No. 22-1394

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Claire E. Mundell
PLAINTIFF - APPELLEE,
v.
Acadia Hospital Corp.,
DEFENDANT - APPELLANT,

Eastern Maine Healthcare Systems,
DEFENDANT.

On Appeal from the United States District Court for the District of Maine
Case No. 1:21-cv-00004-LEW

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MAINE, AND NATONAL WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

Carol J. Garvan
Zachary L. Heiden
Anahita Sotoohi
ACLU of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
cgarvan@aclumaine.org

Gillian Thomas*
ACLU Foundation
Women's Rights Project
125 Broad Street
New York, NY 10004
(212) 284-7356
gthomas@aclu.org

* Admission pending

Sunu Chandy
Natioanl Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
(202) 588-5180
schandy@nwlc.org

Counsel for *Amici Curiae*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae are nonprofit entities operating under § 501(c)(3) of the Internal Revenue Code. *Amici* are not subsidiaries or affiliates of any publicly-owned corporations and do not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amici*'s participation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU"), the American Civil Liberties Union of Maine ("ACLU of Maine"), and the National Women's Law Center submit this *amicus curiae* brief in support of affirmance.

The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters that for more than 100 years has been dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU Women's Rights Project (WRP), co-founded in 1972 by Ruth Bader Ginsburg, uses policy advocacy and litigation to ensure women's and girls' full equality in society. As both direct counsel and *amicus curiae*, WRP

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). *Amici* confirm that no party or counsel for any party authored this brief in whole or in part; that no party or counsel for any party contributed any money to fund the preparation or submission of this brief; and that no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). *Amicus curiae* ACLU of Maine's Legal Director, Carol Garvan, was formerly employed by Johnson & Webbert, LLP and in that capacity she served as one of the attorneys for Plaintiff-Appellee Mundell during trial court proceedings in this case. Attorney Garvan withdrew from representation of Plaintiff Mundell in April 2022, during the pendency of this case in the trial court. As Legal Director for the ACLU of Maine, she is no longer employed by or otherwise affiliated with Johnson & Webbert, LLP, and has no direct or indirect financial interest in the outcome of this case.

pursues cases to end gender-based barriers to equal pay and other terms, conditions, and privileges of employment.

The ACLU of Maine is the Maine state affiliate of the ACLU. Founded in 1968 to advance the civil rights and civil liberties of all Mainers, the ACLU of Maine strives to protect the rights guaranteed and secured by the United States Constitution for the people of Maine. The ACLU of Maine has frequently appeared before this Court both as direct counsel and as *amicus curiae*. *See, e.g.*, *Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020); *Filler v. Kellett*, 859 F.3d 148 (1st Cir. 2017); *Bruns v. Mayhew*, 750 F.3d 61 (1st Cir. 2014); *Decotiis v. Whittemore*, 635 F.3d 22 (1st Cir. 2011); *Azimi v. Jordan's Meats, Inc.*, 456 F.3d 228 (1st Cir. 2006).

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights. NWLC has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity

including numerous cases addressing sex discrimination in the workplace, such as pay discrimination.

The interpretation and application of Maine's Equal Pay Law in a manner that protects the fundamental right to pay equity and freedom from discrimination is of immense concern to the ACLU, the ACLU of Maine, the National Women's Law Center, their civil rights clients seeking justice, and their members and supporters.

BACKGROUND AND SUMMARY OF ARGUMENT

After working for Defendant-Appellant Acadia Hospital for nearly three years, Plaintiff-Appellee Claire Mundell learned in a chance conversation with a co-worker that he was paid nearly double what she was. *See* Amended Appendix (A.) 9, 15, 69-70. Dr. Mundell and the other female psychologists at the hospital were each paid $50 or less per hour, while the two male psychologists—who Defendant-Appellant admits did comparable work in jobs requiring comparable skills, effort, and responsibility—were each paid $90 or more per hour. A. 69-70.

