No. 15-15623

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRUCILLA COOPER,

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, San Francisco Division
Civil Action No. 3:13-CV-02870-JSC

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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February 1, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

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FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members or their counsel contributed money that was intended to fund the preparation or submission of this brief.

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The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* contingent upon granting of the accompanying motion for leave to file.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the

interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Most of *amici*'s members are employers, or representatives of employers, subject to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, as amended by the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and other federal employment laws and regulations. As representatives of potential defendants to EPA compensation discrimination charges and lawsuits, *amici*'s members have a substantial interest in

the issue presented in this matter regarding the proper scope of the statute's "any other factor than sex" affirmative defense. The court below correctly held that a pay disparity between a female employee and her three male co-workers was based on application of a legitimate, facially nondiscriminatory compensation system, and thus was justified by factors "other than sex" for EPA purposes. It also properly rejected Plaintiff-Appellant's contention that the mere existence of the pay disparity over a period of time was sufficient to give rise to an EPA violation, without regard to its legitimate, nondiscriminatory, business-related cause.

As national representatives of many professionals and businesses responsible for compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC, the Chamber, and NFIB collectively have participated as *amicus curiae* in hundreds of cases before the U.S. Supreme Court, this Court, and every other federal court of appeals involving significant issues of employment law. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

Defendant-Appellee United Airlines, Inc. (United) employs approximately 80,000 employees throughout the world. It maintains standard policies and practices governing employee compensation decisions. Appellee Brf. at 5. While United's pay practices are applied consistently to all employees, the rules regarding what amount employees are paid varies depending on a number of factors, including whether they are hired from outside the company or are promoted from within, or whether they are being promoted from a position governed by a collective bargaining agreement or into one that supervises union employees. *Id.*

Like many companies, United generally prefers to promote from within. Internal promotions are made with the understanding that the individual often does not fully possess the knowledge, skills and experience needed to perform all facets of the job effectively on day one. *Id.* at 6. For that reason, the salaries of internal candidates promoted from one position to another typically are set at the low end of the salary range. *Id.* Where an individual is promoted into a job supervising union employees, United's practice is to ensure that the new supervisor's salary is not less than that of his or her highest-paid direct report. *Id.*

For individuals who are promoted from a union to management job and whose previous salary is lower than the minimum for the new position, United's

practice is to raise their pay by ten percent or to the minimum within the relevant salary band, whichever is larger. *Id.* at 7-8. The salary of a current employee moving from one management position to another is set based on an analysis of his or her current grade level and salary range for the new position. *Id.* at 6. United's pay-setting practices are different for external hires, who are selected *because* they possess all the requisite skills, knowledge and experience to fully perform the job on day one. *Id.* at 6-7. For that reason, the salary of an external hire is set near the mid-range for the particular position in question. *Id.*

Plaintiff-Appellant Drucilla Cooper began her employment with United in 1997 as a Security Officer, a position governed by collective bargaining agreement. *Cooper v. United Air Lines, Inc.*, 82 F. Supp. 3d 1084, 1099 (N.D. Cal. 2015). Just prior to her promotion in 2002 to the position of Supervisor-Security Officers, Cooper's salary was $28,109.78 – well below the $42,700 to $72,500 salary range for her new position. *Id.* Accordingly, when she was promoted, United increased her compensation by 52% to $42,700, the minimum within the range. *Id.* Thus, in accordance with United's compensation policies, Cooper's new pay was determined based on her status as a current employee (as opposed to an external applicant) promoted from a unionized position into one responsible for supervising unionized employees.

