarely invoke the first three.[44] In a majority of circuits[45] and under the EEOC's interpretation,[46] the employer is not permitted to rely on literally any other factor,

but only a factor that is job-related, adopted for a legitimate business reason, and not based on sex. As courts have explained, "[w]ithout a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned."[47] Unfortunately, in a minority of Federal circuit courts, that loophole exists.[48]

The Paycheck Fairness Act codifies the majority view that the "factor other than sex" defense does not mean "anything under the sun" other than an admission of sex discrimination. Rather, the factor must be related to the job in question and consistent with business necessity. This amendment is the most important provision of the Paycheck Fairness Act. It will encourage employers to develop more clearly defined compensation systems—guided by any considerations the employer wants—so long as they relate to the business and job. As one Federal judge commented:

> "The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to the business."[49]

Some opponents contend that adopting the majority view will somehow threaten the free-market system and turn courts into "super-personnel officers." That has not happened in the majority of circuits in which this standard has already been operating. In addition, the argument that employers must be able to use vague, ill-defined "market" excuses for pay discrimination among equal jobs is alarming to hear 50 years after the passage of the Equal Pay Act. Indeed, the EPA was designed to alter the compensation market so that employers would not pay women less than men performing substantially equal jobs simply because that was what the "market" required or permitted, or because men asked for more pay than women did.[50]

Given the distinct market purpose of the EPA, early cases flatly rejected "market forces" defenses asserted by employers because they perpetuated the very discrimination that Congress sought to alleviate.[51] Courts noted that the EPA aimed to cure imbalances in the compensation market based on gender. As the Supreme Court stated in *Corning Glass Works* v. *Brennan*:

> The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, *but also as a matter of market economics*, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition."[52]

Since the EPA was passed, the "market" defense in some EPA cases has evolved into an escape hatch through which many pretexts for gender pay discrimination have been accepted. A common market defense in EPA cases relies on employees' prior salaries.[53] If a man earned more in a prior position with a different employer, and a woman earned less in a prior position with a different employer, they will be paid based on their prior salaries, regardless of whether they are now performing substantially equal jobs and have comparable qualifications.

Market defenses also rely on negotiation outcomes: the male employee negotiated a higher salary, and the woman either failed to ask for more pay, or was prohibited from negotiating a higher rate.[54] Negotiation defenses harm women. Studies have shown that employers react more favorably to men who negotiate salaries, and that women may be reluctant to ask for higher pay because they may be penalized for violating gender stereotypes and feel more social pressure to agree to employers' wage offers.[55] This is compounded by the problem of pay secrecy: employers enjoy a monopoly on pay information and women may not have access to the same networks that men do to determine potential pay ranges.

Consider the following example from an equal pay case that I litigated. Like some companies, the employer had no formal job descriptions or compensation system, which allowed gender pay disparities between employees performing substantially equal jobs to flourish. The supervisors of each department had great discretion to negotiate and set individual salary amounts upon hiring, without guiding criteria. In one department, a female vice president was hired months earlier than two other male vice presidents. All three were hired to do essentially the same work. All had comparable qualifications for the job. The executive vice president who hired them admitted that the female vice president had equal if not better performance and was even appointed a "player-lead" to train her male colleagues—yet her pay was substantially lower than her male peers. When asked why he paid his female player-lead less than two men doing the same job, the supervisor defended the disparity based on the employees' prior salaries and their wage negotiations with him.[56] When asked why he failed to pay similarly qualified vice presidents equal pay for equal work, the supervisor responded:

> Because I didn't need to. I mean at the end of the day it was, at the end of the day [sic]—first of all they, they didn't need to see what each other's salaries

> were. They weren't—it wasn't like we post it on your name tag. So there was no demotivation. [The female vice president] was somewhat aware what the other people were making, so it was, you know, I didn't want to demotivate her, but, *you know, at the end of the day you're paying people, you know, the market rate, you're not necessarily paying them for a job. You know, you're saying what's it take?*[57]

As seen in this example, the "market" on which the supervisor relied was nothing more than a haphazard situational accident, not a fair reflection of the job duties, skill sets, and performance of the employees. The employer paid the worst performer the highest salary simply because he asked for it. The female player-lead who trained her male peers received the lowest salary, simply because her salary at a previous employer was lower than that of her male counterparts. The law requires equal pay for equal work, but pay secrecy enables inequities based on the happenstance of prior salaries—not the skills, responsibility, and effort required for the job—to continue uncorrected. This perpetuates the very discrimination that Congress sought to prevent with the EPA.

In other words, some employers' vague assertions that the invisible hand of "the market" dictated wage rates tend to be mythical covers for paying women less than men to perform substantially equal jobs—for reasons that have nothing to do with actual market compensation data, the job, or the merits of the employees in those jobs. Just as Congress saw through employers' assertions of "market forces" when the Equal Pay Act was passed, Congress should pass the Paycheck Fairness Act to once again confirm that abstract notions of "the market" do not trump the promise of equal pay.[58]

TITLE VII ALSO DOES NOT PROVIDE AN ADEQUATE REMEDY

Title VII is not a workable remedy for pay discrimination in most cases because of its intent requirement, which is virtually impossible to show in these cases.[59] Proving a discrimination case of any kind is extremely difficult. As one Federal court noted:

> Employment discrimination and retaliation, except in the rarest cases, is difficult to prove. It is perhaps more difficult to prove such cases today than during the early evolution of Federal and State anti-discrimination and anti-retaliation laws. Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it.[60]

Proving pay discrimination is especially challenging. First, unlike hiring and promotions, pay decisions are often made in secret,[61] and psychological research has shown that decisionmakers typically undervalue employees if they are women rather than men.[62] Scholars have shown how unconscious biases can lead to discrimination.[63] When the decisionmaking processes surrounding pay are opaque and guided by subjective factors, unconscious biases are more likely to reduce women's wages.[64]

Second, the employer has a monopoly on the information used to make the pay decision and should have the burden of proving the reasons for that decision. Employees are typically not privy to the decisionmaking process, and records of the reasons underlying pay decisions rarely exist unless the company has an established compensation system. It is therefore easier for an employer to craft post hoc excuses for pay disparities to mask discrimination.[65] For these reasons, the burden-shifting structure of the EPA is more appropriate for pay discrimination claims. Indeed, some plaintiffs prevail on EPA claims but lose on title VII claims due to insufficient evidence of intent.[66]

In sum, the notion that women already have adequate, well-functioning tools to remedy pay discrimination is belied by the experience of women who have attempted—unsuccessfully—to vindicate the protections of title VII and the EPA.

3. THE PAYCHECK FAIRNESS ACT BRINGS THE EQUAL PAY ACT INTO THE MODERN ERA

In addition to adopting the standard used by a majority of Federal circuits for the "factor other than sex" defense, the Paycheck Fairness Act modernizes the Equal Pay Act in other important ways:

a. Widening the "Same Establishment" for the Prima Facie Standard

The Paycheck Fairness Act permits plaintiffs to use comparators who work for the same employer at a different physical location in the same county or similar political subdivision of a State at the *prima facie* stage. This adapts to the reality that more employers have decentralized structures. Note that this "same establishment" provision relates only to the showing of a *prima facie* comparator who performs equal work: it would not preclude an employer from defending a pay disparity at

the affirmative defense stage based on a job or business-related reason, such as the potential need to pay workers in an urban area of a county a higher wage.

b. Compensating for Non-Economic Harms of Pay Discrimination and Deterring Malicious Conduct

If an employee wins an EPA case, she may recover only the amount of the pay disparity (up to 2 years of back pay, or 3 years if a "willful" violation), plus an additional equal amount as liquidated damages. The harms of pay discrimination often extend beyond the actual dollar amount of the pay disparity.

Work is an essential component of how we define ourselves in this country. It brings us a sense of purpose, dignity, and fulfillment. In many cases, women do not discover egregious pay disparities between themselves and male co-workers who perform substantially the same jobs until after many years or even decades of working hard for an employer. When that happens, women often feel betrayed and humiliated. For many women, it eviscerates their sense of identity and impacts their mental and physical health in dramatic ways. Yet, the EPA does not compensate for these very real harms. Such damages are available for victims of racial pay discrimination under 42 U.S.C. § 1981, and under title VII for employment discrimination, albeit at very low-capped damage levels. The Paycheck Fairness Act recognizes that women who experience pay discrimination should likewise have those damages available to them, where appropriate.

In addition, for those cases in which employers act "with malice or reckless indifference," the Paycheck Fairness Act permits punitive damages. This enhanced penalty is important for those cases in which proven violations are especially egregious and malicious. As in other employment discrimination cases, such awards are likely to be extremely rare. Nevertheless, their availability will express our strong commitment to equal pay for equal work and be a strong deterrent against future violations.

c. Permitting Class Actions for Systemic Pay Discrimination

Under current law, the EPA does not permit class actions.[67] Instead, it follows the Fair Labor Standards Act collective action structure, which requires every individual plaintiff to affirmatively "opt-in" to the litigation by filing a signed consent form with the court.[68] The benefit of this approach is that the preliminary certification standard for a collective action is more lenient than the standard for class certification.[69] Plaintiffs only need to show that they are "similarly situated" and do not have to satisfy the more demanding prerequisites of Federal Rule of Civil Procedure 23.

The major downside is that a collective action can be considerably more expensive to manage and litigate. For example, rather than having a representative group of plaintiffs answer discovery requests and appear for depositions, defense attorneys often demand answers to interrogatories for and depositions of *every* member of the collective action (and then they seek to dismiss the claims of those individual plaintiffs who do not respond). This significantly raises the costs of the litigation.

In addition, the opt-in collective action procedure is intimidating for many employees at the initiation of litigation. Although the named plaintiffs may muster up the courage to take a stand on behalf of the collective group, other employees may fear retaliation or be reluctant to go on public record to challenge the employer in court. In this respect, employment class actions are very different from other types of class actions, such as those involving consumer or securities law. Whereas consumers or investors can simply purchase from another company or go without the product in question, many employees do not want to risk unemployment and may not be able to move to another employer if they lose their jobs. For many women, in particular, claiming pay discrimination or suing their employer can be damaging to their future job prospects. A class action procedure will help to protect those women who are similarly harmed by a common discriminatory pay policy or practice but fear that they will be fired if they go on public record against the employer.

Permitting class actions—which are available for most other types of employment discrimination and have a more exacting standard for certification—would provide an important tool to address systemic pay discrimination by the same employer.

d. Using "Sunshine as a Disinfectant" by Encouraging Better Wage Information

Pay secrecy is common in American workplaces. Most workers have no idea how their pay is determined and do not know what their peers make. Many employers have strict pay confidentiality policies, the violation of which can lead to termination, even though such policies violate the National Labor Relations Act.[70] Some women have been fired for asking about the salaries of their male counterparts.[71] Many women do not discover gross pay disparities until they, for example, receive

anonymous letters on the eve of retirement,[72]review proxy statements,[73] or are publicly ridiculed by co-workers who happen to see how low her paycheck is.[74]

The Paycheck Fairness Act recognizes that a litigation remedy alone—which is reactive, piecemeal, and difficult to achieve—will not fully address the problem of unequal pay for equal work, especially when most pay discrimination remains "hidden from sight."[75] Greater transparency about pay practices is needed to encourage compliance without litigation.

To that end, the Paycheck Fairness Act would prohibit employers from retaliating against employees because they simply discuss or inquire about wages in the workplace. The Act also instructs the Department of Labor to,

> "conduct studies and provide information to employers, labor organizations, and the general public concerning the means available to eliminate pay disparities between men and women."

These anti-retaliation and data collection provisions provide a balanced, proactive approach to combating pay discrimination. My scholarship has explained how the compensation market we have now in this country is failing because it lacks one of the key ingredients to a well-functioning, efficient market: information.[76] Better information and study about existing market pay rates will help women understand their potential value in the marketplace and provide an incentive for employers to address pay disparities among employees who perform similar jobs *before* they turn into fodder for litigation. Greater pay data analysis will help to sharpen our understanding of the causes of the gender wage gap and educate employers about best practices. The Act also provides for training that will empower women and girls with better tools to negotiate salaries and an employer pay equity award that will encourage the development of best practices. These programs will engage both employees and employers in the effort to reduce the gender pay gap.

In conclusion, the Paycheck Fairness Act takes a balanced, commonsense approach to adjusting the Equal Pay Act to the realities of the modern workplace. Without the Paycheck Fairness Act, the Equal Pay Act will continue to be an "empty shell" for many women who experience pay discrimination. As Congresswoman Dwyer stated in the original debates regarding the EPA in 1963: "I can assure you that women would not be inclined to welcome an empty shell of a bill—legislation with a title but with no substance. This would be a heartless deception, and Congress would only be fooling itself if it should follow such a course."[77]

Thank you for the opportunity to testify on this important legislation.

REFERENCES

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2. *See, e.g.,* DANIEL H. WEINBERG, U.S. DEP'T OF COMMERCE, CENSUS 2000 SPECIAL REPORTS, EVIDENCE FROM CENSUS 2000 ABOUT EARNINGS BY DETAILED OCCUPATION FOR MEN AND WOMEN 21 (May 2004) ("There is a substantial gap in median earnings between men and women that is unexplained, even after controlling for work experience . . . education, and occupation."); U.S. GEN. ACCT. OFFICE, GAO–04–35, WOMEN'S EARNINGS: WORK PATTERNS PARTIALLY EXPLAIN DIFFERENCE BETWEEN MEN'S AND WOMEN'S EARNINGS 2 (2003) (concluding based on nationally representative longitudinal data set that women in 2000 earned only 80 percent of what men earned after accounting for education, occupation, hours worked, and time away from the workplace because of family responsibilities); STEPHEN J. ROSE & HEIDI I. HARTMANN, INST. FOR WOMEN'S POL'Y RES., STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS GAP 9–10 (2004), *available at http://www.iwpr.org/pdf/C355.pdf* (finding that differences in men's and women's labor force attachment do not explain the gap); Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay* 10 (Nat'l Bureau of Econ. Research, Working Paper No. 7732, 2000) (finding unexplained residual of 10–15 percent of total wages, after controlling for other factors that may explain gender wage gap).

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4. JOAN ENTMACHER, KATHERINE GALLAGHER ROBBINS, & LAUREN FROLICH, NAT'L WOMEN'S LAW CTR., WOMEN ARE 76 PERCENT OF WORKERS IN THE 10 LARGEST LOW-WAGE JOBS AND SUFFER A 10-PERCENT WAGE GAP (Mar. 2014), *available at http://*

www.nwlc.org/sites/default/files/pdfs/women__are__76__percent__of__workers__in__the__10__largest__low-wage__jobs__and__suffer__a__10__percent__wage__gap.pdf.

5. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009, at 8 tbl.1 (2010), *available at http://www.bls.gov/cps/cpswom2009.pdf* [2009 HIGHLIGHTS]. Women who earn a bachelor's degree and higher earn 73.1 percent as much as their male colleagues, whereas those with less than a high school diploma earn 76.4 percent, and those with a high school diploma, 75.7 percent.

6. *Id.* at 14 tbl.2.

7. *Id.* at 16 tbl.2.

8. *Id.* at 20 tbl.2.

9. *Id.* at 12 tbl.2.

10. *Id.* at 10 tbl.2. Within the "management occupations" category, the earnings gap was the largest for financial managers (66.6 percent) and the smallest for lodging managers (84.6 percent). *Id.* Chief executives also fall in the managers' category, with female chief executives earning 74.5 percent as much as male chief executives. *Id.*

11. Anthony T. LoSasso, *et al., The $16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women*, 30 HEALTH AFFAIRS 193 (2011).

12. *Id.* at 201.

13. JUDY GOLDBERG DEY & CATHERINE HILL, AAUW EDUCATIONAL FOUNDATION, BEHIND THE PAY GAP 10 (2007), *available at http://www.aauw.org/learn/research/upload/behindPayGap.pdf* ("If the pay gap is going to disappear naturally over time, we would expect that pay differences among full-time female and male workers after college would be small or nonexistent. . . . Yet 1 year after college, female graduates working full-time earn only about 80 percent as much as male graduates earn.").

14. 2009 HIGHLIGHTS tbl.5, at 40.

15. *Id.* at 13–14 tbl.2.

16. *Id.* at 15–16.

17. *Id.* at 13–14.

18. *Id.* at 21–22.

19. Plaintiffs' Motion for Class Certification and Memorandum of Points and Authorities at 26, *Dukes*, 222 F.R.D. 137 (N.D. Cal.) (No. C–01–2252 MJJ) (providing examples of sex-based explanations for pay disparities by Walmart supervisors).

20. *Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (June 29, 2011) (statement of Betty Dukes), available at *http://judiciary.senate.gov/pdf/11–6–29%20Dukes%20Testimony.pdf*.

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22. *See* Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 273–76 (2003) (finding motherhood wage penalty of approximately 5 percent for one child and 7 percent for two or more children); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219–20 (2001) (finding that interruptions from work, working part-time, and decreased seniority/experience collectively explain no more than about one-third of the motherhood penalty of approximately 7 percent per child).

23. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty*?, 112 AM. J. SOC. 1297, 1297 (2007).

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25. *Id.*

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28. *Id.* at 1.

29. *Id.* at 2.

30. *Id.* at 3.

31. *Id.*

32. I discuss this case in more detail in my scholarship. *See Shattering*, at 48 and *Money, Sex, and Sunshine*, at 992–93.

33. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (reviewing cognitive psychology scholarship regarding the nature of human inference and the roles played by cognition and motivation in decision-making).

34. Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 396 (2008); Hannah Riley Bowles, Linda Babcock & Kathleen McGinn, *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. 951 (2005).

35. *Id.*

36. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 165 (2004).

37. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK 65 (2003) ("[K]nowledge of what the market will pay for their skills and time can help override women's inaccurate sense of self-worth.").

38. *Brobst* v. *Columbus Servs. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985) ("Given the fact intensive nature of the [Equal Pay Act] inquiry, summary judgment will often be inappropriate [in EPA cases].").

39. *Overuse of Summary Judgment in Equal Pay Cases, supra*, at 821–24.

40. In *Shattering the Equal Pay Act's Glass Ceiling*, I conducted an empirical analysis of every reported case involving an Equal Pay Act claim at a Federal appellate circuit court from 1970 to 2009. I found that employees prevailed on equal pay claims only 35 percent of the time from 2000–09, a substantial decrease from previous decades: employees prevailed on appeal in 55 percent of EPA cases in the 1990s, 52 percent in the 1980s, and 59 percent in the 1970s.

41. 29 U.S.C. § 206(d)(1) (2006).

42. *See Shattering, supra.*

43. *Id.*

44. *Overuse of Summary Judgment*, at 836.

45. *See Steger* v. *Gen. Elec. Co.*, 318 F.3d 1066, 1078–79 (11th Cir. 2003) ("Because the evidence showed that the salary retention plan was justified by 'special exigent circumstances connected with the business,' and because there was no evidence which rebutted GE's explanation, the district court did not err in submitting the matter to the jury or in denying Steger's motion for judgment as a matter of law." (quoting *Irby* v. *Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)); *Belfi* v. *Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999) ("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."); *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992) ("[A]n employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense."); *EEOC* v. *J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1992) ("[The factor-other-than-sex] defense does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."); *Glenn* v. *Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) ("[The factor-other-than-sex] exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business."); *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) ("The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.").

46. EEOC, Directives Transmittal No. 915.003, § 10.IV.F.2. & nn.65–66 (Dec. 5, 2000), *available at http://www.eeoc.gov/policy/docs/compensation.html#N_65_ ("An employer . . . must show that the factor is related to job requirements or otherwise is beneficial to the employer's business [and] the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices.")*.

47. *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992), *cert. denied*, 506 U.S. 965 (1992).

48. *See Wernsing* v. *Dep't of Human Servs.*, State of Ill., 427 F.3d 466, 470 (7th Cir. 2005) (discussing split between Seventh and Eighth circuits and those circuits that require an 'acceptable business reason').

49. *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982).

50. *See Money, Sex, and Sunshine, supra* at 964–71 (describing market purpose of the EPA).

51. *Brennan* v. *Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir. 1974) ("[U]se of the 'market force' theory, i.e. a woman will work for less than a man, is not a valid consideration under the Act."); *Brennan* v. *Prince William Hosp. Corp.*, 503 F.2d 282, 286 (4th Cir. 1974) (finding "the availability of women at lower wages than men" to be "precisely the criterion for setting wages that the Act prohibits"); *Brennan* v. *City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973) (stating that there is "no excuse" for hiring female workers at a lower rate "simply because the market will bear it"); *Hodgson* v. *Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970) (finding that an employer's greater bargaining power with women "is not the kind of factor [other than sex] Congress had in mind" in enacting the EPA); *Hodgson* v. *Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973) (noting that Congress passed the EPA "[r]ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor").

52. 417 U.S. 188, 207 (1974) (quoting §2(a)(5), 77 Stat. at 56) (emphasis added).

53. *See* Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of 'Factors Other than Sex' Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1108 (1989) (urging greater scrutiny of prior salary defenses).

54. *See, e.g., Balmer* v. *HCA, Inc.*, 423 F.3d 606, 615 (6th Cir. 2005) (finding no EPA violation where male comparator negotiated higher salary and female employee was not permitted to negotiate starting salary); *Reznick* v. *Associated Orthopedics & Sports Med., P.A.*, 104 F. App'x 387, 391–92 (5th Cir. 2004) (finding no EPA violation where a male surgeon negotiated higher compensation level in his initial employment contract than the plaintiff); *Dey* v. *Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (finding no EPA violation where a male comparator negotiated a higher salary); *EEOC* v. *Home Depot U.S.A., Inc.*, No. 4:07CV0143, 2009 WL 395835, at *10 (N.D. Ohio Feb. 17, 2009) (finding a valid factor other than sex where male employees were able to negotiate higher starting salaries than the plaintiff); *Hardwick* v. *Blackwell Sanders Peper Martin, L.P.*, No. 25–859–CV–W–FJG, 2006 WL 2644997, at *3–4 (W.D. Mo. Sept. 14, 2006) (finding male comparator had negotiated a higher salary and the plaintiff did not negotiate). *But see Mulhall* v. *Advance Sec., Inc.*, 19 F.3d 586, 596 (11th Cir. 1994) (rejecting the employer's defense that wage disparities resulted from negotiations surrounding the purchases of comparators' businesses); *Glodek* v. *Jersey Shore State Bank*, No. 4:07–CV–A–2237, 2009 WL 2778286, at *9 (M.D. Pa. Aug. 28, 2009) (rejecting negotiation defense and stating "[t]hough salary demands are not entirely irrelevant, it would be inequitable to permit defendant to shelter itself from liability by stating that one individual received greater compensation than another simply because he or she requested it"); *Day* v. *Bethlehem Ctr. Sch. Dist.*, No. 07–159, 2008 WL 2036903, at *9 (W.D. Pa. May 9, 2008) (rejecting the school district's defense at the summary judgment stage that male comparators negotiated salaries that were higher than the standard salary scale); *Klaus* v. *Hilb, Rogal & Hamilton Co.*, 437 F. Supp. 2d 706, 723–24 (S.D. Ohio 2006) (denying summary judgment where the employer defended a $36,000 wage disparity based on the male comparator's negotiation of higher salary).

55. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK (2003); Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 395 (2008); Deborah A. Small, *et al.*, *Who Goes to the Bargaining Table? The Influence of Gender and Framing on the Initiation of Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007); Lisa Barron, *Ask and You Shall Receive?: Gender Differences in Negotiators' Beliefs About Requests for a Higher Salary*, 56 HUM. RELATIONS 635 (2003); B. Gerhart & S. Rynes, *Determinants and Consequences of Salary Negotiation by Male and Female MBA Graduates*, 76 J. APPLIED PSYCHOL. 256 (1991).

56. Deposition Transcript at 32–5, 75–80 (Mar. 6, 2008) (on file with author).

57. *Id.* at 79–80 (emphasis added).

58. *See Siler-Khodr* v. *Univ. of Tex. Health Sci. Ctr.*, 261 F.3d 542, 547 (5th Cir. 2001) (stating that the market forces defense simply perpetuates discrimination).

59. *See Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 344 (4th Cir. 1994) (explaining the differences in the burdens of proof for title VII and the EPA).

60. *Parada* v. *Great Plains Int'l of Sioux City, Inc.*, 483 F. Supp. 2d 777, 791 (N.D. Iowa 2007).

61. Tom Krattenmaker, *Compensation: What's the Big Secret*?, HARV. MGMT. COMM. LETTER, Oct. 2002, at 3.

62. *See* BABCOCK & LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE 98–100 (2007) (reviewing studies that show that "people's prejudices can powerfully influence the ways in which they respond to men and women without their realizing it"); Claudia Goldin

& Cecilia Rowe, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000) (reporting that when auditions for an orchestra were conducted with the performers behind a screen, women were substantially more likely to advance out of the preliminary selection round).

63. *See, e.g.*, Barbara S. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 Yale L.J. 2009 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999).

64. BABCOCK & LASCHEVER, at 119–20 ("[W]omen fare better when an evaluation process is more structured, includes clearly understood benchmarks, and is less open to subjective judgments." (citing S. FISKE & S.E. TAYLOR, SOCIAL COGNITION (1984); M.E. Heilman, *The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool*, 26 ORG. BEHAV. & HUMAN PERFORMANCE 386 (1980))).

65. In some cases, there is evidence of gender-based comments or other discriminatory actions that can help to prove intent in title VII cases. For example, Lilly Ledbetter testified that her supervisor "threatened to give her poor evaluations if she did not succumb to his sexual advances." Brief for the Petitioner, *supra* note 8, at 5–6. When she questioned him about poor evaluations, he responded that it was "a lot easier to downgrade you. . . . You're just a little female and these big old guys, I mean, they're going to beat up on me and push me around and cuss me." *Id.* at 6; *see also Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 340 (4th Cir. 1994) (employer told plaintiff to be an engineer or a "mama").

66. *See, e.g., Fallon* v. *Illinois*, 882 F.2d 1206, 1217 (7th Cir. 1989) ("It is possible that a plaintiff could fail to meet its burden of proving a title VII violation, and at the same time the employer could fail to carry its burden of proving an affirmative defense under the Equal Pay Act."); *Brewster* v. *Barnes*, 788 F.2d 985, 987 (4th Cir. 1986) (holding defendant liable for pay discrimination under EPA, but not under title VII).

67. 29 U.S.C. § 216(b) (2006).

68. *Id.* ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

69. *See Cunningham* v. *Elec. Data Sys. Corp.*, 754 F. Supp. 2d 638, 643 (S.D.N.Y. 2010) (internal quotations and citations omitted) ("The similarly situated standard is far more lenient, and indeed, materially different, than the standard for granting class certification under Fed. R. Civ. P. 23.").

70. *See* Rafael Gely, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 122 n.2, 124–25 (2003).

71. *Crabtree* v. *Baptist Hosp. of Gadsden, Inc.*, No. 82–AR–1849–M, 1983 WL 30400 (N.D. Ala. Dec. 7, 1983), aff'd, 749 F.2d 1501 (11th Cir. 1985).

72. Lilly Ledbetter received an anonymous letter informing her of pay disparities. *See* Katie Putnam, Note, *On Lilly Ledbetter's Liberty: Why Equal Pay for Equal Work Remains an Elusive Reality*, 15 WM. & MARY J. WOMEN & L. 685, 689 (2009).

73. Margaret Heffernan, the former CEO at CMGI, told this story:

> For years, I was the only woman CEO at CMBI. But it wasn't until I read the company's proxy statement that I realized that my salary was 50 percent of that of my male counterparts. I had the CEO title, but I was being paid as if I were a director.—BABCOCK & LASCHEVER, at 104.

74. In one case, the plaintiff "accidentally left her pay stub in plain view, and some of her colleagues began laughing and making negative remarks about her pay." *Boumehdi* v. *Plastag Holdings, LLC*, 489 F.3d 781, 785 (7th Cir. 2007).

75. *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649–50 (2007) (Ginsburg, J., dissenting) (citing *Goodwin* v. *Gen. Motors Corp.*, 275 F.3d 1005, 1008–09 (10th Cir. 2002) ("[P]laintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, 7 years after her starting salary was set lower than her co-workers' salaries."); *McMillan* v. *Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) ("[P]laintiff worked for employer for years before learning of salary disparity published in a newspaper.")).

76. *See Money, Sex and Sunshine: A Market-Based Approach to Pay Discrimination.*

77. 109 CONG. REC. 9200 (1963) (statement of Rep. Dwyer).

Senator MIKULSKI. Ms. Young.

STATEMENT OF ReSHONDA YOUNG, OPERATIONS MANAGER, ALPHA EXPRESS, INC., WATERLOO, IA

Ms. YOUNG. Chair Mikulski, Ranking Member Alexander, and members of the committee, I want to thank you for the opportunity to testify today and share a small business perspective on pay equity.

My name is ReShonda Young, and I serve as operations manager and corporate vice president for two family businesses based in Waterloo, IA. Alpha Express is a transportation and delivery company that hauls parts—machine parts, farm equipment—all across the United States and into Canada, and Alpha Services is a contracting business that provides maintenance services to companies like John Deere.

Our business is a true family business. My father started the company 25 years ago, and back then, it was just him and one partner. Now, we employ about 50 people. I've also just launched a new business of my own. It's a gourmet popcorn shop called Popcorn Heaven in Waterloo, IA. We started in February and already have 10 employees.

I worked in Iowa's insurance sector for more than 10 years. But entrepreneurship is my passion. I guess you could say that small business just runs in my blood. I want to share with you the story of what happened when I joined my father in the family business 8 years ago. When I started taking on H.R. responsibilities, I found an issue with our paychecks. Women were being paid less for the same work.

We had a woman who had been with us for 16 years. She was the one who kept everything in order, yet she was only getting paid a little more than half of what male employees were making, even though she had a lot more responsibilities. I knew I had to do something. I believe people should be paid according to the job they're doing and the value that they bring to the company, nothing less.

I refused to allow women to be paid less than the value we bring to our company because of our gender. So I stuck my neck out. I called our accountant and raised the pay of our women workers without authorization. Now, I love my father. He's an amazing man, and I've learned a lot from working with him these past 8 years. I'm most grateful for that. But when I started working with him, he was 65 years old and had an old-school mentality about women in the workplace.

In the end, my father came around to see things as I see them. He recognizes that the women on our team keep the business afloat, so equal pay for equal work is one of the commitments we make to our employees. I'm proud of this commitment, but offering equal pay for equal work isn't just about doing the right thing. It has a positive impact on our business, too. It boosts our employees' morale and their respect for the business.

It also boosts retention. Cutting down on turnover saves our business money. It also saves us a lot of stress to know that we have a stable team that we can count on to get the job done. For these reasons, I know maintaining our commitment to equal pay is good business for Alpha Express.

In February, I launched my new business called Popcorn Heaven, and we offer more than 50 flavors of gourmet popcorn in a happy and upbeat environment. So far, the customer response has been great. You could say business is really popping. We've already got 10 full-time and part-time employees, and I'm making the same commitment to decent pay and paying living wages and pay equity that we've made in my father's business.

I know the leading opponents of things like pay equity laws are often big corporations. But if a startup small business like mine can commit to equal pay and paying living wages and make it work for our business, then I believe that bigger companies can do the same.

As a small business owner and manager, I support the Paycheck Fairness Act because it's in line with my values. Because I'm committed to pay equity, I have nothing to fear from this legislation. If other businesses are truly committed to pay equity, they'll have nothing to fear, either. I support it because it will be good for our local economy. Ensuring pay equity will put more money in women's pockets to spend in Waterloo businesses, like taking their kids out to experience a little taste of Popcorn Heaven.

And I support it because it will level the playing field of business competition. Small business owners don't like being forced into a race to the bottom by big box stores and chains that can undercut us by underpaying their women workers. Making a national commitment to pay equity allows small businesses to pay our workers fair wages without fear of being undercut by low-road competitors.

As a small business owner and manager, I urge your support for the Paycheck Fairness Act. Thank you.

[The prepared statement of Ms. Young follows:]

PREPARED STATEMENT OF RESHONDA YOUNG

SUMMARY

BACKGROUND

My name is ReShonda Young. I serve as operations manager and corporate vice president for two family businesses based in Waterloo, IA. Alpha Express is a transportation and delivery company that hauls parts all across the United States and into Canada. Alpha Services is a contracting business that provides maintenance services to companies like John Deere. We employ about 50 people. I've also just started a new business, a popcorn shop called Popcorn Heaven. We already have 10 employees.

PAYCHECK FAIRNESS AT ALPHA EXPRESS, INC

When I left corporate America and joined my dad in the family business 8 years ago, I found an issue with our paychecks. We had a woman who had been with us for 16 years. She was the one who kept everything in order. Yet, she was only getting paid a little more than half of what male employees were making, although she had a lot more responsibilities than the male employees.

I knew I had to do something. So, I stuck my neck out: I called our accountant and raised the pay of our women workers. In the end my father came around to see things as I see them. Equal pay for equal work is one of the commitments we make to our employees. I'm proud of this commitment.

But offering equal pay for equal work isn't just about doing the right thing—it has a positive impact on our business, too. It boosts our employees' morale and their respect for the business. It also boosts retention. Cutting down on turnover saves us money and it also saves us a lot of stress.

COMMITTING TO PAY EQUITY IN A SMALL BUSINESS START-UP

In February, I launched my new business. We offer more than 50 flavors of gourmet popcorn. We've already got 10 full-time and part-time employees. And I'm carrying forward the same commitments to decent wages and pay equity that we've made in my dad's business.

I know that the leading opponents of things like pay equity are often big corporations. But if we, as a startup small business, can commit to pay equity and make it work for our business, then I believe the bigger companies out there can, too.

SMALL BUSINESS SUPPORT FOR THE PAYCHECK FAIRNESS ACT

As a small business owner and manager, I support the Paycheck Fairness Act because it's in line with my values. I'm committed to pay equity so I have nothing to fear from the Paycheck Fairness Act. If other businesses are truly committed to pay equity, they'll have nothing to fear, either.

I support it because it will be good for our local economy. Ensuring pay equity for women workers will put more money in their pockets to spend in local businesses like mine and boost local economies.

And I support it because it levels the playing field in terms of business competition. Making a national commitment to equal pay for equal work will allow small business owners to pay our workers fair wages without fear of being undercut by low-road competitors who underpay their women workers.

As a small business owner and manager, I urge your support for the Paycheck Fairness Act. Thank you.

Chair Mikulski, Ranking Member Alexander, and members of the committee, thank you for the opportunity to testify today and to share my perspective on pay equity issues and the Paycheck Fairness Act as a small business manager and owner.

My name is ReShonda Young. I serve as operations manager and corporate vice president for two family businesses based in Waterloo, IA. Alpha Express is a transportation and delivery company that hauls parts all across the United States and into Canada. Alpha Services is a contracting business that provides maintenance services to companies like John Deere.

Our business is a true family business. My father started the company 25 years ago. Back then, it was just him and one partner. Now we employ about 50 people.

I've also recently started a new venture of my own, a popcorn shop called Popcorn Heaven in Waterloo. We started in February and already have 10 employees.

I hold a degree in Business Management. I worked in Iowa's insurance sector for more than 10 years, but entrepreneurship is my passion. I guess you could say small business runs in my blood.

PAYCHECK FAIRNESS AT ALPHA EXPRESS, INC

I want to share with you the story of what happened when I left corporate America and joined my dad's business 8 years ago. With the company starting to expand and evolve, I started taking on more H.R. responsibilities at Alpha Express. In the process, I found an issue with our paychecks.

There was a discrepancy in what women employees in the business were being paid. We had a woman who had been with us for 16 years. She was the one who kept everything in order. Yet, she was only getting paid a little more than half of what male employees were making, although she had a lot more responsibilities than the male employees.

I knew I had to do something. For my dad and me to be able to work together, and make his company into what he dreamed it could be, things had to change.

I believe people should be paid according to the job they're doing and the value they bring to a company—nothing less. I refuse to allow myself—or other women workers—to be paid less than the value we bring to our company because of our gender.

So, I stuck my neck out: when my concerns weren't immediately addressed, I called our accountant and raised the pay of our women workers . . . without authorization. There are some things you just do. If you get in trouble, you deal with it because it's the right thing to do.

Let me be clear, I love my dad. He is an amazing man and I've learned a lot from working with him these past 8 years. I am most grateful for that, but when I started working with him he was 65 years old and had an "old school" mentality about women in the workplace.

In the end, my father came around to see things as I see them. Equal pay for equal work is one of the commitments we make to our employees. My dad recognizes that the women on our team keep the business afloat. It wouldn't survive without us. Our pay scales were adjusted and two-thirds of our female employees received pay raises to be in line with their male counterparts (the rest worked in areas with pre-set wages and pay raises).

I'm proud of the decisions we've made in our business, and I'm committed to continuing to offer fair wages and equal pay for equal work. We think of our employees as family, and at the end of the day I have to be able to sleep at night. Knowing I'm doing right by them, I can.

But offering equal pay for equal work isn't just about doing the right thing—it has a positive impact on our business, too.

Our commitment to pay equity boosts our employees' morale and their respect for the business. It feels good for our women employees to know they're taking home a fair paycheck. They're happier to come in to work and be more productive. They're willing to give more of themselves when they know the business is giving them a fair shake in return.

Our commitment to pay equity also boosts employee retention. Turnover has major costs for businesses, both in terms of lost productivity and the up front costs of advertising, hiring, and training new employees. And, as someone who's had to run the dispatch and pick up other responsibilities in times of transition, while continuing to carry out all my other regular job responsibilities, I know turnover takes a toll on small business owners and managers, too. We're the last line of defense and the ones who have to pick up anything that isn't getting done at the end of the day. Cutting down on turnover saves us money and it also saves us all that extra stress.

For these reasons, I know offering equal pay for equal work is good business for Alpha Express.

COMMITTING TO PAY EQUITY IN A SMALL BUSINESS START-UP

In February, I launched my new business, a popcorn shop called Popcorn Heaven in Waterloo. We offer more than 50 flavors of gourmet popcorn in a happy and upbeat environment. So far, the customer response has been great—you could say business is popping. We just did the Cedar Valley Baconfest this past weekend.

One of my goals for starting this business was to offer job opportunities in downtown Waterloo, and we've already got 10 full-time and part-time employees. And I'm carrying forward the same commitments to decent wages and pay equity that we've made in my dad's business.

I know that the opponents of things like pay equity are often big corporations. But if we, as a startup small business, can commit to pay equity and make it work for our business, then I believe the bigger companies out there can, too.

SMALL BUSINESS SUPPORT FOR THE PAYCHECK FAIRNESS ACT

As a small business owner and manager, I support the Paycheck Fairness Act.

I support it because it's in line with my values as a business owner. I'm committed to pay equity for my employees so I have nothing to fear from the Paycheck Fairness Act. If other businesses are truly committed to pay equity, they'll have nothing to fear, either.

I support it because it will be good for our local economy. Ensuring pay equity for women workers will put more money in their pockets to spend in local businesses—like taking their kids out to experience a little taste of heaven . . . Popcorn Heaven, that is. This will help businesses like mine and boost local economies.

And I support it because it levels the playing field in terms of business competition, supporting responsible businesses that treat our employees fairly. Small business owners don't like being forced into a race to the bottom by big box stores and chain operations that threaten to undercut us by underpaying their women workers. Making a national commitment to equal pay for equal work will allow small business owners to pay our workers fair wages without fear of being undercut by low-road competitors.

As a small business owner and manager, I urge your support for the Paycheck Fairness Act. Thank you.

Senator MIKULSKI. Thank you very much for that excellent testimony.

Ms. Sleeman.

STATEMENT OF KERRI SLEEMAN, MECHANICAL ENGINEER, HOUGHTON, MI

Ms. SLEEMAN. Thank you, Senator Mikulski and everyone here today, for having us.

In 1998, I began work at an engineering company in Michigan. When I was offered the position, they told me that the company did not negotiate salaries. I took the job and worked there for 5 years as a design supervisor. I managed several other workers, mostly males. I always received glowing reviews.

My company, an automotive supplier, was forced into bankruptcy in 2003. Not only was I out of a job, but the employees of the company had to go through bankruptcy court to get our final paychecks and back vacation pay. I signed up to receive updates about the court's list of claims and was stunned by what I found. All of the men I had been supervising while at the company were paid more than me.

It was heartbreaking, it was embarrassing, it was infuriating, and it will affect me and my pay for the rest of my life. When I finally got my wits about me several months later, I asked my former supervisor about it. He said that the men I supervised were the bread winners for their wives and children, and that was probably taken into account.

The company paid those men more than me, not because of their qualifications, not because of their experience, not because of their performance or their productivity, but because they were men and I was a woman. I was shocked and saddened. I never thought that this could happen to me. In my testimony, you'll hear a little bit more about my rave performance reviews so that you can understand why this was so shocking.

I didn't know I was being discriminated against when I worked there. I was rebuffed in my attempt to negotiate. I received rave performance reviews. What more could I have done? You can't fight back when you're not privy to the rules, and you can't negotiate your way around this kind of discrimination.

What happened to me is happening across the country, and that's why we need the Senate to pass the Paycheck Fairness Act. We're more than 50 years past the passage of the Equal Pay Act of 1963 and still dealing with a sizable pay gap. This clearly points to the fact that the current law is not strong enough to get the job done. It's well overdue for a makeover. Our economy has changed, family structures have changed, and working women have changed. It's time for the pay gap to finally change as well.

My co-workers and I didn't talk about our wages, because we didn't know what would happen if we did, and none of us could afford to get fired. The Paycheck Fairness Act would prohibit employers from retaliating against employees who share their salary information with co-workers or ask their employers about wage practices. I think this is very important.

Workers, and especially women, need this protection. The American Association of University Women did research that drilled down beyond the infamous 77 percent stat. They found that women just 1 year out of college, working full-time, were paid on average just 82 percent of their male counterparts.

Even after controlling for factors commonly understood to affect earnings, the gap remains, even amongst those with the same major working in the same occupation. In fact, about one-third of the pay gap remains unexplained. This gap begins early in women's careers and is even larger for mothers and women of color.

I've lost more than $10,000 in pay and retirement benefits. That's money lost directly to gender-based pay discrimination. What could I have done with this money? I might have lowered the refinancing on my house. I know I would have been able to pay the co-pay for my husband's heart surgery out of savings rather than using a credit card. Or I might be able to help my parents and my in-laws as they start their journey into retirement.

Given the landscape, women cannot close the pay gap by ourselves. We need policymakers to do their part in ensuring that the protections and technical assistance of the Paycheck Fairness Act are there to help both employees and employers work together toward a more equitable workplace. No one should have to go through what I've gone through, no one. For the women and the families that you represent, I urge you to pass the Paycheck Fairness Act without delay.

Thank you.

[The prepared statement of Ms. Sleeman follows:]

PREPARED STATEMENT OF KERRI SLEEMAN

In 1998, I began work at an engineering company in Michigan. When I was offered the position, they told me the company didn't negotiate salaries. I took the job, and worked there for 5 years as a design supervisor. I managed several other workers, almost all men, and always received glowing reviews. My company, an automotive parts supplier, was forced into bankruptcy in 2003. Not only was I out of a job, but the employees of my company had to go through bankruptcy court to get our final paycheck and back vacation pay. I signed up to receive updates about the court's list of claims, and was stunned by what I found: all the men I'd supervised had been paid more than me. It was heartbreaking. It was embarrassing. It was infuriating. And it will affect me for the rest of my life.

I asked my former supervisor about it, and he said that the men I supervised were the breadwinners for their wives and children, and that was probably taken into account. The company paid those men more than me not because of their qualifications, experience, performance, or productivity, but because they were men and I was a woman. Frankly, I don't know how I stayed civil during that conversation.

I didn't know I was being discriminated against when I worked there. I was rebuffed in my attempt to negotiate. I received rave performance reviews. What more could I have done? You can't fight back when you're not privy to the rules, and you can't negotiate your way around such discrimination. What happened to me is happening across the country, and it's why we need the Senate to pass the Paycheck Fairness Act (S. 84).

