No. 19-35428

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIFER JOY FREYD,
Plaintiff-Appellant,

v.

UNIVERSITY OF OREGON, HAL SADOFSKY, and MICHAEL H. SCHILL,
Defendant-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON, EUGENE
(CV. 6:17-cv-448-MC)

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF APPELLANT

FILED WITH CONSENT OF ALL PARTIES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of University Professors ("AAUP"), founded in 1915, is a non-profit organization of over 42,000 faculty, librarians, graduate students, and academic professionals in public and private colleges and universities. The mission of the AAUP is to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good. AAUP's policies have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See, e.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971). In cases that implicate AAUP policies, or otherwise raise legal issues important to higher education or faculty members, AAUP frequently submits amicus briefs in the Supreme Court and the federal circuits. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Urofsky v.*

Gilmore, 216 F.3d 401 (4th Cir. 2000). By participating as an amicus in this case, the AAUP seeks to assist the Court in evaluating the federal Equal Pay Act, the Oregon equal pay law, and Title VII of the Civil Rights Act in a manner that promotes the remedial purposes of these laws within the context of the standards and principles of the academic profession in higher education.[1]

SUMMARY OF ARGUMENT

The wage disparity in Professor Jennifer Freyd's case is an example of the ongoing gender-based salary inequalities in the academic profession, generally, and for women full professors in doctoral institutions, in particular. AAUP's reported faculty salary data shows a persistent pattern of wage inequality between male and female university and college professors. As AAUP's most recent *Report on the Economic Status of the Profession* concludes, "[W]omen remain underrepresented at the most senior and highest paying posts, and their aggregate position has barely budged in ten years. A great deal of work remains

[1] Pursuant to Federal Rule of Appellate Procedure 29(4)(E) and Circuit Rule 29-3, all parties have consented to AAUP's filing of this brief. Further, no party's counsel authored this brief in whole or in part and no party or party's counsel contributed money intended to fund the brief's preparation or submission. Amicus AAUP may apply for funding from AAUP Foundation, a related 501(c)(3) entity of AAUP, to support the brief's preparation or submission.

in the quest for equity and inclusion in higher education."[2] Professor Freyd's individual claim of wage discrimination should be evaluated within this broader context of higher education, including the persistence of gender-based inequities.

Amicus AAUP seeks to assist this Court by presenting AAUP standards and principles of the academic profession in higher education. AAUP's *1940 Statement of Principles on Academic Freedom and Tenure* has been endorsed by the Association of American Colleges and Universities and, over subsequent decades, by more than 250 academic professional organizations and institutions.[3] AAUP urges this Court to consider AAUP standards and principles in evaluating Professor Freyd's claims under the federal Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), the Oregon equal pay law, Or. Rev. Stats. § 652.220, and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e–2000e-17.

This amicus brief argues that the standards and principles of the academic profession as defined by AAUP should inform the interpretation of "equal

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[2] Am. Ass'n of Univ. Professors, *The Annual Report on the Economic Status of the Profession, 2018–19* 9 (May 2019), https://www.aaup.org/sites/default/files/2018-19_ARES_Final_0.pdf.

[3] Am. Ass'n of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, *in* AAUP Policy Documents and Reports 13 (11th ed. 2015), https://www.aaup.org/file/1940%20Statement.pdf; https://www.aaup.org/endorsers-1940-statement.

work" under the EPA and the "work of comparable character" standard under the Oregon equal pay law. As the Supreme Court explained in *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974), to understand the meaning of "equal work" the courts must look to the employer's own policies and practices and to the definitions of the work at issue within the "specific meaning in the language of industrial relations." In the instant case, defining equal work in the context of the relevant "industry standards" would mean the definitions of work in the academic profession. Colleges and universities across the US, including University of Oregon ("UO"), have adopted AAUP's definitions of faculty work and thus have established the relevant standards of the academic profession – namely that the common core of faculty job duties are teaching, research, and service. Further, AAUP and the academic profession define "academic freedom" as an essential working condition that enables faculty to carry out their common core job duties of teaching, research, and service.