The salaries of Cooper's two male co-workers at the time, William Knight (who supervised the swing shift) and Martin Del Campo (who supervised the graveyard shift) were set in accordance with that same compensation practice. *Id.* at 1093. Knight was a 2008 external applicant hired at a salary of $58,008, which was then the mid-range point for the Supervisor position. *Id.* at 1100. Del Campo began working for United in 1989 as a mechanic, a union job that had a higher pay scale than that for security officer. *Id.* Del Campo was promoted to the position of Team Coordinator – Plant Equipment Maintenance[1] in 1996 at a salary of $51,336. After his position was eliminated in 2003, he took a 12.5% pay reduction to move into the Security Supervisor job. *Id.*

United merged with Continental Airlines in 2010, resulting in a companywide restructuring that affected a substantial number of the combined company's 80,000 employees, including Cooper and her male co-workers. *Id.* at 1093. Among other things, the Supervisor-Security Officer position description was revised and the job title changed to Supervisor-Base Maintenance Security. *Id.* at 1094. All three incumbents, including Cooper, were required to reapply to the new position under a post-merger talent selection process (the "TAS"). *Id.*

[1] The position was retitled Supervisor – Plant & Equipment Maintenance in 2000. *Id.* at 1100.

Cooper, Knight, Del Campo and another internal candidate, Russ Faultner, applied. *Id.* Knight and Del Campo were rehired, but Faultner was selected over Cooper. *Id.*

Faultner began his employment with United in 2009 as Manager of the Base Distribution, Warehouse and Logistics Department, a position that was two grades higher than the Security Supervisor job. *Id.* He applied for the new Supervisor – Base Maintenance Security position after his was eliminated. *Id.* Under post-merger revisions to United's compensation practices, Faultner's $80,004 salary was not reduced, i.e., was "red-circled," when he was selected for the new Supervisor role.

After not being selected for one of the new Supervisor-Base Maintenance Security positions, Cooper elected to return to her previous position as Security Officer at a salary of $56,112. *Id.* On June 21, 2013, she filed an action in federal court asserting among things that the manner in which United set her initial pay caused gender-based salary disparities that could not be justified by application of its compensation practices, in violation of the Equal Pay Act, 29 U.S.C. § 206(d). *Id.* at 1095.

The district court found that United had in place detailed policies regarding compensation of internal and external hires and that the policies were a "legitimate neutral business reason justifying the pay differential." *Id.* at 1102. Finding that

United's application of its compensation policies and practices to Cooper constituted a reasonable, non-sex factor for the pay differential, the trial court entered summary judgment in United's favor. *Id.* at 1115. This appeal ensued.

SUMMARY OF ARGUMENT

The decision below should be affirmed. United's application of gender-neutral compensation practices constituted a factor other than sex, thus justifying any incidental differential in pay between Cooper and her three male co-workers.

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), prohibits employers from paying men and women working at the same establishment and in the same job different rates of pay because of sex. The statute contains four affirmative defenses to employer liability, including that a pay differential is justified by "any other factor other than sex." 29 U.S.C. § 206(d)(1). Thus on its face, the EPA makes gender-based pay differentials unlawful, while expressly permitting those that are based on factors other than sex.

Consistent with those legal requirements, United set employee compensation based on facially-neutral criteria such as, for instance, whether the individual is an external hire or internal promotion, is being promoted into a position supervising represented employees, or is voluntarily moving into a lower-paid position due to position elimination. Those facially-neutral compensation criteria were applied consistently in setting the initial salaries of Cooper and her male co-workers – each

of whom fell into four different categories: internal promotion from union to supervisor job (Cooper); external hire (Knight); transfer into a lower-paying position (Del Campo); and post-merger position downgrade with no reduction in pay, i.e., "red circling" (Faulkner). Because the difference in pay between Cooper and her male comparators was based on "factors other than sex," the differentials do not implicate the EPA.

Despite the entirely legitimate basis for the pay differential in this case, Cooper and *amicus curiae* EEOC strain to find some independent basis for establishing an EPA violation, arguing for instance that the mere fact men were paid more "to perform Cooper's job strongly suggests that United had no legitimate business reason for failing to equalize her pay with that of her other male colleagues…" EEOC Brf. *Amicus Curiae* at 23. Yet employers are under no legal obligation to ensure across-the-board pay parity among employees under the EPA. In fact, no such obligation exists under *any* federal law, including those laws that impose a duty to take *affirmative action* to ensure equal employment opportunity.

In addition to being lawful, sound policy reasons exist for permitting employers to differentiate in compensation among employees, including to promote excellence and discourage mediocrity, as well as to remain competitive in a global economy. Mandating sex-based equity adjustments in the manner urged

by Cooper and the EEOC defies logic and would undermine sound and proven business practices.

