UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WENDIE DREVES, *Plaintiff*	* *	Civil Action No. 2:11-cv-4
v.	*	
HUDSON GROUP (HG) RETAIL, LLC, *Defendant*	* *	

BRIEF *AMICUS CURIAE* ON BEHALF OF THE VERMONT COMMISSION ON WOMEN AND OTHER GROUPS AND INDIVIDUALS DEDICATED TO GENDER EQUITY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTEREST OF *AMICI CURIAE*

The Vermont Commission on Women (Commission) is the independent, nonpartisan state agency charged with equalizing women's legal and economic status. The gender wage gap therefore represents a paramount concern of the Commission. Accordingly, the Commission led statewide public information campaigns, grassroots advocacy, and coalition-building efforts to pass the Vermont Equal Pay Act of 2002. VT. STAT. ANN. tit. 21, § 495(a)(8) (2009) (Act). Because this case is the first time this Court will interpret the Act, the Commission urges this Court to do so in a manner consistent with its history and intent to provide broad remedial relief to victims of wage discrimination. The Commission is joined by the National Committee on Pay Equity, both the national and the Vermont chapters of the American Association of University Women, the National Association of Commissions for Women, Vermont Legal Aid, the South Royalton Legal Clinic, the Vermont Human Rights Commission, and Vermont state legislators, whose statements of interest are detailed in the Appendix. These national and state nonprofit

organizations and public policy leaders also share a commitment to gender equity and have a particular concern that the Act be interpreted to provide adequate remedy to individuals harmed by gender-based wage discrimination.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici draw to the Court's attention the enduring problem of the wage gap both nationally and in Vermont. Women in Vermont earn only 84 cents-on-the-dollar compared to men, marginally better than the nationwide wage gap of 77 cents-on-the-dollar.[2] The Act, passed under the leadership of the Commission, was intended to provide Vermont victims of wage discrimination a broad remedy, consistent with the United States Supreme Court's interpretation of the Federal Equal Pay Act (EPA).

To that end, the intent and purpose of the Act is to limit the affirmative defenses that an employer can raise to those that have a bona fide legitimate business related reason in explaining why there is a wage differential. This is an objective standard, and the employer bears a heavy burden. This narrow reading of the affirmative defense of "a factor other than sex" is consistent with the Second Circuit's interpretation of the EPA, and is the interpretation of a majority of circuits, and state and federal courts interpreting state equal pay laws modeled on the federal law.

The Defendant Hudson News, however, would urge this Court to deviate from the intent of the Act, and instead adopt a legal standard confined to only two circuit courts, and widely criticized by courts, legal scholars, and advocates as effectively nullifying the purpose of equal pay laws. In addition, the reasons raised by the Defense for Ms. Dreves's wage differential are common reasons that serve as pretext for wage discrimination. This Court must look skeptically

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[1] *Amici* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the above-named *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-239, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 12 (2011), http://www.census.gov/prod/2011pubs/p60-239.pdf.

at Defendant's claims that Mr. Dixon's higher salary was in part to compensate for his wife's loss of income, and that Ms. Dreves's lower wage was based on poor performance. Such claims underscore why the Defense maintains the burden of persuasion under the Act, given how easy it is to provide *ex post facto* rationalizations for gender bias that reinforce the assumption that a man's labor is more valuable than a woman's labor.

The difference between Plaintiff's and Defendant's proposed legal frameworks can best be understood by comparing the theoretical underpinnings of equal pay laws. Defendant is essentially arguing that this Court adopt a market force theory, one that would justify unequal pay if the market demand for a male employee is greater than that for a female employee. However, the United States Supreme Court rejected this approach in interpreting the EPA. *Corning Glass Works v. Brennan*, 417 U.S. 188, 189 (1974). In doing so, the Court reasoned that even if a female employee is willing to work for less than a male employee, the wage differential is still unjustified under the law. Market analyses fail to account for the historic disadvantage women face in the labor market, and the irrational bias that men are more valuable employees and should earn more because they are primary breadwinners.

Rather, courts ought to compare the job, not the employees, to determine whether an equal pay violation has occurred. This is why the Act requires employers to clarify and justify the wage differential based on actual, job-specific needs and requirements, not the relative bargaining positions of male and female employees.

Therefore, *amici* urge this Court to adopt the Second Circuit's interpretation of "a factor other than sex" affirmative defense, and in doing so, grant Plaintiff's motion for partial summary judgment. Defendant has failed to prove that it applied an objective bona fide legitimate business

related reason when it paid Mr. Dixon more than Ms. Dreves for working in an identical position at the company.

I. THE VERMONT EQUAL PAY ACT WAS INTENDED AS A BROAD REMEDY FOR GENDER-BASED WAGE DISCRIMINATION

A. WAGE DISCRIMINATION NATIONALLY AND IN VERMONT IS SIGNIFICANT AND ENDURING

Amici urge the Court to first consider the historic and enduring problem of gender-based wage discrimination that the Act was intended to alleviate, and how Ms. Dreves's case reflects national trends. The median pay for a woman working full-time in Vermont is $35,891, while a man receives $42,562, 16% less on average than men. This is only slightly better than the national average of women earning 23% less on average than men.[3]

The wage gap is particularly a problem for older women like Ms. Dreves. While the gender wage gap exists across the board when controlling for age, occupation, race, and experience, it disproportionately disadvantages women over the age of 35.[4] Indeed, women over the age of 35 earn only 75% of what their male counterparts earn.[5] From 1979 to 2009, older women have seen a compounded effect caused by income disparities. Women ages 55–64 earned $9,829 annually in 1979, and have seen that number grow to only $37,804 by 2009.[6] In comparison, men aged 55−64 saw an increase in income from $16,224 to $50,180 over that same time period and younger men, ages 35−44, earned $17,472 annually in 1979 and $47,632 by

[3] U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-239, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES 12 (2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf.
[4] U.S. BUREAU OF LABOR STATISTICS, 1025, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009 1 (2010), http://www.bls.gov/cps/cpswom2009.pdf.
[5] *Id.* This data is striking compared to women under the age of 35 who earn closer to 89%, and women ages 16-24 who earn 93% as much as their male counterparts.
[6] *Id.* at 52.