In granting summary judgment to Dr. Mundell on her Maine Equal Pay Law claim, the district court correctly construed the Maine law not to require the plaintiff to prove discriminatory intent. Addendum to Brief of Defendant-Appellant Acadia Hospital Corp. ("Add.") 6-15. Like the federal Equal Pay Act ("EPA"), the Maine Equal Pay Law is not limited to intentional, purposeful or

malicious discrimination on the basis of sex; rather, it simply but strictly prohibits an employer from discriminating "between employees in the same establishment on the basis of sex." 26 M.R.S. § 628. As cogently explained in the district court's order and in Dr. Mundell's brief on appeal, the district court's conclusion that discriminatory motive is irrelevant under the Maine Equal Pay Law is the only interpretation that is faithful to the statute's plain language and to the case law uniformly interpreting analogous federal and state equal pay provisions. Add. 6-15; *see also* Brief of Plaintiff-Appellee Claire Mundell 10-25. As the district court correctly noted, no principled basis exists for reading into the Maine law an evidentiary hurdle that is absent from the statute's plain text and not imposed by the federal EPA.

Since its enactment in 1949, the Maine Equal Pay Law has always evinced robust intent to aggressively tackle equal pay, and indeed outstrips the federal EPA's protections in various respects. For instance, the Maine law requires the plaintiff to establish only that she and her higher-paid male comparator(s) performed "comparable work," rather than "equal work" as demanded by the federal EPA.[2] And as noted by the district court, when the Maine legislature

[2] *Compare* 26 M.R.S. § 628 *with* 29 U.S.C. § 206(d)(1) ("No employer . . . shall discriminate, . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires

revisited the Maine Equal Pay Law in 1965 after the federal EPA's enactment, it *removed* a broad catch-all affirmative defense permitting "any reasonable differentiation [in pay] except difference in sex,"[3] after Congress had adopted a near-identical catch-all defense allowing employers to justify pay disparities using "any other factor other than sex."[4] With subsequent amendments, the Maine legislature has acted to combat documented drivers of the gender wage gap, including the lack of transparency concerning employee compensation and reliance on prior salary as a determinant in setting new employee pay.[5] Demanding that plaintiffs using this progressive statute also prove discriminatory intent would contravene the Maine law's plain intent to provide greater protection than federal law, particularly when the federal Equal Pay Act does not require a showing of intent.

As *amici* detail below, giving full effect to the Maine law is critical to eradicating the gender pay gap. Indeed, over the past twenty years, that gap has remained stubbornly constant at around 80 cents on the dollar, and is even more extreme for many of the most vulnerable workers, including many women of color.

---

equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .").

[3] Add. 13-14 (citing P.L. 1965, ch. 150, § 628).

[4] *Id.* (citing Equal Pay Act of 1963, P. L. No. 88-38, § 3, 77 Stat. 56, 57 (1963)).

[5] *See* 26 M.R.S. §§ 4572(A)(2)(b) & (a).

Taken as a whole, the provisions of Maine's Equal Pay Law aim to dismantle some of the most pernicious drivers of these systemic inequities. Grafting an unwritten intent requirement onto the statute would directly undermine that legislative goal. And contrary to the alarmist arguments by Defendant-Appellant that the district court's interpretation will somehow harm Maine's economy, robust enforcement of the Maine Equal Pay Law actually is sound economic policy.

ARGUMENT

I. Strong state equal pay laws like Maine's are critical to address the persistent gender wage gap, which disproportionately harms many women of color.

