**No. 05-1074**

IN THE

# Supreme Court of the United States

LILLY M. LEDBETTER,
*Petitioner*,

v.

GOODYEAR TIRE & RUBBER COMPANY, INC.,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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***ADDITIONAL AMICI CURIAE***

9to5, National Association of Working Women
American Association of University Women
American Civil Liberties Union
Coalition of Labor Union Women
Connecticut Women's Education & Legal Fund
Equal Rights Advocates
Feminist Majority Foundation
HADASSAH
Legal Momentum
MANA National Latina Organization
National Asian Pacific American Women's Forum
National Association of Social Workers
National Council of Women's Organizations
National Organization for Women Foundation
National Women's Law Center
Northwest Women's Law Center
Pick Up the Pace
The Women's Law Center of Maryland
Wider Opportunities for Women
Women Employed
Women's Advocacy Project, Inc.
Women's Bar Association of the District of Columbia
Women's Law Project

## QUESTION PRESENTED

Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* are twenty-four organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. Statements of interest for the individual organizations are attached in the Appendix.[1]

## SUMMARY OF ARGUMENT

Under the ruling below, an employee cannot challenge pay discrimination resulting from any decisions made before the most recent pay decision prior to the 180-day limitations period under Title VII of the Civil Rights Act of 1964. This represents a stark and abrupt change in the law. *Cf. Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring) ("Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."). As even the Eleventh Circuit acknowledged, *Bazemore* was widely understood to permit a plaintiff to challenge ongoing pay discrimination, regardless of how far back the decision to discriminate was made. Pet. App. 20a-22a n.17. Contrary to the view of the court below, this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), fully supports this understanding of *Bazemore*.

The Eleventh Circuit's ruling can only aggravate the longstanding gender wage gap. To this day, women earn less than men in virtually every occupation and job category, at every age and stage in the employment lifecycle, and for every hour worked. The wage gap expands over the course of a woman's working life, with serious economic consequences. Pay discrimination is responsible for a significant

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[1] Letters of consent are on file with the Clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

portion of this gap, and Title VII must be construed broadly and fairly in order to effectively combat it.

The Eleventh Circuit's untethering of discriminatory pay decisions from the subsequent paychecks that implement them is contrary to the way in which typical employers set and review wages. By not permitting employees to challenge pay decisions that continue to affect their paychecks, the court below has created a safe harbor for pay discrimination to persist and grow over time.

The ruling below improperly imposes overwhelming burdens on the victims of pay discrimination. Pay discrimination is rarely accompanied by overt bias, and employee salaries are notoriously cloaked in secrecy. Victims thus have difficulty perceiving pay discrimination and, in any event, are unlikely to promptly complain about it. These difficulties are compounded for employees subjected to discrimination in their starting salaries, when much pay discrimination begins. A discovery rule, although appropriate for Title VII claims generally, would do little to alleviate these concerns and would turn virtually every pay discrimination case into a messy factual dispute over what the plaintiff knew and when. Employees governed by the lower court's ruling will face undue pressure to file first and ask questions later in order to preserve their Title VII rights.

At the same time, the decision below undermines the incentives for employers to prevent and correct pay discrimination. Because this ruling grandfathers in pre-existing pay discrimination, it creates little incentive for employers to find and correct pay disparities between male and female workers. Instead, it encourages employers to conduct periodic *pro forma* salary reviews so as to insulate prior discriminatory decisions from challenge.

Title VII's language and intent foreclose the rule adopted by the court below in three respects. First, Title VII makes an unlawful employment practice the trigger for the limitations period. In a pay discrimination case, the unlawful employ-

ment practice is the payment to an employee of less money because of her sex. Consequently, any discriminatory paycheck received within the limitations period is actionable, regardless of when the decision to pay the plaintiff a discriminatory salary first was made. Second, Title VII allows for up to two years' backpay from the date of filing a charge—a provision which would make little sense unless a plaintiff could challenge pay discrimination that begins prior to and continues into the limitations period. Finally, the Civil Rights Act of 1991, which overturned this Court's decision in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), clearly reflects Congress' intention that Title VII reach the current implementation of prior discriminatory decisions.

## ARGUMENT

### I. THE RULING BELOW IGNORES THE REALITIES OF PAY DISCRIMINATION.

#### A. Pay Discrimination Remains an Intractable Problem for Women in the Workplace.

The gender-based wage gap in the United States is persistent and well-documented. Although researchers disagree about the size of the gap, almost all agree that it exists and is significant.

Current estimates of the gender wage gap hover between seventy and eighty percent—meaning that a woman, on average, earns seventy to eighty cents for every dollar earned by a man. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Highlights of Women's Earnings in 2003*, at 29 tbl. 12, 31 tbl. 14 (Sept. 2004) (reporting that women's median weekly earnings were 79.5% of men's in 2003, but only 73.6% for college graduates). The pay gap is especially pronounced for African American women and Hispanic or Latino women, who earn even less on the dollar compared to white men. *See id.* at 3 cht. 2 (reporting median usual weekly earnings of $715 for white men, $567 for white women, $491

for black or African American women, and $410 for Hispanic or Latino women); *cf.* Amy Caiazza et al., Inst. for Women's Pol'y Res., *The Status of Women in the States, Women's Economic Status in the States: Wide Disparities by Race, Ethnicity, and Region* 24-25 (Apr. 2004) (finding wide variation in Asian American women's wages). Although the gender wage gap today is narrower than the 1970s measure of fifty-nine cents on the dollar, the bulk of the change occurred during the 1980s, and studies show little additional progress since 1990. *See* Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. Rev. 707, 715 (2000).

The gender wage gap exists at every level of earnings. *See, e.g.*, Daniel H. Weinberg, U.S. Dep't of Commerce, Census 2000 Special Reports, *Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women* 7 (May 2004).[2] Moreover, the disparity in men's and women's wages extends, with some variation, throughout the employment lifecycle. Women in their 40s and 50s earn salaries more disparate from their male counterparts than do women at the beginning of their careers. *See*, *e.g.*, Bureau of Labor Statistics, *supra*, at 11 tbl. 1 (finding, based on data from the Current Population Survey, that women ages 45-54 earn 73% of what men earn, while women ages 25-34 earn 87% of what men earn); Francine D. Blau et al., *The Economics of Women, Men, and Work* 150 (5th ed. 2006) ("women earn less than men in all age categories," and the ratio of women's earnings to men's decreases as they age). When earnings over a longer

[2] The gap is largest at the top of the earnings spectrum. For example, "Physicians and Surgeons" is the highest paid occupational category for both sexes, yet the female median ($88,000) is only 63% of the male median ($140,000). *See* Weinberg, *supra*, at 12 tbl. 5. The wage gap remains significant at the bottom of the earnings spectrum, however, especially since the effect of real-dollar differences may be felt most acutely by lower-wage workers. *See id.* at 13 tbl. 6 (citing example of "Teacher assistants," a lower-paid occupation, where the female median, $15,000, is 75% of the male median of $20,000).

period of time are aggregated, the gap is even starker. In their prime earning years, women earn only 38 percent of what men earn over a 15-year period. *See* Stephen J. Rose & Heidi I. Hartmann, Inst. for Women's Pol'y Res., *Still a Man's Labor Market: The Long-Term Earnings Gap* 9 (2004).