We're more than 50 years past the passage of the Equal Pay Act of 1963, and still dealing with a sizable pay gap. This clearly points to the fact that current law is not strong enough to get the job done. It's well overdue for a makeover—our economy has changed, family structures have changed, and working women have changed. It's time for the pay gap to finally change as well.

My co-workers and I didn't talk about our wages because we didn't know what would happen if we did, and none of us could afford to get fired. The Paycheck Fairness Act would prohibit employers from retaliating against employees who share their salary information with co-workers or ask their employers about wage practices.

Workers, and especially women, need this protection. American Association of University Women research drilled down beyond the now infamous 77 percent stat. They found that women just 1 year out of college. working full-time, were paid on average just 82 percent of their male counterparts. Even after controlling for factors commonly understood to affect earnings, the gap remains—even amongst those with the same major working in the same occupation. In fact, about one-third of the pay

gap remains unexplained.* This gap begins early in women's careers, and is even larger for moms and women of color.

I've lost more than $10,000 in pay and retirement benefits. That's money lost ***directly*** to gender-based pay discrimination. What would I have done with this money? I could have lowered the refinancing on my house. I would have been able to pay the co-pay for my husband's heart surgery out of savings instead of using a credit card, which resulted in interest fees and constant worry.

Given the landscape, women cannot close the pay gap by ourselves. We need policymakers to do their part, ensuring that the protections and technical assistance of the Paycheck Fairness Act are there to help both employees and employers work together toward a more equitable workplace.

No one should have to go through what I've gone through. ***No one.*** For the women and families you represent. I urge you to pass the Paycheck Fairness Act without delay.

Chairman Harkin, Ranking Member Alexander, and members of the committee, thank you for this opportunity to speak about my experience with pay discrimination and how the Paycheck Fairness Act could have helped me.

In 1998, I began work at a company in Michigan that designed, built, and installed laser welding assembly systems. When I was offered the position, I was told the company did not negotiate salaries. As someone put it to me then, "the offer is what it is." I took the job, and I felt honored when they offered to provide me with benefits immediately. I saw it as a sign of how much they already valued me.

I worked there for 5 years as a design supervisor. It was hard work, but I was good at it. I managed several other workers, almost all men, and I received glowing reviews. My supervisor told me again and again that, "If I could duplicate you, I'd be able to get rid of the rest of the staff." I thought I'd be at that firm for many years to come.

And then the auto industry ran into trouble. As a supplier to the auto industry, my company also faltered. My employer was forced into bankruptcy in 2003.

As if suddenly being out of a job wasn't hard enough, the employees of my company had to go through bankruptcy court in order to get our final paycheck and any back vacation pay we were owed. I wanted to keep track of what was happening, so I signed up for a mailing list to see the bankruptcy court's list of claims.

I recognized the names on the lists, but the numbers shocked me. People I'd supervised, people below me in our pecking order, were making claims for 2 weeks of pay that were much larger than mine. The people I'd supervised were reporting they'd made more money than I did.

I honestly couldn't believe it. I remember squinting, making sure I was looking at the right names and doing the math correctly. But there it was, black and white on the page: all the men I'd supervised had been paid more than I was. Even the one woman I occasionally supervised was paid less than some of these men, who were on the same level as she was. Men were just paid more.

It was heartbreaking. It was embarrassing. It was infuriating. And it will affect me and my family for the rest of my life.

I was so disappointed and angry with the company. These were people I'd known and worked with for years! Why would they discriminate against me? I'd worked hard for my mechanical engineering degree, just as hard as the guys in my classes, because I knew it was the way to a good career. I worked just as hard or harder than the men I worked with. But even being in a higher paying STEM field, and being a highly rated supervisor on top of that, couldn't protect me from gender pay discrimination.

Soon after I saw these numbers, I talked to my former supervisor—the one who used to tell me, "If I could duplicate you, I'd be able to get rid of the rest of the staff." I asked him about the pay differences. Why was I being paid less than the men I'd supervised?

He said that the people I supervised—lots of young men—were the sole breadwinners for their wives and children, and that fact was probably taken into account when their salaries were initially offered. That was his justification. The company paid higher salaries to men not based on qualifications or experience, not based on performance or productivity, but rather because I was a working woman with no children. The fathers were seen as *more deserving* of higher pay, even though I supervised them and sometimes took over their projects because they weren't per-

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[1] AAUW. (2012). *Graduating to a Pay Gap.* Retrieved January 25, 2013, from *www.aauw.org/GraduatetoaPavGap/upload/AAUWGraduatingtoaPayGapReport.pdf.*

forming up to par. My work was devalued because I was not a male breadwinner. I was considered less worthy just because I was a woman.

I really don't know how I stayed civil during that conversation. At the time, I remember thinking that the worst part was not knowing if there was anything I could have done differently. They had told me they didn't negotiate. I was an excellent employee with a winning track record. What more could I have done? You can't stand up for yourself when you're not privy to the rules, and you can't negotiate your way around such discrimination.

What happened to me is happening across the country—every day, every week, every month, every year—to millions of Americans, and it's why we need the Senate to pass the Paycheck Fairness Act (S. 84). My co-workers and I didn't talk about our wages because we didn't know what would happen if we did, and none of us could afford to get fired. Because, you see, that's exactly what can happen currently when people share their salary information against company rules: their employer can punish and even fire them. This stops people from sharing information with their co-workers, and allows discrimination to fester and grow.

The Paycheck Fairness Act would prohibit employers from retaliating against employees who share their salary information with other co-workers. It doesn't require employers to "post" anyone's salary, like those workplace safety posters we all see in the lunch room. It just simply says employees can't be punished when they disclose or discuss their wages, or ask their employer about wage practices. This seems reasonable and fair to me, especially because these proposed anti-retaliation protections don't apply to employees with confidential access to wage information: human resource staffers privy to employees' salaries may not disclose the wage information of other employees.

Workers need this protection. Women especially need this protection.

According to the most recent statistics from the U.S. Census Bureau, the median earnings for U.S. women working full-time, year-round were just 77 percent of men's median earnings—a gap of 23 percent that has not budged for more than a decade. The gap is even larger for mothers and women of color.[1]

This gap begins early in women's careers, and occurs in virtually every occupation. According to one study:

> Of the 534 occupations listed by the Bureau of Labor Statistics, women earn more than men in exactly seven professions. Together, these seven occupations account for about 1.5 million working women, or about 3 percent of the full-time female labor force. The remaining 97 percent of full-time working women work in occupations where they earn less than their male counterparts.[2]

Research by the American Association of University Women drilled beyond the now infamous 77 percent stat. They found that women only 1 year out of college, working full-time, were paid on average just 82 percent of what their male counterparts were paid. Eighty-two percent! Even after controlling for hours worked, occupation, college major, employment sector, and other factors associated with pay, this gap shrinks but does not disappear—even amongst those with the same major working in the same occupation. In fact, about one-third of the pay gap cannot be explained by these factors commonly understood to affect earnings.[3]

This disparity is felt all over the country. In my home State of Michigan, the 2013 median earnings for men were $49,897 compared to women's median earnings of $36,772. That's an earnings ratio of just 74 percent.[4] In essence, women in Michigan are potentially missing up to 26 percent of their pay. In my own congressional district, the first district of Michigan, the earnings ratio is 75 percent.[5] I don't know about you, but I don't know anyone who would happily choose to forfeit any of their wages, let alone over a quarter of their paycheck.

The wage gap has enormous consequences. Recent research[6] has found that 4 in 10 households with children include a mother who is either the sole or primary earner for her family. Pay equity is not just a matter of fairness, but the key to families making ends meet.

Because of pay discrimination, I've lost more than $10,000 in pay and retirement benefits. Recently I was asked what I would have done with this money if I'd had it. Some of it would definitely have gone into my retirement savings, as I was having 15 percent of my paycheck automatically go into my retirement account at that time. That would have been a great boost to my retirement security. I also needed that money when I refinanced my mortgage, so I wouldn't have had to refinance for as much. Finally, I think I would have used it for health care bills. If I'd had the money I lost because of gender discrimination, I would have been able to pay the co-pay for my husband's heart surgery out of savings instead of having to use a credit card, thereby avoiding the interest fees and the constant worry.

I'd rightfully earned that money, my family and I needed that money, but I won't ever get it back. That's money lost ***directly*** to gender-based pay discrimination. Millions of American women continue to lose more money, every day, because they're afraid to talk about wage practices and because the current law is not strong enough to inspire business compliance. It's time for this to end.

The Paycheck Fairness Act would improve current law, providing incentives for employers to more fully comply as well as enhanced Federal technical assistance and enforcement efforts. The bill updates the Equal Pay Act of 1963. We're more than 50 years down the road and still dealing with a sizable pay gap, which clearly points to the fact that current law is not strong enough to get the job done. It's well overdue for a makeover—our economy has changed, family structures have changed, and working women have changed. It's time for the pay gap to finally change as well. The law needs to reflect the realities of the modem workplace. Most important to my own experience, the Paycheck Fairness Act would protect workers from retaliation for talking about their salary at work. Frankly, that's not too much to ask.

I'm here before you today to say this: we need the Paycheck Fairness Act. If the Paycheck Fairness Act had been the law, I would have talked about my salary without fear, and I likely would have known where I stood in comparison to the men I worked with and those I supervised. Instead, without the Paycheck Fairness Act, I wasn't able to ask, and I made less. This disparity continues to have consequences, and it will continue to have ramifications when I receive a smaller Social Security check.

Since I found out I was discriminated against, I've dedicated myself to fighting for pay equity. Working with the WAGE Project and American Association of University Women, I lead $start $mart workshops on college campuses, teaching women students how to negotiate their salaries. I believe that negotiation is critical, and I'm glad that the Paycheck Fairness Act includes some funding for women's negotiation programs. But we also need to remember that while helpful, simply urging women to negotiate is not a complete solution to the pay gap. Negotiations can backfire if a woman isn't armed with the right information and confidence to make her case, and if laws are not strong enough to influence an employer to respond favorably to those negotiations.

Part of why I support the Paycheck Fairness Act is because it requires ***everyone*** to do their part to close the gender pay gap, women included. Sure, we can learn to better negotiate, but what if a company refuses to negotiate like mine did? And don't get me started on the outdated stereotypes about women's roles that clearly impact women's wages today. I still cannot believe that I was paid less than a man for doing the same job—actually even supervising some of them. Why? Because my boss thought my wages weren't as important to my family. ***They were.*** Given the landscape, women cannot close the pay gap by ourselves. We need policymakers to do their part, ensuring that the protections and assistance of the Paycheck Fairness Act are there to help both employees and employers work together toward a more equitable workplace.

No one should have to go through what I've gone through. ***No one.*** Working with AAUW, I have managed to turn my anger into action. My convictions have brought me here today. For the women and families you represent, I urge you to pass the Paycheck Fairness Act without delay.

Thank you for this opportunity to testify, and I look forward to your questions.

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Senator MIKULSKI. Ms. Olson.

STATEMENT OF CAMILLE A. OLSON, PARTNER, SEYFARTH SHAW, CHICAGO, IL

Ms. OLSON. Thank you very much.

Senator MIKULSKI. Ms. Olson, and to all the witnesses, I'm going to ask unanimous consent that your full statement be in the record. That's not in any way to curtail what you're saying here, but I know you had an extensive review. Many did, too. So by unanimous consent, all of those will be fully entered into the record.

Please present your views here.

Ms. OLSON. Thank you very much. Good afternoon, and thank you, Chair Mikulski, Ranking Member Alexander, and other members of the committee.

My name is Camille Olson, and I am testifying on behalf of the U.S. Chamber of Commerce. I chair the Chamber's Equal Employment Opportunity Policy Subcommittee, and I also chair my law firm's National Complex Discrimination Litigation Practice Group.

I'm testifying on behalf of the U.S. Chamber today. The Chamber strongly supports equal opportunities in employment and, specifically, equal pay for equal work. However, for all the reasons set forth in my written testimony, the Chamber strongly opposes the Paycheck Fairness Act because it doesn't promote equal pay for equal work.

If passed, the act would amend the Equal Pay Act significantly in the following substantive and procedural ways. One, it would impose harsher lottery type penalties of unlimited compensatory and punitive damages upon all employers regardless of size and without a showing of intentional sex discrimination, different than every other employment discrimination law in this country. It would effectively eliminate the factor-other-than-sex defense, and it would provide a more attorney friendly class action device, among other amendments.

The act's proponents contend that these changes are necessary to ensure equal pay for women. But nothing could be further from the truth, because existing laws already provide robust opportunities to challenge discriminatory pay practices as well as significant remedies to protect employees against gender-based pay discrimination under both the Equal Pay Act, title VII, and Executive Order 11246.

Today, the Equal Pay Act and title VII provide favorable and effective remedies for pay discrimination. Those include back pay, injunctive relief in the form of increased pay, liquidated or double damages, attorney's fees, costs, prejudgment interest, and up to $300,000 in compensatory and punitive damages per employee. And if an employer is a government contractor, as many are, it may also face sanctions and other remedies if it discriminates in its pay practices.

Today's Federal court docket and EEOC charge and settlement statistics confirm that aggrieved victims are taking advantage of these multiple forms of redress currently available to remedy pay discrimination in both single plaintiff as well as class and collective actions across the country as well as by raising claims with both the EEOC and the OFCCP. Despite these protections, the act's proponents propose drastic changes that would transform the Equal Pay Act beyond recognition, all upon an unsubstantiated premise

that any differences in wages between men and women are the result of employer discrimination.

Most concerning to the Chamber are the following three issues. First, by expanding the Equal Pay Act remedies to include unlimited compensatory and punitive damages, the Paycheck Fairness Act ignores that it is a remedial, strict liability statute specifically designed to compensate employees for sex-based pay inequities without a showing of discriminatory employer intent. It runs contrary to the entire body of Federal anti-discrimination law that damages conceived and intended to punish and deter wrongdoing would now apply to claims of unintentional conduct prohibited by the Equal Pay Act.

Second, the rewriting of the factor-other-than-sex defense is the most significant substantive change proposed by the Equal Pay Act. The change must be considered in tandem with the Equal Pay Act's fundamental underpinning, balancing the requirement of equal pay for equal work against the mandate that the government cannot interfere with private companies' valuations of a worker's qualifications, the work performed, and the setting of pay rates.

Currently, under the Equal Pay Act, an employer defends a claim by showing either a seniority or a merit system or a system measuring quality or quantity of work or a gender-neutral factor other than sex, including, for example, education, experience, special skills, expertise, and external market conditions, caused the difference. If the Paycheck Fairness Act becomes law, the employer would be required to prove, if there was a showing of any difference in pay, that it paid more because of a bona fide factor that was job-related and consistent with business necessity and that the established factor was not derived from a sex-based differential in compensation.

Even then, the employer remains liable if a plaintiff can show an alternative employment practice that would serve the same business purpose. This is true even where the employer shows that the factor other than sex justifying the differential in pay is education, training, or experience.

The business necessity standard developed by case law as a disparate impact defense and confirmed as such by the Civil Rights Act of 1991 is fundamentally incompatible with the Equal Pay Act, which the Supreme Court has noted is designed to address disparate treatment, not disparate impact claims. Applying business necessity to the Equal Pay Act, an employer is required to prove for every single wage decision that the ultimate business goal achieved by the higher pay is essential to the business and that the factor is essential to achievement of that ultimate business goal.

What would be the practical impact of redefining the factor-other-than-sex defense? Consider whether employers would still have the freedom to hire and retain the most qualified workforce. The act discourages employers from offering added compensation for qualifications beyond the minimum required by the job. Employers who are willing to match higher pay offered by a competitor risk liability unless they are able to prove that the outside competitor's offer is not based upon or derived from a sex-based differential.

Finally, if an employer's financial ability to round up all employees' wage rates qualifies as an alternative factor under the Paycheck Fairness Act, because it is neither overly costly nor so cost prohibitive it would threaten the survival of the business, then any pay differential under this act would likely automatically require a uniform raise in every single employee in the job, regardless of variations in qualifications, such as education, training, or experience. If this is the case, the factor-other-than-sex defense is illusory. It wipes out all pay differences based on qualifications.

I see that I'm over my time. I also wanted to make a note that there are significant comments in my written statement with respect to the concern about revising the class action mechanism that's in the Equal Pay Act. But I'll just defer to those comments.

In conclusion, I'll just say that the Chamber believes that the Paycheck Fairness Act presents serious and dangerous ramifications that far outweigh any protection offered to victims of discrimination. The compounded effect of the act's most problematic provisions will be to expose private enterprise to unprecedented invasion by the judiciary under threat of unlimited damages as well as subvert the carefully constructed frameworks of existing antidiscrimination law.

For these reasons and the reasons contained in my written testimony, the Chamber has serious concerns with respect to the Paycheck Fairness Act. Thank you very much for the opportunity to share some of these concerns with you today.

[The prepared statement of Ms. Olson follows:]

PREPARED STATEMENT OF CAMILLE A. OLSON

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 States.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Good afternoon Mr. Chairman and members of the committee. On behalf of the U.S. Chamber of Commerce, I am pleased to testify on S. 84, the Paycheck Fairness Act (the "Act").[1] I am Chairwoman of the Chamber's equal employment opportunity policy subcommittee. The Chamber is the world's largest business federation, rep-

[1] In July 2007, I testified before the House Subcommittee on Workforce Protections on H.R. 1338 (also entitled The Paycheck Fairness Act), *available at http://www.gpo.gov/fdsys/pkg/CHRG–110hhrg36467/html/CHRG–110hhrg36467.htm*.

resenting more than three million businesses and organizations of every size, industry sector, and geographical region.

I am also a partner with the law firm of Seyfarth Shaw LLP,[2] where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national companies in Federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their pay practices to ensure compliance with Federal and local equal employment opportunity laws. I have represented business and human resource organizations as *amicus curiae* in landmark employment cases, including *Dukes* v. *Wal-Mart*, and also teach Federal equal employment opportunity law topics at Loyola University Chicago School of Law.

In today's testimony[3] I discuss the meaning and impact of the Act on the Equal Pay Act of 1963[4] ("EPA"). If enacted, the Act would amend the EPA significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise—namely, that throughout the United States of America, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers.[5]

On the unsupported assertion that women today earn 77 cents for every dollar a man earns as a result of intentional employer discrimination, the Act would impose harsher, "lottery-type' penalties upon all employers, in effect eliminate the factor other than sex defense,[6] and make available a more attorney-friendly class action device. The Act's proponents contend that these changes are necessary to ensure equal pay for women. Nothing could be further from the truth because existing laws already provide robust protections and significant remedies to protect employees against gender-based pay discrimination (protections exist under both the EPA, Title VII of the Civil Rights Act of 1964 ("Title VII")[7] as well as Executive Order

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[2] Seyfarth Shaw LLP is a global law firm of over 800 attorneys specializing in providing strategic, practical legal counsel to companies of all sizes. Nationwide, over 350 Seyfarth attorneys provide advice, counsel, and litigation defense representation in connection with discrimination and other labor and employment matters affecting employees in their workplaces.

[3] I would like to acknowledge Seyfarth Shaw LLP attorneys Richard B. Lapp, Paul H. Kehoe, Kevin A. Fritz, and Lawrence Z. Lorber, as well as Jae S. Um for their invaluable assistance in the preparation of this testimony.

[4] 29 U.S.C. § 206(d)(1).

[5] The proponents of the Act have not cited any evidence establishing that a wage gap is actually caused by employer discrimination. They essentially propose acceptance of the existence of the wage gap as presumptive proof. However, this unsubstantiated syllogism does not withstand scrutiny. As labor economists and feminist scholars have observed, any wage gap between men and women is attributable to a number of factors bearing no relationship whatsoever to 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, work experience, career interruptions, 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).

The so-called gender wage gap ignores the complexity and documented factors that have been identified in social science research to explain the differences in wage rates between men and women, including the following differences: the availability of other non-economic benefits provided by the employer; an employees' willingness and ability to negotiate pay; 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; 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. Many of these factors are a function of personal choices employees make. Reliance on this figure as sufficient evidence of widespread employer discrimination in today's workforce runs counter to every facet of the long-held standard of equal pay for equal work.

[6] Revisions to the "factor other than sex" defense would render it 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. The Act, in effect, requires 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 and it cannot be shown that a different economic decision could have been implemented that would not have caused a wage differential for female employees without the pertinent job qualifications.

[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").

11,246). 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.

Instead, in practice, the Act would: (1) impose enormous burdens and risks on employers who base compensation decisions on factors other than sex such as training, experience and education, or reliance on the current market value placed on skills and experience and economic need, (2) devalue in the marketplace enhanced skills, training and experience (as well as other non-discriminatory factors for pay differences between employees), and (3) expand litigation opportunities for class action lawyers seeking millions of dollars from companies without ever having to prove that the companies intentionally discriminated against women.

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.[8] 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, the Age Discrimination in Employment Act,[9] the Americans with Disabilities Act,[10] as well as Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871.[11] 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 without any required showing that the employer intended to discriminate against the worker.

Commentators and courts have often referred to this leniency in the EPA as rendering employers "strictly liable" for any pay disparity between women and men for substantially equal work unless the employer can show that the pay differential was due to: 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 the Act are debated. By eliminating the factor other than sex defense, and replacing it with an unattainable standard of an affirmative employer showing that any individual wage difference was: (1) job-related and required by "business necessity" and (2) not "derived from a sex-based differential in compensation" the Act imports a business necessity "plus" standard for an employer to defend every individual pay decision even where no evidence of discrimination is required to be shown.[12]

And, if the Act becomes law, a plaintiff could erase an employer's defense and leave it open to a jury award of unlimited punitive and compensatory damages in large mass actions on the basis of one employee's complaint (without regard to the size of the employer). Under the Act, employer liability attaches every time a plaintiff's lawyer shows an employer could have implemented an alternative employment practice that would serve the same business purpose without producing a 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. The Act 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 that alternative an alternative employment practice that would de-

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[8] Indeed, the Government's experience with wage setting finds its genesis with the War Labor Board in World War II when the Board looked to determine market rates to apply to women then entering previously male-dominated jobs.

[9] 29 U.S.C. § 621 *et seq*.

[10] Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq*. Like title VII, under the ADA, punitive and compensatory damages are only available where intentional disability discrimination is shown. *See* 42 U.S.C. §§ 12117(a), 1981a(2). Similarly, disparate impact claims under title VII do not subject an employer to punitive or compensatory damage claims.