ARGUMENT

I. THE CONTINUING EFFECT OF A GENDER-NEUTRAL COMPENSATION POLICY IS A LEGITIMATE JUSTIFICATION FOR A PAY DISPARITY UNDER THE EQUAL PAY ACT

In this appeal, Cooper – supported by the U.S. Equal Employment Opportunity Commission (EEOC) as *amicus curiae* – argues that summary judgment was improper because in her view, United's application of well-established, facially neutral compensation practices failed to adequately explain why her pay as Supervisor – Security Officers remained less than that of her male co-workers. Yet this argument rests on a legally flawed premise – that employers have an affirmative obligation under the Equal Pay Act to eliminate disparities in pay that are caused by gender-neutral compensation policies. No such obligation exists. Rather, because United's legitimate, business-related compensation policies were applied without regard to gender, they constituted a "factor other than sex" within the meaning of the Equal Pay Act, and Cooper's argument is without merit. Accordingly, the decision below should be affirmed.

A. Mandating Pay Parity Despite Gender-Neutral Compensation Practices Is Inconsistent With The EPA's Text And Legislative History

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended by the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), prohibits employers from differentiating in pay on the basis of sex. It provides:

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

29 U.S.C. § 206(d)(1) (emphasis added). The EPA thus "prohibits differential payments between male and female employees doing equal work except when made pursuant to any of three specific compensation systems or 'any other factor other than sex.'" *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982).

> [Essentially, t]he Equal Pay Act is divided into two parts: a definition of the violation, followed by four affirmative defenses. The first part can hardly be said to "authorize" anything at all: it is purely prohibitory. The second part, however, in essence "authorizes" employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act.

County of Washington v. Gunther, 452 U.S. 161, 169 (1981). As this Court has held, "These exceptions are affirmative defenses which the employer must plead and prove." *Kouba*, 691 F.2d at 875 (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974)).

While appearing to concede that her initial pay was set pursuant to legitimate, nondiscriminatory factors, Cooper nonetheless contends that United's failure over time to equalize her salary to that of her three male co-workers – whose higher initial rates of pay also were set in accordance with standard nondiscriminatory procedure – somehow should give rise to an EPA violation. In essence, Cooper argues for a form of disparate impact liability, under which a gender-neutral policy that produces an adverse impact against women (or men, as the case may be) violates the EPA if the disparity is not eliminated immediately.

Neither the EPA's text nor legislative history, as interpreted by the U.S. Supreme Court and this Court, supports such a contention, however. To the contrary, as any residual pay differential that existed between Cooper and her male co-workers was the result of starting salaries that were set (as Cooper concedes) using legitimate, non-sex factors, the EPA makes clear that the differential is permissible. Accordingly, the district court's ruling below should be affirmed.

1. The U.S. Supreme Court has held that only pay differentials that discriminate based on sex are unlawful under the EPA

In *County of Washington v. Gunther*, the U.S. Supreme Court held that the Bennett Amendment to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, incorporates the EPA's four affirmative defenses, including the defense for differentials based on "any other factor other than sex." 452 U.S. 161 (1981). At the same time, the Court intimated that the "factor other than sex" defense was inconsistent with the disparate impact doctrine established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), suggesting that it was meant primarily to limit the application of the EPA to disparate treatment claims. *Gunther*, 452 U.S. at 170.

In particular, the *Gunther* Court noted that Title VII was designed not only to prohibit "overt discrimination", but also to proscribe "practices that are fair in form, but discriminatory in operation." *Id.* (citation omitted). The EPA's "any other factor other than sex" defense, however, "was designed differently to *confine the application of the act to wage differentials attributable to sex discrimination*." *Id.* (citation omitted) (emphasis added). It found that "Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" *Id.*; *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) ("Congress' purpose in enacting the Equal Pay Act was to remedy

what was perceived to be a serious and endemic problem of employment discrimination in private industry. … The solution adopted was quite simple in principle: to require that 'equal work will be rewarded by equal wages'" (citation omitted)).