The district court erred in finding that Professor Freyd could not prove a prima facie case of "equal work" under the EPA or "work of comparable character" under the Oregon equal pay law. The court failed to evaluate faculty work within the standards of the academic profession that define faculty core job duties as being teaching, research, and service. Further, the district court based its conclusion on its erroneous view that academic freedom enables faculty to

"change their job duties" or "'remake their job.'" *Freyd v. Univ. of Or.*, 384 F. Supp. 3d 1284, 1290–91 (D. Or. 2019). Academic freedom does not enable faculty to create different jobs with unequal work. Rather, academic freedom is a unifying condition of employment for faculty, which enables them to carry out their common core of job duties of teaching, research, and service. The district court's misuse of academic freedom to justify sex-based wage inequality would make it virtually impossible for faculty to bring a successful prima facie case of "substantially equal work" under the EPA or "work of comparable character" under the Oregon equal pay law.

The district court erred in granting summary judgment to UO on the Title VII disparate impact claim. Professor Freyd's prima facie case is supported by evidence that UO's practice of offering retention raises to faculty has a disparate impact on the basis of sex. UO's affirmative defense is flawed in relying on a "market forces" theory to justify the gender-based wage inequality resulting from its retention raise practice. As noted in a report by the AAUP Committee on the Status of Women in the Academic Profession, "Within disciplines, female faculty members may be 'less marketable' than male colleagues of equal

merit, because discriminatory attitudes on other campuses reduce their likelihood of getting an outside offer."[4]

UO's affirmative defense under Title VII is not supported by evidence that its retention pay practice is a business necessity or job-related. Moreover, UO policies providing for pay equity adjustments constitutes an alternative employment practice under Title VII that eliminates the disparate impact resulting from using retention raises. If UO offers raises to retain faculty, it should correct for resulting gender-based wage inequalities by making equity adjustments in salaries.

ARGUMENT

I. THE ACADEMIC PROFESSION HAS A LONG AND PERSISTENT HISTORY OF GENDER-BASED INEQUALITY IN WAGES.

The wage disparity in Professor Freyd's case is an example of the ongoing gender-based salary inequalities in the academic profession, generally, and for women full professors in doctoral institutions, in particular. Professor Freyd's individual claim of wage discrimination, therefore, should be evaluated within the broader context of persistent gender-based inequities in higher education.

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[4] Am. Ass'n of Univ. Professors, *Salary-Setting Practices that Unfairly Disadvantage Women Faculty*, *in* AAUP Policy Documents and Reports 313, 314 (11th ed. 2015) [hereinafter *Salary-Setting Practices*].

Academic institutions across the country have adopted policies meant to foster equality and inclusiveness among the faculty, staff, and student body. Yet, a persistent wage gap between male and female faculty members is evident in both public and private institutions and across disciplines. These pay disparities are widespread and fall within a larger pattern of gender-based wage differentials found in the wider labor market — a subject of Congressional concern since at least the 1940s. After decades of failed attempts to pass legislation curbing unequal pay in American workplaces, Congress amended the Fair Labor Standards Act in 1963 by passing the Equal Pay Act, a law designed to correct a centuries old problem of gender-based wage discrimination in the labor market. One year later, Congress passed Title VII of the Civil Rights Act of 1964 to address discriminatory employment practices that are based on factors including "sex." Until then, few laws explicitly dealt with the myriad forms of discrimination against female workers across the economy. More common were "protective" labor laws restricting women's freedom to work in certain professions, establishments, and at certain hours. Turning its attention to education, Congress passed Title IX of the Education Amendments Act of 1972 prohibiting gender-based discrimination in educational institutions that receive federal funds.

Long before these laws were enacted, however, AAUP had registered its concern about discrimination against women in the academy and in 1918 established the Committee on Women in the Academic Profession (Committee W). Since the late 1970s, AAUP has been collecting gender-specific faculty salary data that shows a persistent pattern of wage inequality between male and female university and college professors. Investigations into various issues adversely affecting female faculty have resulted in AAUP standards and principles for sound academic policies relating to discrimination, family responsibilities and academic work, partner accommodations and dual career appointments, faculty child care, and sexual harassment. In its report, *AAUP Faculty Gender Equity Indicators 2006*, AAUP concluded that "women face more obstacles as faculty in higher education than they do as managers and directors in corporate America."[5]

AAUP publishes annual reports on the economic status of the profession. The AAUP 2018-2019 annual report explains the continuing gender-based salary inequities over the last ten-year period:

> [S]alaries for women faculty members continue to lag behind those of men. On average, women in full-time faculty positions were

[5] Martha S. West & John Curtis, *AAUP Faculty Gender Equity Indicators 2006*, at 4, https://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf.