The federal Equal Pay Act of 1963[6] was enacted well over half a century ago. At that time, women earned, on average, 59 cents for every dollar earned by men.[7] The EPA initially had some success, but after several early decades of progress eradicating the most obvious and dramatic discriminatory pay practices, that progress stalled. Since 2000, the nationwide wage gap between men and women workers has remained constant at around 80 cents on the dollar,[8] and that same gap persists in Maine.[9]

---

[6] 29 U.S.C. § 206(d).
[7] Inst. for Women's Pol'y Rsch., *Equal Pay Act 55th Anniversary*, (June 7, 2018), https://iwpr.org/media/in-the-lead/equal-pay-act-55th-anniversary/.
[8] Stephanie Bornstein, *Equal Work*, 77 Md. L. Rev. 581, 586 (2018).
[9] Nat'l Women's L. Ctr., *Wage Gap Overall State Rankings*, (2021), https://nwlc.org/wp-content/uploads/2021/03/Overall-Wage-Gap-State-By-State-2021-v2.pdf.

The gender wage gap has a compounded and doubly harmful impact on many women of color. Last year, Black women were paid just 67 cents for every dollar paid to white, non-Latino men, a figure that translates into more than $22,000 a year in lost income—totaling more than $900,000 over a 40-year career.[10] Native women and Latinas fare even worse, being paid just 60 cents and 55 cents, respectively, for every dollar paid to white men.[11] These disparities create a vicious cycle of economic harm: "The stubborn resilience of the gender wage gap, coupled with intersecting racial bias in the workplace, means that many women of color are perpetually underpaid, ... [and therefore are] less able to build savings, withstand economic downturns, and achieve some measure of economic stability."[12] Indeed, women experience higher rates of poverty than men in large part *because of* the gender wage gap—if the gender pay gap were closed, researchers estimate that the overall poverty rate for women would be reduced by about half.[13]

---

[10] Nat'l Women's L. Ctr., *It's Time to Pay Black Women What They're Owed*, (Sept. 15, 2022), https://nwlc.org/resource/black-womens-equal-pay-day-factsheet/.

[11] Jasmine Tucker, *The Wage Gap Has Robbed Women of Their Ability to Weather COVID-19*, Nat'l Women's L. Ctr. at 2 (Mar. 2021), https://nwlc.org/wp-content/uploads/2021/03/EPD-2021-v1.pdf.

[12] Robin Bleiweis *et al*., *Women of Color and the Wage Gap*, Ctr. for Am. Progress, (Nov. 17, 2021), https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/.

[13] Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 Ala. C.R. & C.L.L. Rev. 1, 23 (2019).

The COVID-19 pandemic has exacerbated all of these disparities, "wreak[ing] havoc in the employment market and widen[ing] the gender pay gap."[14] Once again, these trends have disproportionately harmed women of color: even "[a]s the economy recovered from the depths of the COVID-19–related 'she-cession'" between 2020 and 2021, "the wage gap widened for Asian, Black, and Hispanic women" while remaining the same for white women.[15]

Careful analyses have rebutted many of the proposed neutral reasons for the gender wage gap. For example, women have attained higher educational levels than men for over two decades, and yet the wage gap persists; indeed, women at higher educational levels experience a *greater* pay gap, not a lesser one.[16] Equally unavailing is the contention that women earn less, overall, because they work fewer hours than men or are more likely to work part-time schedules. While women's disproportionate responsibility for family caregiving does have some deleterious effects on work hours and pay, data also show that women who work the most hours experience the *highest* wage gap.[17]

---

[14] Amy H. Soled, *Gender Pay Disparity, the Covid-19 Pandemic, and the Need for Reform*, 87 Brook. L. Rev. 953, 978 (2022).
[15] Ariane Hegewisch and Eve Mefferd, *Gender Wage Gaps Remain Wide in Year Two of the Pandemic*, Inst. for Women's Pol'y Rsch. at 1-2 (Mar. 2022), https://iwpr.org/wp-content/uploads/2022/02/Gender-Wage-Gaps-in-Year-Two-of-Pandemic_FINAL.pdf.
[16] Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 Ariz. St. L.J. 951, 973-74 (2011).
[17] *Id.* at 977.