Consistent with those principles, this Court has observed that the EPA's "factor other than sex" affirmative defense is a "'broad general exception,'" *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986) (quoting *EEOC v. Maricopa Cnty. Comm. Coll. Dist.*, 736 F.2d 510, 514 (9th Cir. 1984)), which Congress intended would allow employers to use any number of legitimate, nondiscriminatory pay-setting procedures including "bona fide gender-neutral job evaluation and classification systems." *Id.*; *see also Kouba*, 691 F.2d at 878 (EPA "does not impose a strict prohibition against the use of prior salary"). Other courts of appeals agree with that interpretation. As the Eighth Circuit has pointed out:

> On its face, the EPA does not suggest any limitations to the broad catch-all "factor other than sex" affirmative defense. The more specific factors that are enumerated—seniority systems, merit systems, and systems that measure earnings by quality or quantity of output—provide examples of the type of gender-neutral factors envisioned by the legislature. The legislative history supports a broad interpretation of the catch-all exception, listing examples of exceptions and expressly noting that the catch-all provision is necessary due to the impossibility of predicting and listing each and every exception. Given this facially broad exception, we are reluctant to establish any per se limitations to the "factor other than sex" exception by carving out specific, non-gender-based factors for exclusion from the exception.

Taylor v. White, 321 F.3d 710, 717-18 (8th Cir. 2003) (citation and footnote omitted).

2. Ensuring nondiscrimination in compensation does not equate to ensuring that all employees are paid the same

Accordingly, and contrary to Cooper's and the EEOC's assertions, the mere fact that there was a disparity in pay between men and women in the Supervisor-Security Officers position during Cooper's tenure does not, in itself, constitute an EPA violation. Rather, the Act obligates employers to ensure that pay decisions are made for nondiscriminatory reasons, in other words, without regard to sex; it does not require they ensure across-the-board pay parity between all men and all women. Indeed, the EPA is "not the 'Pay Everyone Exactly the Same Act.'" *Behm v. U.S.*, 68 Fed. Cl. 395, 405 (2005) (citations omitted).

Yet, *amicus* EEOC advances that very argument, contending the disparity in pay between Cooper and her male co-workers was a result of United's "failure to reconcile the pay disparity over the nine years Cooper served as security supervisor," EEOC Brf. *Amicus Curiae* at 11, which it then suggests is not a "factor-other-than-sex" for EPA purposes. According to the EEOC, summary judgment was improper because United "never explained why it failed to equalize their pay over time, long after the criteria United identified as relevant for setting initial pay became irrelevant to the salary level appropriate for longstanding employees performing equal work." *Id.* at 17. That is, because United did not

explain why it failed to implement "pay equity" adjustments to Cooper's compensation sometime between 2002 and 2011, the EEOC argues that material disputed facts exist as to whether the pay differentials were based on a factor other than sex.

Cooper's "successful job performance," the EEOC insists, should have resulted in a salary adjustment "to achieve parity with her male colleague." *Id.* at 23. But neither the EEOC nor Cooper cites to any authority that reasonably can be read as supporting the notion that all workers who perform successfully eventually should achieve the same pay as the highest-paid worker in the position – even if the differentials are not rooted in sex discrimination. To the contrary, while some employer compensation practices and policies "might lead to wage decisions based on factors unrelated to an individual's qualifications for a particular job, such policies are not necessarily gender biased." *Taylor v. White*, 321 F.3d at 718.

At bottom, the EEOC's argument has no basis in the EPA's text or legislative history, or in any holding of this Court or the Supreme Court. It also is nonsensical as a practical matter. As the Seventh Circuit, in concluding that "more evidence than the mere passage of time is required," *Lindale v. Tokheim Corp.*, 145 F.3d 953, 958 (7th Cir. 1998), aptly explained:

> Most large employers, even if their work force is not unionized, find it impracticable to match each employee's pay with the employee's work. Instead they use a pay grade system …. Each employee within a given grade receives the same or a similar salary; there are salary

> jumps between grades rather than a smooth progression; and promotion from grade to grade may be based in part on seniority, in part on credentials, and in part on competition in the labor market. In such a situation, it is inevitable that some workers will receive different pay for the same work, and the fact that the lower-paid worker is a woman is so likely to reflect the operation of accidental, noninvidious factors that we do not think an inference of violation of the Equal Pay Act can be drawn from the mere difference. If the woman were hired first at the higher wage and the man later at a lower wage yet he zoomed past her even though their work was identical in kind and quality, this would be enough evidence of a violation to carry the case into jury-land. But a mere failure of catch up is not by itself enough evidence.