> paid 81.6 percent of the salaries of men in full-time positions during the 2018–19 academic year. That figure stood at 80.8 percent in the analogous table from 2008–09. The AAUP has been tracking gender differences in salary since the mid-1970s, and the progress toward equity has been exceedingly slow.[6]

The AAUP 2018-2019 report explains that gender-based inequality is particularly pronounced at doctoral universities. "The proportion of women who are full professors increased only slightly over ten years, primarily because of their continuing underrepresentation at that rank in doctoral universities."[7] Salary inequity "is highest (nearly 11 percent) for women full professors at doctoral universities, where both the salaries and the numbers of faculty are the highest."[8] The 2018-2019 report concludes:

> In sum, the post recessionary years have brought continued slow progress toward gender equity within the full-time faculty. Yet women remain underrepresented at the most senior and highest paying posts, and their aggregate position has barely budged in ten years. A great deal of work remains in the quest for equity and inclusion in higher education.[9]

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[6] Am. Ass'n of Univ. Professors, *supra* note 2, at 3.

[7] *Id.* at 9.

[8] *Id.*

[9] *Id.*

II. THE DISTRICT COURT ERRED IN FINDING THAT PROFESSOR FREYD COULD NOT PROVE A PRIMA FACIE CASE OF "SUBSTANTIALLY EQUAL" WORK UNDER THE EQUAL PAY ACT OR "WORK OF COMPARABLE CHARACTER" UNDER THE OREGON EQUAL PAY LAW.

A. "Equal work" of faculty should be evaluated within the well-established core requirements of faculty jobs, as defined by AAUP and widely accepted as the standards of the academic profession.

In *Corning Glass*, 417 U.S. at 208, the Supreme Court stated, "The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." The Court also explained, "Congress recognized . . . that the concept of equal pay for equal work was more readily stated in principle than reduced to statutory language which would be meaningful to employers and workable across the broad range of industries covered by the Act." *Id.* at 198–99. To understand the meaning of "equal work," the courts must look to the employer's own policies and practices and to the definitions of the work at issue within the "specific meaning in the language of industrial relations." *Id*. at 202. (The Court's conclusion that "working conditions" did not include the "time of day worked" was "not only manifested in Corning's own job evaluation plans but is also well accepted across a wide range of American industry." *Id.*)

In the instant case, this Court should interpret the EPA definition of "equal work" in the context the relevant "industry standards," which would

mean the definitions of work in the academic profession. Amicus AAUP urges this Court to consider the widespread endorsement and use of AAUP standards and principles that define the work of faculty. Universities and colleges broadly recognize AAUP as the authoritative source for the standards of the profession of faculty in higher education. Here, the definition of "equal work" or "substantially equal work" must consider the policies and practices of the college or university involved in the case, as well as the standards and principles of the academic profession more broadly.

The AAUP *1940 Statement of Principles on Academic Freedom and Tenure* ("*1940 Statement of Principles*") has been endorsed by the Association of American Colleges and Universities and, over subsequent decades, by more than 250 academic professional organizations and institutions.[10] Since 1940, colleges and universities across the country, including UO, have adopted AAUP's definitions of faculty work and thus have established the relevant standards of the academic profession — namely that the common core of faculty job duties are teaching, research, and service. Further, the academic profession defines "academic freedom" as an essential working condition that enables faculty to carry out their common core job duties of teaching, research, and

[10] Am. Ass'n of Univ. Professors, *supra* note 3.

service. As stated in the *1940 Statement of Principles*, "Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning."[11]

These standards of the academic profession as defined by AAUP should inform the interpretation of "equal work" under the EPA. The EPA does not require proof of identical work. *Gunther v. Cty. of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd on other grounds*, 452 U.S. 161 (1981). Rather, the EPA requires equal pay for "substantially equal work," which is what faculty members do in their core job duties of teaching, research, and service. This is consistent with the judicial standard that defines "substantially equal" work based on a "common core" of tasks, along with a determination of whether any additional job duties make two jobs "substantially different." *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir. 1999). These common core job duties also meet the broader " work of comparable character" standard under the Oregon equal pay law, Or. Rev. Stats. § 652.220. The fact that faculty teaching, research, and service entail a variety of courses, research methods/projects, and service activities does not make the work substantially different. The variety in

[11] *Id.* at 14.

teaching, research, and service activities from year to year is an inherent characteristic of the common core job duties of faculty.

