No. 19-1176

IN THE

Supreme Court of the United States

JIM YOVINO,
FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,
Petitioner,
v.
AILEEN RIZO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER

DARYL L. JOSEFFER
EMILY J. KENNEDY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

JONATHAN S. FRANKLIN
Counsel of Record
PETER B. SIEGAL
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@nortonrosefulbright.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 19-1176

JIM YOVINO,
FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,
Petitioner,
v.
AILEEN RIZO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents approximately

[1] No counsel for a party authored this brief in whole or in part. No person other than amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Both parties were timely notified more than 10 days

300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every geographic region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus briefs in cases, such as this one, involving issues of national concern to the business community.

The National Federation of Independent Business (NFIB), based in Nashville, Tennessee, is the nation's leading small business association, representing members in Washington, DC, and all 50 state capitals. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. To protect its members' interests, NFIB frequently files amicus curiae briefs in cases that threaten to harm small businesses.

Amici and their members have a strong interest in ensuring that the laws that govern hiring and compensation practices are fair, predictable, and uniformly interpreted. The court of appeals' decision deepens a circuit split regarding the viability of widely used and important employment practices that help both employers and employees. If left in place, the Ninth Circuit's judgment would not only exacerbate a glaring disuniformity in federal law, but also have

---

in advance of the intent to file this brief and have consented to its filing.

significant negative effects on hiring and compensation practices across the country.

SUMMARY OF THE ARGUMENT

The Equal Pay Act permits pay disparities based on "any * * * factor other than sex." 29 U.S.C. § 206(d)(1). In the decision below, a deeply fractured Ninth Circuit, sitting *en banc*, held that prior salary is *never* a "factor other than sex," and, as a result, cannot permissibly be used, even as only one of many factors in the hiring process, to set salaries unless it results in identical pay across genders.

The question presented in this case is whether a widely used practice—one that has long been understood as justified for reasons that have nothing to do with sex—is now illegal. That question is of extraordinary significance. Employers large and small, in every region of the United States, have historically used prior salary as a metric to assess a range of matters, including the caliber and experience of applicants, the viability and competitiveness of their own compensation packages, and, ultimately, the fairness of the wages they pay to employees. This sex-neutral practice can benefit female and male applicants alike—particularly those who were highly valued by their prior employers—by increasing the pay that they might otherwise receive. By placing wage-history data off limits for employers within the nation's largest circuit, the court of appeals' rule exacerbates a clear, acknowledged split regarding the legal viability of that important practice.

The Ninth Circuit's tortured reading of the Equal Pay Act's "catchall" defense also threatens the viability of a broad array of employment practices, such as individualized negotiation and competitive

salary bidding, that include a reliance on prior pay. And, by depriving employers of the ability to rely on an objective measure of an applicant's market salary and legitimate expectations, the Ninth Circuit's rule encourages decisionmaking based on subjective factors—which is precisely what employment law generally seeks to avoid. Indeed, because subjective estimates of a market salary may tend to reflect outdated or inaccurate information, the court of appeals' rule could lead to greater gender-based pay disparities and disadvantage applicants—both female and male—who were particularly valued by their prior employers.

For these reasons, and those in the petition, the Court should grant certiorari.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON THE LEGALITY OF A WIDELY USED AND USEFUL EMPLOYMENT PRACTICE.

As the petition explains, the federal courts of appeals disagree sharply about the permissibility of using prior salary to set employee pay. The Ninth Circuit held that "an employee's prior pay cannot serve as an affirmative defense to a prima facie showing of an EPA violation." Pet. App. 27a. The Fourth, Seventh, and Eighth Circuits, by contrast, have held that, absent some case-specific reason for skepticism, the use of prior pay is categorically acceptable. *See, e.g.*, *Spencer* v. *Va. State Univ.*, 919 F.3d 199, 202-03 (4th Cir. 2019); *Wernsing* v. *Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005); *Taylor* v. *White*, 321 F.3d 710, 717-18 (8th Cir. 2003). The Second and Sixth Circuits permit employers to

rely on prior pay as long as they prove that such use is "rooted in legitimate business-related" concerns. *Aldrich* v. *Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525-27 (2d Cir. 1992); *see also, e.g.*, *Beck-Wilson* v. *Principi*, 441 F.3d 353, 365 (6th Cir. 2006). And the Tenth and Eleventh Circuits permit the use of prior pay only "as part of a mixed-motive" mode of setting salaries that relies on other factors as well. *Irby* v. *Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *see also, e.g.*, *Riser* v. *QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).[2]