Id. This Court accordingly should squarely reject the notion, advanced by both Cooper and her *amicus* EEOC, that the lack of pay parity between similarly situated men and women over a specific period of time (here, the EEOC's magic number is nine years) is enough, without more, to give rise to unlawful discrimination *on the basis of sex*.

This Court has made clear that the EPA's factor-other-than-sex affirmative defense "enables the employer to determine legitimate organizational needs and accomplish necessary organizational changes." *Maxwell v. City of Tucson*, 803 F.2d at 447. It follows that a "factor used to effectuate some business policy is not prohibited simply because a wage differential results." *Kouba*, 691 F.2d at 876. Remarkably, however, the EEOC insists that the evidence "*all* suggests there was no legitimate reason for United's failure to pay Cooper, over time, in line with her

male colleagues, and United has not provided any explanation for perpetuating this disparity." EEOC Brf. *Amicus Curiae* at 24 (emphasis added).

Of course, that statement is untrue. United's well-documented, gender-neutral compensation policies, which were applied consistently to all employees – including Cooper's male comparators – provide a complete explanation for the disparity at issue. Those gender-neutral compensation policies rested on sound and common business practice, and thus constituted a factor other than sex. In the absence of proof of sex-based discrimination, there is no basis for invoking the EPA.

B. *Amicus* EEOC's Position Would Reflect A Dramatic Expansion Of The EPA That Both Congress And The Department Of Labor Have Rejected

The EEOC's essential complaint is that "United has not offered any argument that its failure to equalize the pay of Cooper with her male colleagues was *reasonable* based on budgetary or similar economic reasons, and its willingness to pay Employee 3[2] some 30% more than it had just been paying Cooper to do exactly the same job strongly indicates that no such reasons existed." *Id.* (emphasis added). As described above, this argument disregards completely the EPA's plain text and the manner in which the "factor other than sex"

[2] "Employee 3" is Faultner, who applied for and was hired into the newly-restructured Supervisor position for which Cooper competed unsuccessfully in 2011. 82 F. Supp. 3d at 1100.

affirmative defense has been interpreted by the Supreme Court and this Court. Indeed, the Supreme Court in *Smith v. City of Jackson* disposed of the EEOC's argument here, pointing out that "in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), "Congress barred recovery if a pay differential was based 'on any other factor' - *reasonable or unreasonable* -'other than sex.'" 544 U.S. 228, 239 n.11 (2005) (emphasis added). The EEOC seems to be pressing this Court to adopt an expansive, extra-statutory interpretation of the EPA that both Congress and the Department of Labor have implicitly rejected.

1. Congress repeatedly has declined to enact legislation that would incorporate the extra-statutory standard being advocated by *amicus* EEOC

The unenacted Paycheck Fairness Act (PFA), S. 862 & H.R. 1619, 114th Cong. (Mar. 25, 2015), is the legislative centerpiece of a broad-based campaign dating back to the late 1990's aimed at significantly amending the EPA. Among other things and as most relevant here, the PFA would replace the current "any other factor other than sex" with a so-called "bona fide factor other than sex" affirmative defense, under which an employer seeking to defend a pay differential would be required not only to show that the factor causing the disparity is not based on sex, but also that it is job-related and consistent with business necessity. *Id.*

An employer still would face liability even after making that showing if the plaintiff can demonstrate that a less discriminatory alternative existed that the employer refused to adopt. The proposed "bona fide factor" defense is strikingly similar to the "business necessity" test applicable to *disparate impact* claims brought under Title VII.