Discrimination accounts for a significant part of the wage gap. Although there are plausible nondiscriminatory reasons for pay differences between men and women, none of them, even in the aggregate, explains the entire gap. *See* Selmi, *supra*, at 719-43 (reviewing data). For example, part of the wage gap is sometimes attributed to differing degrees of labor force attachment between men and women. Yet, women who work year-round and full-time during at least 12 of 15 consecutive years earn only 64 percent of what men with a similar attachment to the labor force earn. *See* Rose & Hartmann, *supra*, at 10.

Differences in the number of hours worked also fail to explain the gender disparity in wages. Hour-for-hour, women earn less than men. *See* Bureau of Labor Statistics, *supra*, at 2, 25 tbl. 9, 26 tbl. 10, 35-36 tbl. 15, 37-36 tbl. 16 (reporting that among hourly workers, the median hourly wage for women is 85% of the median hourly wage for men). Similarly, differences in education explain little of the wage gap. According to 2000 Census data, the "only women aged 35-54 to earn more than 71.4 percent of men at the median are those with some college education, but only a bit more, 72.1 percent." Weinberg, *supra*, at 14, 15 tbl. 9.

Most importantly, when studies simultaneously control for multiple variables such as education, occupation, hours worked, and time away from the workplace because of family care responsibilities, a significant gender gap remains. *See, e.g.*, U.S. Gen. Acct. Office, *Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings*, GAO-04-35 at 2 (Oct. 2003) (examining nationally representative longitudinal data set and concluding that women in 2000 earned only 80% of what men earned

even after accounting for differing work patterns and other "key factors"); Weinberg, *supra*, at 21 ("There is a substantial gap in median earnings between men and women that is unexplained, even after controlling for work experience . . . education, and occupation."); Council of Econ. Advisers, *Explaining Trends in the Gender Wage Gap* 11 (1998) (concluding that women do not earn equal pay even when controlling for occupation, age, experience, and education); Michelle J. Budig, *Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator*, 49 Soc. Prob. 258, 269-70 (2002) (explaining that men are advantaged, net of control factors, in both pay levels and wage growth regardless of the gender composition of jobs).

While debate continues over how much of the gender wage gap is explained by discrimination, clearly some employers continue to practice pay discrimination. For example, employers penalize women for expected leave-taking out of proportion to the patterns many women actually follow. *See* Selmi, *supra*, at 745-50; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (discussing employer reliance on "stereotype-based beliefs about the allocation of family duties" as a form of sex discrimination). There is also a well-documented "wage premium" for married men, but not for married women, and a wage penalty of 10-15% for women who have children. *See* Selmi, *supra*, at 726. Major U.S. corporations have settled multi-million dollar lawsuits for pay discrimination in recent years. *See, e.g.*, Richard W. Stevenson, *Texaco is Said to Set Payment Over Sex Bias*, N.Y. Times, Jan. 6, 1999, at C1; *Boeing Agrees to Pay $4.5 Million as Bias Settlement*, L.A. Times, Nov. 20, 1999, at C1.

Thus, despite modest progress in narrowing the wage gap, sex discrimination in compensation persists, and the need for strong protection under Title VII is as great as ever.

### B. The Court Below Disregarded the Cumulative Nature of Pay Discrimination.

The Eleventh Circuit ruled that to challenge current discrimination in pay, a plaintiff can reach no farther back than (and perhaps not even as far as) the pay decision immediately preceding the charge-filing period. Pet. App. 14a. This approach, which treats each pay decision as severable from preceding decisions about an employee's salary, belies the realities of wage discrimination and can only exacerbate the gender wage gap.

Like most employers, Respondent Goodyear Tire and Rubber Company ("Goodyear") sets an employee's initial salary and then periodically determines whether to award a percentage-based increase.[3] Left uncorrected, even a relatively minor initial pay disparity will expand exponentially over an employee's career, even if subsequent raises are determined in a nondiscriminatory fashion. Moreover, under most performance review systems, there is little room to correct a discriminatory current salary. Goodyear's raises, for example, were subject to both individual and group caps. Pet. App. 6a. Thus, once a discriminatory pay rate is set, it is likely to continue throughout an employee's tenure with that employer, and perhaps even provide the basis for determining a starting salary with a subsequent employer.

Illustrating this effect, a study at Carnegie Mellon University found that male students who graduated with a master's degree earned starting salaries 7.6% higher than their female counterparts, for an average annual salary difference of almost $4,000. *See* Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* 1

[3] Although the Eleventh Circuit stated that Goodyear "annually reviews and reestablishes employee salary levels," Pet. App. 2a, the record clearly reflects that periodic reviews were confined to a determination of whether to augment an employee's existing salary with a modest percentage-based increase based on performance. Pet. 4 n.5; Pet. Rep. 2-3 n.1.

(2003). Using standard assumptions, the authors explained how a relatively modest disparity generates "sobering results" by the end of a career. *Id.* at 5. In their example, if a 22-year-old man received a starting salary of $30,000, and an equally qualified 22-year-old woman received a starting salary of $25,000, assuming each received identical 3% annual raises, the gap would widen from $5,000 to $15,000 annually by the time they reached age 60. *Id.* The sum total of the difference would rise to a whopping $361,171 over the woman's employment life, and a staggering $568,834 by age 60, if the man earned 3% annual interest on the difference. *Id.*; *see also* Virginia Valian, *Why So Slow?: The Advancement of Women* 3 (1998) ("Very small differences in treatment can, as they pile up, result in large disparities in salary, promotion, and prestige.").

By treating each pay decision as severable from the paychecks that follow, the Eleventh Circuit disregarded the cumulative nature of pay discrimination and misapplied this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In that case, this Court held that "discrete" decisions such as hiring, firing, promotion, demotion, and transfer trigger Title VII's limitations period. The Court rejected a continuing violation theory for such claims, which would have permitted plaintiffs to challenge discrete acts outside the limitations period if they were "sufficiently related" to timely acts. *Id.* at 114.

Nothing in this Court's decision in *Morgan* supports the Eleventh Circuit's ruling. Discriminatory paychecks are not actionable simply because they are "sufficiently related" to a pay decision that occurred outside the limitations period. *Id.* at 114. They are actionable because they pay less money to an employee because of sex. The court below improperly applied *Morgan* by treating the *decision* to pay an employee less because of sex—as opposed to the paychecks implementing that decision—as the event that triggers the limitations period, cutting off the employee's ability to challenge

subsequent paychecks implementing that decision. That ruling flatly disregards this Court's recognition in *Bazemore*, cited with approval in *Morgan*, 536 U.S. at 111-12, that each discriminatory paycheck is actionable, regardless of when the decision to discriminate in pay first occurred. *See Bazemore*, 478 U.S. at 395-96 (deeming this point "too obvious to warrant extended discussion").