Courts, including the U.S. Supreme Court, have recognized AAUP's standards and principles. *See, e.g.*, *Roth*, 408 U.S. at 579 n.17; *Tilton*, 403 U.S. at 681–82 (1971). In *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975), this Court stated, "We take notice…that section 2.3 [of the code of the university] was adopted almost verbatim from the 1940 Statement of Principles of the American Association of University Professors . . . ." In *McAdams v. Marquette University*, 914 N.W.2d 708 (Wis. 2018), a faculty member brought a breach of contract claim against Marquette University, which had adopted the *1940 Statement of Principles*. In ruling in favor of the plaintiff faculty member, the Wisconsin Supreme Court majority stated, "[W]e will refer to [the AAUP *1940 Statement of Principles*] . . . to understand the scope of the academic freedom doctrine." *Id.* at 730. The concurring opinion noted, "As the first organization to develop codes of academic freedom, AAUP's statements remain the model." *Id.* at 746, n.10 (Bradley, J., concurring); *see also* 29 C.F.R. § 1625.11(e)(2) ("[T]he minimum standards [of tenure] set forth in the 1940 Statement of Principles on Academic Freedom and Tenure, jointly developed by the Association of American Colleges and the American Association of University Professors, have enjoyed widespread adoption or endorsement.")

In 1993, AAUP's Committee on Teaching, Research, and Publication issued a report, *The Work of Faculty: Expectations, Priorities, and Rewards* to "assess the current state of public discussion regarding the duties and obligations of the professoriate." Am. Ass'n of Univ. Professors, *The Work of Faculty: Expectations, Priorities, and Rewards*, *in* AAUP Policy Document and Reports 241 (11th ed. 2015). The report clarified "the roles of teaching, scholarship, and service for faculty, their institutions, and the public welfare." *Id.* In describing the work of faculty, the report emphasizes the unified and integrated nature of the faculty job duties of teaching, research, and service:

> Faculty workload combines teaching, scholarship, and service; this unity of components is meant to represent the seamless garment of academic life, and it defines the typical scholarly performance and career . . . . All of these are vital components of the work of faculty. Ideally they reinforce each other . . . .

Id.

The report further describes faculty "workload" as the "total professional effort, which includes the time (and energy) devoted to class preparation, grading student work, curriculum and program deliberations, scholarship (including, but not limited to, research and publication), participation in governance activities, and a wide range of community services, both on and off campus." *Id.* at 242.

The 1993 AAUP report also explains that carrying out the core duties of teaching, research, and service entails a diverse range of potential activities. Teaching, "a basic activity of the professoriate," includes classroom and laboratory instruction, academic advising, and training graduate students in individualized research. *Id.* Research includes "discovery and publication," as well as "a broader concept of scholarship that embraces the variety of intellectual activities and the totality of scholarly accomplishments." *Id.* Service, "an important component of faculty work," includes work on the curriculum, shared governance, academic freedom, and peer review "as contributions to the shaping and building of the institution." *Id.* at 243.

Thus, AAUP standards and principles accepted by universities and colleges describe the common core duties of teaching, research, and service, emphasizing the unified and integrated nature of these components, including the mutually reinforcing nature of these core duties. At the same time, faculty members do not perform identical work. The core duties of teaching, research, and service may be carried out through a variety of teaching, research, and service activities. Indeed, individual faculty members will not perform identical work from one year to the next, as they teach various courses, initiate new research projects, or become involved in different service activities. The standards and principles of the academic profession include the expectation that

teaching, research, and service workloads will go up or down for individual faculty members from year to year, depending on factors such as departmental teaching needs, changes in levels of research funding, or institutional service needs.[12]

It is also the norm that faculty members move in and out of administrative roles, for example, as chair of a department or director of an institute for some period. While taking on such an administrative role, the faculty member will continue to engage in the core faculty job duties of teaching, research, and service. In some instances, an administrative role as department chair or institute director may be considered part of the service obligations of a faculty position. In recognition of the additional time entailed in carrying out such administrative roles during that period, the faculty member may teach fewer courses or receive an additional stipend. Filling the administrative role, however, does not alter the common core of faculty members' job duties in teaching, research, and service. Moving in and out of positions such as department chair or research institute director is simply an expected and normal part of being a faculty member.

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[12] *See* Am. Ass'n of Univ. Professors, *Statement on Faculty Workloads with Interpretive Comments*, *in* AAUP Policy Documents and Reports 237, 238–39 (11th ed. 2015).

