18-3728

In the United States Court of Appeals
FOR THE SECOND CIRCUIT

DONNA KASSMAN, SPARKLE PATTERSON, JEANETTE POTTER, ASHWINI VASUDEVA, TINA BUTLER, CHERYL CHARITY,| HEATHER INMAN, NANCY JONES AND CAROL MURRAY, individually and on behalf of a class of similarly-situated female employees,

Plaintiffs-Petitioners,

v.

KPMG LLP,

Defendant-Respondent.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF OF *AMICI CURIAE* 9TO5, A BETTER BALANCE, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, ASIAN AMERICAN ADVANCING JUSTICE – ASIAN LAW CAUCUS, EQUAL JUSTICE SOCIETY, EQUAL RIGHTS ADVOCATES, GENDER JUSTICE, IMPACT FUND, LEGAL AID AT WORK, LEGAL VOICE, MUSLIM ADVOCATES, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND WOMEN'S LAW PROJECT
IN SUPPORT OF PLAINTIFFS-PETITIONERS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule Appellate Procedure 26.1, *Amici Curiae* 9to5, A Better Balance, American Association of University Women, American Civil Liberties Union, Asian American Advancing Justice – Asian Law Caucus, Equal Justice Society, Equal Rights Advocates, Gender Justice, Impact Fund, Legal Aid at Work, Legal Voice, Muslim Advocates, National Center for Lesbian Rights, National Employment Law Project, National Partnership for Women & Families, National Women's Law Center, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Women's Law Project state that each is a non-profit corporation with no parent corporation. None has any stock held by publicly-traded corporations.

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INTEREST OF AMICI CURIAE[1]

Amici organizations, described in Appendix A, are each committed to ensuring civil rights and workplace equality.

SUMMARY OF ARGUMENT

Petitioners have ably explained why this Court should permit an interlocutory appeal of the district court's order denying class certification. Amici write separately to highlight one manifest legal error in the order that warrants interlocutory review.

By presuming that it would be "difficult, if not impossible" for plaintiffs in a Title VII case challenging a facially neutral companywide policy to certify a nationwide class of more than a few thousand employees, Order at 37, the district court imposed a burden on plaintiffs that is not supported by Supreme Court precedent or found in Rule 23's requirements. Critically, the district court's view that class size and geographic scope weigh against certification, regardless of the existence of common policies or practices unifying class members' claims, threatens the ability of employees to combat systemic discrimination in the workplace—especially those employees who work for employers with large

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[1] No party's counsel authored this brief in whole or in part. No counsel or party contributed money to fund its preparation or submission. No person other than *amici* and their counsel contributed money for its preparation or submission. All parties have consented to the filing of this brief.

workforces, and conflicts with the remedial goals of Title VII.[2] Immediate review is necessary for the Court to clarify that Title VII cases are not subject to a heightened standard under Rule 23, and to prevent other courts from denying certification in cases like this seeking to enforce important workplace protections.

ARGUMENT

I. Immediate Review of the District Court's Order Is Warranted to Clarify the Proper Role of Class Size and Scope in Evaluating Commonality.

The district court's determination that classes that are "larger" in size or geography are inherently less capable of being certified requires immediate review. The district court's view is not only inconsistent with Rule 23 and Supreme Court precedent; it would set a higher, possibly insurmountable bar for employees of large employers, including national companies or government entities, to challenge widespread discriminatory policies and practices, and would undermine Title VII's equal employment goals. Even if a sliding scale approach were appropriate, which it is not, the 10,000-member class in this case is small in comparison to those that courts have certified in cases similarly challenging facially neutral, companywide policies or practices.

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[2] *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.")

A. There Is No Basis in Rule 23 for the District Court's Consideration of Class Size and Geography as Independently Significant Indicators of Commonality.

Nothing in the language of Rule 23(a)(2) supports an arbitrary cap on class size, or a presumption against certification of classes that are large in number or geographic scope. Fed. R. Civ. P. 23(a)(2). In fact, if anything, Rule 23(a)(1)'s numerosity requirement suggests a preference in favor of larger—not smaller—classes. *See* Fed. R. Civ. P. 23(a)(1) (requiring the class to be "so numerous that joinder of all members is impracticable"); *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 690 (S.D.N.Y. 1996), *aff'd sub nom. Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) (noting that "the size of the proposed [100,000-plus member] class is largely irrelevant except as it pertains to the numerosity requirement").

Moreover, because "Rule 23 provides a one-size-fits-all formula," district courts are not free to impose "additional requirements" for certain types of cases beyond Rule 23's express criteria. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399, 401 (2010); *see also id.* at 398 (Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action"); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend [Rule 23] outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right'" (quoting 28 U.S.C. §

2072(b))); *In re Petrobras Sec.*, 862 F.3d 250, 267 (2d Cir. 2017) (declining to import administrative feasibility requirement into Rule 23 analysis because "'[t]he text' of Rule 23 . . . 'limits judicial inventiveness'" (quoting *Amchem*, 521 U.S. at 620)). The district court's "additional requirement" in the form of a presumptively higher burden under Rule 23(a)(2) for plaintiffs seeking to certify a supposedly large or geographically dispersed class should be rejected.