The Eleventh Circuit's ruling ignores these realities of pay discrimination. Unlike a discriminatory termination, the decision to pay a woman a lower salary because of sex is not a time-limited act that is severable from the paychecks that implement that decision. When an employee is fired for a discriminatory reason, the firing will undoubtedly have a prolonged negative effect on the employee. But the discrimination itself has concluded, and the time to complain begins to run. *Morgan*, 536 U.S. at 112-13. Not so for pay discrimination. Rather than being able to begin the process of recovery, a victim of pay discrimination continues to experience the discrimination, not just its effects, with each new paycheck. As the time from the original discriminatory decision grows more distant, the discrimination deficit grows larger. The original decision to pay a woman less because of her sex is, in effect, a policy of discrimination that is carried out paycheck by paycheck, each one of which contains less money for an illegal reason. Left uncorrected, each subsequent paycheck implements the discriminatory decision and brings it to bear anew on the employee.

With the decision below, the Eleventh Circuit has created a safe harbor for employers to watch a discriminatory pay rate grow over time without fear of liability. While many factors may contribute to the gender wage gap, the ruling below will only exacerbate that part of the problem that is attributable to pay discrimination.

## II. THE RULING BELOW SADDLES EMPLOYEES WITH UNREALISTIC BURDENS AND CREATES INCENTIVES FOR EMPLOYERS THAT ARE INCONSISTENT WITH TITLE VII.

The rule adopted by the court below is fundamentally inconsistent with the twin goals of Title VII: preventing discrimination and compensating its victims. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). It imposes inordinate burdens on employees who experience pay discrimination and creates perverse incentives for employers not to correct it.

### A. The Decision Below Disregards the Difficulties Employees Face in Challenging Pay Discrimination.

The decision below places an untenable burden on employees to complain shortly after the first salary decision that results in a discriminatory paycheck or forever lose the right to challenge any resulting disparities in pay. Given the reality of how employees perceive and respond to pay discrimination, very few will be able to comply with the Eleventh Circuit's rule. Employees who are subjected to pay discrimination at the time they are first hired face an especially unfair predicament. Contrary to the assumption of the court below, the possibility of equitable tolling principles, including a discovery rule, does not solve these difficulties. Because it radically departs from how employees experience pay discrimination, the Eleventh Circuit's interpretation, if allowed to stand, would effectively immunize the vast majority of pay discrimination from Title VII challenge.

#### 1. *The Eleventh Circuit's Ruling is Incompatible with the Realities of How Women Perceive and Respond to Discrimination.*

The Eleventh Circuit's rule places the burden on the employee to quickly discern and challenge each discrim-

inatory pay decision before her next salary review, however cursory, wipes the slate clean. The court's ruling flatly ignores real life experience with discrimination on two fronts: how people recognize that they have been discriminated against and how they choose to respond.

It is well-documented that victims of discrimination rarely recognize immediately that they have experienced discrimination. Researchers in the field of social psychology have documented a "minimization bias" in which the targets of discrimination resist perceiving and acknowledging it as such, even when they experience behavior that objectively qualifies as discrimination. *See* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-28 (2005) (summarizing social science research). These attribution errors are especially likely when discrimination is masked and not obvious, leading victims to downplay the likelihood of discrimination and attribute negative outcomes to other causes. *See* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 Law & Soc. Inquiry (forthcoming Nov. 2006) (manuscript at 9, on file with authors); Brenda Major & Cheryl R. Kaiser, *Perceiving and Claiming Discrimination, in The Handbook of Research on Employment Discrimination: Rights and Realities* 279, 285-87 (Laura Beth Nielsen & Robert L. Nelson, eds., 2006).

Although the minimization bias and the difficulty perceiving discrimination are not specific to pay discrimination, victims of pay discrimination are especially susceptible to these attribution errors. One difficulty is the lack of transparency in employee compensation systems and a code of silence governing workplace salaries. While the results of hiring, firing, promotion, demotion and transfer decisions are generally commonly known and discussed, employee compensation is typically hidden under a veil of secrecy. *See, e.g.*, Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171

(2004) (explaining that social norms discourage discussion of salaries in the workplace and observing that one-third of U.S. private sector employers have policies which, although illegal, bar employees from discussing their salaries, while many other employers informally communicate an expectation of salary confidentiality). Even if an employee fortuitously learns that she earns less than a male colleague, she is unlikely to have access to the information necessary to discern the basis for the disparity. *See id.* at 178 ("Employees observe wage differentials without the full information necessary to evaluate the justifications for differing wages.").

Pay discrimination is especially difficult to perceive because it is rarely accompanied by circumstances suggestive of bias. Indeed, unless it implements a pay cut, a paycheck is unlikely to be experienced as adverse at all. A victim of pay discrimination may even receive raises and be satisfied with her pay, unaware that her male colleagues earn more. In contrast, with a discriminatory hiring, firing, promotion or demotion, the victim immediately knows that she has experienced an adverse employment action. She can search out an explanation from the employer, evaluate it for pretext, and note any comments suggestive of stereotyping or bias. In making sense of any explanation, she will have less difficulty identifying comparators. Pay discrimination, in contrast, is rarely accompanied by any explanation from the employer, comparison with other employees' salaries, or discernible signs of prejudice. Together, these factors make pay discrimination especially difficult to detect. *See* Major & Kaiser, *supra*, at 289-90 (discussing research showing that people are better able to perceive discrimination when it is accompanied by overt indicators of prejudice).

The absence of aggregate data showing comparisons between men and women as a group makes it particularly difficult to perceive discrimination on an individual basis. *See* Kaiser & Major, *supra* (manuscript at 5-6). Yet this is precisely the situation in which a prospective pay discrim-

ination plaintiff is likely to find herself. Unlike job decisions with respect to hiring, firing, promotion, transfer and demotion, where an employee can usually get some picture of how women generally fare in such decisions, an employee typically has no way of knowing, short of discovery, how women overall are paid compared to men. As a result, it is particularly difficult to perceive individual instances of pay discrimination.

Perceiving discrimination is only half the battle. Even if an employee is able to perceive pay discrimination in the short window of time allowed by the court below, there are additional obstacles to filing a timely charge. As a general matter, research shows that employees rarely challenge discrimination, even when it is obvious. *See* Brake, *supra*, at 28-36 (discussing and citing social science literature documenting the obstacles to challenging discrimination). The high risk of retaliation and the social costs imposed on people who complain about discrimination sharply discourage women from reporting it to authorities or legal institutions. *See id*. at 37; Major & Kaiser, *supra*, at 294-96; Kaiser & Major, *supra* (manuscript at 25-32, 34). Even in the harassment context, for example, where the discrimination is more obvious and blatant, filing a complaint is a last resort, after other strategies have failed. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. Women's L. J. 3, 25-26 (2003) (reviewing surveys and studies of victim response to harassment).