2009.[7] These numbers highlight the compounded problem of age and gender for women like Ms. Dreves in the workforce.[8]

Over the last ten years the wage gap has narrowed by less than 1%.[9] Extensive studies on the wage gap have shown that, after controlling for gender-neutral factors such as industry, occupation, race, marital status, and job tenure, there is still a gender gap in earnings. This is known as the residual wage gap.[10] Because gender-neutral factors do not explain the residual wage gap, workplace discrimination is responsible for it, and that equal pay laws are essential to close it.[11] The U.S. Government Accountability Office (GAO) found that workplace discrimination still contributes to the wage gap, and, along with the Equal Employment Opportunity Commission (EEOC), has called for the greater enforcement of equal pay laws. [12]

The wage gap harms women and their families economically and violates the basic principle of equity. In 2010, in nearly two-thirds of families, a mother was either the breadwinner—either a single working mother or bringing home as much or more than her husband—or a co-breadwinner—bringing home at least a quarter of the family's earnings.[13] When women's wages are lowered due to gender discrimination, their families' incomes are often significantly lowered as well. Thus, both the federal government and states like Vermont have pursued policies aimed at ending the gender wage gap and the harms that it causes.

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[7] *Id*.
[8] *Id.*
[9] INCOME, POVERTY AND HEALTH INSURANCE, *supra* note 3.
[10] Ronald Oaxaca, *Male-Female Wage Differentials in Urban Labor Markets*, 14 INT'L ECON. REV. 693, 708 (1973).
[11] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-799, WOMEN'S EARNINGS: FEDERAL AGENCIES SHOULD BETTER MONITOR THEIR PERFORMANCE IN ENFORCING ANTI-DISCRIMINATION LAWS 1 (2008), http://www.gao.gov/assets/280/279567.pdf.
[12] WOMEN'S EARNINGS, *supra* note 4 (finding that women earned an average of 80% of what men earned in 2000).
[13] INCOME, POVERTY AND HEALTH INSURANCE, *supra* note 3.

B. THE HISTORY AND INTENT OF THE VERMONT EQUAL PAY ACT IS TO PROVIDE BROAD REMEDY TO VICTIMS OF WAGE DISCRIMINATION

1. The Federal Equal Pay Act

Until 2002 victims of wage discrimination in Vermont had to rely upon the Federal Equal Pay Act (EPA) of 1963, the law upon which the Act was eventually modeled. The EPA's express purpose is to ensure that "where men and women are doing the same job under the same working conditions . . . they will receive the same pay."[14] To this end, the EPA prohibits gender discrimination in pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions."[15]

In interpreting the Federal Equal Pay Act, the United States Supreme Court has stated the law is "broadly remedial."

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination . . . that the wage structure of many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." The Act's basic structure and operation are similarly straightforward. In order to make out a case under the Act, the [plaintiff] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). Most significantly, the EPA is a "strict liability" statute. This means that a plaintiff need not show that the employer intended to discriminate on the basis of sex, nor must the plaintiff show that hiring or promotion decisions were motivated by sex preferences. Rather, the law presumes that if a prima facie case is met, then the employer is guilty of wage discrimination absent an affirmative defense. In other words, the law punishes bad outcomes even if there are no bad actors. This is because

[14] 109 Cong. Rec. 9196 (1963) (statement of Rep. Frelinghuysen).
[15] 29 U.S.C. § 206(d)(1) (2000).

historically women have been disadvantaged in the labor market and otherwise seemingly innocent decisions on pay have resulted in enduring pay inequity between men and women. Because the EPA is broadly remedial, it is intended to place an affirmative duty on employers to ensure that when there is pay differential between men and women in substantially similar jobs, that the differential be corrected by either raising the salary of the lesser paid employee or by proving that the differential is based on a legitimate business reason other than sex.

2. The Vermont Equal Pay Act

Despite the broad remedial purpose and intent behind the EPA, it was difficult for Vermont employees to vindicate their rights under the statute. By 2000, the then-named Governor's Commission on Women had identified that the EPA presented substantial procedural hurdles. The Attorney General's Office's Civil Rights Division was required to transfer claims filed against companies with 15 or more employees to the EEOC office in Boston for investigation.[16] In addition, while women could hire their own counsel to vindicate their rights, lawyers would shy away from these cases because of the perception that they were difficult to prove.[17] Some women did not have enough financial resources to pay the initial consultation fee that lawyers required to review the case.[18] There was also a general sense that Vermonters might be more willing to file cases if there were a state statute, rather than relying on a federal one.[19]

[16] Statement of Assistant Attorney General Kate Hayes, in Heather Stephenson, *Trying to Make a Buck: Women in Vermont are Paid Only 79 Cents for Every Dollar a Man Makes,* Times Argus, April 4, 1999.
[17] *Id.*
[18] Governor's Commission on Women, Talking Points: Top Ten Reasons for the Wage Gap in 2001 at 1 (on file with *amici*) (quoting one woman who contacted the National Council on Pay Equity as saying, "I don't have $250 for an initial consultation with an attorney.").
[19] See testimony pertaining to S.102, April 11, 2001, reprinted in Governor's Commission on Women, The Facts: Equal Pay for Equal Work in Vermont, September, 2001 (on file with the Commission) (stating that had there been a well-publicized statute, it may have been easier to bring an equal pay claim).

Thus, by 1999, the Economic Equality Committee of the Governor's Commission on Women, along with many partners, had made the passage of a state equal pay law a priority. [20]

Senate Bill 102 was introduced and passed with the stated purpose of "assur[ing] that the employees who do the same job receive the same pay." S.102, 2001 Leg., Reg. Sess. (Vt. 2001). The bill passed the Senate unanimously, and passed the House 131 – 3, signaling overwhelming support for the law and its purpose.