Plainly, factors such as education, experience, age, hours worked, and time away from the workplace due to family responsibilities cannot explain away the wage gap. Indeed, one seminal study found that *nearly 40 percent* of the gap cannot be attributed to neutral factors, and that discrimination is at least one driver of the disparity.[18] But as discussed further below, such discrimination is best understood not as individual acts of intentional malice, but rather as the aggregation of "widespread, persistent, and systemic" disparities.[19]

Accordingly, laws targeting pay discrimination are crucial to closing the gender wage gap. In recent years, the fight for equal pay has shifted to the state level—over a dozen states have recently enacted or strengthened state equal pay laws.[20] Notably, several of the states with the lowest gender wage gaps, including

---

[18] Francine D. Blau and Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, Nat'l Bureau of Econ. Rsch., Working Paper 21913 (Jan. 2016), at 8, 72 (Table 4), https://www.nber.org/papers/w21913. *See also* Bornstein, *Statutory Public Interest*, *supra*, at 22 ("[R]esearch suggests that one-third to one-half of the gender pay gap can be attributed to actual demographic differences between men and women in hours worked or time off for childbearing or rearing (and, to a lesser degree, remaining differences in experience or education levels), [but] that leaves up to one-half of the gender pay gap still caused by gender workforce segregation and discrimination.")

[19] Eisenberg, *Money, Sex, and Sunshine, supra*, at 972.

[20] Nat'l Women's L. Ctr, *Progress in the States for Equal Pay*, (Sept. 20, 2022), https://nwlc.org/resource/progress-in-the-states-for-equal-pay/; Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 567 (2020).

Hawaii, Maryland, and California, have strong and well-enforced equal pay laws.[21] Robust enforcement of Maine's own strong Equal Pay Law, as written, has the opportunity to make similar strides in Maine.

II. While Title VII requires a showing of intent for pay discrimination claims, Maine's Equal Pay Law—like the federal EPA—does not.

On appeal, Defendant-Appellee Acadia urges this Court to graft Title VII's intent requirement onto the Maine Equal Pay Act. But while some plaintiffs may succeed in proving pay discrimination under Title VII's disparate treatment framework, the evidentiary demands of that standard also can impose insurmountable barriers. Construing the Maine Equal Pay Law to not demand separate proof of intent is consistent with its plain terms and the federal EPA, and enables the Maine law to fulfill its remedial promise.

As this Court has long recognized, "smoking gun" evidence of intent is "rarely found in today's sophisticated employment world." *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 171 (1st Cir. 1998).[22] Employers are rarely

[21] Katilyn Hollowell, *Mind the Gap: Bridging Gender Wage Inequality in Louisiana*, 77 LA. L. REV. 833, 870-871 (2017).

[22] Empirical evidence shows that employment discrimination cases are particularly difficult to win. For example, over the period from 1979 through 2006, the win rate for plaintiffs' employment discrimination cases in federal district court was 15 percent, far lower than the 51 percent win rate for other, non-employment civil cases. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 127 (2009).

transparent about their motives and, as discussed further in Section III, *infra*, may not even be consciously aware of the biases influencing their decisionmaking. Ironically, as our society has "come to embrace an anti-discrimination norm (in theory)," it has become more difficult for plaintiffs to prevail in discrimination cases.[23] As one court cogently explained:

> Employment discrimination and retaliation, except in the rarest cases, is difficult to prove. It is perhaps more difficult to prove such cases today than during the early evolution of federal and state anti-discrimination and anti-retaliation laws. Today's employers, even those with only a scintilla of sophistication, will neither admit discriminatory or retaliatory intent, nor leave a well-developed trail demonstrating it.

Parada v. Great Plains Int'l of Sioux City, Inc., 483 F. Supp. 2d 777, 791 (N.D. Iowa 2007).[24]

Proving discriminatory intent is particularly challenging in pay discrimination cases, because workers generally have very limited information about employers' compensation decisions: "First, unlike hiring and promotions,

---

[23] Trina Jones, *Title VII at 50: Contemporary Challenges for U.S. Employment Discrimination Law*, 6 Ala. C.R. & C.L.L. Rev. 45, 64 (2014).