A. Reliance On Prior Pay Is Widespread And Legal In Most Jurisdictions.

That patchwork interpretation of federal law is intolerable for Amici's members, particularly given the widespread nature of the practice at issue. As the petition notes, a recent study showed that, in jurisdictions in which it is permitted, more than 60% of employers allow interviewers to ask about prior salary. Roy Maurer, Soc'y for Hum. Res. Mgmt., *Employers Split on Asking About Salary History* (Apr. 2, 2018) (https://tinyurl.com/ycrpcp42). Other studies confirm employers' widespread reliance on prior pay. One 2017 study found that 65% of executives believe their operations would be affected by the prohibition of questions about prior pay, such that if a nationwide ban were imposed, "hundreds of thousands of employers w[ould] need to modify their talent screening and hiring processes." Korn Ferry, *Korn Ferry Executive Survey: New Laws Forbidding*

---

[2] As the petition makes clear, the use of prior salary—like the use of any other factor—is impermissible in any circuit if invoked as a pretext for sex discrimination. *See*, *e.g.*, *Wernsing*, 427 F.3d at 469.

Questions On Salary History Likely Changes The Game For Most Employers (Nov. 14, 2017) (https://tinyurl.com/y9gb4aru). Virtually none of those employers considered themselves "well prepared" to handle such a ban at that time. *Id.*

This case demonstrates that it is not just private employers who find it useful to ask about and rely on salary history when making decisions about recruitment, compensation, and retention. As the petition notes, the standard application for employment with the Judicial Branch of the United States requires applicants to list their starting and final salary at each job they held in the past ten years. *See* Federal Judicial Branch, *AO 78: Application for Employment* (www.uscourts.gov/sites/default/files/ao078.pdf); *cf.* 29 U.S.C. § 203(e)(2)(iii) (Equal Pay Act applies to Judicial Branch units with positions in the competitive service). The Judicial Branch's Pre-Employment Information form calls for even more specifics, including information about past retirement plans and the impact of cost-of-living adjustments on prior pay. *See* Federal Judicial Branch, *AO 425: Pre-Employment Information* (www.uscourts.gov/sites/default/files/ao425.pdf).[3]

Reliance on prior pay, moreover, is legal almost everywhere. A few jurisdictions, including California, Massachusetts, Oregon, Delaware, and the cities of

---

[3] A standard Executive branch application asks for prior salary as "optional" information. *See* Create Profile: Work Experience (https://www.usajobs.gov/Applicant/Profile/New/WorkExperience/) (requires account creation). But under the Ninth Circuit's rule, if an applicant voluntarily submits information in response to such a request, the employer would violate the law if it actually considered the prior-salary data that it asked for.

New York and Philadelphia, among some others, have enacted legislation either barring employers from asking for job applicants' salary history or eliminating salary history as a justification for pay discrepancies. *See* Yuki Noguchi, Nat'l Pub. Radio, *Proposals Aim to Combat Discrimination Based on Salary History* (May 30, 2017) (https://tinyurl.com/ya67hrua); *see also* Recent Legislation, *Oregon Bans Employers From Asking Job Applicants About Prior Salary*, 131 Harv. L. Rev. 1513, 1515-16 (2018). But most jurisdictions have left the practice of relying on pay history largely undisturbed. *See* Áine Cain, *et al.*, Bus. Insider, *9 Places In The US Where Job Candidates May Never Have to Answer the Dreaded Salary Question Again* (Apr. 10, 2018) (https://tinyurl.com/yc6odzs6); HRDive, *Salary History Bans: A Running List of States and Localities That Have Outlawed Pay History Questions* (Feb. 28, 2020) (https://tinyurl.com/y6urjl4x).