In March of 2001, Assistant Attorney General Katherine Hayes testified before the House General Affairs Committee regarding S. 102 on behalf of the Attorney General's Office, Civil Rights Division, the office responsible at that time for enforcing the wage discrimination law. Ms. Hayes testified about the difficulties that faced individuals complaining about wage discrimination under Vermont law at that time. First, although wage discrimination was unlawful, there was no special sanction that could be imposed against an employer found guilty of wage discrimination. Second, complainants were required to prove intent to discriminate, or a broad-based policy of gender discrimination. In order to remedy these problems, the Act adopted the language of the EPA. The EPA, and thus the Act, removed the requirement of proving intent, and instead only required complainants to show different pay for the same job. *Hearing on S. 102 Before the H. Comm. on Gen. Affairs*, 2001 Leg., Reg. Sess. (Vt. 2001) (statement of Katherine Hayes, Att. Gen. Civil Rights Div.). Ms. Hayes' testimony, along with that of the Human Rights Commission Executive Director Robert Appel[21] and the Governor's Commission

[20] Those partners included Business and Professional Women, Vermont AFL-CIO, the Peace and Justice Center, Vermont Livable Wage Campaign, Vermont Children's Forum, Vermont NOW, Vermont Businesses for Social Responsibility, Racial Justice and Equity Project, Springfield Area Child Parent Center, Umbrella, Vermont Association of Child Care Resource and Referral Agencies, Vermont Child Care Providers Association, Windham Child Care Resource Center, and the Vermont Women Business Owners Network.

[21] Robert Appel, executive director of the Human Rights Commission testified that because the Vermont Act mirrored the federal Act, it did not "break[] new ground," it simply allowed wage discrimination claims to be investigated in state and thereby provided a more thorough review process for the claims. *Hearing on S. 102 Before*

on Women Executive Director Judith Sutphen, who both also testified that the bill would extend federal protections to all Vermonters, provided the substantive testimony for the bill.[22] After an extensive review of the legislative history, *amici* are unable to find any testimony or legislative materials in opposition to this testimony.

The Act made several important improvements to the federal scheme and provided greater protection and pragmatic ease for employees. First, the Act mirrored verbatim the language of the federal law, providing the same substantive equal pay protections as outlined in *Corning Glass*. Second, it allowed employees of all Vermont employers, no matter how small, to bring claims of violations of state law. Third, all equal pay violations would carry the extra penalty of double lost wages. This provided additional incentive for employers to comply with the Act, and additional incentives for employees and their counsel to seek legal vindication of their rights. Fourth, the Attorney General would not be required to transfer equal pay violations to the EEOC, but could conduct investigations in state.

In addition to these changes, in 2005, three years following the passage of the Act, the Vermont Legislature (Legislature) also passed the Unlawful Employment Practices Act, VT. STAT. ANN. tit. 21 § 495(b), which allows employees to discuss and disclose their wages without fear of discipline, discharge, or retaliation. The clear intent of the Legislature was again to encourage employees to use these laws to vindicate their rights to equal pay and to further discourage employers from discriminating or retaliating against employees who suspected wage discrimination. The Unlawful Employment Practices Act was also intended to make it more

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the H. Comm. on Gen. Affairs, 2001 Leg., Reg. Sess. (Vt. 2001) (statement of Robert Appel, Human Rights Comm.).

[22]Judith Sutphen, Executive Director of the Vermont Commission on Women also testified that S. 102 brought Vermont law into conformity with federal law and was intended to remedy the wage gap. *Hearing on S. 102 Before the H. Comm. on Gen. Affairs*, 2001 Leg., Reg. Sess. (Vt. 2001) (April 11, 2001) (statement of Judith Sutphen, Governor's Commission on Women).

likely that employers would be proactive and carefully examine their wage rates to ensure that illegal pay inequities did not exist.

All of these changes demonstrate the intent of the Legislature to provide enhanced protections to Vermont women to eradicate wage discrimination and to encourage, via greater penalties, Vermont employers to comply with the Act. Thus, this Court must interpret the Act, particularly the "factor other than sex" affirmative defense, in light of the Legislature's significant antidiscrimination policy. It is inconceivable that lawmakers would have intended one set of rules to apply under federal law and another set of rules to apply under Vermont law given the policy choice to align the two statutes and expand the reach of the law.

II. THE COURT OUGHT TO CONSTRUE THE ACT'S FACTORS-OTHER-THAN-SEX-DEFENSE NARROWLY TO EFFECTUATE THE ACT'S PURPOSE OF ERADICATING THE GENDER WAGE GAP

A. A NARROW READING OF THE "FACTORS OTHER THAN SEX" DEFENSE COMPORTS WITH THE ACT'S REMEDIAL PURPOSE.

The drafters of the EPA understood that employers could easily exploit the substantial skepticism faced by women plaintiffs by inventing pretextual, *ex post facto* reasons for wage differentials.[23] Therefore, they shifted the burden to employers to prove one of the Act's four affirmative defenses once the plaintiff established a prima facie case. *Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999). Courts have stressed that this burden is a "heavy" one. *Ryduchowski v. Port Auth. of N.Y. & N. J.*, 203 F.3d 135, 143 (2d Cir. 2000).

In addition, courts have narrowed the scope of the affirmative defenses. In doing so, courts have emphasized that the EPA's affirmative defenses "could easily swallow the rule . . . if not strictly construed against the employer." *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970) (requiring employers to prove that any merit or seniority system employed

[23] Mayer G. Freed & Daniel D. Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078, 1087 (1984).

objective standards, and was applied in nondiscriminatory manner) (citing *Shultz v. First Victoria Nat. Bank*, 420 F.2d 648, 657 (5th Cir. 1969)). Specifically, an overbroad reading of the "factors other than sex" defense that allows employers to assert any reason for pay differentials permits employers to assert pretextual, *ex post facto* reasons for pay discrimination. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) ("Without a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned."); Jeanne M. Hamburg, *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, 1095 (1989).