As discussed more fully in the following section of this amicus brief, the UO Psychology Department's policies and practices are consistent with the standards of the academic profession in defining the common core duties of teaching, research, and service and academic freedom to carry out those duties. Professor Freyd and the comparator full professors in the department do not perform identical work. They do perform "substantially equal work" and "work of comparable character" by carrying out their common core duties through a variety of teaching, research, and service activities, as is the norm in the academic profession.

B. The district court erred in finding that Professor Freyd could not prove a prima facie case under the EPA or the Oregon equal pay law. The district court failed to consider the academic standards of the profession that define faculty work and the meaning of academic freedom.

The district court erred in finding that Professor Freyd could not prove a prima facie case of "equal work" under the EPA or "work of comparable character" under the Oregon equal pay law. The court failed to evaluate faculty work within the standards of the academic profession that define faculty core job duties as being teaching, research, and service. Further, the district court erred in describing academic freedom as enabling faculty to "change their job duties" or "'remake their job.'" 384 F. Supp. 3d at 1290–91. The district court used its inaccurate definition of academic freedom to conclude that Professor Freyd

could not prove her prima facie case of "work of comparable character" under the Oregon equal pay law, Or. Rev. Stat. § 652.220(1). By extension, the court concluded that Professor Freyd could not prove a prima facie case under "the stricter 'substantially equally and similarly situated' test required by the [federal] Equal Pay Act." *Freyd*, 384 F. Supp. 3d at 1295.

The district court's analysis fails to understand that academic freedom is an essential condition of the core job duties of faculty teaching, research and service. Academic freedom does not enable faculty to create different jobs with unequal work. Rather, academic freedom is a unifying condition of employment for faculty, which enables them to carry out their common core of job duties of teaching, research, and service. Academic freedom enables faculty to experiment with different teaching and research methods, teach new courses, explore new research ideas, and take on service activities that respond to the needs of the department or university.

The district court's misuse of academic freedom to justify sex-based wage inequality threatens irreparable damage to academic freedom, the EPA, and the Oregon equal pay law. Academic freedom is a condition of employment that all faculty hold in common to enhance their ability to engage in teaching, research, and service. It is not a weapon to be wielded as a justification for gender-based inequalities. Further, the court's misapplication of academic freedom would

make it virtually impossible for faculty to make a successful prima facie case of "substantially equal work" under the EPA or "work of comparable character" under the Oregon equal pay law. Applying the district court's analysis would mean that faculty at the same rank and in the same department do not engage in "substantially equal work" or "work of comparable character" anytime they teach different courses, pursue different research projects, use different research methodologies, or serve on different departmental service committees. This analysis flies in the face of reason and is inconsistent with federal and state equal pay legal standards. Certainly, Congress did not intend to exclude an entire profession from the gender equality requirements of the EPA. Rather, applying the Supreme Court's approach in *Corning Glass*, the federal "substantially equal work" and state "comparable work" standards should be interpreted consistently with the standards of the academic profession.

In granting summary judgment to UO, the district court ignored the evidence that the UO Psychology Department's policies and practices are consistent with the standards of the academic profession. This includes the Psychology Department's describing common core job duties in faculty job classifications and in the criteria for job evaluation and review, maintaining the core job duties of teaching, research, and service of faculty when they go in and out of administrative roles, and paying a separate stipend for faculty for the

period of time when they hold administrative roles. As in colleges and universities across the United States, UO policies protect faculty academic freedom in carrying out the common core of teaching, research, and service in ways that are appropriate to their discipline and their institution. For example, the Psychology Department does not require faculty to use any particular research methodology. Nor does the Psychology Department require faculty to support their research through federal grants. Rather, faculty members choose their research methods as appropriate for the research project, such as Professor Freyd's survey research for her work in the field of trauma and sexual violence research and Professor Allen's use of scanning and imaging technology for his brain imaging research. Research funding and research methodology may differ among faculty, but this is not evidence of unequal work.

UO should be held to the standards of the academic profession, as reflected in UO's policies and practices, which define the common core duties of teaching, research, and service and protect the academic freedom to carry out those duties. UO should not be permitted to avoid this reality of equal work in its attempt to justify unequal pay to Professor Freyd. At the very least, the district court should have found that there were genuine issues of material fact regarding the substantial equality and comparable nature of the work performed by the full professors in the Psychology Department.