[24] *See also* Hannah L. E. Masters, *Red Card on Wage Discrimination: US Soccer Pay Disparity Highlights Inadequacy of the Equal Pay Act*, 22 Vand. J. Ent. & Tech. L. 895, 903 (2020) ("Employers are less likely now to engage in overt discrimination; indeed, they are often trained to avoid even the appearance of discrimination.").

pay decisions are often made in secret," and "[s]econd, the employer has a monopoly on the information used to make the pay decision."[25]

In many Title VII disparate treatment cases, the worker at least knows that an adverse action has occurred and has access to information providing a basis for suspecting discrimination, such as evidence suggesting the employer's stated reasons are unworthy of credence or that a person from outside the protected group received more favorable treatment. But with wage discrimination, in most cases, workers never even know they have been subjected to an adverse action. *See, e.g.*, *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (explaining that the plaintiff had worked for her employer for over a decade before she happened to learn of the pay disparity when male colleagues' salaries were published in newspaper).[26] Finally, even if workers

[25] Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 50 (2010); *see also* Nicole B. Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 Geo. J. Gender & L. 159, 204 (2011) ("Notably, proof of intent is rarely forthcoming in pay discrimination cases. The nature of pay decisions makes it difficult for plaintiffs to prove discriminatory animus.").

[26] A number of states—including Maine, as noted above—have begun to address this pay secrecy by passing legislation to protect workers' disclosure of wage information. Maine Equal Pay Law, 26 M.R.S. § 628, as amended eff. Sept. 19, 2019. But this is only a modest first step, and certainly not sufficient to justify imposing on litigants the evidentiary burden of proving discriminatory intent. Maine law, for example, does not require employers to share data about wages with their employees, and instead expressly cautions that "[n]othing in this section creates an obligation to disclose wages." *Id*.

somehow find out they are being paid less, they rarely have access to information about the employer's motives for doing so.

This is a case in point. Claire Mundell worked for Acadia for over three years. Only when a male colleague mentioned that he was getting a pay *decrease* to $57/hour, which would have represented a *raise* for her, did Dr. Mundell learn she was being underpaid, A. 27; she ultimately discovered that while she was paid $50/hour, both of the two male psychologists were paid nearly double that. A. 69-70.

Thus, it is no surprise that when workers are required to prove discriminatory intent in order to establish pay discrimination, they "will succeed in only rare circumstances."[27] Indeed, some plaintiffs prevail on their federal EPA claims but lose their Title VII claims because they have not met their burden to prove intent.[28]

The Maine Equal Pay Act, like the federal EPA, avoids the evidentiary burden imposed by Title VII's intent requirement. And as noted above, Maine's

[27] Pamela L. Perry, *Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate*, 14 Harv. Women's L.J. 127, 135 (1991).
[28] *See, e.g.*, *McMillan*, 140 F.3d at 298, 304-05 (at trial court level, court granted summary judgment to employer on Title VII pay discrimination claim based on insufficient evidence of intent but refused to grant judgment as a matter of law to employer on EPA claim; First Circuit affirmed, holding that unlike in a Title VII claim, the plaintiff in an EPA claim "need not show that the defendant was motivated by a discriminatory animus").

Equal Pay Law is even broader, in certain respects, than its federal counterpart. But the promise of Maine's Equal Pay Law has yet to be fulfilled. It has gone largely underused: only a handful of cases even reference the statute, and none has substantively interpreted it. Now is the time to change that. If this Court interprets the Maine Equal Pay Law consistent with its plain meaning, it will further the legislature's purpose: to prohibit paying women less than men for comparable work, regardless of whether the plaintiff also can prove her employer harbored discriminatory animus.

III. Interpreting the Maine Equal Pay Law to not require proof of discriminatory intent not only comports with the federal EPA and the Maine law's plain text and purpose, but also more effectively addresses the systemic bias that drives unequal pay.