The obvious aim of the proposed revisions to the EPA's "any other factor" affirmative defense is to make it more difficult for employers to avoid liability for pay differentials cause by legitimate, non-sex based factors that currently are allowed under existing law. For instance, employees legitimately may get paid differently based on what shift they work, their hours of work, or other differences based on experience, training and ability. Any of those presently lawful business justifications for pay differentials would be impermissible under the PFA, unless the employer could provide, under the bona fide test, that they are "job-related with respect to the position in question." Paycheck Fairness Act, S. 862 & H.R. 1619, 114th Cong. (Mar. 25, 2015) (Sec. 3(a)(3)(B)).

The effect of requiring employers to meet each of these separate burdens under the fourth affirmative defense would be to severely limit the contexts in which the defense may be asserted. For example, common factors influencing pay

– such as market rates, prior salary history, and "red circle" rates[3] – most likely would not pass muster under the bona fide factor test. Such a change would sharply limit, or eliminate entirely, an employer's ability to vary pay based on factors that in its sound business judgment contribute to increased productivity, employee satisfaction, and the like.

One example is the common practice of differentiating pay based on work hours, i.e., paying more for second- or third- shift work. While such a factor easily is considered to be any other factor other than sex under the current EPA, the proposed PFA would render it illegal – except for those businesses that could plausibly argue that shift work is "significantly related to," not simply good for, the "employment in question." In effect, that is the standard that the EEOC seeks this Court to apply to this case.

The Paycheck Fairness Act thus would reflect a dramatic (and damaging) shift in the law, which is perhaps one reason that Congress has not passed it. Yet the EEOC is arguing for effectively the same result by imposing extra-statutory restrictions on an employer's right to assert the "any other factor" defense. Of course, the EEOC lacks the authority to modify a statute where Congress has declined to do so.

[3] A "red circle rate" is defined in the EEOC's EPA regulations as that "used to describe certain unusual, higher than normal, wage rates which are maintained for reasons unrelated to sex." 29 C.F.R. § 1620.26.

2. Department of Labor regulations governing federal contractors impliedly reject the EEOC's reading of the EPA

As noted, the EEOC's position would amount to a requirement that all employers rigorously justify any pay disparity between genders, even those created by a gender-neutral policy. It is therefore noteworthy that, when the Department of Labor (DOL) issued affirmative action regulations to ensure pay equity by federal contractors, even those regulations did not impose such a requirement. It would be odd indeed if these *heightened* requirements for federal contractors were in fact *lower* that the requirements the EEOC claims are contained in the EPA.

As amended, Executive Order 11,246 requires covered federal contractors to agree that they:

> [W]ill not discriminate against any employee or applicant because of race, color, religion, sex, sexual orientation, gender identity, or national origin . . . [and] *will take affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (quoting subpart B, § 202(1), as amended) (emphasis added). *See also* 41 C.F.R. § 60-1.4(a)(1). General guidelines for implementing the Executive Order are set forth in regulations promulgated by the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), at 41 C.F.R. Part 60-1. Specific requirements for affirmative action programs are listed in 41 C.F.R. Part 60-2.

Federal contractors subject to Executive Order 11,246 must regularly review their employment practices and workplace conditions to determine whether any of them may pose an impediment to equal opportunity for minorities and women. *See* 41 C.F.R. § 60-2.17(b). When any such problem area is found, the contractor is contractually obligated to establish numerical targets and must make good faith efforts to reach them. 41 C.F.R. § 60-2.17(c).

In order to identify problem areas, OFCCP's regulations require contractors to perform annual "in-depth analyses" of the total employment process to determine whether and where impediments to equal employment opportunity exist. 41 C.F.R. § 60-2.17(b). Among other things, contractors must annually evaluate their "[c]ompensation system(s) to determine whether there are [*gender-based*] disparities." *Id.* (emphasis added). However, not even under federal affirmative action laws and regulations are covered employers required to equalize pay between men and women performing the same job – simply *because* both men and women are in the job.