Some jurisdictions have even gone in the opposite direction from the Ninth Circuit: in 2018, both Michigan and Wisconsin enacted laws *forbidding* localities to adopt salary-history bans and other restrictions on the information employers can seek from applicants. *See* Mich. Comp. Laws § 123.1384(4) ("A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or a potential employee"); Wis. Stat. § 103.36(3)(a) ("No city, village, town, or county may enact or enforce an ordinance prohibiting an employer from soliciting information regarding the salary history of prospective

employees."). The Ninth Circuit's interpretation of the Equal Pay Act gives rise to significant interference with the operation of those state laws.

Moreover, there is reason to believe that the surveys noted above actually understate the importance of the question presented. Among the roughly one-third of employers who do not rely on salary history even in jurisdictions where it is permitted, many are "large[] * * * organization[s]" that have reacted to legal uncertainty by adopting companywide policies to comply with the strictest rules to which they are subject anywhere. Maurer, *Employers Split on Asking About Salary History*, *supra*; *see also, e.g.*, Yuki Noguchi, Nat'l Pub. Radio, *More Employers Avoid Legal Minefield By Not Asking About Pay History* (May 3, 2018) (citing survey finding that "46 percent of employers said they would adopt policies to comply with the strictest laws in their region") (https://tinyurl.com/y8d44oqk); HRDive, *Amazon Bans Salary History Inquiries* (Jan. 19, 2018) (quoting internal memorandum stating that Amazon took "a proactive stance" of banning salary-history questions in order to be "consistent for all candidates * * * in * * * the United States") (https://tinyurl.com/y8j653mu). Those employers skew the surveys, because they would ask about prior pay if it were permissible in more jurisdictions. It is therefore likely that far more than two-thirds of employers in the United States would, if left to their own devices, ask about and rely upon information about prior pay. For these larger national employers, the Ninth Circuit's decision has consequences far beyond that court's territorial borders.

For other employers of all sizes, the circuit split on the question presented means that the requirements

of federal law vary depending on where the employer happens to be located. The vast majority of employers in the United States operate in jurisdictions in which reliance on salary history is entirely legal, and an overwhelming percentage of those businesses operate locally. Indeed, of the 5.6 million employer firms in the United States, 99.7% are small businesses with fewer than 500 employees. Small Bus. & Entrepreneurship Council, *Facts & Data on Small Business and Entrepreneurship* (https://tinyurl.com/yby8j54r). Those firms employ nearly half of all employed Americans. *Id.* Thus, while rules adopted in large states can exert outsized influence on some large employers, tens of millions of American job-seekers and employees continue to live and work in jurisdictions in which reliance on salary history is both permitted and commonplace, and in which most businesses have no reason to adapt to bans enacted in a few coastal states. Those individuals, and most of the businesses that could potentially employ them, therefore operate under an entirely different federal-law regime with respect to the use of prior pay than their counterparts in the Ninth Circuit and the other circuits that have circumscribed the practice in lesser ways. The Court should grant certiorari to restore uniformity to the law.

B. Reliance On Prior Pay Is A Sex-Neutral Practice.

As the practice's widespread nature tends to suggest, many employers rely on prior salary for reasons having nothing to do with sex. For instance, in litigation over Philadelphia's legislation prohibiting employers from seeking information regarding prior pay, testimony from a diverse array of businesses demonstrates that companies use wage

history for a host of legitimate reasons. In the recruiting process, data about items such as prior bonus payouts and vested and unvested equity from a current employer can be critical to a company's ability to generate an appropriate compensation offer competitive with what the applicant might be "leaving behind."[4] Wage history can also "signal[] the value that the candidate's prior employer placed on his or her work," which is particularly relevant for a sales- or commission-based job.[5]

Further, information about prior pay can assist a company's efforts to maintain "a diverse workforce" by facilitating effective retention.[6] Such information provides an employer "flexibility" to "reserve funds for promotions or other rewards for good work or longevity."[7]