[11] 42 U.S.C. §§ 1981 and 1983, respectively.

[12] Under the Act, 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 influenced by a sex-based differential in pay. Under the Act, 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?).

feat the employer's defense (in every case, so that the Act's "factor other than sex" defense is in fact a complete illusion)? In effect, the Act suggests that the universal alternative will be to "round up" any wage distinction. No answer is found in the Act; yet, there is no question that this one issue will lead to considerable uncertainty and litigation.

The Act's elimination of the EPA's defense of a factor other than sex with the imposition of a statutory framework previously reserved for application to an employer's neutral policy decisions that have a disparate impact on minority employees (where employers are not liable for compensatory or punitive damages) is unworkable, ill-advised, and inappropriate as an analytical tool to judge an employer's individualized wage decisions.

For these reasons, and all of the reasons set forth below, the Chamber strongly opposes the Paycheck Fairness Act. We urge the committee to carefully consider the issues raised by the Chamber and proceed cautiously in considering the Act.

CURRENT PROTECTIONS AGAINST SEX-BASED WAGE DISCRIMINATION

Overview

Since 1963, it has been unlawful under the EPA for an employer to pay a female employee less than a male employee for equal work. Today, employees enjoy a substantial assortment of protections against wage discrimination. Since 1979, the EPA has been enforced by the Equal Employment Opportunity Commission.[13] In addition to the protections against wage discrimination based on sex afforded by the EPA, sex discrimination in wages is also prohibited by title VII, many State antidiscrimination statutes, and, for employees of Federal contractors and subcontractors.[14]

Today, the EPA and title VII provide a woman who prevails on her wage discrimination claim a collection of favorable and effective remedies. Those combined remedies include: back pay; front pay; liquidated damages; attorneys' fees; costs; affirmative injunctive relief in the nature of an increase in wages on a going forward basis; prejudgment interest; $300,000 in punitive and compensatory damages. If an employer is a government contractor, as many are, it may also face sanctions (including, for example, debarment, the cancellation, termination or suspension of any existing contract) and remedies (such as elimination of practices, seniority relief, monetary and equitable relief to identified class members, and accelerated training). These contractor remedies exceed those available to victims of intentional discrimination under title VII generally, the ADA, and the ADEA.

Mechanics of the EPA and Title VII

The EPA

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.[15] An employee may assert an EPA claim either by filing a charge of discrimination with EEOC or by proceeding directly to Federal court and filing a lawsuit there.

To prevail under the EPA, an employee must make a *prima facie* showing of discrimination by presenting evidence 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.[16] If the employee makes that showing, she has established a presumption of discrimination. 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.[17] Note, even if an employer meets this burden, a plaintiff prevails if able to show that the employer's proffered reason is not bona fide, but is a pretext or excuse for paying higher wages to men for equal work. Critically, there is no requirement under the EPA for a plaintiff to prove any

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[13] In 1986, the EEOC issued detailed regulations entitled "EEOC's Interpretations of the Equal Pay Act," 29 CFR § 1620, *as amended*. In 2006, the EEOC issued regulations under the EPA, 29 CFR § 1621, *as amended*. Since Fiscal Year 2008, the EEOC has received between 919 and 1,082 charges asserting violations of the Equal Pay Act annually, representing roughly 1 percent of total charge filings. *See* EEOC CHARGE STATISTICS FY 1997 THROUGH FY 2013, *available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm*.

[14] Exec. Order No. 11,246, Section 202(1), 30 Fed. Reg. 12,319 (Sept. 24, 1965), *as amended* by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

[15] 29 U.S.C. § 206(d).

[16] 29 U.S.C. § 206(d)(1); *Fallon* v. *Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989).

[17] 29 U.S.C. § 206(d)(1).

discriminatory intent or animus on the part of the employer. That element is not present in the liability scheme under the EPA.[18]

The EPA is contained within the Fair Labor Standards Act ("FLSA").[19] Under the FLSA, a successful EPA plaintiff may recover back pay, front pay, prejudgment interest, and attorneys' fees and costs. Where willfulness is shown, a plaintiff may also recover an additional amount of back pay as liquidated ("double") damages, and the defendant may also be fined up to $10,000 and imprisoned for up to 6 months.[20]

Title VII

Similarly, under title VII, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex . . . ."[21] An employee may assert a claim for sex-based pay discrimination by filing a charge of discrimination with EEOC and then, upon receipt of her notice of right to sue (and regardless of whether EEOC finds "cause" for concluding that discrimination occurred), may file a lawsuit in Federal court. Further, an employee need not engage an attorney to participate in the EEOC processes, including investigation of their allegations of discrimination under the EPA and title VII, as well as conciliation and litigation of their claim in Federal court (if the EEOC determines to file suit on the employee's behalf).

To establish that similarly situated males were more favorably compensated, as is necessary to prevail in a disparate treatment pay claim under title VII, a plaintiff must either provide direct evidence of discrimination, or prove discrimination through the indirect method by providing evidence of a *prima facie* case of discrimination. Once she has done so, the employer must articulate a legitimate, non-discriminatory reason for the wage differential. At that juncture, the plaintiff has an opportunity to prove that the proffered reason is a pretext for unlawful employment discrimination. The plaintiff's burden is higher under title VII in connection with discrimination-based pay claims than under the EPA, where establishment of a disparity in pay for equal work obligates the employer to prove that the disparity is for a reason other than sex to avoid strict liability.

Comparison of EPA and Title VII

Both the EPA and title VII provide remedies for women who believe they have been subjected to sex discrimination in pay, and we have included examples below demonstrating that both serve as effective mechanisms for women to redress alleged claims of sex-based pay discrimination. From an employee's perspective, the EPA is the more favorable and lenient of the two statutes with respect to both the ease of pursuing a claim against an employer and the relatively low standard for establishing liability. For example:

- Under the EPA, an "employer" includes entities and individuals. An employer employing as few as two employees is included within its coverage (whereas title VII covers employers of 15 or more employees);
- Establishment of the *prima facie* case of pay discrimination under the EPA entitles an employee to a legal presumption of discrimination, with the burden of production and persuasion moving to the employer. In contrast, under title VII, even where a plaintiff establishes a *prima facie* case of pay discrimination, she at all times retains the burden of persuasion as to discrimination. To avoid the imposition of liability, an employer must prove that the disparity was caused by one of four permissible reasons. As a result, under the EPA, plaintiffs are much more successful in defeating employer's motions for summary judgment and having their claims heard by a jury;[22]

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[18] *See* 29 U.S.C. § 206(d)(1) (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).

[19] 29 U.S.C. 201 *et seq*.

[20] 29 U.S.C. § 216(b).

[21] 42 U.S.C. § 2000e–2(a). *See also* 42 U.S.C. § 2000e–2(h).

[22] *King* v. *Acosta Sales & Mktg.*, Inc., 678 F.3d 470, 474 (7th Cir. 2012) (reversing summary judgment for employer where it only articulated, rather than proved, that education and experience accounted for a pay differential between male and female managers); *Vehar* v. *Cole Nat. Group Inc.*, No. 06–4542, 2007 WL 3127913, at *7–8 (5th Cir. 2007) (reversing summary judgment for employer where the differences in experience between male and female computer programmers were not enough to support summary judgment); *Boumehdi* v. *Plastag Holdings, LLC*, 489 F.3d 781, 794 (7th Cir. 2007) (reversing summary judgment for employer where a genuine issue of material fact existed regarding the justification—perceived performance and one additional year of seniority—for a $2 per hour pay differential between male and female press feeders); *EEOC* v. *Health Management Group*, No. 09–1762, 2011 WL 4376155, at *5–6 (N.D. Ohio Sept. 20, 2011) (denying employer's motion for summary judgment where it argued that a pay differential between male and female franchise distributors was based on the male's prior nego-

• The EPA provides for strict liability, meaning that a plaintiff need not show discriminatory intent on the part of the employer to prevail, whereas a disparate treatment plaintiff under title VII must show the existence of discriminatory intent on the part of the employer to prevail;
• There is a much longer, more generous limitations period (2 years for a general violation, 3 years for a violation found to be willful) under the EPA as opposed to at most 300 days for the filing of an administrative charge of discrimination with the EEOC under title VII (which is a prerequisite to suit in Federal court); and
• Under the EPA there is no charge filing requirement with an administrative agency.

The EPA also shares many of the advantages accorded to claimants under title VII, including:

• Plaintiffs may recover attorneys' fees and costs;
• The EEOC may bring public suits to enforce the EPA, including seeking injunctive and other remedies; and
• Plaintiffs may file a charge alleging a violation of the EPA and request the EEOC investigate the violation.

In the aggregate, these overlapping non-discrimination statutes provide employees multiple avenues for pursuing claims of unequal pay for equal work. They also provide employees with multiple forms of redress with respect to alleged pay discrimination, including: a direct right to a jury trial on their own behalf in Federal court, the filing of a charge of discrimination with the EEOC, the right to have the EEOC pursue a claim on their behalf in Federal court, and the right to bring a collective action or class action on behalf of other similarly situated employees who choose to participate in an action under the EPA or title VII, respectively (on their own or by their attorney of choice). It is not uncommon for a worker suing to enforce his or her rights to equal pay under the EPA to also file a charge of discrimination with the Equal Employment Opportunity Commission, file a lawsuit in Federal or State court, and, if their employer is a Federal contractor, raise a claim under Executive Order 11,246 with the Office of Federal Contract Compliance Programs (or do all of the above).

And, of course, notwithstanding the differences between the statutes, claimants may bring parallel claims under the EPA and title VII to ensure that they receive the fullest protection under the law. Indeed, they may recover under both statutes for the same period of time provided they do not receive a double or duplicative recovery for the same "wrong." As such, a prevailing plaintiff may recover back pay, a front pay adjustment, compensatory damages, punitive damages, liquidated damages, and injunctive relief, among other relief. Put simply, women who believe that they suffer wage discrimination as a result of their sex have available to them Federal statutes that provide significant remedies.[23]

CONCERNS REGARDING PROPOSED CHANGES TO THE EQUAL PAY ACT

Inappropriate Expansion of EPA Remedies For Unintentional Wage Discrimination to Include Unlimited Compensatory and Punitive Damages

Critics of the EPA in its current form have observed that it is not a "lottery."[24] Indeed, it is not intended to be. Rather, its remedial provisions are intended to compensate employees for sex-based pay inequities, whether inadvertent (which is sufficient for the imposition of liability) or not. Awarding compensatory and punitive damages where no showing of intent is required would be inappropriate and contrary to the purposes behind the allowance for compensatory and punitive damages in cases of *intentional discrimination*.

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. Prior to passage of that Act, 42 U.S.C. § 1981 "permitted the recovery of unlimited compensatory and puni-

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tiating skills with physicians, where a question of fact existed regarding whether the hiring official knew of that skill). *See also*, Mickelson, 460 F.3d at 1311 ("This is not to say that an employer may never be entitled to summary judgment on an EPA claim if the plaintiff establishes a *prima facie* case. But, because the employer's burden in an EPA claim is one of ultimate persuasion, 'in order to prevail at the summary judgment stage, the employer must prove at least one affirmative defense so clearly that no rational jury could find to the contrary'") (internal citation omitted).

[23] Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW, Ch. 15 (3d ed. 1996).

[24] Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act*, 26 REV. PUB. PERS. ADMIN. 199, 204 (2006).

tive damages in cases of intentional race and ethnic discrimination, but no similar remedy existed in cases of intentional sex, religious, or disability discrimination.[25] As then-Congresswoman Pat Schroeder from Colorado explained in her statement during the congressional floor debate from August 2, 1990 regarding punitive damages for Civil Rights Act:

> Mrs. SCHROEDER. Mr. Chairman, I want to answer some of the things that we have just heard. We are hearing here that there is something wrong with this bill because there are remedies . . . Let me tell Members one more thing about punitive damages. *You do not get punitive damages unless there was intent. It is all equitable, unless there is intent.* It seems to me in this country that if there is intent to discriminate, then we certainly should be out trying to assess some kind of punitive damages. Otherwise, someone just assigns it as a cost of doing business.[26]

As evidenced by the above, compensatory and punitive damages serve distinct and specific purposes. Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[27] Punitive damages are "intended to punish the defendant and to deter future wrongdoing."[28] Under title VII, "[A] finding of liability does not of itself entitle a plaintiff to an award of punitive damages."[29] "The purpose of awarding punitive damages is to 'punish a wrongdoer for his outrageous conduct and to deter others from engaging in similar conduct.'").[30] "Such an award must be supported by the record, and may not constitute merely a windfall for the plaintiff."[31] It strains logic and flouts the entire body of Federal anti-discrimination law to suggest—or, as the Act would do, to mandate—that damages conceived and intended to punish and deter wrongful conduct should apply to claims of inadvertent, unintentional conduct that has the effect of violating the EPA. It is inconsistent to introduce a concept of malice or reckless indifference into a strict liability statute.

In sum, it is inappropriate here to amend the EPA, a strict liability remedial statute that requires no showing of discriminatory intent, to facilitate the imposition of unlimited punitive and compensatory damages. It would serve no legitimate purpose, and it would serve the illegitimate purposes of both turning the EPA into a lottery for plaintiffs willing to roll the dice to capitalize on likely legitimate wage differentials and to unjustly enrich plaintiffs' attorneys.

De Facto Elimination of the "Factor Other Than Sex" Affirmative Defense

Perhaps the most significant substantive revision to the EPA contained in the Act is found in its re-writing of the "factor other than sex" affirmative defense. If enacted, it would be extremely onerous, impracticable, and prohibitively expensive for an employer to defend against a claim that a wage differential existed on the basis of a factor other than sex.

The EPA's existing factor other than sex affirmative defense was explained by the EPA's primary sponsor in the House of Representatives, Representative Charles E. Goodell, back in 1963, as follows:

> 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.[32]

Clearly, just as important to the EPA's sponsors of the legislation as the goal of eliminating sex-based pay differentials was the bedrock of free enterprise. Given how critical that concept is to the EPA—and the fundamental importance of the factor other than sex affirmative defense in achieving it—it is clear that this Act would not actually "amend" the EPA. Instead, what the Paycheck Fairness Act seeks to

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[25] *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 851 (2001).
[26] 101 CONG. REC. S. 1745 (daily ed. Aug. 2, 1990) (Statement of Cong. Schroeder).
[27] *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, (2001).
[28] *Id.* (citing *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350, (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence") and *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").
[29] *Yarbrough* v. *Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986).
[30] *Id.* (internal citations omitted).
[31] *Id.* (internal citations omitted).
[32] 109 Cong. Rec. 9198 (1963) (statement of Rep. Goodell, principal exponent of the Act).

do is require employers to justify individualized pay decisions on a case-by-case basis based on vague, but clearly onerous, standards.

Today, the "factor other than sex" affirmative defense forms the crux of the EPA. 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 gender-neutral factor other than sex.[33] This affirmative defense enables employers to consider a wide range of permissible, *i.e.*, non-discriminatory, 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 marketplace conditions, in setting salaries. Although some circuit courts have attempted to read a "business justification" or "business necessity" element into this affirmative defense,[34] the U.S. Supreme Court, quite prudently, has never endorsed such a reading and has made clear that the affirmative defense means what it says—any factor other than sex.[35]

The Act would effectively eliminate the EPA's factor other than sex defense. Under the Act, 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 faces liability if it cannot prove paying the male applicant a higher starting wage based on his greater job experience or education was a business necessity.

In addition, an employer who determines to pay an applicant or an employee a higher wage based on market forces—i.e. matching a higher pay offer from a competitor—does so at considerable peril. Under the Act, payment of a wage rate as a result of a market condition is unacceptable unless an employer can prove all of the above plus that the market rate of its competitor is "not based upon or derived from a sex-based differential in compensation". How does a small employer demonstrate the absence of sex-based discrimination in its competitor's setting of wages when faced with an imminent decision as to whether to match the pay rate or lose a valuable employee? The Act provides no guidance.

And, finally, having passed each of the above hurdles for every individual wage decision, an employer remains liable for a violation of the Act, if a plaintiff responds to the job-related, business necessitated prior job experience, prior training, or education reason for the higher starting wage rate for the male applicant by "demonstrat[ing] 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."[36] If an employee demonstrates that an employer was not required to employ a worker with the most experience in the business, or has the financial ability to pay all employees in that position a higher starting wage rate, does the employee satisfy this burden and eliminate the employer's defense? The Act provides no guidance.

Having shown an employer could have adopted another employment practice instead of paying a male applicant a higher wage rate because of their greater experience, education or training, the Act seals the liability of the employer for unlimited compensatory and punitive damages for paying 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 jury determined it could have chosen an alternative employment practice.

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[33] *See, e.g.*, *Fallon* v. *State of Ill.*, 882 F.2d 1206, 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).

[34] *See, e.g.*, *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992); *EEOC* v. *J.C. Penney Co., Inc.*, 843 F.2d 249, 253 (6th Cir. 1988); and *Glenn* v. *Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

[35] *See Smith* v. *City of Jackson*, 544 U.S. 228, 239 n.11 (2005). *Compare* the Second, Third, Sixth, Ninth, and Eleventh Circuits' application of a "legitimate business reason" standard to the Act's "factor other than sex" *with* the Fourth, Seventh, and Eight Circuits' application of a "gender neutral test" requiring the "factor other than sex" to be both facially gender neutral and uniformly applied. *See*, *Kouba* v. *AllState Ins. Co.*, 691 F.2d 783, 876 (9th Cir. 1982) *with Wernsing* v. *Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) and *Taylor* v. *White*, 321 F.3d 710 (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.").

[36] S. 84, 113th Cong. (2013–14).

If the Act were law, it would be imprudent and highly risky for an employer to ever reward applicants or employees in a job title for their individual educational, training, or experience,[37] without providing that same reward to all employees in the job, regardless of their inferior business-related qualifications. Yet, what is the purpose of compensation? Is it to fairly compensate employees for work performed as well as to enable employers to attract the skills and experience necessary to promote the enterprise? The Act looks to the first concept (though it minimizes the importance of education, experience and training by saddling any wage payment differential based on these examples with other prerequisites before they can be used to justify a wage increase), but ignores the second. By placing an employer's decision to value intangible skills and experience under a business necessity test, the Act motivates employers to lean toward compensation practices of an earlier industrial age where many jobs were fungible and skills and education were not regarded as valuable. These concepts have long since been rejected, but the Act will resurrect them as national policy.

As such, the Act places judges and juries in the human resources offices of American businesses to determine whether sex-neutral factors were appropriate considerations—and appropriately considered in an employer's wage-setting decisionmaking. As the Seventh Circuit Court of Appeals aptly observed with respect to questions of relative job valuation,

> "Our society leaves such decisions to the market, to the forces of supply and demand, because there are no good answers to the normative question, or at least no good answers that are within the competence of judges to give."[38]

Application of A Disparate Impact Defense to EPA Disparate Treatment Claim is Inappropriate

Section 3(a) of the Act would alter the "factor other than sex" affirmative defense by requiring employers to *prove*, in order to counter the presumption of wage discrimination, that the factor responsible for a wage differential is a bona fide factor other than sex, job-related, consistent with business necessity, and is not based upon or derived from a sex-based differential in compensation.

The job-related and consistent with business necessity defense, however, is an offshoot of disparate impact law under title VII, intended to address the effects of an employer's neutral policies that disproportionately impact a protected group.[39] A helpful key to explaining the improper application of the business necessity standard to EPA defendants can be found in the supposition of discrimination uniquely afforded to the EPA plaintiff. To establish a *prima facie* case of disparate impact under title VII, a plaintiff must not only demonstrate that a disparity exists, but also identify a specific policy or practice and establish a causal relationship between the disparity and the policy or practice.[40] It is in direct response to this challenged, specific, particular policy or practice identified by the title VII plaintiff that title VII defendants must demonstrate the business necessity of the specific practice. In contrast, EPA plaintiffs are already free from this requirement of specificity, as EPA claims directly challenge an employer's pay practices based on the existence of a pay disparity alone.

Courts have long held that these frameworks are not compatible. In *Wernsing*, the Seventh Circuit found that "[a]n analogy to disparate-impact litigation under title VII does not justify a "business reason" requirement under the Equal Pay Act, however, because the Equal Pay Act deals exclusively with disparate treatment. It does

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[37] For example, under this replacement for the factor other than sex affirmative defense, an employer who wishes to pay a higher wage to an employee who has 5 years more experience than another employee may not be able to do so because a court finds that the differential in experience could be overcome by in-house training over an extended period of time. That is a judgment that employers should have an ability to retain in order to have an effective, efficient workforce and in order to achieve their own specific business objectives and priorities.

[38] *Sims-Fingers* v. *City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007).

[39] *See* 42 U.S.C. §2000e–2(k)(1)(A)(i)-(ii) which provides "a complaining party demonstrates that a respondent uses *a particular employment practice* that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity or the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." Notably, the job-related and consistent with business necessity defense was left undefined in the Civil Rights Act of 1991.

[40] *See* 42 U.S.C. §2000e–2(k)(1)(B)(i), which provides that "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact . . ."

not have a disparate impact component."[41] As the Ninth Circuit explained in *Spaulding* v. *University of Washington*:

> The [disparate impact] model was developed as a form of pretext analysis to handle specific employment practices not obviously job-related . . . As the court in *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982) (Pouncy), made clear: "[t]he discriminatory impact model of proof . . . is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." The [Plaintiff-Appellant] unconvincingly cites cases for the proposition that "the disparate impact analysis has been applied to wage discrimination cases." They do not involve wide-ranging allegations challenging general wage policies but rather challenges to specific employer practices.[42]

Attaching a disparate impact framework onto a disparate treatment claim is fundamentally illogical, because it removes the intermediary step of identifying the practice or policy, whose application allegedly serves as the basis for the assertion of employer discrimination. In other words, EPA claims challenge pay practices directly rather than identifying a policy that results in the pay disparity, because under the EPA, discrimination is presumed to exist once a disparity is shown.