Accordingly, the Second Circuit has held that the "factors other than sex" defense does not permit employers to justify any pay differential with a gender-neutral reason. *Aldrich*, 963 F.2d at 525. Instead, employers must justify pay differentials with bona fide, business related reasons. *Id.* The Second Circuit explained that this narrow reading would accomplish the statute's remedial objectives by shifting the burden to employers to prove lack of pretext. *Id.*

The Second Circuit is joined by a majority of circuits, including the Sixth, Ninth, and Eleventh Circuits in requiring employers to show a legitimate business reason for the wage differential. *See EEOC v. J.C. Penney Co.,* 843 F.2d 249, 253 (6th Cir. 1988) ("'[T]he factor other than sex' defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason"); *Glenn v. General Motors Corp.,* 841 F.2d 1567, 1571 (11th Cir. 1988) (requiring an employer to show that a disparity in pay was based on the "experience, training, or ability" of the employee, rather than just an unwritten "policy" against requiring an hourly employee to take a cut in pay when transferring to a salaried position); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (stating that "[a]n employer **...**

cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason"). The EEOC agrees with the Second Circuit's interpretation of a "factor other than sex" defense. EEOC COMPLIANCE MANUAL § 10-IV(F).

These circuits employ an objective standard that requires that the employer's defense be rationally related to the specific job. This standard does not allow employers to meet their burden by comparing the male and female employee. *See Aldrich,* 963 F.2d at 525 (stating that "employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral classification system without more"); *See also J.C. Penney Co.,* 843 F.2d at 253 (holding that the EPA only exempts disparate pay practices "adopted for . . . legitimate business reason[s] and used reasonably in light of the employer's stated purpose"); *Glenn,* 841 F.2d at 1570-71 (stating that merely identifying a policy of paying new employees based on their prior wages is not sufficient evidence to establish an "any factor other than sex" defense). There is no presumption in these circuits that the expressed reason was legitimate. Rather, when employers offer explanations that do not provide any indication of their underlying intent, these circuits will consider whether the "use [of] the factor [was] reasonabl[e] in light of the employer's stated purpose as well as its other practices." *Kouba,* 691 F.2d at 876–77.

In practice, the Second Circuit's narrow reading of the "factor other than sex defense" has proven more successful for plaintiffs because it guards against pretext. Recent empirical data shows that plaintiffs face a far worse success rate in the Seventh and Eighth Circuits—the circuits that have adopted a broad reading of the factor-other-than-sex defense—than the remaining circuits that have adopted a narrow reading:

SUCCESS RATE ON APPEAL BY CIRCUIT
December 1999 – December 2009

Circuit	Employee	Employer	Employee Success Rate	Cases
First	4	6	40%	10
Second	8	4	67%	12
Third	5	4	56%	9
Fourth	1	7	59%	17
Fifth	1	10	50%	20
Sixth	1	2	85%	13
Seventh	7	22	24%	29
Eighth	1	23	39%	38
Ninth	5	5	50%	10
Tenth	9	6	60%	15
Eleventh	1	7	63%	19
D.C.	3	1	75%	4
Federal	0	1	100%	1

Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 36 (2010).

However, Defendant cites the Seventh Circuit's minority standard in its argument about applicable law. In its June 4 memorandum of law, Defendant argues, "[r]egardless of whether the reasons that determined Jarrod's salary were objectively good reasons, or were based on unassailable logic and accurate facts, they were unquestionably 'reasons other than sex' within the meaning of the Equal Pay Act." Sur-Reply Mem. Law of Defs. Hudson Group (H.G.) Retail, LLC in further Opp'n to Pl.'s Mot. *In Limine* to Exclude Certain Evidence 2 (citing *Wernsing v. Department of Human Services*, 427 F.3d 466, 468 (7th Cir. 2005) ("The statute asks whether the employer has a reason other than sex–not whether it has a 'good' reason.").

In this Circuit, however, **employers do need a good reason** to justify a wage differential. Although the Seventh and Eighth Circuits have adopted a subjective good faith standard, these circuits are in the minority of jurisdictions, and this standard has been widely criticized by both courts and legal scholars as undermining the purpose and intent of the EPA. *Steger v. Gen. Elec.*

Co., 318 F.3d 1066, 1078–79 (11th Cir. 2003); *Belfi*, 191 F.3d at 136; *Aldrich*, 963 F.2d at 526; *J.C. Penney Co*., 843 F.2d at 253; *Glenn*, 841 F.2d at 1571; *Kouba*, 691 F.2d at 876; *see* Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 57–58(2010) (explaining how construing factors-other-than-sex defense as a catchall undermines EPA's effectiveness).

Furthermore, in light of the history the Act, there is absolutely no evidence that the Vermont Legislature would have intended this Court to nullify the Act's strong remedial intent by adopting the Seventh and Eighth Circuits' standard. The Second Circuit's interpretation had been long-standing at the time the Act was passed, and there is no indication that the Vermont Legislature intended to hold employers to a lower standard under state law. Rather, by imposing a penalty of double back wages, and passing the subsequent anti-retaliation law, it is without dispute that the State of Vermont intended to hold employers to a higher affirmative duty to ensure that they were not engaging in illegal, albeit unintentional, gender discrimination.

Thus, *amici* urge this Court to find, just as the Nevada Supreme Court said when it rejected the Eighth Circuit's interpretation, "the proper legal standard underlying the factor-other-than-sex defense requires, at a minimum, that an employer demonstrates a business-related reason for the wage disparity. It is essential that the factor-other-than-sex defense is business related in order to avoid the pitfalls otherwise created by such a broadly worded provision." *Univ. and Cmty. Coll. of Nev. v. Farmer,* 930 P.2d 730, 737 (Nev. 1997).