Decades of social science research have established that in most cases, gender-based pay disparities result not from the conscious discriminatory animus of an individual decisionmaker, but from implicit, deeply rooted, and often subconscious biases and stereotypes. Interpreting the Maine Equal Pay Law to prohibit unequal pay for comparable work regardless of whether the plaintiff has proven discriminatory intent—as the district court correctly did—not only conforms with the federal Equal Pay Act and the Maine statute's plain terms and

legislative history,[29] but also addresses the empirical reality of how systemic bias drives pay inequity.

As Professor Linda Hamilton Krieger observed nearly three decades ago, and as hundreds of scientific studies have reinforced,[30] many discriminatory employment decisions stem not from conscious discriminatory animus, but from normal cognitive processes that tend to bias decisionmakers' perception and judgment—often outside their conscious awareness:

> A substantial body of empirical and theoretical work supports the proposition that . . . . [i]ntergroup discrimination, or at least that variant which results from cognitive sources of bias, is automatic. It does not result from a motive or intent to discriminate; it is an unwelcome byproduct of otherwise adaptive cognitive processes.[31]

Thus, women's lower pay often stems not from an employer's deliberate decision to pay women less, but from deeply rooted implicit biases about the relative value of men's and women's work. These biases fuel the wage gap in at least three different ways.

First, gender stereotypes—which are themselves deeply embedded in women's historically circumscribed roles at home and in civic life—affect

---

[29] *See* Brief of Plaintiff-Appellee Claire Mundell, 10-27.
[30] Porter & Vartanian, *Debunking the Market Myth, supra*, at 184 n. 224 (noting "substantial agreement among scientists about the operation of cognitive processes like unconscious bias and stereotyping" based on "hundreds of studies").
[31] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1216 (Jul. 1995).

employers' evaluation of women's worth.[32] They associate men, but not women, with professional competence and leadership. *Id.* As a result, as empirical studies have repeatedly shown, when decisionmakers review identical resumes with male or female names, they evaluate the male resumes more highly.[33] And even when men and women perform equally well, observers tend to attribute men's success to ability and effort, while female employees' success is more likely to be attributed to luck or ease of task.[34] A related strain of such stereotyping repeatedly shown to disadvantage women who have children is the "motherhood penalty."[35] In contrast, men with children enjoy a "fatherhood bonus."[36]

In short, decades of psychological studies "ha[ve] shown that decisionmakers typically undervalue employees if they are women rather than men."[37] As a result, employers routinely assign lower wages to women based on

---

[32] Porter & Vartanian, *Debunking the Market Myth, supra*, at 187-188.
[33] *Id*. at 188.
[34] *Id.*
[35] Shelley J. Correll, Stephen Benard, and In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Soc. 1297 (Mar. 2007) (finding that mothers were recommended for a nearly 8 percent lower starting salary than non-mothers).
[36] *See*, *e.g.*, Michelle J. Budig, *The Fatherhood Bonus and the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, Third Way, (Sept. 2, 2014), https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay; Correll et al., *Getting a Job, supra* at 1307.
[37] Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, *supra*, at 50.

their implicit devaluation of their work, even when not consciously intending to discriminate on the basis of sex.

Second, and relatedly, occupations in the U.S. workforce are deeply segregated by gender, and female-dominated occupations are routinely devalued compared to male-dominated occupations.[38] This is true even when the occupations require comparable skills and education level.[39] And it is true even when the occupations are strikingly similar: for example, workers in the male-dominated occupation of car and equipment cleaning earn 14% more on average than workers in the female-dominated occupation of housecleaning.[40] This devaluation can be observed in real time. For example, in the 1950s, most computer programmers were women and were relatively low-paid, but by 2000 the occupation was male-dominated and was viewed no longer as a role for a "glorified typist" but for a "prestigious professional—with a corresponding increase in real median wages."[41] On the flip side, in the 1950s, when most