Accordingly, any notion that employers must guarantee gender pay parity in the absence of any evidence of sex-based discrimination or face liability under the EPA should be soundly rejected by this Court. In fact, forcing employers to adjust pay based on sex where no evidence of actual discrimination exists could expose employers to claims that such adjustments themselves violate Title VII. *See Ricci*

v. DeStefano, 557 U.S. 557, 585 (2009) (concluding that intentional discrimination under Title VII that is carried out to avoid or remedy unintentional discrimination under that same statute is permissible only when the employer has a "strong basis in evidence" to believe that the intentionally discriminatory action is necessary to avoid liability for the unintentional discrimination); *Rudebusch v. Hughes*, 313 F.3d 506 (9th Cir. 2002) (ruling that by adjusting the salaries of women and minority employees in an effort to achieve "pay equity" in compliance with its federal affirmative action obligations, the university may have incurred liability to those employees' white male colleagues by making pay adjustments that were larger than necessary to remedy discrimination).

II. EMPLOYERS COMPENSATE THEIR EMPLOYEES IN MYRIAD WAYS FOR LEGITIMATE, NONDISCRIMINATORY BUSINESS REASONS

> At United Airlines and in other companies, it is a generally accepted human resource management practice for a business to consider an individual's skills, education and experience in determining whether and where to place him/her within an established salary range and to vest a recruiting partner with the discretion to make a recommendation regarding that individual's salary and allow the hiring manager discretion to determine whether to follow that recommendation.

Cooper v. United Airlines, Inc., Case No. CV 13 2870 JSC, Document 73-5 (N.D. Cal. Jan. 22, 2015) (Expert Report of David Lewin, Ph.D. Nov. 4, 2014), at 13. Those efforts should not be frustrated by an impermissibly narrow interpretation of the EPA's "factor other than sex" affirmative defense.

Sound policy reasons exist for differentiating in compensation among employees. For example, some of the benefits that inure to employers and employees alike from promote-from-within policies include offering a path to promising and dedicated staff for upward growth and advancement; achieving significant cost-savings compared to more traditional external selection practices; effectuating faster placements; and maintaining headcount for budget reasons, i.e. due to hiring freezes. Indeed, United's compensation practices and philosophy are not unlike those of many private sector employers *and* the federal government. *See, e.g.*, Office of Personnel Management, *General Schedule Classification & Pay* (describing, in detail, the federal government's "General Schedule (GS) classification and pay system [which] covers the majority of civilian white-collar Federal employees (about 1.5 million worldwide) in professional, technical, administrative, and clerical positions").[4]

As described above, employers are not obligated under any federal law to equalize their employees' pay over time. Such a notion runs directly counter to the principles of meritocracy that have driven private sector compensation practices for decades. Ensuring perfect parity in compensation among all employees in a particular job group, for instance, would mean that employers would have to compensate every incumbent at the same rate of pay as the highest earner (likely

[4] *Available at* https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/ (last visited Jan. 28, 2016).

the most experienced or best performer), thus disregarding differences in skills, knowledge, ability and/or time in job. Alternatively, employers would resort to compensating every employee at the *lowest* wage without regard to merit.

The former would increase payroll budgets exponentially, while the latter would severely impede efforts to attract the best talent and produce the highest quality product, thus ensuring a quick race to the bottom, rather than to the top. Under either scenario, American businesses would be placed at a significant and extremely damaging competitive disadvantage.

In the end, courts should defer to an employer's judgment in applying sex-neutral pay practices. As the Supreme Court instructed in *County of Washington v. Gunther,* "Under the Equal Pay Act, the courts and administrative agencies are not permitted to 'substitute their judgment for the judgment of the employer … who [has] established and applied a bona fide job rating system,' so long as it does not discriminate on the basis of sex." 452 U.S. at 170-71; *accord Kouba,* 691 F.2d at 876 ("The Equal Pay Act entrusts employers, not judges, with making the often uncertain decision of how to accomplish business objectives"); *see also Wernsing v. Dept. of Human Servs.,* 427 F.3d 466, 468 (7th Cir. 2005) ("Congress has not authorized federal judges to serve as personnel managers for America's employers"); *Taylor v. White*, 321 F.3d at 719 (the Court should not "sit as a super-personnel department that re-examines an entity's business decisions") (citations

omitted); *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 169 (2d Cir. 2014) ("While we must ensure that employers do not act in a discriminatory fashion, we do 'not sit as a super-personnel department that reexamines an entity's business decisions'") (citation omitted).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to affirm the decision below.

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