B. THIS COURT SHOULD GIVE DEFERENCE TO THE VERMONT HUMAN RIGHTS COMMISSION DECISION IN *SILLOWAY v. VERMONT DEP'T OF CORRECTIONS*

While this is the first time a federal court will interpret the Act, the Vermont Human Rights Commission (HRC), an adjudicatory body, has adopted the Second Circuit's narrow

reading of the factor-other-than-sex defense. *Silloway v. Vermont Dep't of Corr.*, HRC Charge No. E11-0002, ¶ 58, 36–38 (Vt. Human Rights Comm'n 2012). Because deference should be given to a state's interpretation of its own laws, the *Silloway* decision should provide guidance to this Court. *See Noble v. Career Educ. Corp*., 375 F. App'x 102, 103 (2d Cir. 2010) (explaining that when a case turns on the construction of state law, federal courts must give "proper regard" to relevant rulings of the state's lower courts) (citing *Int'l Bus. Machs. Corp. v. Liberty Mut. Fire Ins. Co.,* 303 F.3d 419, 423 (2d Cir. 2002)).

Similar to this case, *Silloway* involved a claim of unequal pay by a female state worker against the Department of Corrections. Ms. Silloway discovered that she was earning $10,000 less than a male co-worker who held the same position but had much less experience and less service to the state. The state's justification, albeit ill-defined, was that the male employee's higher pay was a result of an initial hire into a salary range that was higher than the state pay scale, and that the compounding effect of the initial hiring decision resulted in the pay inequity. The HRC, however, concluded that because the state had failed to follow its own policies when initially hiring the male employee, that there were reasonable grounds to conclude that the state violated the Act. *Id*. at 38.

The Vermont Human Rights Commission stressed the defendant's "heavy burden." *Id.* at 36 (citing *Ryduchowski*, 203 F.2d at143). It noted that the "factor other than sex" defense was not "a green light for the employer to do what it wants to do when it results in pay inequity." *Id.* at 36–37. In doing so, it stated:

> The Second Circuit and the Vermont District Court have interpreted that defense in a much stricter manner that does not relieve the employer of showing proof of actual legitimacy. The Second Circuit has required that employers demonstrate that there is a well-ordered fairly administered system in place that reflects objectivity and compliance with well-established rules and procedures.

Id. at 32 (citing *Aldrich*, 963 F.2d 520; *Knight*, 903 F. Supp. 674).

This Court should construe the HRC's interpretation as a reflection of the state's broader intent to use the Act to remedy long-standing discrimination. The HRC's interpretation is consistent with the history of the Act and the Legislature's intent to redress gender based wage discrimination. *See, e.g.*, *Zustovich v. Harvard Maintenance, Inc.*, No. 08 Civ. 6856(HB), 2009 WL 735062 (S.D.N.Y. March 20, 2009) (when it is clear from the history that a state intended to provide more protection than under federal law, courts are bound to honor that policy decision).

C. THIS COURT SHOULD FOLLOW COURTS INTERPRETING STATE EQUAL PAY LAWS, PARTICULARLY THOSE IN THE SECOND CIRCUIT

Amici have done an exhaustive survey of all states and their own equal pay laws. A majority of states have some form of an antidiscrimination wage law.[24] There are very few cases interpreting those laws, in part because plaintiffs often bring these cases under both federal and state law, with federal law dominating the analysis. *Green v. Par Pools Inc.,* 111 Cal. App. 4th 620, 623 (2003) (noting that the lack of cases interpreting state law is because aggrieved plaintiffs generally bring claims under both state and federal law). *See also* Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 36 (2010) (noting the relatively low number of appellate equal pay cases).

[24] *See, e.g.*, ARIZ. REV. STAT. §23-340 (1988); ARK CODE ANN. §11-4-60 (West 1977); CAL. LAB. CODE §1197.5 (West 1985); DEL. CODE ANN. tit. 19 §1107 (1965); GA. CODE ANN. §34-5-1 (West 1966); HAW. REV. STAT. ANN. §387-4 (1972); ILL. COMP. STAT. ANN. §112/1 (West 2004); KAN. STAT. ANN. §44-1205 (1977); MICH. COMP. LAWS ANN. §37.2202 (2009); MINN. STAT. § 181.66 (1970); MO. REV. STAT. §290.400 (1963); NEB. REV. STAT. §48-1219 (1969); NEV. REV. STAT. §608.017 (West 1975); N.J. REV. STAT. ANN. 34:11-56.1 (West 1952); N.Y. LAB. LAW §194 (1980); N.D. CENT. CODE §34-06.1-01 (1965); OHIO REV. CODE ANN. §4111.17 (West 1999); OKLA. STAT. ANN. tit. 40 §198.1 (1965); OR. REV. STAT. §652.220 (1965); PA. STAT. ANN. TIT. 43 §336.1 (West 1959); R.I. GEN. LAWS §28-6-17 (1956); S.C. CODE ANN. §1-13-80 (1996); VT. STAT. ANN. tit. 21 §495 (2007); VA. CODE ANN. § 40.1-28.6 (West 1974); WASH. REV. CODE ANN. §49.12.175 (West 1943); W. VA. CODE ANN. §21-5B-1 (West 1965); WYO. STAT. ANN. §27-4-301 (2012).

