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House Committee on Education & Labor

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

II. THE WAGE GAP IS REAL, WITH DEVASTATING IMPACTS

A. The Wage Gap Harms Women and Their Families

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

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

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

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

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

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

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

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

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

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

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

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

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

C. A Focus on Pay Equity Is Good for Business

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

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

D. Equal Pay Would Provide an Enormous Economic Boost

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

III. CURRENT LAW FALLS SHORT

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

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

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

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

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

IV. THE PAYCHECK FAIRNESS ACT WOULD PROVIDE CRITICALLY IMPORTANT PROTECTIONS

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

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

1. Protecting Employees from Retaliation for Discussing Pay

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Facilitating Class Action Equal Pay Act Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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⁶¹ *Id.*

⁶² See *id.* (finding that the U.S. economy would have produced additional income of more than \$447 billion in 2012 if women received pay equal to their male counterparts).

⁶³ Kweilin Ellingrud et al., *The power of parity: Advancing women's equality in the United States*, MCKINSEY GLOBAL INST. (Apr. 2016), <http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>. The same study estimates that even if the wage gap was only partially closed, \$2.1 trillion in additional GDP could be added in 2025.

⁶⁴ As Justice Ginsburg has noted:

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

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

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

⁶⁵ IWPR, PAY SECRECY AND WAGE DISCRIMINATION (Jan. 29, 2014), <https://iwpr.org/publications/pay-secrecy-and-wage-discrimination>.

⁶⁶ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

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

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

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

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

⁷¹ *Id.*

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

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

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

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

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

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

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

⁷⁹ *Id.*

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

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

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

⁸³ NJ Exec. Order No. 1 (Jan. 16, 2018), <https://nj.gov/infobank/eo/056murphy/pdf/EO-1.pdf>; NY Exec. Order No. 161 (Jan. 9, 2017), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_161.pdf; New Orleans Exec. Order No. MJL 17-01 (Jan. 25, 2017), <https://www.nola.gov/mayor/news/archive/2017/20170125-pr-mayor-issues-executive-order-to-address/>; Pittsburgh Ordinance No. 2017-1121 (Jan. 30, 2017), <https://pittsburgh.legistar.com/LegislationDetail.aspx?ID=2931161&GUID=E45D1721-68E5-4BEC-9989-59C275B74AA7&FullText=1>; Salt Lake City Dep't of Human Resources Pol'y 3.01.10 (Mar. 1, 2018), <https://static1.squarespace.com/static/5682fba7bfe8733044495b6f/t/5a985d8908522926f70e05aa/1519934858864/3.01.09+Gender+Pay+Equity+%28Final%29.pdf>; DC Dep't of Human Resources, District Personnel Instruction No. 11-92 (Nov. 17, 2017), https://dchr.dc.gov/sites/default/files/dc/sites/dchr/publication/attachments/edpm_11B_92_salary_history_instruction.pdf; Chicago Exec. Order No. 2018-1 (Apr. 10, 2018), <http://www.chicityclerk.com/legislation-records/journals-and-reports/executive-orders>.

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

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

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

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

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

⁸⁹ 29 U.S.C. § 206(d)(1).

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

⁹¹ 29 U.S.C. § 216(b).

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

⁹³ 42 U.S.C. § 1981a(b)(3).

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

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

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

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

⁹⁸ Women are 62.8 percent of workers paid the federal minimum wage or less. NWLC calculations based on BUREAU OF LAB. STAT. (BLS), CHARACTERISTICS OF MINIMUM WAGE WORKERS, (Table 1) (2017), <https://www.bls.gov/opub/reports/minimum-wage/2017/home.htm>. Women are 65.9 percent of the workforce in jobs with median wages of \$11.50 or less per hour. NWLC, WOMEN IN THE LOW-WAGE WORKFORCE BY STATE (Jul. 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/06/women-in-low-wage-workforce-by-state-2018-2.pdf>.

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

¹⁰⁰ See ECONOMIC POLICY INSTITUTE AND OXFAM AMERICA, TEN YEARS WITHOUT A RAISE: A SIMPLE INCREASE IN THE FEDERAL MINIMUM WAGE WOULD BENEFIT MILLIONS OF AMERICAN WORKERS (Feb. 2019), [https://www.oxfamamerica.org/static/media/files/Raise the Wage- How women of color would benefit.pdf](https://www.oxfamamerica.org/static/media/files/Raise%20the%20Wage-How%20women%20of%20color%20would%20benefit.pdf).

¹⁰¹ See, e.g., Catrin Einhorn & Rachel Abrams, *The Tipping Equation*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html>; NWLC, OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN (Aug. 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>; RESTAURANT OPPORTUNITIES CTR. UNITED (ROC UNITED) & FORWARD TOGETHER, ET AL., THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (Oct. 2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.

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

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

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

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ NWLC, FAIR WORK SCHEDULES ARE CRITICAL FOR WORKING PARENTS AND THEIR CHILDREN'S WELL-BEING (Sept. 2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/New-Set-Up-For-Success-Why-Fair-Schedules-Are-Critical-for-Working-Parents-and-Their-Childrens-Well-Being-Sept..pdf>.

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

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

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

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

¹¹² H.R. 2282, S. 1006, 115th Congress (2017); NWLC, THE EQUALITY ACT OF 2017: GROUNDBREAKING PROTECTIONS AGAINST SEX DISCRIMINATION (May 2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/05/Equality-Act.pdf>.

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