It is important to note that the plain text of Act proposes to apply the "bona fide" determination to factors including education, training, or experience. And where such tests have been permitted by courts in pay discrimination cases under title VII, the question has always pertained to a limited threshold test: whether the non-discriminatory factor is truly necessary and inseparably intertwined with the performance of duties and responsibilities of a job. In other words, title VII applies the business necessity test to questions that result in a binary answer: either a factor is necessary to job performance or it is not. For instance, the *Griggs* court found that a high school diploma was not necessary to job performance; and it is from this business necessity showing that courts infer whether defendants are able to produce explanations that are "bona fide" factors, rather than merely a pretext for discrimination that would exclude certain groups. In that sense, the business necessity test as established by the *Griggs* court and applied to title VII claims since then upholds the equality of opportunity explicitly protected by the Civil Rights Act and implicitly promised by the principles that have guided this country since its founding.

In contrast, the Act would now apply standards of job-relatedness and business necessity to questions that require economic valuations of an unlimited number of factors. The Act essentially invites employees and employers to dispute in court whether certain qualifications, including education, training, or experience, are justifications for disparities in compensation. In that sense, the Act represents an unprecedented intrusion of government into the independent business decisions of private enterprises by eroding the fundamental purpose of compensation;[43] in reality, compensation functions not only as a means to remunerate employees for work performed, but also to enable employers to attract the skills and experience likely to promote the competitiveness of the enterprise. In contrast to its usage in title VII and ADA claims, the business necessity test as applied by the amended EPA would sacrifice the autonomy of private enterprise because the statute uniquely presumes discrimination merely on the basis of unequal outcomes.

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[41] 427 F.3d 466, 469 (7th Cir. 2005). *See also Smith* v. *City of Jackson*, 544 U.S. at 239 n.11 (2005) (noting in EPA, Congress intended to prohibit all disparate impact claims).

[42] 740 F. 2d 686 (9th Cir. 1984) (overruled on other grounds). *See also Wards Cove Packing Company, Inc.* v. *Atonio*, 490 U.S. 642, 655–58 (1989).

[43] The Act's business necessity test takes standards of rigor designed to measure and justify the impact of a specific policy to bar certain groups from access to employment and impose the same standards on individualized compensation decisions. As such, the Act improperly thrusts onto the judiciary an untold number of fact-finding exercises with respect to whether certain qualifications result in incremental performance gains that justify the challenged pay differential. For example, if a law degree is not necessary to the performance of duties and responsibilities of a policy analyst, title VII will provide appropriate protection if it is used as an inappropriate barrier to employment. However, application of the Act would place members of this legislative body at risk for unlimited damages for paying a higher salary to a male analyst with a law degree as well as a Master of Public Policy degree in comparison with a female analyst without a law degree. In response, the hypothetical defendant would bear the burden of showing that the second degree is indeed a bona fide factor that justifies added compensation, and would face the risk of a judicial body determining otherwise, or determining that, even if so, there was another employment decision that could have been made that would lead to a lesser pay differential between the two policy analysts (*i.e.*, paying both the same pay regardless of the fact one had different qualifications). However, the Act invites such disputes into courtrooms, forcing the judiciary to weigh the merits of the economic judgments of employers.

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

Section 3(c)(4) of the Act allows an action brought to enforce section 6(d) to be maintained as a class action under the Federal Rules of Civil Procedure. Like multi-plaintiff actions under the FLSA and the ADEA, EPA actions brought by women 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, including before becoming affirmatively bound by any adverse rulings against the employees' interests adjudicated in the case. FLSA, ADEA, and EPA collective actions, as they are known under section 216(b), provide employees with a generally more lenient standard with respect to a plaintiff's initial showing of being similarly situated to fellow employees than that required under Federal Rule of Civil Procedure 23(a), which is applicable to class actions sought under title VII, and proposed by the proponents of the Paycheck Fairness Act as the applicable new class action mechanism to apply to EPA claims. The Chamber submits that the Act's proponents 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 Rule 23's requirements.[44]

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.[45] The similarly situated requirement is met through allegations and evidence of class wide discrimination. 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.[46]

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 well as Rule 216(b) collective actions under the EPA.[47] 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 opposi-

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[44] *See e.g., Rhodes* v. *Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 671 (N.D. Ga. 2003).

[45] *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)).

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

[47] *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).

tion to a motion to certify a class alleging sex discrimination in pay.[48] 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 all of these reasons, the Chamber submits that this collective action mechanism should not be amended to conform to Rule 23 requirements as proposed by the Paycheck Fairness Act.

Other Concerns

In addition to the concerns discussed above, the Act raises other serious concerns. Some of those concerns are noted below:

Reinstatement of The EO Survey

Section 9(b)(3) of the Act reinstates the EO Survey, originally adopted in late 2000 for the primary purpose of effectively targeting OFCCP compliance review resources pursuant to Executive Order 11246,[49] However, the EO Survey was a flawed tool as it failed to accurately target contractors whose pay practices were either compliant or noncompliant. Indeed, in April 2000, Bendick and Eagan Economic Consultants Inc. reported serious concerns to the OFCCP regarding the results of the pilot program and recommended that the survey be validated before implementation.[50] The OFCCP failed to conduct the recommended study.[51] In 2002, OFCCP contracted with Abt Associates to evaluate the reliability and usefulness of the EO Survey.[52] Abt determined that the EO Survey's predictive power was only slightly better than chance, with a false positive rate (identifying compliant contractors as non-compliant) of 93 percent and a high rate of classifying true discriminators as non-discriminators.[53] Based on the EO Survey's limited reliability, the Department of Labor rescinded the EO Survey in 2006.[54]

Data Collection Requirements and Regulations

In 2010, the EEOC requested that the National Academy of Sciences convene a panel to review methods for measuring and collecting pay information by gender, race and national origin.[55] The panel concluded that collecting earnings data would be a significant undertaking for the EEOC and a potential increased burden for employers.[56] The panel also found that the EEOC had "no clearly articulated plan of how the data on wages could be used in the conduct of enforcement responsibilities of the relevant agencies."[57] In addition, the panel determined that existing studies of the cost effectiveness of an instrument for collecting wage data and the resulting burden [were] inadequate to assess any new program."[58] Given the real budgetary and personnel constraints facing the EEOC and the current backlog of pending investigations, simply adding a requirement to adopt regulations and collect data is unwise. The EEOC simply does not have the personnel or the expertise in analyzing this data.

OFCCP Program Initiatives

Under the innocuous title "Reinstatement of Pay Equity Programs and Pay Equity Data Collection," Section 9 of the Act instructs the Director of the OFCCP to ensure

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[48] *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 section 16(b) collection action claim allowed to proceed as a class action as the standard is more lenient under the EPA).

[49] The stated objectives of the EO Survey were "(1) To improve the deployment of scarce Federal Government resources toward contractors most likely to be out of compliance; (2) To increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's regulatory reform efforts thereby allowing better resource allocation; and (3) To increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self-evaluations." Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 65 Fed. Reg. 68,039 (Nov. 13, 2000).

[50] Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors, 71 Fed. Reg. 53,033 (Sept. 8, 2006).

[51] *Id.*

[52] Id.

[53] *Id.*

[54] *Id.*

[55] *See* PANEL ON MEASURING AND COLLECTING PAY INFORMATION FROM U.S. EMPLOYERS BY GENDER, RACE, AND NATIONAL ORIGIN ET AL., COLLECTING COMPENSATION DATA FROM EMPLOYERS, (National Academies Press 2013).

[56] *Id.* at 2.

[57] *Id.*

[58] *Id.*

that OFCCP employees, among other things, use a full range of investigatory tools and not to require a multiple regression analysis or anecdotal evidence in a compensation discrimination case. In 2006, the OFCCP adopted two enforcement guidance documents, commonly known as the "Compensation Standards" and "Voluntary Guidelines." Among other items, the Compensation Standards only compared "similarly situated individuals," required OFCCP to use multiple regression analysis, and required that statistical showings be supported with anecdotal evidence of discrimination. Effective February 29, 2013, the OFCCP rescinded these common sense guidelines.

Two provisions are worth particular note: the provisions relating to the agency's analysis of systematic compensation discrimination and the provisions targeted toward surveying the Federal contractor community.[59]

Section 9 of the Act appears to be designed to statutorily mandate that the OFCCP refrain from requiring the adoption of multiple regression analysis or anecdotal evidence for a compensation discrimination case, among other things. Notwithstanding that the OFCCP recently rescinded the above-noted 2006 Compensation Standards and Voluntary Guidelines, the Chamber opposes the utilization of pay grade analysis as a method for proving that systemic compensation discrimination exists for one very simple reason: it doesn't work. Assuming individuals in the same pay "band" are similarly situated is simply too crude a statistical tool. Multiple regression analysis, on the other hand, is the widely accepted method by which plaintiffs and defendants make their case. Robust statistical tools like this are necessary to analyze the many factors that determine compensation and determine whether pay differentials are due to discrimination or some other factor. Statistical techniques will result in the OFCCP alleging discrimination more frequently, without adequate proof, forcing employers to unnecessarily incur legal costs and wasting OFCCP's resources. One perverse result of making such a change will be that employers will choose to settle with OFCCP based on such an inadequate statistical analysis would open themselves up to charges of reverse discrimination under title VII or State law.[60]

Section 9(b)(3) appears to statutorily mandate the OFCCP equal opportunity survey. It should be noted that the OFCCP's survey, which was intended to help identify Federal contractors that should be audited by the OFCCP, was substantively flawed, failed to serve as a useful enforcement tool of the agency, and placed a significant, unnecessary burden on contractors. Years ago, a neutral study of the survey was conducted by Abt Associates as part of the OFCCP's review of the survey. That study conclusively demonstrated that the survey provided no useful data and was extremely burdensome (with a conservative estimate that the study cost contractors approximately $6 million per year). Imposing this burden, which has been proven to do nothing to help identify or eradicate discrimination, on the Federal contractor community cannot be justified.

Permitted Inquiries About Wages

Section 3(c) of the Act appears to provide an unprecedented broad right to employees under the EPA. Employees would have the right to "inquire about wages of the employee or another employee . . ." without fear of any adverse action by an employer. The new right does not appear to be narrowed in any way by relevancy to the employee's pay or by confidentiality concerns of an employer. This language goes far beyond any rights enjoyed by non-unionized and unionized employees under the National Labor Relations Act ("NLRA").

For example, under the NLRA, non-unionized employees have the right to discuss their own wages with other employees, but do not otherwise have the right to obtain written documentation about the wages of any other employees. Although unionized employees, as part of an employer's duty to bargain in good faith, have the right to inquire about wage information for bargaining purposes, this right is not without boundaries and not without safeguards. In *International Business Machines Corp.*

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[59] A full discussion of these issues is beyond the scope of this testimony. Extensive comment by the Chamber on related issues is available on the Chamber's Web site at: *www.uschamber.com*.

[60] *See Maitland* v. *Univ. of Minn.* 155 F.3d. 1013, 1016–18 (8th Cir. 1998) (reversing district court's grant of summary judgment to employer on reverse discrimination claim and ruling that "the fact that the affirmative action salary plan was implemented pursuant to a consent decree does not bolster the District Court's conclusion at the summary judgment stage of this case and that there was a manifest imbalance in faculty salaries."); *see also Rudebusch* v. *Hughes*, 313 F.3d 506, 515–16 (9th Cir. 2002) (reverse discrimination case based on allegedly insufficient multiple regression analysis, ultimately resulted in a ruling requiring the employer to pay male faculty members $1.4 million); *Smith* v. *Virginia Commonwealth Univ.*, 84 F.3d 672, 676–77 (4th Cir. 1996) (reverse discrimination claim based on inadequate multiple regression analysis).

and Hudson, the National Labor Relations Board ("NLRB") held that employees could discuss their own wages with each other, but could not access or distribute company-compiled information as the company had a valid business justification for its rule against distribution of wage data compiled and classified as confidential.[61] Instead, the NLRB explained that the employer had a valid business justification for discharging an employee who disclosed wage information in violation of the company's rule. In contrast, here, the Paycheck Fairness Act provides an open door for an employee's inquiries in the wages of all employees, without any balancing of an employer's need for confidentiality and other legitimate concerns.

New Definition of "Establishment"

Section 3(a) of the Act appears to redefine and expand the definition of equal work, by amending the EPA to allow an employee to raise a claim of denial of equal pay for equal work if the inequality between men and women pay exists between men and women who work at different physical places of business within the company. Currently, in keeping with the EPA's prohibition against denying employees equal pay for equal work because of their sex, the EPA requires an employee to compare their wages earned against other employees within the physical place of business in which they work. According to the Regulations issued by EEOC to construe the EPA, "establishment" "refers to a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate establishment."[62] We urge the committee to consider the difficulty and impropriety of comparing jobs across locations and geographical regions in determining whether equal pay is being paid for equal work, and reject the unworkable proposal contained within the Act.

CONCLUSION

In conclusion, the Chamber has serious concerns with the Paycheck Fairness Act. Mr. Chairman and members of the committee, we thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.

Senator MIKULSKI. That was all excellent testimony and very content rich, each one, with either these compelling personal stories and the information. The way we're going to proceed here is in the order of arrival. Often, in the old days, the seniority people—we're going to make equal attendance here or something.

I note that the very first person to come was Senator Alexander. Ordinarily, I would go first, but I was one of the latest arrivals. I will be the last person. I'll be the wrap-up questioner. I'm going to turn to Senator Alexander. Then it's Senators Warren, Baldwin, and Casey.

Murray, Franken, and Murphy have left but will come back. Should they not come back, their full statements will go into the record, and any questions they might have for the record will be in.

Senator Alexander, if there are any members of your side of the aisle that wish to submit statements or questions, we would also welcome those for the record as well. So I will turn to you now, sir.

Senator ALEXANDER. Thank you, Madam Chairman. I want to say what is obvious. I appreciate the firm and the fair way that the Senator from Maryland chairs a hearing, and I enjoyed working with her on the Child Care Block Grant last week. Those watching might notice the ideological differences that are here. I would say that the HELP Committee produces more legislation than anybody else, despite that, because we know how to work together to get a result when we can do that.

[61] 265 NLRB 638 (1982).
[62] 29 CFR § 1620.9(a).

We're hoping that the Appropriations Committee beats us this year when Chairman Mikulski passes all 12 appropriations bills on the Senate floor, which I want to help her do. So that's what we're looking forward to.

Ms. Olson, you did a good job of pointing out that for 50 years, Equal Pay for Equal Work has been the law. Actually, there's been two laws. The one that we're not touching is Title VII of the Civil Rights Act. And there are lots of different ways that a person who feels aggrieved may go forward with a lawsuit, damages that can be collected, back pay that can be collected. In the case of Title VII of the Civil Rights Act, you can go to EEOC, and they may do your legal work for you.

So it's the law, and you can sue, and you can go both to the Federal agency and to the courts. So that's already in the law. You made a strong point of something that I was talking about, which is what the proposed change here does to flexibility for employees in the workplace.

For example, let's say you have a dry cleaner with six people, and there are three night shifts and 3 day shifts. There's a manager and six people, and three night shifts and 3 day shifts, or three later shifts and three earlier shifts. And three of the employees have young children, and they say, "We'd like the flexibility of more time off or more flexibility in our schedule." Could you pay some men different than some women based upon a flexible work schedule in the new regime set up by the so-called Paycheck Fairness Act?

Ms. OLSON. An employer who does so risks, under the Paycheck Fairness Act, unlimited compensatory and punitive damages if they're not able to show it was a business necessity.

Senator ALEXANDER. He'd have to show the cleaner couldn't operate well unless he did that.

Ms. OLSON. That it would have been—you're exactly right, Senator.

Senator ALEXANDER. And then assuming he could do that under this law, then the other side, whoever is doing the suing, could come in and say, "Well, but I can think of a way that you could have done it." That's the alternative employment plan. Is that correct?

Ms. OLSON. Right. And the other way is, "You could have just raised all of our pay by a dollar," unless to do so, you would go bankrupt.

Senator ALEXANDER. Well, let me go to a school. I assume this would apply to schools. Is that right?

Ms. OLSON. Yes.

Senator ALEXANDER. Let's say a principal wanted to inspire girls to go into math and science, and in order to attract outstanding female teachers, he had to pay them more than the men. Could he do that?

Ms. OLSON. Under this act, the answer is no. Both males and females can raise a claim under the Equal Pay Act. And, again, any difference that is paid that is different than the minimum amount that you paid someone else of another sex, you've got to be able to justify by business necessity. And you've got to be able to show,

even if it was a business necessity, that you didn't have the ability to pay everybody the higher rate.

Senator ALEXANDER. Is the employer in a school situation the school district, or is it the principal of a particular school?

Ms. OLSON. The employer is generally the school district.

Senator ALEXANDER. So what if there was a school in a rough section of town and a school in an upscale section of town, and you wanted to pay men in the rough section of town a higher wage and women teachers less in the upscale section of town? Would that be a business necessity under the new rule? Would that be difficult to do?

Ms. OLSON. The way this new act would roll out is before an employer determined to pay extra for that particular reason, that difference in the job, the employer would be required to prove that it was a business necessity, that they couldn't otherwise get individuals at the lower rate of pay.

Senator ALEXANDER. My time is about up. I think you've made an excellent point of pointing out how existing law makes it clear that if an employer pays a female less than a male counterpart and a male less than a female for the same work, that's against the Federal law, and there are plenty of opportunities to redress that, and that this would expand litigation. But please make any comment you could about the effect this might have on the ability of an employer to be more flexible in recognizing different circumstances among employees.

Ms. OLSON. What this really does is it eliminates an employer's consideration of the marketplace. It eliminates an employer's consideration of different qualifications between individuals in the same job.

For example, if a female applicant meets the minimum qualifications for an applicant, but a male applicant actually meets the minimum qualifications but let's just say has 2 years more experience and 2 years more training, to pay that male employee more—and if that male applicant says, "I won't take the job unless I'm paid an extra 50 cents. That's what I'm paid an hour more at my current job—the employer would have to show that that was a business necessity to employ that individual, and that, in fact, their valuation of the value of those enhanced qualifications that are described of that new applicant are such that they were appropriate under the law.

And even if so, again, a plaintiff could erase the defense and hold the employer liable under the Paycheck Fairness Act if the plaintiff can show that you had the money to increase others, even though they didn't have the same qualifications, to that same rate of pay in the job.

Senator ALEXANDER. Thank you, Madam Chairman.

Senator MIKULSKI. Senator Warren.

STATEMENT OF SENATOR WARREN

Senator WARREN. Thank you, Madam Chair, and thank you for holding this hearing. I can't believe we're debating equal pay for equal work in 2014. I just really can't believe this. Women still only earn 77 cents for every dollar a man earns, and some women can be fired for asking the guy across the hall how much money he

makes. So what I'd like to ask about today is a little bit more about the defense that employers have under the current law and what's proposed under Paycheck Fairness.

So if I could, could I start with you, Professor Eisenberg? Could you just talk a little bit more about the current law and how some employers are using the factor-other-than-sex defense under today's law?

Ms. EISENBERG. Certainly. That's a great question. You know, the current law allows—I just want you to keep in mind that the first threshold that plaintiffs need to prove is that the jobs in question are equal in terms of skill, responsibility, and effort. And then the burden shifts to the employer to disprove discriminatory intent by showing the actual reason for the pay disparity.

So one of those—the catch-all factor other than sex, as currently interpreted by a majority of courts, is still in a majority of courts supposed to be job and business related. So this proposal in the Paycheck Fairness Act is codifying that majority view.

Senator WARREN. So in a majority of courts, there's no change at all in the law in that fundamental sense——

Ms. EISENBERG. That's right.

Senator WARREN [continuing]. Other than a woman can now ask, and she will be protected and can't be fired for asking what the guys make.

Ms. EISENBERG. That's right.

Senator WARREN. But, please, there'll be some change in some courts.

Ms. EISENBERG. There'll be some—two Federal circuits, the Seventh Circuit and the Eighth Circuit Court of Appeals, have interpreted the factor other than sex to really mean anything under the sun, even if it doesn't relate to the qualifications of the two employees in that job or to a business-related reason.

Let me give you two examples. One common factor other than sex that is accepted by some courts but rejected by others is the happenstance of prior salaries. So if a woman and a man are coming to the exact same job, and a woman is coming from a prior employer where her salary happened to be lower, but she is equally as qualified, and a man is coming from a different job where his salary happened to be higher, they will be paid based on their prior salaries rather than their comparable qualifications and the fact that they're doing comparable work.

Senator WARREN. So if she had been discriminated against in the past, that can now be a defense for discriminating against her in the present and in the future.

Ms. EISENBERG. Absolutely. It perpetuates the very discrimination that the Equal Pay Act was supposed to address. And the other thing that I've seen in some cases—and, again, there's a split among courts—is this so-called market forces argument. In some cases, if the employer is able to show actual market compensation data on which the employer relied, then that is accepted by courts.

Some courts, however, have accepted sort of vague and illusory defenses that this is required by the market. And upon closer examination of actual market data, the men are being paid above market rates, and the women are being paid below market rates. I've had that in cases that I've litigated.

The other thing as far as the market forces defense is that sometimes it's sort of just a subjective value judgment, sort of a subjective hunch on the part of a supervisor. It's not really any sort of objective market data that they're referring to.

Senator WARREN. So just so I'm sure that I understand this, kind of the basic things we talk about, about differences in how employees get paid, like seniority, merit, the quality of your work, a different job description where you have perhaps more flexible hours in your job than someone else does—would those under Paycheck Fairness be legitimate grounds for paying someone differently?

Ms. EISENBERG. Absolutely. And even in the majority of circuits that have already adopted the job-related and business-related standard that the Paycheck Fairness Act codifies, those defenses are allowed, and they've been accepted. So this does not change that at all.

Senator WARREN. Thank you very much. I just want to remember that women earn less than men in nearly every occupation, and that today, in 99.6 percent of all occupations, men are earning more than women. That's not an accident. That's discrimination, and women are tired of it. What this bill does is gives us a chance to fight back.

Thank you, Dr. Eisenberg.

Senator MIKULSKI. Senator Baldwin.

STATEMENT OF SENATOR BALDWIN

Senator BALDWIN. Thank you. I want to pick up where Senator Warren just left off. When I graduated from college, I had the opportunity to work on a study of the issue of comparable worth, somewhat distinguishable from equal pay for equal work, where you look at comparable—is there comparable pay for comparable work. And why would one undertake such an inquiry?