However, in those states whose equal pay laws, like Vermont's law, are modeled on the federal law, courts have been guided by federal interpretation, and generally rely on their own federal circuit's interpretation. *See e.g. Green*, 111 Cal. App. 4th at 623 ("[I]n the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute."); *Arizona Civil Rights Div., Dept. of Law v. Olson*, 132 Ariz. 20, 26 (Ct. App. 1982) (stating that the Arizona Civil Rights Act should be read *in pari materia* with the federal Equal Pay Act of 1963). *Amic*i have been unable to find any case in which a state court has deviated from its own circuit's interpretation of the federal law when the state law is modeled on the EPA.[25]

The other states in the Second Circuit either follow this Circuit's interpretation, or have provided greater protections to victims of wage discrimination. The New York Equal Pay Act, N.Y. LAB. LAW § 194, is modeled on the EPA and analyzed consistent with the Second Circuit's interpretation. *See Pfeiffer v. Lewis County*, 308 F. Supp. 2d 88, 98 n.8 (N.D.N.Y 2004) (citations omitted); *see also Rose v. Goldman Sachs, & Co.,* 163 F. Supp. 2d 238, 242-43 (S.D. N.Y. 2001) (relying on the Second Circuit's interpretation of the EPA in interpreting the New York Equal Pay Act).

Furthermore, Connecticut passed a law in 2009 that codifies the Second Circuit's interpretation of "a factor other than sex." CONN. GEN. STAT. § 31-75. It replaces "a factor other than sex" defense, reading, in part:

> a differential system based upon a bona fide factor other than sex, such as education, training or experience. Said bona fide factor defense shall apply only if the employer demonstrates that such factor (A) is not based upon or derived from a sex-based differential in compensation, and (B) is job-related and consistent with business

[25] Only the state of Illinois deviates from federal law. However, its human rights statute is modeled after Title VII and does not contain a provision that parallels the EPA. Thus, in discrimination cases premised on wage discrimination, Illinois allocates burdens according to Title VII. *Illinois State Board of Elections v. Human Rights Comm'n,* 683 N.E.2d 1011 (Ill. Ct. App. 1997), *appeal denied,* 689 N.E.2d 1139 (1997).

> necessity. Such defense shall not exist where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.

This statute reflects the language and intent of the Second Circuit's jurisprudence by placing a heavy burden on the employer to show both that compensation was not based on sex, and that the justification for the wage differential is job related and consistent with business necessity. This Court should find this model particularly useful when evaluating the Defendant's alleged justifications.

III. DEFENDANTS' PROFFERED JUSTIFICATIONS FOR THE PAY DIFFERENTIAL ARE COMMON GENDER-BASED PRETEXTUAL REASONS FOR WAGE DISCRIMINATION

Women must overcome an entrenched and historic bias that values their labor less than men's labor. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 61 (2010) (citing LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: THE HIGH COST OF AVOIDING NEGOTIATION—AND POSITIVE STRATEGIES FOR CHANGE 98–100 (2007) (reviewing studies that show that "people's prejudices can powerfully influence the ways in which they respond to men and women without their realizing it"). Because of this bias, employers tend to value a woman's job as subjectively less important than her male counterpart's. *See, e.g.*, *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 686 (7th Cir. 1998).

Because gender bias is often subtle and unspoken, the records in equal pay cases seldom contain overt evidence of sex discrimination. *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987). Instead, the evidence often requires fact-finders to draw inferences in favor of the plaintiffs. *Id.*; *see, e.g.*, *Corning Glass*, 417 U.S. at 205 (inferring from circumstantial evidence that "differential arose simply because men would not work at the low rates paid women inspectors"). Because the Act is a strict liability statute that does not require intent, courts must

look skeptically upon justifications that, at first blush, suggest a reasonable business decision, but are, in fact, based in gender stereotyping. Any justification that relies on gendered assumptions is impermissible as a matter of law.

A. COMPENSATING MALE EMPLOYEES FOR THE LOSS OF A SPOUSE'S EARNINGS IS A JUSTIFICATION BASED ON SEX STEREOTYPING AND DOES NOT PROVIDE A LEGAL JUSTIFICATION UNDER THE ACT.

One of the most common assumptions employers make is that men are the primary breadwinners in their families, and because of this role, are more committed to their jobs, and are better performers. This assumption often then leads to the justification that a male was paid more than a female because of his role as the head-of-household. Correspondingly, employers often assume that women are dependent upon their spouses for financial support or have family obligations that divide their loyalties. This then leads to the assumption that women are less committed to their jobs and hence less valuable, resulting in lower wages than their equally situated male-counterparts.[26] This is why the EEOC, in its guidelines on the EPA states: "Since a 'head of household' or 'head of family' status bears no relationship to the requirements of the job or to the individual's performance on the job, such a claimed defense to an alleged EPA violation will be closely scrutinized." 29 C.F.R. §1620.21.

Defendant justifies Mr. Dixon's pay differential by pointing out that he needed additional pay to compensate for his wife's loss of employment. *See* Memorandum of Law of Def. in Support of Mot. for Summ. J. 28 (claiming that the higher salary was to make the offer attractive to Mr. Dixon to move his wife, who would be giving up her employment); Pl.'s Mot. for Partial

[26] For an overview of discrimination based on the assumption that women's work is devalued because of traditional roles, see JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT (2001) (arguing workplaces are designed around men, and that the "ideal worker" is male and has no child care responsibilities and solely devoted to work while women are devalued in the workplace because of family responsibilities) and Martha Challamas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 - 778 (2001) (reviewing cases in which courts have overturned gender classifications based on traditional gender roles, and detailing the how the "presumption of dependency" continues to devalue women's employment).

Summ. J. 13 (citing Scorcia Deposition 15:15 to 18:15 and Nieves Deposition of August 14, 2012 5:1 to 8:12; 8:23 to 9:13.) If this evidence is uncontroverted, Defendant cannot meet its burden of proof. The defendant must show that the factor of sex provided *no basis* for the wage differential. *Id.* (emphasis added); *Gosa v. Bryce Hospital,* 780 F.2d 917, 918 (11th Cir.1986) (the requirements for proving an exception are not met unless the factor of sex provides no part of the basis for the wage differential).

Tellingly, Defendant does not argue that it paid Ms. Dreves *less* because she did *not* need to support her spouse (when, in fact, she did support her family). This evidence suggests that the justification for higher pay was, at least in part, based upon Mr. Dixon's gendered-role as the primary breadwinner. This justification reinforces gender stereotyping, and disadvantages women in the labor market, and thus cannot survive as a matter of law.