B. The Imposition of a Heightened Standard Based on Class Size or Geography Is Inconsistent with Supreme Court Precedent.

The district court's adoption of a heightened standard, or presumption against commonality, for "large" classes misapplies Supreme Court precedent. In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court recognized that the grant of discretion to lower-level supervisors can support Title VII liability under a disparate impact theory in appropriate cases. 564 U.S. 338, 354 (2011); *see also Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (same). To certify a class, plaintiffs must identify "a common mode of exercising discretion that pervades the entire company." *Dukes*, 564 U.S. at 356; *see also Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113-14 (4th Cir. 2013) (commonality may be satisfied where the exercise of discretion is tied to specific employment practices that affect class members in a common manner); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489-90 (7th Cir. 2012)

(commonality satisfied where exercise of discretion is influenced by company-wide policies with potential discriminatory impact).

The Supreme Court's decision in *Dukes* did not establish a numerical or geographic cap on class size, nor did it create a sliding scale pursuant to which commonality necessarily becomes harder to satisfy as the class expands. The Supreme Court merely held that, under the highly unusual facts of *Dukes*, (involving 1.5 million class members at 3,400 stores subject to differing regional policies, and "literally millions of employment decisions"), it would be "quite unbelievable that all managers would exercise their discretion in a common way without some common direction." 564 U.S. at 343, 352-57; *see also id.* at 360 (commonality not satisfied where class members "have little in common but their sex and this lawsuit") (internal quotation marks omitted). The plaintiffs failed to establish commonality in *Dukes*, not because their class was too numerically large or geographically dispersed, but because they provided "no convincing proof" of any "companywide discriminatory" policy across such an extraordinarily expansive class that guided or constrained the exercise of discretion. *Id.* at 359.

The district court misapplied *Dukes* by assuming "that the larger the class size, the less plausible it is that the class will be able to demonstrate a common mode of exercising discretion." Order at 36. In fact, it noted that plaintiffs challenging discretionary policies on behalf of a nationwide class will find it

"difficult, if not impossible" to establish commonality. *Id.* at 37. Finding that Plaintiffs' class size of 10,000 women was much smaller than *Dukes*' 1.5 million member class, but larger than classes in a handful of other Title VII cases that courts have certified, *id*. at 36-37, the district court erroneously presumed that this case was more like *Dukes*—despite the very different policies and practices the Plaintiffs in this case challenge—and therefore, that commonality was not established, *id*. at 37. Amici disagree with the district court's characterization of Plaintiffs' class as "expansive" or "akin" to *Dukes*, *id.*, and more fundamentally, with the proposition that any finding regarding commonality can be drawn from the comparison of class sizes in a tiny sampling of cases.

C. The Uniformity of the Policy—Not the Size or Scope of the Class—Is the Relevant Question in a Disparate Impact Case.

The district court's emphasis on class size and scope is inappropriate in a disparate impact case where the focus is on the existence of a uniform policy or practice. Such cases serve to address subtler, often hidden forms of discrimination in which practices that appear neutral on their face "unnecessarily and disparately exclude protected groups from employment opportunities." Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. & Emp. L.J. 431, 434 (2005) (citing *Watson*, 487 U.S. at 990). Commonality is "more easily satisfied under a disparate impact theory of discrimination," where the plaintiffs target specific

policies or practices that they allege disparately impacted all members of a protected group. *See* 45C Am. Jur. 2d Job Discrimination § 2114. Thus, the size of the group or whether some members sit across the country from others in the group is not determinative, or even relevant to whether the plaintiffs identified a specific policy or practice that applied to the entire class.

D. Courts Regularly Certify Large Classes Challenging Facially Neutral Policies.

Courts have routinely certified classes in Title VII and other civil rights cases challenging facially neutral policies that are far larger than the 10,000-member class proposed by Plaintiffs here. *See, e.g.*, *Augustin v. Jablonsky*, No. 99 Civ. 3126, 2001 WL 770839, at *2-4 (E.D.N.Y. Mar. 8, 2001), *class certified pursuant to In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 229-31 (2d Cir. 2006) (commonality satisfied as to whether defendants engaged in policy of strip-searching class of more than 19,000 misdemeanor arrestees without "reasonable suspicion"); *Menocal v. GEO Group, Inc.*, 320 F.R.D. 258, 263-68 & nn.1-2 (D. Colo. 2017), *aff'd*, 882 F.3d 905 (10th Cir. 2018) (certifying class of more than 50,000 immigrant detainees as to whether defendant coerced class members to work under threat of solitary confinement); *Houser v. Pritzker*, 28 F. Supp. 3d 222, 242-43, 255-56 (S.D.N.Y. 2014) (certifying class of over 450,000 census job applicants in nationwide Title VII class action challenging hiring processes); *Floyd v. N.Y.C.*, 283 F.R.D. 153, 172, 174 & n.134 (S.D.N.Y. 2012) (certifying class of

"well over" 100,000 members challenging law enforcement's use of "stop-and-frisk" procedure without reasonable suspicion) (citing cases).