We don't always have pay inequities that exist from people working side by side. I've often walked into a private sector setting where, say, I've taken a tour, and one part of the facility has a female dominated workforce doing similar things, maybe 80 percent or 90 percent female, and then there might be another part of the job where it's 50–50 in the workforce, and then you might see another part of the operation where it's predominantly males engaged.

The State of Wisconsin in the mid-1980s decided to sort of ask the question in State government service: How do so-called pink collar jobs compare to others. And they started doing, I think, stealing from the private sector, as Ms. Olson was talking about, a valuation of the range that certain occupations ought to pay based on not the future incumbent in that position, but things like degree of academic preparation required for the job and the skill set required and how many people you supervise, if any at all, and the consequence of making a mistake or an error. You know, does somebody die when you make a mistake? Does somebody get harmed? Is somebody denied justice? And what are the consequences of certain mistakes?

And what they found in studying female-dominated positions versus male-dominated positions is that there was an unexplained pay gap. It was just—you compare all of that data collected, and

there was just this element that wasn't explained by anything except the gender of the predominant incumbents in these positions.

It's proven a really difficult issue to rid our society of that. I can't remember the exact quote, but I think Margaret Mead was talking about that half a century ago in a very different place in the world, how we value work done by men versus by women.

So I'm really pleased, Madam Chairwoman, that we're pursuing this, that we will be fighting to pass this legislation. And I guess I do have a question about the warning we hear often from those who oppose this legislation that it may open the doors for a flood of litigation. I think my own State provides a bit of an example.

Professor Eisenberg, I don't know if you have state-by-state reviews, et cetera, but we had an equal pay law, more like a paycheck protection act, and it was recently repealed, regrettably, in the State. Our Governor led a repeal effort, and it was repealed in 2012. I thought it was a real step backward.

But they repealed it. And, in part, the debate surrounded the potential flood of litigation. It had been in effect for some years, and there was just no record to suggest that. Professor Eisenberg, could you respond to that set of arguments?

Ms. EISENBERG. That's a great question. I'm proud to say my own home State of Maryland has an Equal Pay Act, and I should say that there's no catch-all factor-other-than-sex defense. It's very strict, actually. Seniority, merit, ability, skill—an enumerated list, and also has a class action procedural availability, and very few cases are ever filed, even under the Maryland Equal Pay Act.

I think something to keep in mind is that it is very difficult to come forward and sue an employer. It could be career suicide. It takes an enormous psychological toll. So what this act really does is give women some more leverage about their rights so that, hopefully, they can take that to the employer and advocate for themselves and nip it in the bud.

I've also done a study of every Equal Pay Act case in the Federal district courts from 2000 to 2011 that made it to a summary judgment decision in the court. I found that there were only 50 cases, about 50 cases per year, on average, for each of those 11 years. That's an average of one per State. So there already is not a lot of Equal Pay Act litigation out there.

I don't see that this is going to open the flood gates. Perhaps more cases will make it past summary judgments. There is an enormous problem right now in the Federal courts with summary judgment and the real impact that summary judgment has that's sort of stopping cases at the starting gate. They don't make it to juries.

About half of Equal Pay Act cases are dismissed based on the *prima facie* standard, the equal work standard, and of those cases that remain, the remaining half have been dismissed on summary judgment based on the factor-other-than-sex defense. So only about one-third are sort of sneaking past and actually making it to a merits decision in front of a jury.

Senator BALDWIN. Thank you.

Senator MIKULSKI. Excellent questions.

Professor Eisenberg, I have a question for you, and then I'll have some for the others. There are those who say we really don't need

this bill. What we need is better enforcement of the existing legislation. There are those who say, "Who wants to discriminate? That's just not America. That's just not fair." So they say we already have the Equal Pay Act, we already have title VI, and we just need to enforce those laws better.

What do you think about that from the perspective of a law professor who has really studied this?

Ms. EISENBERG. I've spent a lot of time reviewing sort of the State of women's wages in the modern economy. What is so alarming to me is that if you dig deeper, beyond sort of the aggregate pay gap statistic, it becomes even more alarming when you compare occupation to occupation. So women in every occupational category experience a wage gap. Although women are becoming better educated, the gap widens as they get more education.

The myth that the aggregate wage gap is because more women work part-time isn't true, because the aggregate statistic only includes full-time, year-round workers, not part-time workers. And, in fact, part-time women earn more than their part-time counterparts, because more men in the part-time sector tend to be younger and at the beginning of their careers. The statistics also show that if women work harder, the gap doesn't go away. The wage gap——

Senator MIKULSKI. What does that have to—I appreciate that data. What I asked——

Ms. EISENBERG. Is discrimination real?

Senator MIKULSKI. No, I didn't ask if discrimination is real. I asked do we need this law, or do we need to simply enforce—not simply—enforce the Equal Pay Act or title VII and really fully fund the EEOC, which, by the way, was hit by sequester, was hit by slam-down shut-down. They have a tremendous backlog in their cases. So is the law necessary when we have these two other laws on the books?

Ms. EISENBERG. I would agree with you that the EEOC is underresourced and under-staffed, so that would be a big help. We do need the Paycheck Fairness Act, and what is so important about this law is that it deals with some of the deficiencies in the current remedy. It allows for a fuller remedy for all of the multiple harms of pay discrimination.

Right now, for employers, it's sort of a cost of doing business. If the wage disparity is discovered, then they pay the amount of the wage and maybe liquidated damages under the Equal Pay Act. So this will give a fuller remedy, which is very important. My research has shown that the Equal Pay Act is not working very well, that most women who exercise their rights under this law are not able to get a remedy.

As far as title VII, title VII is a very difficult law for pay discrimination because of its requirement of intent, intentional discrimination. And I should say that the myth that the Equal Pay Act does not involve intent is actually not true. It's just that the intent is examined at the affirmative defense stage. And the employer bears that burden, because the employer has a monopoly on the information about how these wages were set.

Senator MIKULSKI. A monopoly on the information.

Ms. EISENBERG. Exactly.

Senator MIKULSKI. Thank you very much.

I'd like to turn to Ms. Young. It sounds like you had a wonderful father and a pretty terrific mother for you to have such a verve and vitality and this sense of entrepreneurship. This is what makes America great, initiative, enterprise, and so on. We come from a family of small businesses, too. My father started a small grocery store. So I can appreciate, you know, fathers saying, "Up and at 'em, girl," you know.

But let's talk about the real world. You have small businesses that I know have to operate close to the margin. One of the things we say is, you know, "Senators, get real. Understand the real world and the market." So here's my question, Ms. Young. When you stepped in and, as you say, you took that bold action when your dad was running the show.

Ms. YOUNG. Right.

Senator MIKULSKI. Was this negative in terms of the bottom line? In other words, what was the impact? Most people would say if they did what you did, your father would want a walk in the woodshed or the equivalent, and the second would be that it would really pull down the earnings.

So what happened when you did that? You talked about the dynamics with your dad. Let's talk about the dynamics of the business.

Ms. YOUNG. Sure. When I did that, it truly did increase the morale of the women who were working there. The turnover for our women workers is next to none. It did not affect our bottom line, and the companies are still profitable. There was no negative effect of me doing that.

Senator MIKULSKI. So that's pretty significant.

Ms. YOUNG. Right.

Senator MIKULSKI. That's a very interesting point.

Ms. Olson, I'd like to turn to you and your very content-rich presentation. But my question is: Is the Chamber opposed to the bill totally? Or if the bill was amended and so on, the Chamber would consider passing it? Do you have suggestions for amendments or kind of—where are you?

Ms. OLSON. Thank you very much for your question.

Senator MIKULSKI. Are you a flat no? Or are you a let's see what we can really do here?

Ms. OLSON. Thank you very much for your question, Senator Mikulski. The answer to——

Senator MIKULSKI. And that's not in any way a negative question.

Ms. OLSON. I understand. The answer to it is the Chamber is very much opposed to the three significant concerns that were raised today. And I want to make a point, if I may, because I think this one is very important.

With respect to the issue of the revision to the factor other than sex, the Paycheck Fairness Act does not track the majority of circuits that have described the factor other than sex as the articulation of a legitimate business reason. That is a far different standard than the standard that has been proposed in this act.

To your question, the answer is there is no question that the Chamber would welcome the opportunity to work with yourself and

Senator Alexander with respect to the issues that we're discussing today.

Senator MIKULSKI. Very good. My time is up.

Senator Alexander, do you have any other questions? Does anybody else have any?

Senator ALEXANDER. I could ask just one.

Senator MIKULSKI. Sure.

Senator ALEXANDER. It seems to me that this is—and I thank all of the witnesses for coming. I spent a lot of time in Waterloo several years ago, and it's a lovely town in Iowa.

The law already is equal pay for equal work. That's the law, and there are already remedies for it. This bill seems to me, Ms. Olson, to be more of a proposal, as was said, about a different remedy, and in the view of those who support it, a more effective remedy. But it's about, in effect, more litigation, more opportunities for lawyers to represent people who feel they're aggrieved and have a chance to assert their claims.

Let's take an example, and let me understand exactly how—the laws that now exist apply to every business, right? As long as you've got two employees, and one is a man and one is a woman, you're covered by this. Is that right?

Ms. OLSON. Correct.

Senator ALEXANDER. And there's strict liability, which means you don't have to prove intent. All you have to prove is the fact that the woman made more than the man for the same work or vice versa, and you've got a——

Ms. OLSON. A *prima facie* case.

Senator ALEXANDER [continuing]. A violation of the law.

Ms. OLSON. Correct.

Senator ALEXANDER. And the way it is today, you can have a defense, which has been variously described here, but it gives the employer some room to present a justification for that. Under the proposed change, take me through exactly what would have to happen with a specific example of a man and a women. And let's take an example of where the man is being paid less than the woman in this case, because this law is not just about women. It's about men and women.

Ms. OLSON. Correct. An employer would have to prove—it has the burden of proof under the law whenever there's a difference in pay—that the woman was being paid more because of a factor other than sex, such as a qualification, an advanced degree, let's say, or more experience, and not just that that was the reason, but that using that reason was a business necessity, which is a very high standard. Courts have described business necessity as the employer being required to hire that particular employee to perform the job with those requirements to be able to sustain it.

Once an employer is able to sustain that, if it is a business necessity to pay the woman an additional dollar, let's say, because of her higher qualifications, the man could still prevail in the case if the man was able to show that it wouldn't be impossible for that business, that the business would survive, and it wouldn't be cost prohibitive to raise his pay as well, even though he would admit he didn't have that same qualification.

Senator ALEXANDER. Do you believe that the provision in the proposed Paycheck Fairness Act to allow for unlimited compensatory and punitive damages for claims and to allow class actions to be brought on behalf of an employee, whether the employee knows it or not, giving the employee an opportunity to opt out—do you believe that those proposed changes would increase litigation significantly?

Ms. OLSON. There's no question it would increase litigation, and not only increase it, but prolong it, because there's an open-ended high top in terms of what the value of that claim is. You can't value it anymore based on what the economic damages are, or a limit on compensatory or punitive—like under title VII. It's limitless.

I think that there's no question that the issue of moving from the collective action to the Rule 23 context, which would be different than every other class case that's brought under the Fair Labor Standards Act, which the Equal Pay Act is part of, would do one thing. It would make it harder, necessarily, to necessarily certify a claim, but it would allow plaintiff's class action lawyers to have much bigger claims, because it's not the people who are sending in their written consent, saying, "Yes, I want to join that claim." It's everybody's in unless you tell me otherwise. That's a very, very big difference in terms of the size of the class actions and the cost of the litigation.

Senator ALEXANDER. Thank you very much.

Thank you, Madam Chairman.

Senator MIKULSKI. Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. First of all, I'd like to apologize to everyone. I had some other pressing stuff, and I'm sorry that I missed this, because it's very important to me. I think it's just fundamental that people should be paid the same for the same work, and that's based on race and religion and national origin and gender. I just think that's a fundamental right. So I'm a co-sponsor, an original co-sponsor, of this act.

I'm sorry I haven't been here for this whole hearing, and I'll read the transcript afterwards. But the Ranking Member, who I respect enormously, talked about this undermining flexibility in the workforce or in the workplace. I don't understand that, and maybe I should just later ask the Ranking Member.

But it seems to me that you can—dads want to go to soccer games, and moms want to go to soccer games. Dads want to be able to have their kid in a daycare center at the school. I think that's a wonderful business you did with Captain Kangaroo. I tried to team up with Mr. Green Jeans, but he wouldn't do it.

[Laughter.]

Professor Eisenberg, would this affect flexibility in the workplace, this law?

Ms. EISENBERG. Based on my reading, I don't think that it would. Remember, the catch-all factor other than sex is still there, but it has to be related to the job and the business. So that leaves the field wide open, in my opinion, that employers can still base com-

pensation and give flexibility in their workforce in a way that matters most for their particular business.

Senator FRANKEN. I'm not sure what questions have been asked and not been asked. So I'm going to go to one that probably no one asked, because I saw something, Ms. Olson, in your testimony. You state that—this is a quote from your testimony—

> "If enacted, the act would amend the EPA significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise, namely, that throughout the United States of America, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers."

Basically, what you're saying is that the fundamental premise of this is that all unexplained wage disparities are necessarily the result of intentional discrimination by employers, that that's the premise of this. Could you expand on that a little?

Ms. OLSON. Yes. There's been a lot of discussion by proponents of this bill that there is a significant wage gap. At footnote 5 of my testimony, I include a discussion of various economists. I'm not an economist. I'm here as a lawyer today—but many economists that describe that when you take into account personal choices and the number of different considerations that are all detailed in that footnote, many economists, and many government studies show that the wage gap decreases to between somewhere around 4.9 percent to somewhere up to 7.9 percent—some studies say 12 percent. It depends.

There are a lot of studies. Some of them track the same person. Some of them don't. Some look at median wages without taking a look at—I'm going to just give you one example—lawyers. Lawyer's aren't going to make—someone who graduates from law school, 5 years out, in that category, isn't going to make the same amount as somebody else.

A big factor is going to be: Do I work for a private law firm? Do I work for a public interest group? Do I work in a public setting in terms of a public governmental institution? Do I work inside a company? But none of those factors are being considered. The point of my testimony that I submitted that you referenced is that to the extent there is a wage gap, there has been no evidence that that wage gap is the result of employer discrimination.

Senator FRANKEN. But there still exists a gap, even when you control for every other factor. But here's the thing. When I read Professor Eisenberg's testimony, it seemed quite at odds with what I read from your testimony. Did you read Professor Eisenberg's testimony?

Ms. OLSON. I did, Senator Franken.

Senator FRANKEN. So were you struck by what I was struck by?

Ms. OLSON. I was struck by it, but——

Senator FRANKEN. I just would like to ask her about it since I'm running out of time.

Ms. OLSON. Sure.

Senator FRANKEN. Can I ask just this one question of Professor Eisenberg?

Senator MIKULSKI. You can wrap up with it.

Senator FRANKEN. In your testimony, you state that it is your firm belief that, "firm belief that most employers try to comply with the law and do not set out to intentionally discriminate against women." That seems to be very at odds with Ms. Olson. Could you comment on her comment and explain the difference in viewpoints?

Ms. EISENBERG. Right. I think most employers do try to do the right thing. But there's no question that there are some outdated attitudes in some workplaces. And one need only hear the stories here today to show that, and many other women have come before this committee to share that.

Just to give you an example, managers at Walmart told women that men would always make more because God made Adam first, and so women would always be second to men. And one manager said, "Bring in your household budget so I can see if you deserve to be paid as much as men." So there's this real bias in some workplaces that——

Senator FRANKEN. That almost makes Ms. Olson's point. That sounds pretty intentional.

Ms. EISENBERG. Yes. And then the second part is sort of—so there is still intentional discrimination is the point. But there's also unconscious biases, especially against working mothers, that seep into the wage setting process. So some of those stereotypes are a real problem as well.

Senator FRANKEN. OK. I apologize for going over, Madam Chair.

Senator MIKULSKI. It was a good exchange.

We want to thank all of our witnesses.

And, Ms. Sleeman, we want to thank you for telling your personal story. I didn't ask you a question because it was complete in and of itself.

I ask unanimous consent that a letter from a constituent of mine, Latoya Weaver, who suffered discrimination as well, be entered into the record.

[The information referred to follows:]

MARCH 31, 2014.

Senator BARBARA MIKULSKI,
503 Hart Senate Office Building,
Washington, DC 20510.

DEAR SENATOR MIKULSKI: My name is LaToya Weaver. I grew up and still live in Great Mills, MD. I currently work in guest services at a hotel. But back in 2012 I had to file a discrimination complaint against my former employer, Extended Stay Hotels, because they had paid me less than two male employees who held the same job as me.

I started working full-time as a Guest Services Representative at Extended Stay Hotels in Lexington Park, MD in July 2007. Most weeks I worked 40 hours. When I started there I was only paid $8.00 per hour, even though I had already gained more than 2 year's worth of hotel guest services experience at a Best Western. I worked at Extended Stay until May 2012. At that point my pay had increased to $8.88, because every year I would ask for an annual raise and the hotel would give me a raise of 10 or 15 cents at a time.

In the spring of 2012 I had an offer for a customer service job at a doctor's office that would pay more than I was making at Extended Stay. I therefore asked for a raise to $9.50 per hour. However, my manager turned me down because she said that the hotel was undergoing construction. I decided to take this other job.

While I was working at Extended Stay the employees were told that we were not supposed to discuss our pay with each other. However, shortly before I left the hotel I saw some papers that my manager had left sitting out that showed that two men who had recently been hired as Guest Services Representatives were each making

$10.00 per hour. I was very upset to discover this, and so I decided to file a pay discrimination complaint with the Equal Employment Opportunity Commission.

After the EEOC investigated, it came out that a number of other women working as Guest Services Representatives for the hotel were also being paid less than these two men. The EEOC filed a lawsuit against Extended Stay Hotels for the discrimination that we all had experienced. The hotel eventually agreed to settle the lawsuit and compensate us for the years of paying us less.

Being paid fairly for all those years would have made a huge difference to me and my family. I am a single parent to three children, and all three of them were in day care at that time. Even though I had a subsidy to help me with paying for a day care center, I still had to spend $100 per week out of my own pocket. Paying that cost along with the rest of my bills was a huge challenge. And in order to finally get work that would pay me more, I had to travel to a job 45 minutes from my house.

I was fortunate enough to finally get a remedy for the discrimination that I experienced. But I am concerned about all the other women who will continue to face unfair treatment in the future because our laws are not strong enough and do not prevent employers from discriminating.

Sincerely,

LATOYA WEAVER,
Great Mills, MD.

Senator MIKULSKI. The record will be open for 10 days for additional statements. But, also, members are allowed to ask followup questions and submit them for the record.

This has been a very excellent hearing. I like the fact that it was about real work, not just about fireworks at a hearing. I think we've all learned a lot by listening to each other. We need to continue the discussion and move the legislation forward.

This concludes the hearing.

[Additional Material follows.]

ADDITIONAL MATERIAL

SEYFARTH SHAW LLP,
CHICAGO, IL 60603,
April 7, 2014.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
731 Hart Senate Office Building,
Washington, DC 20510.

Hon. LAMAR ALEXANDER, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
455 Dirksen Senate Office Building,
Washington, DC 20510.

Hon. BARBARA ANN MIKULSKI, *Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
503 Hart Senate Office Building,
Washington, DC 20510.

Re: Supplemental Testimony Submitted for April 1, 2014 Senate HELP Committee Hearing: "Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act"

DEAR CHAIRMAN HARKIN, SENATOR ALEXANDER AND SENATOR MIKULSKI: This supplemental testimony is presented on behalf of the U.S. Chamber of Commerce by Camille A. Olson. It is provided to the Senate Committee on Health, Education, Labor, and Pensions regarding S. 84, the Paycheck Fairness Act ("PFA"), pursuant to the statements made on the record by Hearing Chair, Senator Mikulski at the hearing entitled "Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act" on April 1, 2014. This supplemental testimony responds to two specific issues addressed by another witness in response to specific questions by Senators during the April 1, 2014 hearing.[1]

Issue #1. Does the PFA Change the Equal Pay Act's ("EPA") factor other than sex defense as it is currently interpreted by a majority of courts in the United States?

Hearing Testimony: No; it is the same test.

Supplemental Testimony: Yes; the test under the PFA is materially different from the test most often used by courts to interpret the factor "other than sex" defense under the Equal Pay Act. In fact, no court in the United States has adopted the language of the PFA as current law under the Equal Pay Act.

A. HEARING TESTIMONY

Senator WARREN: "Professor Eisenberg, and could you just talk a little bit more about the current law and how employers are using the factor other than sex defense under today's law." [1:30:04–1:30:17]

Witness EISENBERG: "Certainly, that's a great question. . . . the catchall factor other than sex, as currently interpreted by a majority of courts, is still in a majority of courts supposed to be job and business-related. So this proposal in the Paycheck Fairness Act is codifying that majority view." [1:30:17–1:31:13]

Senator WARREN: "So in a majority of courts, there's no change in the law, in that fundamental sense." [1:31:13–1:31:15]

Witness EISENBERG: "That's right." [1:31:15].

B. SUPPLEMENTAL TESTIMONY BY CHAMBER OF COMMERCE

The PFA rewrites the Equal Pay Act's factor other than sex defense. PFA is a radical departure from the current interpretations of the Equal Pay Act in all courts in the United States.

First, no circuit court has interpreted the EPA to mean an employer must prove that the factor other than sex is: job-related and consistent with business necessity;

[1] The fact that the Chamber has not commented on other parts of the testimony presented at the hearing on April 1, 2014 should not be viewed as an indication that it agrees with the other testimony.

Second, no circuit court has interpreted the factor other than sex defense to require an employer to prove the factor other than sex was not based upon or derived from a sex-based differential in compensation; and

Third, no circuit court has ever held that an employee prevails under the EPA if the employee shows 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."

Yet, all of the above requirements are contained in the PFA in proposed section 206(d)(1)(B), as set forth below:

> The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. Such defense shall 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.