Wage history has valuable and legitimate uses for companies of all sizes. And smaller companies, in particular, are often unable to commission market compensation studies, even though many of them operate in industries where high turnover rates

---

[4] Decl. of David L. Cohen ("Cohen Decl."), Comcast Corp., Dkt. 29-4, *Chamber of Commerce for Greater Phila.* v. *City of Philadelphia*, No. 2:17-cv-01548-MSG, ¶ 9(c) (E.D. Pa. June 13, 2017). In the Philadelphia litigation, the Third Circuit ultimately rejected a First Amendment challenge to Philadelphia's legislation. *See generally Greater Phila. Chamber of Commerce* v. *City of Philadelphia*, 949 F.3d 116 (3d Cir. 2020).

[5] *Id.* ¶ 9(b).

[6] Decl. of Robert Croner ("Croner Decl."), the Children's Hospital of Philadelphia, Dkt. 29-5, ¶¶ 7, 9(b), *Chamber of Commerce for Greater Phila.* v. *City of Philadelphia*, No. 2:17-cv-01548-MSG (E.D. Pa. June 13, 2017).

[7] *Id.* ¶ 9(b) (emphasis added).

require near-constant salary adjustments. For example, the owner of a small document management company testified in the Philadelphia litigation that "[o]ffering a premium" over prior pay is particularly "essential" to the hiring of professional truck drivers.[8] In that industry, the turnover rate can exceed 80%, as drivers routinely leave one organization for a higher-paying trucking job elsewhere.[9] Knowing what a given applicant is currently making allows a company to "adjust its salary offer accordingly."[10]

Even if an employer cannot match a prior salary, prior-pay information conserves resources by streamlining the hiring process. Many employers ask about prior salary "not in order to discriminate," but because "[t]hey don't want to waste the time of a candidate who's seeking a higher salary than they can offer." Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, *supra*. Wage-history questions save "significant time and resources" in the hiring process, for both applicants and employers, by enabling employers to determine whether an applicant would be able to work within the salary guidelines of a given company.[11]

These are all legitimate reasons for inquiring about prior pay that have nothing to do with an applicant's

---

[8] Decl. of Keith DiMarino ("DiMarino Decl."), DocuVault Del. Valley LLC, Dkt. 29-7, *Chamber of Commerce for Greater Phila.* v. *City of Philadelphia*, No. 2:17-cv-01548-MSG, ¶ 8 (E.D. Pa. June 13, 2017).

[9] *Id.*

[10] *Id.*

[11] Croner Decl. ¶ 9(a); *see also* Cohen Decl. ¶ 9 (information assesses whether an applicant would be willing to work within the "predetermined budget assigned to" each open position).

sex. And the benefits associated with them accrue to male and female employees alike. As this case demonstrates, where an employer has guaranteed a raise to every new employee, many employees will benefit from sharing their past salaries. In the Philadelphia case, one business owner testified that his company had recently offered to increase one candidate's bonus by 75% over that offered at the candidate's previous job, and offered another applicant a 30% premium over the prevailing market rate in light of her prior salary.[12] That employer can no longer even consider such data in Philadelphia. *See Greater Phila. Chamber of Commerce*, 949 F.3d at 121. If the same restriction applied to employers nationwide, applicants' ability to benefit from extraordinary performance in prior jobs would be sharply curtailed.

II. THE NINTH CIRCUIT'S RULE CALLS INTO QUESTION LEGITIMATE AND SEX-NEUTRAL EMPLOYMENT PRACTICES THAT RELY ON OBJECTIVE INFORMATION.