In light of the personal costs of reporting discrimination, an employee who is aware of pay discrimination might reasonably tolerate it for some time, until the discrimination deficit becomes too much for her to tolerate. Yet under the ruling below, once a salary review takes place, the employee loses her chance to challenge pay discrimination first set in motion by prior decisions. Such a rule greatly dilutes Title VII's promise of nondiscrimination.

2. *Pay Discrimination That Begins When an Employee is Hired is Especially Difficult to Reach Under the Ruling Below.*

The decision below places an inordinate burden on all prospective Title VII claimants to quickly perceive and complain of each discriminatory salary decision. However, the lower court's rule has especially dire consequences for employees subjected to pay discrimination when they are first hired.

The time of hiring is a common departure point for salary discrimination. *See, e.g.*, Barry Gerhart, *Gender Discrimination in Current and Starting Salaries: The Role of Performance, College Major and Job Title*, 43 Indus. & Lab. Rel. Rev. 418, 427 (1990) ("even with a comprehensive group of control variables, the analysis shows that women had significantly lower starting and current salaries than men"). Supervisors often have more discretion in setting a starting salary than they do in subsequent adjustments to salary. *See* Kostas G. Mavromaras & Helmut Rudolph, *Wage Discrimination in the Reemployment Process*, 32 J. Hum. Resources 812, 813-14 (1997). Moreover, many job postings indicate a broad salary range rather than a specific salary, so new employees may not know that they are being paid less than other entry-level hires. *Id.* The practice of using prior salary as a baseline for establishing a starting salary can also lead to lower salaries for women at the time of hiring.[4] And,

[4] A number of courts have rejected, under some circumstances, the use of prior salary to set entry-level wages as a defense to a *prima facie* case of pay discrimination under the Equal Pay Act and Title VII. *See, e.g.*, *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir.), *cert. denied*, 488 U.S. 948 (1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982); *Futran v. Ring Radio Co.*, 501 F. Supp. 734, 739 (N.D. Ga. 1980); *see also* Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 Colum. L. Rev. 1085, 1108 (1989) (contending that employers should have the burden of justifying use of prior salary when it results in unequal pay).

as discussed in the previous section, wage discrimination that begins in a starting salary is likely to follow an employee throughout her career, amplified by the typical percentage-based adjustments that follow. Yet, the time of initial hire is when an employee's ability to perceive and complain of pay discrimination is at its lowest.

Limited exposure to the workplace undermines a new employee's ability to detect pay disparities and to sort out benign from discriminatory influences. The code of silence governing employee compensation is likely to be especially impenetrable for new employees. To the extent that employees ever learn comparable salary information, it is often through the kinds of informal connections with coworkers that develop over time. Many women do not learn until much later that they have been underpaid compared to their male counterparts for some time. *See, e.g., Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir.), *cert. denied*, 537 U.S. 941 (2002) (plaintiff did not know what her colleagues earned until a printout listing of salaries mysteriously appeared on her desk, seven years after her starting salary was set lower than her coworkers' salaries); *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff worked for employer for years before learning of salary disparity published in a newspaper).

A recently hired employee will also face a particularly thorny predicament in deciding whether to file a charge of discrimination within the Eleventh Circuit's timeframe. There are many good reasons why an employee might be unable or unlikely to challenge a discriminatory salary decision soon after being hired, foremost among them that she needs to keep her job. The most common reason for not challenging discrimination, the fear of retaliation, is likely to be most acute for new employees, who are especially vulnerable. Without the benefit of an established work record, a recently hired employee will have little to fall back on if

called upon to prove that an adverse action resulted from retaliation as opposed to job performance. *Cf.* 2 Arthur Larson, *Employment Discrimination* § 35.01, at 35-3 (2d ed. 2006) (explaining that a defendant may rebut a *prima facie* case of retaliation by offering a nondiscriminatory reason for its action, shifting the burden back to the plaintiff to prove that the proffered reason was pretextual). And with less of an opportunity to develop strong connections and support from colleagues and supervisors in the workplace, a new employee may be less inclined to risk retaliation by challenging a discriminatory pay decision. *See* Major & Kaiser, *supra*, at 295-96 (discussing the importance of social support as a factor influencing the decision to report discrimination). Concerns about retaliation also may be heightened for new employees who are hired at a lower point in the organizational hierarchy, compared to employees with longer tenure who have been able to work their way up. *See* Brake, *supra*, at 39-40.

For these reasons, the Eleventh Circuit's rule will likely remove from challenge much pay discrimination that begins in starting salaries, with devastating and long term financial consequences for the employees who suffer it.

### 3. *The Possible Applicability of a Discovery Rule Does Not Adequately Address These Problems.*

The Eleventh Circuit mistakenly assumed that equitable tolling principles could avert the danger that its ruling would defeat employees' Title VII rights. Pet. App. 19a n.16. As an initial matter, however, it is not clear whether and to what extent a discovery rule applies at all to Title VII claims.[5]

[5] Although this Court has stated that equitable tolling principles apply under Title VII, it has never expressly declared that Title VII allows for a discovery rule. *See Morgan*, 536 U.S. at 105, 114 n.7; *id.* at 124 (O'Connor, J., concurring) (expressing the belief that "some version of the discovery rule applies to discrete-act claims"). With respect to pay claims in particular, until quite recently, the widespread reliance on *Bazemore* to

Even assuming that a discovery rule applies to all Title VII claims, as *amici* believe it should, its application will not ameliorate the harshness of the rule imposed by the court below. A court applying a discovery rule to a pay discrimination claim would likely start the limitations period running from the time the employee learns that a male comparator earned a higher salary, *see Inglis v. Buena Vista Univ.*, 235 F. Supp. 2d 1009, 1025 (N.D. Iowa 2002), even if the employee does not yet realize that discrimination has occurred. *See Oshiver v. Levin*, 38 F.3d 1380, 1386-87 (3d Cir. 1994) (describing the discovery rule in a discriminatory hiring and discharge case as starting the limitations period from the plaintiff's awareness of injury, not the awareness of a legal wrong). But using mere knowledge of a pay disparity to start the clock running would not solve the problems discussed above with respect to perceiving discrimination. Even if an employee fortuitously learns of a male colleague's salary, this information is unlikely to be accompanied by an explanation from the employer, broader wage data on the workplace, overt signs of prejudice, or any of the other information that enables employees to attribute adverse actions to discrimination. Consequently, the application of a discovery rule will not enable employees to overcome the obstacles to perceiving pay discrimination.