Five of twelve regional circuit courts of appeals[2] have held that the "factor other than sex" defense must be business-related: the Second, Third, Sixth, Ninth and Eleventh Circuits. Three circuit courts have held that the factor other than sex must be sex-neutral and uniformly applied.[3] Four circuit courts have not defined the factor other than sex defense in the EPA. Thus, less than half of the circuit courts have ruled that a factor other than sex must be a business-related factor.

The business-related factor other than sex test used by five circuit courts is, contrary to the Hearing's testimony, significantly different than the new language contained in the PFA.

The Second Circuit Court of Appeals 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."[4]

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.[5]

The Sixth Circuit rejects the PFA's requirement that the employer show its factor other than sex does not perpetuate historic sex discrimination, explaining that such a requirement creates "an impossibly high standard." Indeed, contrary to the PFA, the Sixth Circuit described the factor other than sex defense as:

> Conversely, the [lower] court refused to place an impossibly high standard on the employer by requiring it to show that the factor used does not "perpetuate[] historic sex discrimination." The court required instead that the employer show only that the factor was adopted for a legitimate business reason and used reasonably in light of the employer's stated purpose.

* * *

> We now hold that the legitimate business reason standard is the appropriate benchmark against which to measure the "factor other than sex" defense.[6]

Contrary to the PFA, the Ninth Circuit Court of Appeals defined 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.

* * *

> The Equal Pay Act entrusts employers, not judges, with making the often uncertain decisions of how to accomplish business objectives.

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[2] The Thirteenth Circuit Court of Appeals—the Federal Circuit—does not have jurisdiction over EPA claims, and thus is not included in this analysis.

[3] *Brinkley* v. *Harbour Recreation Club*, 180 F.3d 598, 613 (4th Cir. 1999); *King* v. *Acosta Sales & Mktg., Inc.*, 678 F.3d 470, 474 (7th Cir. 2012); *Taylor* v. *White*, 321 F.3d 710, 718 (8th Cir. 2003).

[4] *Belfi* v. *Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999).

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

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

> A pragmatic standard, which protects against abuse yet accommodates employer discretion, is that the employer must use the factor reasonably in light of the employer's stated purpose as well as its other practices.[7]

Contrary to the PFA, the Eleventh Circuit Court of Appeals defined the factor other than sex as follows:

> The burden to prove these affirmative defenses is heavy and must demonstrate that "the factor of sex provided *no basis* for the wage differential." Further, the employer must show that none of the decisionmakers, whether in middle or upper management, were influenced by gender bias. [citation omitted] Although an employer may not rely on a "*general practice*" as a factor "other than sex," it may consider factors such as the "unique characteristics of the same job; . . . an individual's *experience*, training or ability; or . . . special exigent circumstances connected with the business."[8]

Strikingly, none of the five Circuit Courts of Appeals relied upon for the "majority" view by proponents of the PFA at the Hearing require an employer to show the factor was job-related and consistent with business necessity, nor do those courts require that the employer prove the negative contention—that the factor was not based upon or derived from a sex-based differential in compensation. Similarly none of the other circuit courts allow the employer's factor other than sex defense to be erased by a showing that an alternative employment practice exists that would serve the same business purpose without producing a pay differential between employees. As such, an analysis of circuit court decisions does not support the Hearing testimony that in a majority of courts the PFA would not change the Equal Pay Act.

By introducing the concepts of a job-related and consistent with business necessity requirement into the EPA's factor other than sex defense, the PFA is importing title VII disparate impact law applicable to validating neutral general practices into the EPA which deals with an employer proving that an individual pay difference between employees was based on a factor other than sex. But the EPA is concerned with disparate treatment, not disparate impact, thus it is not appropriate to impose upon an employer a disparate impact burden to disprove an EPA disparate treatment claim. In practice, the job-related and consistent with business necessity burden is placed on an employer when a plaintiff brings a disparate impact claim under title VII, only after a plaintiff has shown that a general qualification standard or test disparately impacts a minority group. In litigation, only after a plaintiff satisfies this specific burden of proof is an employer required to justify the general practice causing the group disparity by proving the group practice is job-related and consistent with business necessity. Both prerequisites to invoking the job-related and consistent with business necessity standard in disparate impact title VII litigation are missing in EPA litigation. Hence requiring an employer prove a decision was job-related and consistent with business necessity is inappropriate under the EPA. In title VII disparate impact litigation, EEOC and Plaintiffs' trial attorneys argue that the employer, at the time the test was implemented was required to validate the test as an important indicator of job performance usually through a formal validation study conducted by an expert in the field.

Both practically and analytically, this disparate impact 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 20 cents an hour more than Employee B because of Employee A's greater experience, training, or education). In disparate impact analysis it is not applied that way (instead it is applied to a general practice, not every application of the practice). In fact, the Supreme Court has noted that disparate impact analysis is incompatible with disparate treatment claims under the Equal Pay Act. *See Smith* v. *City of Jackson*, 544 U.S. 228, 239 n.11 (2005). The statutory language of title VII also explicitly rejects application of the business necessity defense to a disparate treatment claim under title VII (42 USC 2000e–2(k)(2)).[9]

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[7] *Kouba* v. *AllState Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982).

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

[9] Further, damages applicable if an employer is unable to prove job-related and consistent with business necessity under a title VII disparate impact claim are limited to back pay, interest, attorneys' fees and costs. Failure to prove job-related and consistent with business necessity under title VII does not entitle a plaintiff to any punitive or compensatory damages. Whereas, under PFA, a Plaintiff who has not proven discriminatory intent is entitled to unlimited compensatory and punitive damages, in addition to the already available remedies under the EPA of back pay, interest, attorneys' fees and costs and liquidated (or double) damages. The PFA's factor other than sex limitations and damages provisions are internally inconsistent and incongruous with the principles underlying other Federal employment discrimination laws as well as the EPA, and for the reasons stated above, inappropriate to graft onto EPA claims. To make

Applying the PFA's version of the "job-related and consistent with business necessity" test to the EPA, an employer would be required to prove for each wage decision that 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. In addition, an employer would be required to prove that a pay differential was justified at the time that the decision was made.[10] A highly onerous and unrealistic burden to apply to everyday individual pay determinations for all employees is something never before required by any court under the Equal Pay Act. For these reasons and the reasons provided by the Chamber in its submitted written and verbal testimony, the Chamber opposes the proposed modifications to the factor other than sex defense in the Equal Pay Act proposed by PFA.

Issue #2. Should employees and employers be allowed to negotiate pay and should an employer be allowed to consider the market's price for an employee's wage in setting wages?

Hearing Testimony: No, because setting pay based in part on negotiations harms women who do not fare as well as men in pay negotiations and because the free market may be affected by discrimination at other employers.

Supplemental Testimony: Yes, employees and employers should be allowed to negotiate pay and take into consideration the free market's forces in connection with the setting of pay without requiring an employer prove that the market rates set by other employers were not tainted by sex discrimination.

A. HEARING TESTIMONY

Witness EISENBERG: Professor Eisenberg supported the language of the PFA which includes modifying the factor other than sex defense to require an employer prove that the wage paid was "not based upon or derived from a sex-based differential in compensation." The Witness generally criticized all employer's use of prior salaries of employees and market data "as not really any sort of objective market data they're referring to" and "the happenstance of prior salaries" when men and women come from different employers into a new workplace as inappropriate theorizing the different salaries from different employers "absolutely . . . perpetuates the very discrimination the Equal Pay Act was supposed to address". [1:32:36–l :33:39}

B. SUPPLEMENTAL TESTIMONY BY CHAMBER OF COMMERCE

"Neither law nor logic deems the free market system a suspect enterprise."[11]

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 smaller supply, which creates competition for their services. Under the PFA, an employer would not be able to match a competing offer to retain an employee when other employees of the opposite sex in the job category would make less, unless the employer could prove that the competing offer of a competitor was without sex bias—an impossible task. In effect, the PFA creates a presumption of market discrimination by requiring an employer to show that the competing offer or market price is not "based upon or derived from" historic discrimination without any showing by the plaintiff that there is, in fact, any such discrimination. Instead, in effect, the PFA ultimately requires employers to ignore the realities of the marketplace and an employee's expectations regarding pay based on their prior wage rates.

Many circuit courts have noted that neither title VII nor the EPA are substitutes for the free market, which historically determines labor rates.[12] Circuit courts have

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clear, the type of disparate treatment analysis used under the EPA is not the same as that under title VII.

[10] *See* Uniform Employee Selection Guidelines Interpretation and Clarification, *http://uniformguidelines.com/questionandanswers.html*, at Question 50.

[11] *Am. Fed'n of State, Cnty., & Mun. Employees, AFL–CIO (AFSCME)* v. *State of Wash.*, 770 F.2d 1401, 1407 (9th Cir. 1985) (quoting the Circuit Court's opinion written by U.S. Supreme Court Justice Anthony Kennedy). *See also, UAW* v. *State of Michigan*, 886 F.2d 766, 768–69 (6th Cir. 1989).

[12] *Roberts* v. *Segal Co.*, 125 F. Supp. 2d 545, 551 (D.D.C. 2000) (mere failure to rectify market wage disparities in the workplace is not actionable); *Burns* v. *Republic Say. Bank*, 25 F. Supp. 2d 809, 824 (N.D. Ohio 1998) ("[d]iscriminatory intent may not be inferred from the employer's failure to depart from free-market parameters or failure to rectify traditional wage disparities."); *Am. Fed'n of State, Cnty. & Mun. Employees, AFL–CIO (AFSCME)* v. *Cnty. of Nassau*, 799 F. Supp. 1370, 1414 (E.D.N.Y. 1992) (holding that reliance on the market system does not give rise to title VII liability).

also noted that there is no reason to believe that judges or juries are well-equipped to resolve intelligently the issues of the value of an employee's qualifications to the enterprise. The Ninth Circuit Court of Appeals, for example, has noted that Federal discrimination laws were not intended to prevent employers from competing in the labor market.

An employer must be allowed to pay the wages necessary for it to compete in the marketplace for the best qualified applicants. Employees must be allowed to live up to their potential, and earn compensation based on their qualifications and value. Ignoring market competition in a labor market would also erode an employer's ability to develop and implement effective retention policies.

In conclusion, the Chamber's position is that PFA's definition of factor other than sex is substantially different from the definition applied to factor other than sex by circuit courts throughout the United States and is inappropriate. Instead of an "Anything Under the Sun" criticism of the current legislative scheme, the PFA factor other than sex defense is a "Nothing Under The Sun" defense, hurting both valued employees and employers. Mr. Chairman and members of the committee, thank you for the opportunity to provide this supplemental testimony. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

Respectfully submitted,

CAMILLE A. OLSON, *Chair,*
U.S. Chamber of Commerce,
Equal Employment Opportunity Subcommittee.

RESPONSE BY DEBORAH THOMPSON EISENBERG TO QUESTIONS OF SENATOR ALEXANDER AND SENATOR FRANKEN

SENATOR ALEXANDER

Last week, the President attempted to recognize equal pay issues by announcing a new Executive order that prohibits Federal contractors from retaliating against employees who discuss wages with other employees. The President also directed the Department of Labor to collect employee compensation data based on race and sex from Federal contractors. According to the White House, these actions were taken to "ensure equal pay for equal work." Despite this, the American Enterprise Institute (AEI) recently found the median salary in 2013 for female White House staffers was $65,000, compared to $73,729 for male staffers—or a 12 percent pay gap.

Question 1. Assuming that White House staff are covered by the Equal Pay Act if it were passed, would the White House be subject to a lawsuit for paying male staffers more than female staffers, based on the data AEI presented—yes or no? Please provide a detailed explanation of your answer.

Answer 1. The Equal Pay Act was passed in 1963 and the Federal Government is not exempt from its provisions. To determine whether a claim under the Equal Pay Act exists, a plaintiff must identify a comparator of the opposite sex who performs work that is substantially equal in terms of skills, responsibility, and effort, and performed under similar working conditions, and that they are paid different amounts. The AEI data does not specify comparators performing substantially equal work so it is not possible to make any conclusions about whether a *prima facie* claim under the Equal Pay Act exists. It is doubtful, however, because generalized pay disparities among an entire workforce or category of workers, standing alone, are not actionable under the Equal Pay Act (and would not be actionable under the Paycheck Fairness Act if it were passed).

Question 2. On April 7, the President's press secretary, Jay Carney defended the White House's pay gap by saying "[the pay gap] was better than the national average." You state in your written testimony that, "It is simply smart business and good corporate governance for an employer *to be more thoughtful about how its pay awards relate to the job and business*."

Based on your statement, was the White House being thoughtful in its defense of its own pay gap? If the Paycheck Fairness Act became law, could an employer successfully argue their pay gap between male and female employees were "better than the national average" as a defense to avoid liability?

Answer 2. This question misunderstands the requirements of stating a claim under the Equal Pay Act. One cannot sue an employer based solely on an across-the-board "pay gap" among all male and female employees. A plaintiff must identify a specific comparator of the opposite sex who is performing substantially equal work in terms of skills, responsibility, and effort, under similar working conditions.

Claims that fail to identify specific comparators of the opposite sex performing equal work and being paid unequal amounts are not viable, even if the Paycheck Fairness Act passed. Hypothetically speaking, however, if there was a *prima facie* showing that men and women performed substantially equal jobs as defined under the Equal Pay Act (which is not the case with the AEI's generalized aggregate data), the employer would have to show that unequal pay for equal work was caused by one of the four affirmative defenses delineated in the law: (i) a seniority system, (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) any factor other than sex. This analysis focuses on the characteristics of the employee who are being compared and the actual reasons for the differing pay. It does not examine how an employer's generalized gender pay gap compares to that of other employers because such generalized pay disparities are not actionable under the Equal Pay Act or the Paycheck Fairness Act.

Question 3. Further, Mr. Carney contributed the White House's pay gap to the possibility that the lowest paid positions are filled with more women than men. A day later Mr. Carney clarified, "that women are recruited for more junior positions so that they're put in the pipelines for senior positions in the future." Under the Paycheck Fairness Act, is this a legitimate argument in explaining the White House's pay gap?

Answer 3. Again, "pay gaps" generally speaking are not violations of the Equal Pay Act or the Paycheck Fairness Act. In the scenario presented, any claim under the Equal Pay Act (even if amended by the Paycheck Fairness Act) would not satisfy the demanding *prima facie* threshold of showing specific employees of the opposite sex who are performing substantially equal jobs in terms of skills, responsibility, and effort, under similar working conditions, with more pay. Hypothetically speaking, however, if such a claim survived a motion to dismiss or motion for summary judgment by the employer (which is highly unlikely based on my research of Equal Pay Act case law), the employer would prevail if it showed that women were paid less because of differences in the jobs held between the male and female employees being compared.

In other words, paying women who work in junior positions less than men who are working in senior positions is not unlawful under the Equal Pay Act or the Paycheck Fairness Act. In fact, many employers have prevailed in Equal Pay Act cases by showing that plaintiffs were working in lower level or less significant positions than their comparators,[1] or that employees who had the same job title nevertheless had different levels of responsibility or job duties and could not be compared.[2] Many other examples of similar equal pay cases are cited in my scholarship. *See Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 39–41 (2010).

Question 4. The White House has consistently cited the statistic that a woman earns an average of $.77 for every $1 a man earns. The White House's Web site has also said that "there is good evidence that discrimination contributes to the persistent pay disparity between men and women." Do you agree with that statement? If so, is the White House's pay disparity a signal that the Obama administration discriminates against female staffers?

Answer 4. I agree that there is evidence that intentional discrimination contributes to the persistent pay gap between men and women performing similar work, even after controlling for so-called "choice" factors such as occupational category, job position, skills, responsibility, performance, geographical location, etc. As I have explained in my research, I think that there are other factors that have contributed to pay differentials among employees who are performing substantially equal jobs and have comparable qualifications, experience, and performance, including pay secrecy combined with ambiguous or wholly subjective pay practices that tend to disadvantage women (see my answer to Senator Franken's second question above and my written testimony).

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[1] *See, e.g., Stopka* v. *Alliance of Am. Insurers*, 141 F.3d 681 (7th Cir. 1998) (finding that a female executive was not part of the "core business" like her male comparators); *Goodrich* v. *Int'l Bhd. of Elec. Workers*, 815 F.2d 1519 (D.C. Cir. 1987) (finding that male union contract analysts performed tasks that were "significant and essential to the operations and mission" of the union).

[2] *See, e.g., Wheatley* v. *Wicomico County*, 390 F.3d 328 (4th Cir. 2004) (holding that male and female department heads of different agencies could not be compared under Equal Pay Act); *Berg* v. *Norand Corp.* 169 F.3d 1140 (8th Cir. 1999) (holding female department manager did not perform equal work as all other male department managers, who earned on average $6,000 to $8,000 more); *Sprague* v. *Thorn Ams., Inc.*, 129 F.3d 1355 (10th Cir. 1997) (holding assistant manager jobs not equal and could not be compared under Equal Pay Act); *Ratts* v. *Bus. Sys. Inc.*, 686 F. Supp. 546 (D.S.C. 1987) (female vice president could not be compared to four other male vice presidents).

Equal Pay Act cases are extremely fact-intensive. Whether a particular employer's overall pay disparity among its entire workforce signals facially unlawful discrimination against women under Federal law will depend upon whether there are male comparators who perform substantially equal jobs in terms of skills, responsibility, and effort and receive more pay. This question does not provide any facts of pay differentials between specific employees performing equal jobs that would suggest unlawful discrimination under the Equal Pay Act.

SENATOR FRANKEN

Question 1. In your testimony, you highlight the importance of addressing the pay gap for working mothers, their families, and their children. As you note in your testimony, half of all mothers work full-time and more and more families are relying on two earners. At the same time, more and more women are attaining college and advanced degrees. Yet the pay gap has persisted. Why hasn't more education been enough to close the wage gap?

Answer 1. That is a good question. In my scholarship, I explore how women who earn higher levels of education and professional status tend to experience a larger pay gap than women who work in more standardized, lower-wage jobs. I think there are several factors that contribute to the problem. First, many women experience a "motherhood penalty" in their wages, with working mothers likely to receive lower pay and working fathers likely to receive higher wages. Second, compensation for employees in upper-level and professional jobs is more likely to be set through ambiguous and wholly subjective processes that tend to disadvantage women's pay. Pay disparities tend to be the greatest for discretionary elements of pay, such as bonuses and stock options, which comprise larger portions of compensation for women in some higher-level and professional occupations. Based on my research and experience, the more subjective, informal, and unguided the compensation-setting process—which might be the case for many women with higher levels of education—the more likely there will be unjustified pay disparities between men and women who are performing substantially equal jobs. My answer to your next question elaborates on why that might be happening.

Question 2. In her testimony, Ms. Olson stated that,

> "If enacted, the Act would amend the EPA significantly in substantive and procedural ways, all upon a fundamental yet unsubstantiated premise—namely, that throughout the United States of America, all unexplained wage disparities existing between men and women are necessarily the result of intentional discrimination by employers."

However, in your testimony, you state that it is your "firm belief that most employers try to comply with the law and do not set out to intentionally discriminate against women." Can you comment on the argument that the Paycheck Fairness Act is based on an erroneous premise that most pay discrimination is intentional on the part of employers?

Answer 2. It is shocking that some cases still involve blatant sexist attitudes that men deserve more pay as the family "breadwinners," or that mothers should not be working. But there are other complex dynamics that can cause pay discrimination even among otherwise fair-minded employers.

First, my scholarship has explored how unequal pay for equal work happens in the modern economy because of pay secrecy combined with compensation practices that are overly subjective or arbitrary. Pay may be based on the happenstance of prior salaries at previous employers, rather than the qualifications and performance of employees in the new job. It's more typical today for compensation for some jobs to result from a negotiation process that tends to result in lower pay for women. There are complex cognitive, psychological, and social factors at play that can place women in Catch–22 situations when it comes to negotiating their salaries. Women are negotiating in the larger context of societal norms and expectations about gender roles. Sometimes women are prevented from negotiating at all (as Kerri Sleeman testified happened to her and as women in other equal pay cases report). Other times, if women negotiate, or negotiate too "hard," they may violate the notion that women should be "friendly and agreeable," which can penalize them in the workplace. Studies have shown that women who have identical qualifications and negotiate just as skillfully as men will sometimes wind up with lower starting salaries.

Second, the more ambiguous and ill-defined pay processes are, the more likely women's pay will be lower because of unconscious biases that can infect pay decisions even in the absence of what we might consider "intentional" discrimination. Working fathers tend to be rewarded with more pay, and working mothers tend to

earn less because of deeply ingrained, subconscious stereotypes that wives perform "extra" work and their husbands are the family "breadwinners," or that working mothers will have more "work-life" conflict and not be as committed to working hard, even when that is not true.

To top it all off, as we know from the stories of Lilly Ledbetter, Kerri Sleeman and many others, pay secrecy makes most gender pay discrimination hidden from sight. Pay disparities may start small and snowball over time, undetected and undeterred.

I think the Paycheck Fairness Act starts to address some of these dynamics that can cause unequal pay for equal work even in the absence of intentional sex-based animus by: (1) allowing employees to discuss wages and compare notes about what employees in similar positions are paid without retaliation; (2) requiring that the "any factor other than sex" defense under the Equal Pay Act relate to business and job-related factors (rather than, for example, the happenstance of salaries at previous employers or vague claims about "market forces"); (3) providing negotiation training to help address the Catch–22 in which women sometimes find themselves when they negotiate pay; and (4) requiring reporting of wage data by sex so that employers will be more aware of, and hopefully motivated to correct, unjustified pay disparities before they turn into a lawsuit.

SEYFARTH SHAW LLP,
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April 29, 2014.

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Re: Response to Supplemental Questions for April 1, 2014 Senate HELP Committee Hearing: "Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act"

DEAR CHAIRMAN HARKIN, SENATOR ALEXANDER AND SENATOR MIKULSKI: This Response provides answers to Supplemental Questions provided to the undersigned following the April 1, 2014 Hearing, and is presented on behalf of the United States Chamber of Commerce by Camille A. Olson. It is provided to the Senate Committee on Health, Education, Labor, and Pensions regarding S. 84, the Paycheck Fairness Act ("PFA"), in conjunction with the hearing entitled "Access to Justice: Ensuring Equal Pay with the Paycheck Fairness Act" on April 1, 2014. This response provides answers to four questions, as set forth below.