The court of appeals based its decision on the conclusion that, under the Equal Pay Act's "catchall" defense, the only legitimate "factor[s] other than sex" are those that are "job-related." Pet. App. 11a-29a. That rationale does not justify the Ninth Circuit's decision even on its own terms, given that prior pay is plainly job-related and that prospective employers use it to measure an applicant's performance in prior jobs. *See supra* at 9-12; *see also* Pet. App. 21a (conceding that prior pay may "be viewed as a proxy for job-related factors such as education, skills, or

[12] DiMarino Decl. ¶¶ 11(c), 10(a).

experience") (emphasis omitted). More fundamentally, the court of appeals' broad holding is contrary to the statute, which, by its plain text, permits an employer to invoke "*any* * * * factor other than sex" as a defense. 29 U.S.C. § 206(d)(1) (emphasis added); *cf. Republic of Iraq* v. *Beaty*, 556 U.S. 848, 856 (2009) ("Of course the word 'any' * * * has an expansive meaning."). In failing to heed that mandate, the Ninth Circuit's logic threatens to invalidate, without any statutory warrant, many other employment practices that are equally as valuable and widely accepted as reliance on prior pay.

For example, it is very common for both applicants and employees to seek better pay by informing employers not only of past salaries, but of other offers available at the time of the negotiation. *See, e.g.*, Amy Gallo, Harv. Bus. Rev. Online, *Setting the Record Straight: Using an Outside Offer to Get a Raise* (July 5, 2016) (outside offers are "recognized as a legitimate way to get * * * higher compensation") (https://tinyurl.com/jhm2eub); *see also* Jen Hubley Luckwaldt, PayScale, *When Should You Use an Outside Offer to Negotiate Salary?* (July 11, 2016) (providing strategic advice for applicants) (https://tinyurl.com/ybsf6n3l). This strategy almost uniformly benefits prospective employees and the labor market more generally: by informing a current or prospective employer of alternative salary offers, applicants and employees hope to encourage matching or higher offers. The ability to bargain in that manner is a basic aspect of any market.

Under the court of appeals' reasoning, however, that practice may be suspect. There is no apparent reason why reliance on pay associated with *current* job offers would be any more or less discriminatory than

reliance on pay associated with *past* jobs. Moreover, if, as the Ninth Circuit held, the pay one earned in past positions is not sufficiently related to "job experience, job qualifications, [or] job performance" to constitute a "factor other than sex," *cf.* Pet. App. 13a, then the pay one has been offered for an alternative position would seem to be no different. The Ninth Circuit's opinion therefore poses a significant threat not just to reliance on prior pay, but to competitive salary bidding altogether, even where an applicant discloses prior-pay information voluntarily. *See* Pet. App. 39a (McKeown, J., concurring) (explaining that Ninth Circuit's rationale "bars the use of prior salary to set initial wages," and therefore, "[i]n the real world," leaves "little daylight for arguing that negotiated starting salaries should be treated differently" from established pay scales).[13]

It is also not clear whether the Ninth Circuit's rule threatens *all* negotiated salary differentials, even where the negotiations do not turn on the applicant's prior pay. Some have argued, based on studies asserting that men and women differ in their propensity to negotiate, that pay differentials based on salary negotiations are inherently sex-based, and that they violate the Equal Pay Act for that reason. *See*, *e.g.*, Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary*

---

[13] The Ninth Circuit's assertion that its judgment merely prohibits "relying on prior pay *to defend an EPA violation*," and thus has no bearing on the permissibility of relying on prior pay *to set salaries*, Pet. App. 28a (emphasis altered), is nonsensical. The obvious effect of prohibiting employers to rely on prior pay as a defense in an Equal Pay Act suit is to expose to liability any employer who makes compensation decisions that are in any way based on that factor.

Negotiation Is Not a "Factor Other Than Sex" Under the Equal Pay Act, 10 Geo. J. Gender & L. 1, 33-35 (2009). Although no court has yet endorsed that conclusion, the Ninth Circuit's decision, which severely circumscribes the catchall defense based on nothing more than social science hypotheses about what might have influenced a facially neutral factor, threatens to chill that commonplace practice as well.