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treat each discriminatory paycheck as actionable provided little occasion to consider whether to adopt a discovery rule in such cases. *See Inglis v. Buena Vista Univ.*, 235 F. Supp. 2d 1009, 1021 (N.D. Iowa 2002) (explaining that, before *Morgan*, courts interpreted "pay claims as continuing violations of Title VII, regardless of whether the plaintiff challenged a single act of wage discrimination or a discriminatory pay policy"). As a result, the applicability of a discovery rule to pay claims is not settled. *Compare Hamilton v. 1st Source Bank*, 928 F.2d 86, 90 (4th Cir. 1990) (*en banc*) (rejecting a discovery rule for pay claims under the Age Discrimination in Employment Act and holding that the "last possible time that pay discrimination could have occurred was the date when [plaintiff] received his final paycheck") *with Inglis*, 235 F. Supp. 2d at 1025 (applying a discovery rule to Title VII pay discrimination claim).

Reliance on a discovery rule, however well-crafted, is an inadequate and undesirable solution to the predicament employees face under the decision below. The Eleventh Circuit's rule, as tempered by a discovery rule, would turn virtually every Title VII pay discrimination case into a pitched battle over what the plaintiff knew and when, requiring the fact finder to sort out the precise point in time at which the plaintiff had enough information to put her on notice that she had a pay discrimination claim. Because a paycheck itself is not inherently adverse, does not come with a list of comparators, and is unlikely to be accompanied by any explanation or overt signs of bias from the employer, a discovery rule is particularly difficult to apply in such cases. The typical triggers of notice present in other discrimination claims, such as notice of a demotion and the identity of one's replacement, are absent in a pay discrimination claim.

Rather than adopt a rule that would require protracted litigation over the timing and extent of the plaintiff's knowledge in virtually every pay discrimination case, this Court should reaffirm its position in *Bazemore* that each discriminatory paycheck is actionable, thus keeping the focus of the dispute on the critical question of whether the employer pays the plaintiff less because of her sex.

4. *The Eleventh Circuit Rule Pressures Plaintiffs to File First and Ask Questions Later*.

In order for an employee to avoid the harsh consequences of the Eleventh Circuit's rule, the prudent course of conduct would be to file a discrimination charge within 180 days of each new pay decision if she has the slightest reason to suspect that she is paid less than similarly situated males. At the outset, given the uncertainty about how a discovery rule might apply to pay claims, the decision below places the onus on the employee to find out quickly as much as she can about her colleagues' pay, at whatever cost to herself or to work-

place cohesion. *See* Bierman & Gely, *supra*, at 177-78 (explaining that learning other employees' salaries generates conflict among employees and undermines morale). Once she discovers a disparity in pay, an employee determined to protect her Title VII rights under the Eleventh Circuit's framework may find herself forced into an early litigation posture rather than take the time to pursue more informal and conciliatory strategies to protest her pay. *Cf. Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-40 (1976) (pursuit of a collective bargaining grievance procedure does not toll Title VII's limitations period). Such hypervigilance is not necessarily best for the employee, given the high costs of complaining of discrimination, discussed above, and is likely to lead to unnecessary litigation that could have been avoided but for the intense time pressures generated by the Eleventh Circuit.

*Amici* recognize that just because a rule operates harshly in practice does not justify the creation of a judicially crafted exception where the terms of the statute require such a result. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). But in this case, it is the Eleventh Circuit that departed from the terms of the statute and twenty years' experience under *Bazemore*. This Court should reject such a strict approach.

### B. The Decision Below Discourages Voluntary Compliance and Invites Subterfuge.

The incentives placed on employers by the Eleventh Circuit in this case are flatly inconsistent with the deterrent purpose of Title VII. Under this approach, discriminatory wages in place long enough are effectively grandfathered in, eliminating an employer's incentive to voluntarily comply with Title VII. The lower court's ruling not only ends incentives for voluntary compliance, but actually deters employers from engaging in such efforts. Under the reasoning of the court below, undertaking a comprehensive salary review to examine gender equity could risk opening up the employer to

charges of pay discrimination that would otherwise be foreclosed by more narrowly confined, regular reviews of individual salaries. An employer would be better off leaving undiscovered any gender disparities in wages, and conducting periodic salary reviews allowing for only marginal modifications that are unlikely to raise any new allegations of discrimination. Surely Congress did not intend Title VII to discourage employers from proactively addressing gender-based pay disparities. *See, e.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (noting "Congress' intention to promote conciliation rather than litigation in the Title VII context"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1979) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal."). Indeed, to be consistent with other nondiscrimination requirements, Title VII must encourage employers to take such steps. *See, e.g.*, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), *reprinted as amended in* 42 U.S.C. §2000e (2000) (placing affirmative obligations on federal contractors to take proactive steps to find and correct discriminatory practices, including illegal pay practices, in their workforce).

If the lower court's rule were allowed to stand, it is a safe bet that virtually *all* employers, if they had not done so already, would act quickly to establish regular *pro forma* salary reviews to insulate discriminatory pay decisions from challenge. In effect, the court's ruling invites employers to take advantage of a new, unprecedented and nearly failsafe affirmative defense to pay discrimination claims, without even placing the burden of persuasion on the employer. In a misguided effort to justify this approach, the Eleventh Circuit repeatedly chastised the plaintiff for not taking advantage of the opportunity provided in her annual review to raise her pay discrimination complaints with her employer. Pet. App. 24a ("[T]he timing of the employer's compensation system creates one, obviously preferable opportunity for an employee to make any pay-related complaints: the point at which the

employee's salary is reviewed and he or she is dissatisfied with the result."); Pet. App. 26a (distinguishing a contrary circuit precedent by noting, "[t]here is no indication . . . that the employer had in place any sort of system like Goodyear's, giving the plaintiff regular opportunities to complain of improperly deflated pay . . . ."); Pet. App. 31a (". . . Owen told Ledbetter that she would not be receiving a raise when he met with her to discuss her performance appraisal, and she made no complaint about being discriminated against.").

This Court has never placed the onus on a plaintiff to complain internally of discrimination as a prerequisite for an actionable Title VII claim, and for good reason. The lower court's emphasis on an employee's failure to complain to her employer at the time of her salary review fails to account for the bind confronting employees if they complain too soon without a sufficient basis for believing that Title VII was violated. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (per curiam) (Title VII does not protect a plaintiff from retaliation if she lacked a reasonable belief that the conduct she opposed violated the statute). Instead, this Court has held that when a tangible employment action is involved, employer liability is automatic, regardless of whether the employee first complains informally or files an internal grievance. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998). The much narrower affirmative defense adopted by this Court for the limited context of supervisory sexual harassment lacking a tangible employment action obviously has no applicability here, as there is nothing quite so tangible as a paycheck.

Under the Eleventh Circuit's framework, by providing regular salary reviews that enable only modest adjustments in wages, an employer could effectively nullify Title VII's prohibition on wage discrimination. Title VII's substantive protections must not be so easily thwarted.

## III. THE DECISION BELOW CONTRAVENES TITLE VII'S LANGUAGE AND INTENT.

The decision below is contrary to the law of Title VII in many respects. *Amici* focus on three critical errors. First, the Eleventh Circuit's mistaken view of discriminatory intent led it to misconceive the unlawful employment practice that triggers the limitations period in a pay discrimination claim. Second, the lower court failed to consider the implications of Title VII's two-year back pay provision, 42 U.S.C. §2000e-5(g)(1) (2000). And finally, the court below disregarded the Civil Rights Act of 1991, which makes clear that Title VII permits a plaintiff to challenge the present implementation of a prior discriminatory decision.