---

[38] Bornstein, *Equal Work*, *supra*, at 596 (citing sociological research finding "'substantial evidence" that lower pay among female-dominated occupations was due to "devaluation of work done by women").
[39] *Id*. at 596-97.
[40] *Id*. Even when men work in low-wage, female-dominated fields, however, they still earn substantially higher wages. *See*, *e.g*., Thomas B. Foster et al., *An Evaluation of the Gender Wage Gap Using Linked Survey and Administrative Data,* (Nov. 2020), at 38, https://www2.census.gov/ces/wp/2020/CES-WP-20-34.pdf (documenting gender-based pay gaps among retail salespeople, personal care aides, cashiers, and fast food workers, among others).
[41] *Id.* at 582.

biologists were men, it was a relatively highly paid profession, but by 2000 the occupation was composed mostly of women—and wages had sunk by almost 20 percent.[42]

Third, the dynamics of wage negotiation deepen the gender pay gap. Women tend to negotiate for higher wages less often than men, in part because gender stereotypes instruct that women should behave "modestly and unselfishly," and that pushing for what they want is "unfeminine, unattractive and unwelcome."[43] Moreover, when women do negotiate, their efforts are often less effective than men's because they lack access to social and professional networks through which men glean salary information.[44] And the widespread practice of using prior salary to set starting pay also has been well-documented to perpetuate past gender-based disparities.[45]

In sum, the putatively neutral "market rate" for men's and women's wages is shaped by deeply embedded, often unconscious biased forces. Grafting an intent

---

[42] *Id. See also* Claire Cain Miller, "As Women Take Over a Male-Dominated Field, the Pay Drops," *The New York Times*, (Mar. 18, 2016), https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html.
[43] Porter & Vartanian, *Debunking the Market Myth*, *supra*, at 192-93.
[44] Eisenberg, *Money, Sex, and Sunshine, supra,* at 988, 992.
[45] *Id*. at 992; *see also* Robin Bleiweis, *Why Salary History Bans Matter to Securing Equal Pay*, Ctr. for Am. Progress, (Mar. 24, 2021), https://www.americanprogress.org/article/salary-history-bans-matter-securing-equal-pay/.

requirement onto the Maine Equal Pay Law not only departs from the statute's language and purpose, but also ignores the reality of why wage disparities exist at all.

IV. Prohibiting unequal pay on the basis of sex, regardless of whether it is fueled by discriminatory intent, is good economic policy.

Defendant-Appellant seeks to avoid the plain meaning of the Maine Equal Pay Law by arguing that the district court's construction of the statute will hurt Maine's economy, hampering businesses' ability to "attract and retain a talented and highly skilled workforce" and "diversify Maine's workforce." Brief of Defendant-Appellant 16. But empirical research has shown precisely the opposite: pay equity is good for business.

Studies have shown again and again that gender pay inequity results in a loss of women's purchasing power. Researchers have found that if women were paid equally to men, "the U.S. economy 'would have produced additional income of $512.6 billion," which "represents 2.8% of 2016 gross domestic product,'" and that "achieving gender parity in the workplace worldwide could add between $12 and $28 trillion to annual global GDP in 2025."[46] Paying women equally would reduce poverty among working women by over 40 percent.[47] These research findings

[46] Bornstein, *Statutory Public Interest, supra,* at 24.
[47] Elyse Shaw and Halie Mariano, *Narrow the Gender Pay Gap, Reduce Poverty for Families: The Economic Impact of Equal Pay by State*, Inst. for Women's Pol'y

vividly demonstrate how pay inequity "hinder[s] business profitability" and "hamper[s] economic growth": "It is shortsighted to ignore the long-lasting effects of discriminatory pay differentials—consequences that are intergenerational. This inequality restricts consumer spending, impedes worker utility, and decreases productivity, thereby preventing businesses from maximizing profits and obstructing the national economy from ever reaching its full potential."[48]

Closing the wage gap is equally important for Maine's local economy. If working women in Maine were paid equally, their increased earnings would total $1.84 billion dollars—representing 2.7 percent of the state's GDP.[49] Moreover, poverty among working women in Maine would fall by 39.3 percent.[50] Far from "stifl[ing] economic prosperity," Brief of Defendant-Appellant 8, strong pay equity protections will increase Mainers' ability to spend, invest, and thrive in their local communities.