III. UO'S RETENTION RAISE PRACTICE CREATES A DISPARATE IMPACT ON THE BASIS OF SEX IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT AND OREGON STATE LAW.

The district court erred in granting summary judgment to UO on the Title VII disparate impact claim. Professor Freyd's prima facie case is supported by evidence that UO's retention raise practice has a disparate impact on the basis of sex.[13] UO's affirmative defense is flawed in relying on a "market forces" theory to justify the gender-based wage inequality resulting from its retention raise practice. Further, UO's affirmative defense is not supported by evidence that its retention pay practice is a business necessity or job-related as required by Title VII. Moreover, UO policies providing for pay equity adjustments constitute an alternative employment practice under Title VII that eliminates the disparate impact resulting from using retention raises. If UO offers raises to retain faculty, it could correct for resulting gender-based wage inequalities by making equity adjustments in salaries.

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[13] UO has a policy governing Faculty Retention Salary Adjustment (or retention raises). However, UO's practice of extending retention raises is often inconsistent with this published policy. For example, the policy calls for consideration of "implications for internal equity within the unit," yet this consideration was ignored. Amicus AAUP's argument addresses UO's retention raise practice as applied in this case.

A. UO's retention raise practice creates a disparate impact on the basis of sex.

The district court erred in holding that Professor Freyd was unable to establish a prima facie case that UO's retention raise practice has a disparate impact on female professors. Title VII prohibits employers from using an employment practice that has a disparate impact on members of a protected class. In *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971), the Supreme Court interpreted Title VII to proscribe "not only overt discrimination, but also practices that are fair in form, but discriminatory in practice. The touchstone is business necessity. If an employment practice which operates to exclude [a member of a protected class] cannot be shown to be related to job performance, the practice is prohibited." Therefore, neutral employment practices may violate Title VII's prohibition against discrimination even absent a showing of an employer's subjective intent to discriminate.

To establish a prima facie case of disparate impact discrimination, the plaintiff must show (usually by statistical evidence) that the defendant engaged in a practice, neutral on its face, but discriminatory in impact. Professor Freyd alleges that the university's retention raise practice has a disparate impact on female professors. In the AAUP report, *Salary-Setting Practices that Unfairly Disadvantage Women Faculty*, the AAUP Committee on the Status of Women

in the Academic Profession (Committee W), describes the discriminatory impact on women faculty from universities' use of a market-based practice of paying retention raises to faculty who have received outside job offers from other universities:

> It is sometimes claimed that all pay differences between men and women, including those within and between occupational specialties, can be explained by the operations of "the market." . . . But market-determined wages and discrimination that merits correction are by no means mutually exclusive . . . . Within disciplines, female faculty members may be "less marketable" than male colleagues of equal merit, because discriminatory attitudes on other campuses reduce their likelihood of getting an outside offer. Moreover, a higher proportion of women than of men belong to two-career couples, so that the ability of women to seek and accept outside offers is on average lower. These facts suggest that salary gaps between equally meritorious people can open up if outside offers result in salary adjustments without attention to internal equity in pay-setting.

Salary-Setting Practices, at 314.

In support of her claim, Professor Freyd offered evidence of a $15,000 to $25,000 salary gap between male and female professors that results from UO's practice of offering retention raises. She also produced evidence that "the University has offered retention raises sufficient to keep female professors who have outside offers 40% of the time, while they have offered sufficient raises to keep male professors with outside offers 62% of the time which indicates that

the University retained women at a rate of only 65% of the rate that they retained men." *Freyd*, 384 F. Supp. 3d at 1296.

Although Professor Freyd's expert witness found the sample size to be reliable, the court found the sample size so small "as to render the statistical significance of [her] analysis suspect." *Id.* Statistically significant evidence of this kind, however, should be understood in the context of organizational structures within academic institutions. In colleges and universities, academic departments vary in size. Some departments may have less than a handful of faculty members, while others may have dozens. If small sample size renders statistically significant evidence "suspect" it follows that potential gender-based wage disparities in smaller departments are outside Title VII's remedial reach. Holding that a small sample size is "suspect" would have serious repercussions especially given widespread gender-based wage disparities in academia.

B. UO cannot meet its burden of proving an affirmative defense that its retention raise practice is job-related and consistent with business necessity.