### A. The "Unlawful Employment Practice" is the Discriminatory Paycheck, Not the Underlying Intent.

The decision below mistakes an employer's *intent* to discriminate against women for the *disparate treatment* that effectuates that intent. It is the latter practice which comprises the "unlawful employment practice" that triggers Title VII's limitations period. 42 U.S.C. § 2000e-5(e)(1) (2000) ("A charge . . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . .").

In a Title VII pay discrimination case, the unlawful practice is the discriminatory paycheck that compensates a woman less because of her sex. *See Bazemore*, 478 U.S. at 395-96. Discriminatory intent is established when a plaintiff proves that she has received unfavorable treatment because of her sex. *See, e.g., County of Washington, Oregon v. Gunther*, 452 U.S. 161, 179 (1981) (Title VII plaintiff must prove "that her salary would have been higher had she been male"); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) ("'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the

other sex are not exposed.'") (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). Thus, the unlawful practice that triggers the limitations period is the differential treatment, even if the underlying intent originated outside the limitations period.

The Eleventh Circuit went astray by viewing the "unlawful employment practice" as beginning and ending with the subjective intent of the decisionmaker. Pet. App. 24a ("[A]n employee . . . may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period. Other, earlier decisions may be relevant, but only to the extent they shed light on the motivations of the persons who last reviewed the employee's pay, at the time the review was conducted."). The court compounded its error by improperly defining discriminatory intent as a conscious ill will towards women and a lack of good faith, rather than the intent to pay a woman less because of sex. *Compare* Pet. App. 31a ("There was no evidence that he [Owen] bore any ill will towards Ledbetter or toward women generally") and Pet. App. 31a-32a n.21 ("It is not discriminatory to honestly rely on inaccurate information . . . and there was no evidence that Owen acted any way but in good-faith reliance on the information he was using.") *with Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (explaining that "the absence of a malevolent motive" does "not alter the intentionally discriminatory character of the policy").[6] In effect, the court incorrectly grafted a willfulness requirement

[6] The lower court's view that good faith reliance on a discriminatory performance review does not violate Title VII as long as the person who implemented the discriminatory decision was unaware of the underlying bias, Pet. App. 31a-32a n.21, is simply not the law. *See Faragher*, 524 U.S. at 790 ("there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like . . . compensation . . . , have resulted in employer liability once the discrimination was shown").

onto Title VII.[7] These misconceptions led the court to incorrectly view the unlawful employment practice as limited to the past, even though the discriminatory paychecks continued throughout the limitations period.

Under Title VII's plain language, it is the unlawful employment practice, not the underlying intent, that triggers the limitations period. That practice occurs with each paycheck that pays a woman less because of her sex.

### B. Title VII's Allowance of Up to Two Years' Backpay Must Mean That a Plaintiff Can Challenge Pay Discrimination Traceable to Decisions Made Before the Limitations Period.

Title VII allows for recovery of backpay up to two years before the charge of discrimination is filed. 42 U.S.C. § 2000e-5(g)(1) (2000) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."). A necessary implication of this provision is that a Title VII plaintiff must be able to challenge pay discrimination that began before and continues into the filing period, and recover up to two years' backpay if the discrimination extends into that timeframe.

If the two-year backpay provision did not apply to pay discrimination claims such as Ledbetter's, it is difficult to imagine how it would have any application at all.[8] Under this

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[7] Although some form of malice, ill will, or intent to violate the statute is necessary for punitive damages, *see Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 529-30 (1999), no such intent is required to establish Title VII liability. *See, e.g.*, *Albemarle*, 422 U.S. at 422 (holding that the employer's lack of "bad faith" was not a sufficient reason to deny backpay, and noting that "a worker's injury is no less real simply because his employer did not inflict it in 'bad faith'").

[8] Although in theory, the decision below might permit Title VII's two-year backpay provision to apply to cases where the most recent salary decision occurred two or more years before the charge was filed, this surely describes a tiny class of cases. Moreover, because the Eleventh Circuit explicitly declined to rule that a plaintiff could ever challenge a

Court's decision in *Morgan*, when a plaintiff challenges a discriminatory hiring, firing, demotion, promotion or transfer decision, the two-year backpay allowance does not apply. Because these are discrete, self-contained acts, recovery is limited to the consequences of that act, which, by definition (assuming a timely charge), begin during the limitations period. *See Morgan*, 536 U.S. at 114. For example, if a plaintiff was demoted on January 1, 2001, and filed a charge on the last day of the limitations period, her eligibility for backpay would not extend farther back than the demotion, or 180 days before she filed the charge.

Nor does the two-year backpay provision have any application to hostile environment harassment. Although a plaintiff may seek a remedy for harassment that occurred prior to the filing period as long as it forms part of the hostile environment that extends into the filing period, a hostile environment claim provides no occasion to seek backpay, as opposed to compensatory and punitive damages, for such prior acts.[9] The very nature of such a claim is that it does not involve something tangible like a loss of pay. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986).

Thus, Congress' allowance of up to two years' backpay would be rendered virtually meaningless if plaintiffs could not challenge and seek recovery for pay discrimination that began before and continued into the limitations period. *Cf. Sabree v. United Bhd. of Carpenters*, 921 F.2d 396, 401 (1st Cir. 1990) ("By allowing for the possibility of recovering

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pay decision that occurred outside the limitations period, this remote possibility is not a promising basis for salvaging § 2000e-5(g)(1).

[9] Backpay, as distinct from compensatory and punitive damages, is available for hostile environment harassment only where there has been a constructive discharge, which is treated the same as a termination for purposes of remedy. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 (2004) ("[A] prevailing constructive discharge plaintiff is entitled to all damages available for formal discharge. The plaintiff may recover postresignation damages, including . . . backpay . . . .").

back pay for over a year prior to the 300 day filing period, 'Congress must have envisioned continuing remediable violations that existed prior to the running of the period.'") (quoting Charles A. Sullivan et al., *Employment Discrimination*, §11.5 at 452 (1988)). Indeed, this provision has its most direct application to cases where the plaintiff challenges pay discrimination that began two or more years before the charge was filed and continued into the limitations period.[10]

The lower court's conclusion that it is a "necessary consequence" of *Morgan* that "the employee is limited to recovering for those paychecks received within the limitations period" does not withstand scrutiny. Pet. App. 24a-25a n.18. Although some other courts have also misinterpreted *Morgan* to bar plaintiffs from seeking backpay for pay discrimination that occurred prior to the filing period, they too have failed to explain how this limitation can be squared with § 2000e-5(g)(1). *See Shea v. Rice*, 409 F.3d 448, 451 (D.C. Cir. 2005); *Forsythe v. Fed'n Empl. & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005).