Question 1. Assuming that White House staff are covered by the Equal Pay Act (as amended by the Paycheck Fairness Act if it were passed), would the White House be subject to a lawsuit for paying male staffers more than female staffers, based on the data AEI presented—yes or no?[1] Please provide a detailed explanation of your answer.

Answer 1. No. The AEI median pay statistic by gender compares the pay of all White House female staffers with male staffers regardless of their job. Because the White House's "88 cents gender pay gap" does not compare the pay rates of employees performing equal work requiring equal skill, effort, and responsibility, under

[1] For purposes of the answers provided to the four Supplemental Questions, the undersigned assumes, as the questions request, that the White House is covered by the Equal Pay Act (as amended by the Paycheck Fairness Act, if passed).

similar working conditions ("equal work"), it is irrelevant to a plaintiff's Equal Pay Act ("EPA") claim (even if amended by the PFA). Under the EPA and PFA, the only relevant wage comparisons are between employees performing equal work. This is true even though, overall, the median wage statistics show that the White House pays male staffers more than female staffers.

However, as explained below, the White House is subject to a lawsuit for paying female White House staffers in the positions of Calligrapher, Associate Counsel and Deputy Director of Scheduling less than male staffers in those positions, if the male and female employees in a position perform equal work. No amendment to the EPA is necessary for these female White House staffers to bring this lawsuit under the EPA.

AEI ANALYSIS OF MEDIAN DATA DOES NOT SUPPORT AN EPA OR PFA CLAIM AGAINST THE WHITE HOUSE

Relying on salary data made public by the White House in its 2013 Annual Report to Congress, the American Enterprise Institute ("AEI") data described an 11.5 percent "gender pay gap" in favor of male White House staffers based on a comparison of median salary with female White House staffers. According to AEI, female White House staffers' median salary is $65,000; whereas male White House staffers' median salary is $73,729. The median female salary figure is 88.16 percent of the median male salary figure. The median is described as follows: without any consideration of job responsibilities performed, qualifications, seniority, or hours worked, one-half of female White House staffers are paid a salary exceeding $65,000, and one-half of male White House staffers are paid a salary exceeding $73,729.

AEI's data—describing differences in the median salary of White House staff, depending on their sex—is not relevant to a claim of pay discrimination, under either the EPA or the EPA as amended by the PFA ("PFA"). Under both the EPA and the PFA, a plaintiff must show unequal wages were paid to employees of the opposite sex who performed equal work. Because the White House's "gender pay gap" does not compare the pay rates of employees performing equal work, it is irrelevant to a plaintiff's EPA claim. It is impossible to tell from this specific statistic alone—median salary—whether employees performing the same work are paid equally. Nor is there any information that informs the AEI data as to whether any wage differences amongst employees who are performing the same work are the result of factors other than sex such as seniority, experience, education or merit. As a result, based on the AEI analysis of median data alone, the White House would not be subject to a lawsuit under the EPA.

The White House has repeatedly referenced a 77 cent median pay statistic as evidence of sex discrimination by employers in the United States.[2] Inconsistently, responding to AEI's analysis showing the White House's own "gender pay gap," White House Press Secretary Jay Carney admitted the median wage statistic was not evidence of sex discrimination, explaining that a comparison of median pay rates for employees by gender without regard to their jobs and other relevant factors is not evidence of pay discrimination for any employee. Specifically, Mr. Carney stated:

> And here at the White House equal pay legislation deems that there should be equal pay for equal work, and that's what we have—men and women in equivalent roles here earn equivalent salaries . . . I think that those studies [comparing median wages by gender, including, AEI], look at the aggregate of everyone on staff, and that includes from the most junior levels to the most senior. . . . [W]omen who do the same work as men have to be paid the same, there is no question that that is happening here at the White House at every level.[3]

In short, discussions of a raw median wage gap by gender—whether 77 cents in general census data referenced repeatedly by the White House and proponents of

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[2] President Obama has repeatedly referenced a 77 cents median pay statistic as evidence of sex discrimination by employers. Those references include, but are not limited to his: June 4, 2011 remarks on equal pay for equal work, February 18, 2013 State of the Union Address, January 28, 2014 State of the Union Address and April 8, 2014 remarks on equal pay for equal work. Meanwhile, as noted *infra*, at page 8, Betsey Stevenson, a Member of the White House Council of Economic Advisers, recently admitted that the 77 cents figure is misleading, stating that, "There are a lot of things that go into that 77 cents figure, there are a lot of things that contribute and no one's trying to say that it's all about discrimination."

[3] *See* Press Release, White House Press Secretary Jay Carney, Daily Press Briefing (Apr. 7, 2014), *http://www.whitehouse.govi-the-press-office/2014/04/07/daily-press-briefing-press-secretary-jay-carney-040714.*

the PFA[4]—or 88 cents in White House AEI data—does not inform the conversation of whether private or public employers are paying women unequal wages for equal work.

A DETAILED ANALYSIS OF AEI'S WHITE HOUSE DATA BY JOB CLASSIFICATION SHOWS FEMALE STAFF IN CERTAIN POSITIONS HAVE A PRIMA FACIE CASE OF SEX DISCRIMINATION UNDER THE EPA

Female White House staff in the positions of Calligrapher, Associate Counsel and Deputy Director of Scheduling earn less than males performing work in their same job classification. As a result, if they perform equal work as their male counterparts, these White House staffers would meet their *prima facie* burden under the current EPA, and the White House would be subject to lawsuits under the current EPA for paying them lower wages than males in the same job classification.

Under the EPA and PFA, an appropriate review of the available data requires comparison of salaries by sex within jobs requiring equal work. Although detailed information relating to job responsibilities and qualifications is not available, relying on the White House's job classifications leads to the following examples where the White House is subject to EPA claims for wage discrimination—under the current EPA (as well as the EPA as amended by the PFA).

- The White House employs 2 individuals in the position of "Calligrapher"—a male whose annual salary is $94,372 and a female whose salary is $85,953. Assuming the Calligraphers perform equal work, the White House is subject to a lawsuit by the female White House Calligrapher being paid 8.9 percent less than her male counterpart.
- The White House employs 2 individuals in the position of "Associate Counsel"—a male whose annual salary is $134,999 and a female whose salary is $112,000. Assuming the Associate Counsels perform equal work, the White House is subject to a lawsuit by the female White House Associate Counsel being paid 17 percent less than her male counterpart.
- The White House employs 3 individuals in the position of "Deputy Director of Scheduling"—two males, both paid a salary of $68,000 and a female whose salary is $60,000. Assuming the Deputy Directors of Scheduling perform equal work, the White House is subject to a lawsuit by the female Deputy Director of Scheduling being paid 11.8 percent less than her male counterparts.

Whether any of these female White House staffers will be successful in their claims of unequal pay for equal work depends on whether the White House can satisfy the very different burdens under the EPA and PFA, as described below. What is clear is that the female White House staffers have a *prima facie* case of sex discrimination today, under the EPA, if they perform equal work to those male staffers in the positions of Calligrapher, Associate Counsel or Deputy Director of Scheduling.

Question 2. On April 7, the President's Press Secretary, Jay Carney, defended the White House's pay gap by saying "it [the pay gap] was better than the national average." Deborah Thompson Eisenberg stated in her written testimony that, "it is simply smart business and good corporate governance for an employer to be more thoughtful about how its pay awards relate to the job and business."

Based on Ms. Eisenberg's statement, was the White House being thoughtful in its defense of its own pay gap? If the Paycheck Fairness Act became law, could an employer successfully argue their pay gap between male and female employees were "better than the national average" as a defense to avoid liability?

Answer 2. No. Under the current EPA and the PFA, a favorable comparison to the "national average" is not a legitimate employer defense to a *prima facie* case of sex discrimination in the White House's pay practices.

Assuming we are discussing equal work as defined by the EPA, a pay disparity may not be defended by asserting "it's better than the national average." Under the EPA, once equal work and unequal pay are established, the burden shifts to the employer to show the disparity is owing to (a) a seniority system, (b) a merit system, (c) a system based on quantity or quality of production, or (d) a factor other than sex.

A meaningful evaluation of the thoughtfulness of the White House's defense of its own pay gap also necessitates a discussion on what constitutes thoughtfulness in compensation practices. Certainly, thoughtful consideration of how pay awards re-

[4] The 77 cents statistic was referenced at the April 1, 2014 Senate HELP Committee Hearing on Equal Pay during Senator Warren's testimony (1:29:44). Additionally, Witness Eisenberg referenced the statistic in her written testimony at p. 6.

late to the job and the business is a component of "smart business and good corporate governance."

Yet, the PFA is far more likely to hinder, rather than promote, smart business and good corporate governance. Imposing narrow limitations on compensation decisions impedes employers' ability to exercise business judgment in formulating and executing human resource strategy. Such edicts are premised upon outdated and simplistic models of the relevant factors encompassed by compensation decisions, harkening back to earlier social and economic structures where a greater proportion of the job market was comprised of unskilled laborers. Today's business environments are becoming increasingly complex as we face continuing globalization of business and technology-driven transformations to our labor markets, and in turn, a greater emphasis on knowledge workers and information flow. In short, a myopic, isolated approach to analysis of each disparate job is inconsistent with the demands of our changing workplaces.

Contemplating a hypothetical defense to an EPA claim based on the pay disparity in the White House Associate Counsel position, and a comparison of current law to the proposed PFA, sheds light on the faulty mechanics of the PFA, particularly in its proposed amendments to the factor other than sex defense. Public salary data indicates that the male Associate Counsel is a detailee, rather than an employee of the White House,[5] and that immediately before his current position of Associate Counsel, he was employed as an Assistant Deputy Attorney General in the Department of Justice (with an accompanying Senior Executive Service Level, and salary range between $119,554 and $179,700).[6] Thus, it appears the male White House Associate Counsel was detailed from the Department of Justice on a temporary or detail White House assignment (and is being paid based on his DOJ salary). Under the EPA, the factor other than sex defense allow employers the freedom to institute a salary retention policy of maintaining employees' current salaries upon temporary changes of assignment. If the 17 percent pay disparity in favor of the male Associate Counsel did indeed arise from the detailee's regular (or former) rate of pay in his standing position with the Department of Justice, the White House could advance a "factor other than defense" under the EPA.[7]

Whereas, if the PFA was enacted, even if the White House could prove that a retention policy concerning salaries of detailees caused the pay disparity, the White House would not meet its burden with respect to an affirmative defense to the wage disparity if it stopped there. If the pay disparity arose from a higher salary paid to the male detailee in his standing position by the Department of Justice—a factor independent of the detail assignment—the White House would most likely fail to make a showing of "job-relatedness with respect to the position in question." Whether the White House could advance a theory of business necessity centered on its need to detail this specific male to the Associate Counsel position is also doubtful. As to the required showing that the disparity is not based upon or derived from a sex-based differential in compensation, it is also doubtful that the White House would be inclined to attempt, or even could undertake, an investigation into the salary history of the male detailee and what factors controlled his compensation in positions before the detail—another requirement under the PFA for the White House to justify the wage disparity.[8]

Question 3. Further, Mr. Carney attributed the White House's pay gap to the possibility that the lowest paid positions are filled with more women than men. A day later Mr. Carney clarified, "that women are recruited for more junior positions so that they're put in the pipelines for senior positions in the future." Under the Paycheck Fairness Act, is this a legitimate argument in explaining the White House's pay gap?

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[5] White House, 2013 Annual Report to Congress on White House Staff (Jun. 28, 2013).

[6] *See* Office of Personnel Management, 2011 Pay Tables for Executive and Senior Level Employees (2011), *http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2011/executive-senior-level/*.

[7] Such a scenario would be analogous to the fact pattern in *Taylor* v. *White*, 321 F.3d 710 (8th Cir. 2003), where the Eighth Circuit found that such a retention policy qualified as a factor other than sex, after undertaking careful examination of the facts, noting that "a case-by-case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect when it adopted the "factor other than sex" affirmative defense.

[8] And, finally, even if the White House satisfied all of these defenses, it remains liable under the PFA for sex discrimination if the female Associate Counsel shows that the White House could have utilized another employment practice to minimize the pay disparity—i.e., increased her pay rate.

Answer 3. For the reasons set forth in response to Question 1, the "88 cent pay gap" is irrelevant to an EPA or PFA claim. Thus, to answer this question, it must be put into the framework of the EPA and PFA, as set forth below.

The White House's defense is, in essence, that the median pay of female White House staffers is less than the median pay of male White House staffers due to diversity efforts at the White House that favor hiring women into entry level positions that pay less. In other words, this is the factor other than sex that explains the disparity.

Under the EPA, assuming an 88-cent pay gap between men and women performing equal work at the White House, Mr. Carney's explanation may be a legitimate reason other than sex that explains why the 88-cent pay gap between men and women exists in certain circumstances. If the White House hired women into a job classification that met the minimum qualifications, but who had less qualifications than men hired into the job classification, lesser qualifications would be a legitimate reason for paying the women in the job classification less than men in the job classification.

Under the PFA, assuming an 88-cent pay gap between men and women performing equal work at the White House that occurred as a result of hiring women to fill positions who met the minimum qualifications, but who had less qualifications than men hired into the same job, Mr. Carney's explanation would not satisfy an employer's burden of proving the reason was job-related or consistent with business necessity. For example, Mr. Carney's articulated reason was not related to the specific job at issue, but an articulated goal of increasing gender diversity in other higher level jobs at the White House. And, Mr. Carney has not shown that the hiring of men with qualifications above the minimum was a "business necessity," nor that paying them a higher rate of pay for those higher qualifications was necessary. Mr. Carney's explanation does not satisfy this burden.

In addition, if a female staffer shows 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" Mr. Carney's proffered reasons would not shield the White House from PFA liability. Here, for example, if a female staffer shows that the White House could have paid the same higher salary to all staffers in a job classification who met the minimum qualifications even though they did not have the superior classifications of male staffers within the job classification, Mr. Carney's articulated reason would not shield the White House from PFA liability.

Taken at face value, Mr. Carney's explanation of the wage gap in the White House is a plausible explanation for why the 12-cent pay gap might exist despite the absence of gender discrimination. Indeed, many private sector companies have adopted gender-balance objectives similar to that offered by Mr. Carney's explanation. A 2012 white paper by McKinsey & Company, prepared for the *Wall Street Journal*, validates the funnel approach described by Mr. Carney as a valid path to success in advancement of female employees to senior positions within the organization.[9] Unfortunately, the diversity goals of the White House articulated by Mr. Carney are not, in and of themselves, a legitimate employer defense to a claim under the PFA.

Question 4. The White House has consistently cited the statistic that a woman earns an average of $.77 for every $1 a man earns. The White House's Web site has also said that "there is good evidence that discrimination contributes to the persistent pay disparity between men and women." Do you agree with that statement? If so, is the White House's pay disparity a signal that the Obama administration discriminates against female staffers?

Answer 4. The answers to all three subparts of Question #4 is No.

First, the median statistics cited do not show that women earn $.77 for every $1 a man earns for equal work.

Second, there is no evidence that employment discrimination caused pay disparities between men and women that are present in national median wage statistics data.

Third, as explained in response to Question #1 above, the White House's median pay disparity between female and male White House staffers of "88-cents to a dollar" is irrelevant to the question of whether men and women are paid equally for equal work, as White House representative Carney was forced to admit when the

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[9] Joanna Barsh and Lareina Yee, *Unlocking the Full Potential of Women at Work*, McKinsey & Company for The *Wall Street Journal* (Apr 30, 2012). Retrieved from *http://www.mckinsey.com/careers/women/~/media/Reports/Women/2012%20WSJ%20Women%20in%20the%20Economy%20white%20paper%20FINAL.ashx*.

White House's compensation practices were analyzed through the same median statistic. The national median pay statistic of "88-cents to a dollar" is as irrelevant to a claim under the EPA and PFA as is the White House median pay statistic of "77-cents to a dollar" figure is to a claim under the EPA and PFA.

The "77-cents to a dollar" statistic is irrelevant to the question of whether a woman makes the same wage as a man for equal work. Serious scholarly studies have discarded reliance on the median wage gap as a meaningful barometer for women's economic prospects for almost two decades. Academic studies have long found much stronger correlations in factors including, but not limited to, individual choices relating to education, occupation, childbearing, childcare, and human capital variables including quantity, quality, and substance of education and experience. These correlations also support the continuing narrowing of the adjusted wage gap as women reap continued benefits from increased access to education and other job-related training. More recently, some have cited gender disparities, both in willingness to engage in negotiation and overall effectiveness in negotiation, as factors that contribute toward the continued existence of the wage gap.

Instead, both the "77-cents to a dollar" and the "88-cents to a dollar in the White House" gaps are median ratios. The nationwide figure represents the median from wages earned by all full-time, year-round female workers and compares it to the median from wages earned by all full-time, year-round male workers. The raw wage gap does not consider: quantity of work performed, such as hours worked; nature of work performed, such as occupation, sector, industry, and attendant market factors; quality of work performed, such as output, results delivered, or other performance metrics; human capital factors like training, education and experience; or other factors including union status and attendant protections. Like the 77-cent figure, the 12-cent gap in the White House is a median ratio, and is not a meaningful indicator of discrimination in the White House recruitment or compensation practices. The mere existence of a pay disparity along gender lines in a workforce that is heterogeneous in job responsibilities as well as qualifications, experience, and performance cannot support a credible presumption of discrimination.

Neither the White House nor the proponents of the PFA have ever produced any empirical evidence that "discrimination contributes to the persistent pay disparity between men and women." The idea that the persistence of an aggregated showing of disparity—which only indicates unequal outcomes between men and women in an incredibly complex and interrelated environment of numerous self-interested actors—is derived from employer discrimination is unsupported in scientific literature. Decades of social science research have produced varying estimates of the wage gap and advanced a number of differing interpretations as to the cause of any wage gap. In the entire body of academic literature on the wage gap, two clear themes emerge on which almost all scholars agree: (1) numerous, interrelated factors contribute to the persistence of wage disparities, and (2) precise accounting and portioning of the present wage gap to various causal factors present a very difficult challenge. In other words, the "good evidence" cited by the White House is nothing more than a product of inductive reasoning, and the unsupported hypothesis that in the absence of other explanations, discrimination *must* be the cause.

Despite its prominence in the national discourse, the raw wage gap contributes very little to the exploration of the employment opportunities currently available to women or the endeavor to support their increased participation and advancement in the workplace. The current administration's Council of Economic Advisors' member, Betsey Stevenson, recently admitted the "77 cents to a dollar" statistic often quoted by proponents of the PFA does not represent differences in pay between men and women for equal work and apologized for any earlier comments that may have been misleading:

> **If I said 77 cents was equal pay for equal work, then I completely misspoke, so let me just apologize and say that I certainly wouldn't have meant to say that** . . . Seventy-seven cents captures the annual earnings of full-time, full-year women divided by the annual earnings of full-time, full-year men. **There are a lot of things that go into that 77-cents figure, there are a lot of things that contribute and no one's trying to say that it's all about discrimination**, but I don't think there's a better figure.[10] (emphasis added)

[10] Ashe Schow, *White House: The '77 Cents' Wage Gap Figure Isn't Accurate, But They'll Use It Anyway,* Washington Examiner (Apr. 7, 2014), *http://washingtonexaminer.com/white-house-the-77-cents-wage-gap-figure-isnt-accurate-but-theyll-use-it-anyway/article/2546914*.

Ms. Stevenson's remarks make crystal clear that the raw wage gap of "77 cents" fails to meet the standards of pay discrimination as it has been always defined: *equal pay for equal work*.

Serious scholarly studies have discarded reliance on the median wage gap as a meaningful barometer for women's economic prospects for almost two decades.[11] Academic studies have long found much stronger correlations in factors including but not limited to individual choices relating to education, occupation, childbearing, childcare, and human capital variables including quantity, quality, and substance of education and experience. These correlations also support the continuing narrowing of the adjusted wage gap as women reap continued benefits from increased access to education and other job-related training.

Misapplication of statistics like the 77-cent figure distorts the economic realities facing the labor force and serves to impede both private-sector and public-sector endeavors to promote advancement of equal opportunities. Such statistics do not warrant a presumption of rampant discrimination, nor do they imply that existing legal remedies and protections are not working, particularly when paired with an overreliance on the judicial system as a panacea for real or imagined social ills. Scholars of law and economics have warned against "economic social consequences that are generated by the antidiscrimination laws."[12] In particular, laws that impose controls on labor pricing may bring greater capacity for unintended consequences in contrast to statutes governing access to employment.

For the same reason that the existence of a 12-cent gap fails to prove discrimination by the White House, the 23-cent gap in our national labor force does not provide sufficient evidence to presume either a widespread infection of discrimination by employers or the obsolescence of the anti-discrimination statutes in effect today.

Respectfully submitted,

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U.S. CHAMBER OF COMMERCE,
EQUAL EMPLOYMENT OPPORTUNITY SUBCOMMITTEE.

[Whereupon, at 4:29 p.m., the hearing was adjourned.]

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[11] *See, e.g.,* Francine Blau and Lawrence Kahn, National Bureau of Economic Research, *Gender Differences in Pay* (June 2000) (attributing a majority of the wage gap to differences in human capital variables, industry, occupation, and union status based on a 1997 study); Howard J. Wall, The Regional Economist, *The Gender Gap and Wage Discrimination: Illusion or Reality* (Oct. 2000) (finding a 6.2-cent unexplained wage difference after controlling for human capital variables, differences in industry, occupation, and union status); Diana Furchtgott-Roth & Christine Stolba, *Women's Figures: An illustrated Guide to the Economic Progress of Women in America* (Aei Pr; 2 Sub edition 1999) (finding that of childless workers aged 27 to 33, women's median hourly earnings were 98 percent of men's median hourly earnings, before adjusting for differences in human capital and other variables, which would presumably further narrow the 2-cent gap)

[12] Richard A. Epstein, *Forbidden Ground: The Case Against Employment Discrimination Laws* (First Harv. U. Press, 1995) (arguing that even in the presence of discrimination, market forces pressure discriminating employers to hire from "the disfavored pool").