UO has the burden of proving an affirmative defense under Title VII with evidence that its retention raise practice is supported by a business necessity and is job-related. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Courts have cautioned against an expansive interpretation of "job relatedness" and "business necessity" as such

an interpretation hinders the broad remedial purposes of Title VII. The district court erred in holding that UO met its burden of proof of the affirmative defense based largely on its interests in retaining faculty who bring federal grant revenue to the university. The court explained its finding of a business necessity: "The University must retain its faculty who are being recruited by other institutions, especially those who secure federal funding, because they help the University to maintain its status as a top tier research institution, expand its research footprint, and provide funding for the training of graduate students." *Freyd*, 384 F. Supp. 3d at 1297. The court explained its finding that the retention raise practice is job-related: "[P]rofessors, including the named comparators in this case, receive competing offers directly because of their job performance, including their ability to attract federal grant funding." *Id.*

The district court's reasoning amounts to a market-based justification that a practice of offering retention raises is "good for business" because of revenue enhancement of federal grants. *See Rizo v. Yovino*, 887 F. 3d 453, 467 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019).[14] The federal courts have become increasingly critical of the use of market-based defenses under the

[14] Although this Court's *Rizo* decision was vacated by the Supreme Court due to the death of Judge Reinhardt prior to the issuance of the decision, the observations in *Rizo* about the serious problems with market-based defenses remain relevant and useful.

EPA, particularly in defining the scope of the "factor other than sex" affirmative defense. *See, e.g.*, *Glenn v. Gen. Motors*, 841 F.2d 1567, 1571 (11th Cir. 1988); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F. 2d 520, 527 (2d Cir. 1992); *Rizo*, 887 F. 3d at 466-67. The courts' reasoning in these cases reveals that market-based defenses undermine the purpose of the EPA to eliminate gender-based wage inequalities created and perpetuated by the market.[15] In particular, these courts require that an employer prove that an asserted affirmative defense of a "factor other than sex" is job-related. Similarly, judges should bring a critical eye to market-based affirmative defenses offered to justify wage inequality under Title VII.

UO's market-based defense is based largely on an asserted need to offer raises to retain faculty who bring in revenue through federal grants. Closer analysis of this justification reveals, however, that this retention raise practice is not supported by business necessity and is not job-related. At most, the "good for business" defense is business-related, but not a business necessity.

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[15] As the Eleventh Circuit stated, "This Court and the Supreme Court have long rejected the market force theory as a 'factor other than sex': 'The argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected.'" *Glenn*, 841 F.2d at 1570.

Further, UO's use of retention raises to retain faculty for their federal grants is not job-related. In *Griggs*, the Supreme Court warned that "if an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. Title VII's disparate impact affirmative defense framework, thus, is meant to be narrowly construed. Once a prima facie case of disparate impact has been established, an employer must demonstrate that the practice is related to job performance. However, there is no evidence that UO's retention raise practice relates in any way to the performance of a professor's teaching, research, and service responsibilities. The UO Psychology Department does not require faculty to obtain federal grants. Rather, faculty job duties require research and publication. Whether a faculty member seeks grant funding depends on the nature of the research methods, such as the need for funds to support certain types of research equipment, and whether grants are available for the type of research they engage in.

As the AAUP report, *Salary-Setting Practices that Unfairly Disadvantage Women Faculty*, explains, "Within disciplines, female faculty members may be 'less marketable' than male colleagues of equal merit, because discriminatory attitudes on other campuses reduce their likelihood of getting an outside offer." *Salary-Setting Practices*, at 314. These conditions, as evidenced by the instant

case, demonstrate the disparate impact of UO's use of retention raises and the lack of support for UO's market-based affirmative defense.

Moreover, UO has available a practice that could eliminate the disparate impact on women faculty and therefore constitute an "alternative employment practice" under Title VII. As the AAUP report notes, where colleges and universities use retention raises, they can correct for gender-based wage disparities by giving "attention to internal equity in pay-setting. One solution would be to review internal equity analyses whenever pay adjustments are made to meet outside offers." *Id.* With this reasonable alternative practice, UO could continue to use retention raises, as long as it conducts internal equity analyses and makes necessary salary adjustments to correct for sex-based pay inequities. In the instant case, although UO policy provides for gender-equity adjustments, the Psychology Department and the UO administration failed to make such adjustments to rectify the disparate impact of its retention raises.

CONCLUSION

For the foregoing reasons, and those in the brief of the Plaintiff Jennifer Joy Freyd, this Court should reverse the district court and remand this case for trial.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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