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[10] The only other plausible use for § 2000e-5(g)(1) would be in cases in which equitable tolling was applied to extend the filing period beyond 180 days from the discriminatory act. *See, e.g.*, Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 57-58 (Autumn 1986) (arguing that the two-year backpay allowance could be given effect by applying it to cases involving estoppel and fraudulent concealment). However, this is an odd way to make sense of the explicit language in § 2000e-5(g)(1), given that Title VII says nothing about equitable tolling at all, much less that the explicit two-year backpay allowance is limited to such cases. *See id.* at 58 (acknowledging that "Congress probably was not thinking about those cases" when it enacted this provision). Nor does this explanation do justice to Congress' design that backpay be broadly available to fulfill Title VII's remedial purposes and not limited to exceptional cases. *See Albemarle*, 422 U.S. at 416-23 (discussing the important role of backpay in Title VII's remedial scheme); *see also Morgan*, 536 U.S. at 113 (cautioning that equitable doctrines such as tolling and estoppel "are to be applied sparingly").

*Morgan* does not foreclose the application of § 2000e-5(g)(1) to pay discrimination claims. That case only barred recovery for discrete acts, such as hiring, firing, promotion, demotion and transfer decisions, that occurred outside the limitations period. *Morgan*, 536 U.S. at 114-15. It refused to fashion such a rule for all Title VII claims, specifically permitting plaintiffs to seek make-whole relief for earlier harassment that forms part of the same hostile environment that extends into the filing period. *Id*. at 119-21.

For purposes of crafting a remedy, pay discrimination falls on the harassment side of the line under *Morgan*. Much like acts of harassment, each discriminatory paycheck is part and parcel of the same discriminatory conduct. The accumulation of harm and the linkage of the discriminatory acts to the same discriminatory decision make pay discrimination precisely the type of discrimination for which the statute's two-year back-pay provision was designed.[11] Indeed, a number of courts have recognized that Title VII's two year backpay allowance applies to pay discrimination claims, both before and after *Morgan*.[12]

As this Court has long recognized, the allowance of backpay is a crucial part of Title VII's remedial scheme. *See Albemarle*, 422 U.S. at 416. Indeed, when Congress enacted the two-year backpay provision in 1972, it reaffirmed the

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[11] Because the two-year backpay allowance does not eliminate the need to prove a violation within the limitations period, there is no reason for concern about saddling defendants with stale claims. Moreover, to the extent that liability for up to two years of backpay for pay discrimination that continues into the limitations period is burdensome for employers, it is a burden that Congress explicitly imposed.

[12] *See, e.g.*, *Goodwin*, 275 F.3d at 1010; *Anderson v. Zubieta*, 180 F.3d 329, 337 (D.C. Cir. 1999); *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1988); *Merrill v. S. Methodist Univ.*, 806 F.2d 600, 606 (5th Cir. 1986); *Lovell v. BBNT Solutions, LLC*, 299 F. Supp. 2d 612, 615 (E.D. Va. 2004); *Tomita v. Univ. of Kan. Med. Ctr.*, 227 F. Supp. 2d 1171, 1180 (D. Kan. 2002).

importance of backpay and specifically rejected proposals to restrict it, including a less generous provision that would have authorized the accrual of backpay only up to two years prior to filing a complaint in court. *Id*. at 420-21 & n.13. In order to effectuate Congress' remedial policy, Title VII plaintiffs must be able to challenge pay discrimination that begins before and extends into the filing period, and seek up to two years' backpay from the date the charge was filed. *Cf. Gunther*, 452 U.S. at 178 ("We must . . . avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.").

### C. The Court Below Disregarded Congress' Intent in Enacting the Civil Rights Act of 1991.

Congress enacted the Civil Rights Act of 1991 in part to overturn a series of Supreme Court decisions that unduly narrowed the protection available to discrimination victims. One of the decisions that prompted Congress to act was *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

In *Lorance*, the plaintiffs challenged a 1979 collective bargaining agreement that changed the calculation of seniority. *Id.* at 902-03. Although this recalculation did not immediately affect the plaintiffs, it caused them to be demoted in 1982. *Id.* The plaintiffs filed a Title VII charge arguing that the 1979 change in seniority discriminated against women. *Id.* Although the charge was timely as measured from the demotions, this Court held the charge time-barred, ruling that the adoption of the 1979 agreement triggered the limitations period. *Id.* at 911. The Court reasoned that the violation occurs when the discriminatory decision is made, not when its effects are felt. *Id.* at 908-09.

Congress responded by enacting a provision in the 1991 Act specifically designed to overturn the result in *Lorance*:

> For the purposes of this section, an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured

> by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2) (2000).

This provision, although limited by its terms to seniority systems, was intended as a broad repudiation of the reasoning in *Lorance* and an endorsement of the approach taken in *Bazemore*. In enacting this provision, Congress clarified its intent that Title VII reach ongoing practices that perpetuate discrimination, both with respect to seniority systems and beyond. *See* 137 Cong. Rec. S15483, S15485 (daily ed. Oct. 30, 1991) (interpretive memorandum of Sen. Danforth) ("This legislation should be interpreted as disapproving the extension of this decision rule [in *Lorance*] to contexts outside of seniority systems.").

Significantly, with this provision, Congress saw itself as endorsing and generalizing the result in *Bazemore*. As the Senate Report accompanying the proposed Civil Rights Act of 1990, the precursor to the 1991 Act, carefully explained:

> Section 7(a)(2) does not alter existing law regarding when an employer's discrete action is, and is not, a continuing violation of the law; rather, the provision concerns employer rules and decisions of on-going application which were adopted with an invidious motive. Where, as alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* . . ., for example, . . . the Supreme Court properly held that each application of that racially motivated salary structure, i.e., each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore*.

Civil Rights Act of 1990, S. Rep. No. 101-315, at 54 (1990).[13] In explaining that the *Lorance* provision would not

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[13] The Senate did not submit a report with the Civil Rights Act of 1991. *See* Civil Rights Act of 1991, H.R. Rep. No. 102-40(I), at 1 (1991), *as*

undercut this Court's precedents on continuing violations, Congress repeatedly cited *Bazemore* with approval.[14]

To now rule that Title VII prevents a plaintiff from challenging the perpetuation of pay discrimination that began before the filing period would disregard Congress' intent in enacting the Civil Rights Act of 1991.

## CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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*reprinted in* 1991 U.S.C.C.A.N. 549 (noting that no Senate report was submitted).

[14] *See, e.g.*, Civil Rights Act of 1991, H.R. Rep. No. 102-40, pt. 1, at 62 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 600 n.58; Civil Rights Act of 1991, H.R. Rep. No. 102-40, pt. 2, at 24 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 717-18 & n.39; Civil Rights Act of 1990, H.R. Rep. No. 101-644, pt. 1, at 74 & n.78 (1990); Civil Rights Act of 1990, H.R. Rep. No. 101-644, pt. 2, at 31 & n.41 (1990).