Moreover, and setting aside particular pay practices, the Ninth Circuit's rule undermines the accepted understanding that, in making employment and compensation decisions, employers should strive whenever possible to rely on objective data. [14] Reliance on such data is generally viewed as desirable because it avoids even an appearance of implicit bias. Indeed, employers rely on wage history precisely because it is an objective, reliable indicator of a wide range of useful facts about a given applicant, including the value that a prior employer has placed

---

[14] *See, e.g.*, Heather Huhman, Huffington Post, *5 Ways to Be Objective in Your Hiring Process* (May 7, 2013) ("Employers need to be objective when hiring new employees to ensure they provide equal opportunities for every job seeker who applies. By applying these ideas to your hiring process, you will be able to select a candidate with accuracy and fairness.") (https://tinyurl.com/y992lyq7); *see also* Toni Vranjes, Soc'y for Hum. Res. Mgmt., *Reduce the Legal Risks of Performance Reviews* (Feb. 19, 2016) ("Employers should strive to evaluate workers on objective factors, like meeting sales numbers or meeting project deadlines.") (https://tinyurl.com/y8f9et2u); Bus. Mgmt. Daily, *Use Objective Criteria—and Beware Subjective Judgment Calls—When Deciding Promotions* (Feb. 21, 2010) ("Nothing speeds a disappointed job-seeker's trip to court like a selection process based on an employer's use of subjective criteria.") (https://tinyurl.com/yatqaoj5).

on a particular employee and that employee's legitimate salary expectations. *See supra* at 9-12.

If employers are prohibited from inquiring about or relying on that objective information, they may rely on more subjective factors that would be imperfect substitutes for the banned data. One economist has opined that if employers "cared enough about [prior salary] to ask [about] it to begin with, they probably care about it enough to try to guess." Noam Scheiber, N.Y. Times, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?* (Feb. 16, 2018) (quoting Jennifer Doleac, an economist at the University of Virginia) (https://nyti.ms/2C1mmMX). Thus, some employers who are prohibited (or otherwise discouraged) from seeking useful, objective data about applicants may instead make guesses about what the data would be if it were available. *See* Fabiola Cineas, Philadelphia Mag., *Here's How the Wage Equity Law Kenney Just Signed Could Hurt Women* (Jan. 23, 2017) (https://tinyurl.com/ybkrpkv5). That would not be surprising where pay is negotiated, since any party to a negotiation must make assumptions about the legitimate expectations of its counterparty. Thus, banning reliance on prior pay may encourage employers to rely on subjective estimates about an applicant's true expectations, rather than on objective data.

Nor is there any reason to think those guesses will help alleviate pay disparities. To the contrary, if employers cannot rely on accurate and truthful information about what applicants have in fact been paid in the past, some may tend to rely instead on outdated assumptions. In doing so, they may underestimate applicants' prior pay, thereby leading to greater wage discrepancies than would exist if accurate information were available. Indeed,

precluding employers from learning about or relying on prior salary could particularly disadvantage applicants who are already well paid by their current employers. *See* Recent Legislation, *supra* (discussing Oregon statute banning prior-pay defense, and noting that although it may help plaintiffs who bring claims, "its overall effect on wage setting is uncertain (and perhaps undesirable)"). It is likely for that reason that, even apart from the inefficiencies created by prior-pay bans, nearly two thirds of executives in one recent study concluded that such bans would be ineffective in "actually improv[ing]" gender pay equity. *See Korn Ferry Survey*, *supra*.

* * *

This Court's review is warranted to ensure that, as Congress intended, the Equal Pay Act leaves in place legitimate compensation practices that are based on factors other than sex. *See Washington County* v. *Gunther*, 452 U.S. 161, 170-71 (1981). The permissibility of relying on prior pay is a matter of continuing public debate, and Congress, which is best equipped to assess the costs associated with a ban on that practice, has not seen fit to enact one. The courts should not effectively amend the Equal Pay Act's plain language to do what Congress has so far chosen not to. Nor should this Court leave in place an entrenched and widely acknowledged circuit split on this critical issue of federal law.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant the petition for certiorari and reverse the judgment.

Respectfully submitted,

DARYL L. JOSEFFER
EMILY J. KENNEDY
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

JONATHAN S. FRANKLIN
Counsel of Record
PETER B. SIEGAL
NORTON ROSE FULBRIGHT US LLP
799 9th Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 662-0466
jonathan.franklin@
nortonrosefulbright.com

Counsel for Amici Curiae

April 27, 2020