In enacting the federal EPA, Congress made specific findings on how the law would serve the U.S. economy. The federal EPA's Declaration of Purpose included congressional findings that "wage differentials based on sex" in industries "depresses wages and living standards for employees necessary for their health and

---

Rsch. at 1, (May 2021), https://iwpr.org/wp-content/uploads/2021/05/Economic-Impact-of-Equal-Pay-by-State_FINAL.pdf.
[48]Soled, *Gender Pay Disparity, supra, at 958.*
[49]Shaw and Mariano, *Narrow the Gender Pay Gap, supra*, at 8.
[50] *Id.* at 4.

efficiency"; "prevents the maximum utilization of the available labor resources"; and "burdens commerce and the free flow of goods." Equal Pay Act of 1963, P. L. No. 88-38, 77 Stat. 56, § 2, "Declaration of Purpose." Given these findings, the "declared . . . policy" of the Equal Pay Act was "to correct the[se] conditions" through regulation of interstate commerce. *Id.*

Defendant-Appellant and *amicus curiae* Maine Chamber of Commerce assert that "employers need flexibility in setting compensation . . . for [Maine] to thrive." Brief of Defendant-Appellant 18; *see also* Brief of Me. State Chamber of Com. Br. 14. But unrestricted employer "flexibility" is exactly what enables pay discrimination and the harmful economic consequences that flow from it: "[R]esearch has overwhelmingly shown that the more discretionary the compensation system, the more likely it is that women will experience a gender pay gap."[51] Under subjective pay policies, gender-based biases "have free rein."[52] Equal pay laws represent an express legislative decision to restrict employer discretion in service of gender equity and a stronger economy: "With the EPA, Congress made a policy choice . . . . not simply to protect individual workers and

[51] Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 233 (2012).
[52] Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 Geo. L.J. 559, 609 (2017).

promote fairness, but also to foster a better-functioning wage market on a systemic level."[53]

This Court should effectuate the Maine legislature's equally progressive policy choice by effectuating the plain text of the Maine Equal Pay Law, and affirm the decision of the district court.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court and hold that the Maine Equal Pay Law does not require the plaintiff to prove discriminatory intent.

Respectfully Submitted,

September 28, 2022

/s/ Carol J. Garvan
Carol J. Garvan (1st Cir. No. 1145471)
/s/ Zachary L. Heiden
Zachary L. Heiden (1st Cir. No. 99242)
/s/ Anahita Sotoohi
Anahita Sotoohi (1st Cir. No. 1204291)
ACLU of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
cgarvan@aclumaine.org

/s/ Gillian Thomas
Gillian Thomas*
ACLU Foundation

[53] Eisenberg, *Money, Sex, and Sunshine*, *supra*, at 964-65.

Women's Rights Project
125 Broad Street
New York, NY 10004
gthomas@aclu.org
*Admission pending

/s/ Sunu Chandy
Sunu Chandy
National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
(202) 588-5180
schandy@nwlc.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 5,220 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman 14-point type.

Dated: September 28, 2022

/s/ Carol J. Garvan
Carol J. Garvan
ACLU of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
cgarvan@aclumaine.org

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2022 electronically filed this Amici Curiae Brief with the Clerk of Court using the CM/ECF system, which will send notifications of such filings to all counsel of record.

Dated: September 28, 2022

/s/ Carol J. Garvan
Carol J. Garvan
ACLU of Maine Foundation
P.O. Box 7860
Portland, Maine 04112
(207) 619-8687
cgarvan@aclumaine.org

Counsel for Amicus Curiae