B. POOR WORK PERFORMANCE IS A COMMON JUSTIFICATION THAT REQUIRES THE DEFENDANT TO MEET A HIGH BURDEN OF PROOF

Defendants often claim, and courts often assume, that sex discrimination plaintiffs are poor job-performers who are retaliating against their former employers. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 61 (2010); *e.g.*, *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 434 F. Supp. 2d 554, 565 (N.D. Ill. 2006). For example, one court speculated that:

> [T]he very best workers are seldom employment discrimination plaintiffs due to sheer economics: Because the economic costs to the employer for discrimination are proportional to the caliber of the employee, discrimination against the best employees is the least cost effective. Rather, discrimination and retaliation plaintiffs tend to be those average or below-average workers . . . .

Id. (citing *Parada v. Great Plains Int'l of Sioux City, Inc.*, 483 F. Supp. 2d 777, 791–92 (N.D. Iowa 2007) (citation omitted)). Thus, in addition to the inherent difficulty of proving wage

discrimination, plaintiffs face substantial skepticism from courts and fact-finders about their worth as employees.

One of the easiest defenses for employers to argue is poor job performance because it already plays into the inherent skepticism that courts have about plaintiffs who bring wage discrimination claims. This is why the Second Circuit requires employers to bear the heavy burden of showing that claims of poor performance are not *ex post facto* rationalizations. As the Second Circuit has explained, a merit system must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. Moreover, employees must be aware of the merit system, and the merit system must not be gender based. *Ryduchowski*, 203 F.3d at 142–43.

The current record in Ms. Dreves's case does not show that the Defendant employed an organized system whereby employees were evaluated according to predetermined gender-neutral criteria. In fact, it is particularly troubling that the Defendant has suggested that Ms. Dreves would have earned more but for her poor performance, primarily based on allegations that she became "abusive" to other employees. One might understand that this poor performance review was based in part on the fact that Ms. Dreves was deviating from expected gender norms that dictate women should be kind and compassionate when dealing with others.

Simultaneously, Hudson News claims that Mr. Dixon was a model employee, while the record shows that he engaged in sexually harassing and arguably illegal behavior toward female employees. This suggests that the company was far more tolerant of "hyper-masculinity" that resulted in sex discrimination against women. This raises the questions of whether the company's actual administration of its performance evaluations were gender-neutral, and

whether it tolerated extreme misbehavior by male employees while being far less tolerant of more minor misbehavior by female employees.

Amici raise this point to highlight the subtle, yet real, kinds of gender discrimination that can exist in performance evaluation systems even if there is no overt intent to discriminate. This is why *amici* again urge this Court to adopt the Second Circuit standard of evaluating employer justifications with skepticism, placing a high burden on the Defendant to rule out any gender bias in decision-making.

C. THIS COURT SHOULD REJECT THE MARKET-BASED THEORY OF EQUAL PAY

The Defendant's proffered justifications for the pay differential are largely based on market theory. Defendant argues that because Mr. Dixon demanded a higher wage, the company was justified in paying him more than Ms. Dreves. However, in *Corning Glass*, the United States Supreme Court rejected this theory as a justification for unequal pay. In that case, the company argued that women were willing to work for less than were men. The Court held,

> "[t]hat the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." Courts recognize that market justifications are inaccurate because they presume a perfectly functioning market. Yet, because markets don't function perfectly, reliance on this would undermine the intent of equal pay laws. In particular, it has been noted that "the lack on information and lack of mobility of some workers make the market model an inaccurate description of how relative wages are determined and how they influence the choice of jobs.

Corning Glass, 417 U.S. at 205; *see Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 720 (7th Cir. 1986) (internal citations omitted). Market theory justifications have also been rejected in those circuits that follow the Second Circuit's interpretation. *See, e.g.*, *Brock v. Georgia Sw. Coll.*, 765 F.2d 1026, 1037 (11th Cir. 1985) (citing *Corning Glass*, 417 U.S. at 205).

As one scholar has argued, courts should reject a market justification because it is

inherently deceptive:

> [W]hen the burden of proof is expressly placed squarely on one party's shoulders, it should not be shifted by an explanatory sleight of hand; doing so unjustly places the burden of proof on the party least likely to be able to prove the employer's motive. . . The cost of acquiring information about the employer's motives in enacting a particular payment scheme is significantly lower for the defendant employer than the plaintiff employee."

Rubin Bolivar Pagan, *Defending the Acceptable Business Reason Requirement of the Equal Pay Act: A Response to the Challenges of Wernsing v. Dept't of Human Resources,* 33 J. CORP. L. 1007, 1021 (2007 – 2008). Therefore, the "acceptable business reason" requirement is efficient because it places the burden of production on the party that can access the information for the lowest cost by requiring a defendant employer to justify an ambiguous payment practice as a "factor other than sex." *Id.*

Rather, *amici* urge this court to understand the Act's purpose as eradicating gender discrimination in the market, particularly the historic fact that men have often been able to demand higher wages. Thus, employers ought to pay employees based on the worth of their job, thereby eliminating any gender bias or gender preference. The Second Circuit has essentially adopted this understanding of equal pay laws by consistently reiterating that when undertaking equal pay analysis, courts should avoid comparing employees, and should instead compare the actual skills and responsibilities of the position itself to determine whether a difference in pay was justified by a bona fide legitimate business reason. *See also EEOC v. Universal Underwriters Ins. Co*., 653 F.2d 1243, 1245 (8th Cir. 1981) (citing 29 C.F.R. §§ 800.114-.132) (the "court must compare the jobs in question in light of the full factual situation and the broad remedial purpose of the statute"). In Ms. Dreves's case, it would appear that Hudson News had no legitimate business reason to hire Mr. Dixon at a significantly higher salary than Ms. Dreves but for its assertion that the market demanded that it pay a higher salary. This decision cannot be

supported as a matter of law, even if made with a subjective, good faith belief. *Robinson v. 12 Lofts Realty Co.*, 610 F.2d 1032, 1040 (2d Cir. 1979) ("The district court must carefully scrutinize suggested reasons that are not objective in nature."). Doing so would undermine the Act's intended purpose of eradicating gender-based wage discrimination.