# APPENDIX

## INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

*9to5, National Association of Working Women* is a national membership-based organization of low-wage women working to improve the workplace and end discrimination. 9to5's members and constituents are directly affected by pay disparities, sex discrimination and the difficulties of seeking and achieving redress for these issues. Our toll-free Job Survival Hotline fields thousands of phone calls annually from women facing these and related problems in the workplace.

For 125 years, the *American Association of University Women* (AAUW), an organization of over 100,000 members and 1,300 branches nationwide, has worked to promote education and equity for all women and girls. AAUW's 2005-07 member-adopted Public Policy Program states that AAUW is committed to supporting fairness in compensation, equitable access and advancement in employment, and vigorous enforcement of employment antidiscrimination statutes. AAUW believes that pay equity is a simple matter of justice and continues to support initiatives that seek to close the persistent and sizable wage gap between men and women.

The *American Civil Liberties Union* ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 600,000 members, dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae.* Through its Women's Rights Project, founded in 1972, the ACLU has long sought to ensure that the law provides individuals with meaningful protection from employment discrimination on the basis of gender. The ACLU Women's Rights Project is also devoted to advancing the economic empowerment of

women, as such empowerment is key to gender equality. The proper resolution of this pay discrimination case is a matter of substantial interest to the ACLU and its members.

The *Coalition of Labor Union Women* (CLUW) is a nonprofit national organization for union women dedicated to the economic, political and social advancement of women and all workers. For thirty-five years CLUW has been addressing economic issues and concerns important to working women and their families through legislative efforts and at the workplace, including the elimination of sex- and race-based wage discrimination.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since it's founding in 1973, CWEALF has provided legal information and conducted public policy and advocacy to ensure women have equal employment opportunities and are free from workplace discrimination.

*Equal Rights Advocates* (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974), *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977), and is co-counsel in the current sex discrimination case of *Dukes v. Wal-Mart Stores*, in the United States District Court, Northern District of California. ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington*

*Industries v. Ellerth*, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405. ERA believes the issues raised by the instant case are equally critical to women workers who historically have been paid less than men.

The *Feminist Majority Foundation* (the Foundation), is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

*Hadassah*, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah strongly supports stricter enforcement of pay equity laws, improvements in restrictive pension policies and support for measures that will reduce the wage gap and bring about real economic security for women.

*Legal Momentum* advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote recruitment and retention of women in non-traditional jobs. Legal Momentum has liti-

gated cases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum is fully aware that pay discrimination against women remains pervasive, and is deeply concerned with assuring that long-standing discriminatory pay practices remain actionable under Title VII.

*MANA National Latina Organization* believes that unless our culture and processes recognize institutional disparities there will always be an unacceptable gap in salaries. In this country where the fullness of one's life is dictated by earnings, unequal pay is guaranteeing a life of despair and disparity for women who are now the majority of the population in the United States. The most serious argument is that it is telling future generations that women are not valued and that their work does not merit the same pay consideration.

Founded in 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. The economic empowerment of all women is one of the central issues that forms the basis of NAPAWF's advocacy. NAPAWF supports the plaintiff in *Ledbetter v. Goodyear Tire* because the persistence of wage discrimination prevents women, particularly women of color, from achieving equality and economic security in the workplace. Moreover, the difficulties of perceiving and filing claims of pay inequity are often multiplied for women of color.

Established in 1955, the *National Association of Social Workers* (NASW) is the largest association of professional social workers in the world with 149,000 members and

chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. NASW policies support "measures that allow women who are discriminated against in employment and compensation to seek full legal and fiscal compensation." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 366, 370 (2003). Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

The *National Council of Women's Organizations* is a coalition of over 200 of the nation's largest and most influential women's groups. Representing 10 million women nationwide, NCWO groups support full enforcement of laws that prohibit sex discrimination in employment. NCWO groups recognize the long-term effects that persistent wage disparities have on women's economic security as well as the difficulties women face in identifying and complaining about discriminatory pay practices.

The *National Organization for Women Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW

Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included achieving equal employment opportunities for women. To that end, NOW Foundation advocates for vigorous enforcement of Title VII of the Civil Rights Act, prohibiting discrimination on the basis of sex.

The *National Partnership for Women & Families* is a nonprofit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination, and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, with special attention to women in non-traditional work environments. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court and the federal courts of appeals.

The *Northwest Women's Law Center* (the "Law Center") is a regional nonprofit organization dedicated to advancing and protecting the legal rights of women through litigation, legislation and education. The Law Center provides these services to women in Washington, Alaska, Montana, Idaho and Oregon. Since its founding in 1978, the Law Center has fought to ensure and protect women's legal rights to equal

pay for equal work. The Law Center has worked on legislative initiatives both locally and nationally to further this aim. The Law Center has also participated as *amicus curiae* in several sex discrimination cases throughout the country and before the United States Supreme Court.

*Pick Up the Pace* is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, with emphasis on glass ceiling discrimination, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education, technical assistance, and legal advocacy, including the filing of amicus briefs in this Court, most recently in the case of *Burlington Northern & Santa Fe Railway Co. v. Sheila White*.

The *Women's Law Center of Maryland*, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, workplace issues and family law. The Women's Law Center seeks to protect women from discrimination and pay disparities in employment.

*Wider Opportunities for Women* (WOW) is a non-profit organization established in 1964 that works nationally and in its home community of Washington, DC to achieve economic independence and equality of opportunity for women and girls. WOW's programs focus on building pathways to economic security through technical and non-traditional skills, ensuring a workplace and supports responsive to the needs of families, career development and family economic self-sufficiency. A woman's economic security very much depends on her ability to obtain an education free of gender bias.

*Women Employed's* mission is to improve the economic status of women and remove barriers to economic equity.

Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that pay discrimination is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace.

The *Women's Advocacy Project, Inc.* ("the Project") is a statewide legal non-profit organization based in Austin, Texas (www.women-law.org). The Project promotes access to justice for Texas women and children in need. Started in 1982 as a legal hotline, the agency has evolved as an expert on legal issues affecting survivors of domestic violence and sexual assault, and now provides a range of legal services to end violence against women.

The *Women's Bar Association of the District of Columbia* (WBA-DC), which was founded in 1917, advances and promotes the interests of women lawyers; promotes the administration of justice; and works to maintain the honor and integrity of the legal profession. Among its many activities, the organization monitors legislation and files amicus briefs on issues vital to its members and the Bar. WBA-DC has an interest in protecting the legal rights of women workers, both within and outside of the legal profession, as guaranteed by Title VII of the Civil Rights Act of 1964. The organization is particularly interested in defending the right of women to seek redress for longstanding inequalities in the workplace, including gender-related differences with respect to compensation and benefits. WBA-DC therefore files as an amicus in this matter in the interest of protecting the rights of victims of gender-related

pay discrimination to seek and receive just compensation for all of the harm caused by the discriminatory conduct of their employers.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.