CONCLUSION

Amici therefore respectfully request that this Court adopt the Second Circuit's legal standard in interpreting the Vermont Equal Pay Act and in doing so, grant the Plaintiff's Motion for Partial Summary Judgment.

Date: November 2, 2012

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*Counsel wishes to thank Daniel Belzil, Katrina Brannan, and Nora Mahoney for their assistance on this brief.

APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The American Association of University Women (AAUW) empowers women and girls through advocacy, education, philanthropy, and research. AAUW is a nonprofit organization with more than 150,000 members and supporters across the United States, including Vermont, as well as 1,000 local branches and 700 college and university partners. Since AAUW's founding in 1881, our members have examined and taken positions on the fundamental issues of the day — educational, social, economic, and political. AAUW has a long history of providing research and policy expertise in the area of pay equity.

The American Association of University Women (AAUW) of Vermont advances equity for women and girls through advocacy, education, philanthropy and research. AAUW of Vermont supports the arguments advanced by the Vermont Commission on Women because our members believe that all individuals should receive equal pay for equal work.

The National Association of Commissions for Women (NACW) provides national leadership and focus to over 200 state, county, and local commissions for women throughout the United States and its territories. Pay equity and equal pay for women and minorities are legislative issues of key importance to NACW. NACW supports the arguments of the Vermont Commission on Women and urges the court to adopt the Second Circuit's legal standard in this case in order to ensure that all Vermont citizens will receive equal pay for equal work.

The National Committee on Pay Equity (NCPE), founded in 1979, is a coalition of women's and civil rights organizations; labor unions; religious, professional, legal, and educational associations, commissions on women, state and local pay equity coalitions and individuals working to eliminate sex- and race-based wage discrimination and to achieve pay equity. NCPE provided support to the Vermont Commission on Women during the passage of

the Vermont Equal Pay Act and recognizes that wage discrimination continues to affect individuals across the country. Therefore, NCPE encourages the court to adopt the Second Circuit's legal standard in this case because it will help ensure a legal remedy for future victims of wage discrimination.

The South Royalton Legal Clinic is dedicated to providing legal services to Vermont residents who cannot afford counsel and need assistance on a variety of legal issues. The South Royalton Clinic supports the Commission's argument because it will help ensure that all citizens, including those we serve, earn equal wages for equal work.

The **Vermont Commission on Women** is a non-partisan independent state agency of appointed volunteers from across the state. Its mission is to reduce discrimination against and increase opportunities for Vermont women by providing information, public education, and advocacy regarding women's issues in Vermont. The wage gap has long been an issue of paramount importance for the Commission. The Commission was instrumental in passing the Equal Pay Act in April of 2002 through its leadership in public information campaigns, statewide grassroots advocacy, and coalition building. The Commission's interest in this case is to ensure that the courts interpret the Equal Pay Act consistent with its intent to eradicate wage discrimination.

The mission of the **Vermont Human Rights Commission** is to promote full civil and human rights in Vermont. The Commission works to protect people from unlawful discrimination in housing, state government employment, and housing by enforcing laws, mediating disputes, educating the public, and advancing public policies on human rights. The Human Rights Commission supported the passage of the Equal Pay Act in 2002 as a way to bring the protections of the Federal Equal Pay Act to Vermont citizens. The Human Rights

Commission also supported the Act as a way to ensure a more thorough review process for wage discrimination claims by Vermonters by keeping the investigations in state. The Human Rights Commission urges the court to adopt the Second Circuit's legal standard in interpreting the Equal Pay Act because it will ensure that the Act is applied in accordance with its legislative intent.

Vermont Legal Aid provides free civil legal services to people throughout Vermont who are poor, elderly, or have disabilities and who would otherwise be denied justice or the necessities of life. Vermont Legal Aid supports the Commission's efforts to achieve pay equity and encourages the court to adopt the legal standard of the Second Circuit. By doing so, the Court will help ensure that all Vermont citizens, including those served by Vermont Legal Aid, are paid equal wages for equal work.

The following individuals are **Vermont legislators** who **r**epresent a diverse group of ideologies, but are all devoted to ensuring that all citizens of Vermont receive equal pay for equal work.

Sen. Claire Ayer, Addison

Rep. Clement Bissonnette, Chittenden

Rep. Sarah Buxton, Windsor-Orange

Rep. Mollie Sullivan Burke, Windham

Rep. Alison Clarkson, Windsor

Rep. Susan Hatch Davis, Orange, Assistant Progressive Leader

Rep. David Deen, Windham

Sen. Sally Fox, Chittenden

Rep. Helen Head, Chittenden

Rep. Willem Jewett, Addison, Assistant Majority Leader

Rep. Kathleen C. Keenan, Franklin

Sen. Jane Kitchel, Caledonia

Sen. Sara Branon Kittell, Franklin

Rep. Joan Lenes, Chittenden

Rep. Michael Mrowick, Windham

Rep. Betty A. Nuovo, Addison

Sen. Anthony Pollina, Washington

Rep. Kesha Ram, Chittenden

Rep. Will Stevens, Addison-Rutland

Rep. George W. Till, Chittenden

Rep. Linda Waite-Simson, Chittenden

Sen. Jeanette Knutson White, Windham

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2012, I filed, by U.S. Postal Service, with the Clerk of Court the following document:

Brief *Amicus Curiae* on Behalf of the Vermont Commission on Women and other organizations and individuals dedicated to gender equity in Support of Plaintiff's Motion for Partial Summary Judgment

And I also caused to be served, by U.S. Postal Service, the following parties:

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