As these cases demonstrate, class size and scope are not determinative of whether plaintiffs can establish a common policy or practice. The district court's sliding scale approach to certification is manifestly erroneous and requires review.

II. Without Review and Clarification, the District Court's Erroneous Analysis Will Imperil Future Efforts to Combat Systemic Discrimination.

The district court's presumption against larger classes in Title VII cases is inconsistent with the purposes of Rule 23 and would undermine the efficiency of class litigation. Larger classes allow plaintiffs to pool more resources, impact greater numbers of employees, and eliminate the drain that courts and litigants would bear if the claims were disaggregated. *See generally* 1 William B. Rubenstein, Newberg on Class Actions §§ 1:7-10 (5th ed. 2018) (hereinafter "Newberg"); *see also Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 93 (2d Cir. 2018) (class actions "result in efficiencies of cost, time, and judicial resources and permit a collective recovery where obtaining individual judgments might not be economically feasible"). These benefits are furthered, not hindered, when challenges to nationwide policies are litigated in one case on behalf of all affected class members.

Moreover, under the district court's reasoning, large government employers and corporations with a national presence could be immunized against classwide discrimination challenges, or benefit from an artificially heightened Rule 23 standard, simply because their policies harm *more* individuals. Yet class litigation is often the only means by which plaintiffs can effectively challenge such powerful adversaries. *See In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 842 (E.D.N.Y. 1984), *aff'd sub nom. In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145 (2d Cir. 1987) (because "large corporations[] are usually better able to bear the cost of litigating individual suits than are plaintiffs' attorneys," class actions "tend to equalize the odds between the two sides"); *Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 973 (4th Cir. 1981) ("Without the backing of a comprehensive class, individual plaintiffs or their lawyers will find it difficult to muster the resources and incentives sufficient to tackle industrial giants . . . . We will observe classic applications of the strategy of divide and conquer."). This is particularly important in the employment context, where plaintiffs put their reputations, careers, and workplace relationships at risk when they complain of discrimination, perhaps especially so at large employers with a global reach.[3]

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[3] *See* Lilia M. Cortina & Vick J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. Occupational Health Psychol. 247, 255 (2003) (substantial majority of employees who spoke out against workplace mistreatment faced either professional or social retaliation).

Finally, further heightening the standards for Title VII class actions could threaten the positive effects on workplace conduct that these cases promote. Class actions "generate important spillover effects—what economists call 'positive externalities'" that "make the enforcement of law more efficient," for example, by creating norms that influence potential defendants' behavior. *See* Newberg § 1:9 (citing William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. Rev. 709 (2006)). Title VII class actions—especially those against larger employers with a nationwide impact—help to clarify appropriate workplace behavior, set new norms, and deter unlawful conduct by other employers. *See* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 414-27 (2008) (examining factors that contribute to success of consent decrees in large employment discrimination class actions); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 690-705, 724 (2003) (Title VII class actions "hold[] the capacity to trigger change in the organizational structures, cultures, and taken-for-granted institutionalized practices that continue to engender unequal treatment in the workplace").

These cases should not face arbitrary hurdles that much larger cases in other contexts do not. This Circuit has endorsed class certification in cases involving common practices under antitrust law, securities law, and ERISA, for example, that

involved many more class members than this case does. *See Osberg v. Foot Locker, Inc.*, 862 F.3d 198, 206 (2d Cir. 2017) (affirming grant of equitable relief to 16,000-member ERISA class) (referencing certification pursuant to No. 07 Civ. 1358, 2014 WL 5796686, at *3 (S.D.N.Y. Sept. 24, 2014)); *In re WorldCom Sec. Litig.*, 496 F.3d 245, 249 (2d Cir. 2007) (discussing tolling applicable to securities class consisting of tens of thousands of investors) (referencing certification pursuant to 219 F.R.D. 267, 280 (S.D.N.Y. 2003)); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001) (affirming certification of class comprised of four million merchants raising antitrust violations) (referencing certification pursuant to 192 F.R.D. 68, 81 (E.D.N.Y. 2000)).

The Second Circuit should clarify that the same Rule 23 standards apply to Title VII cases challenging a companywide policy or practice regardless of the size or geography of the proposed class.

CONCLUSION

Amici respectfully urge the Court to grant the Petition for Permission to Appeal.

Dated: December 21, 2018
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rules 29(b)(4) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 2,540 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: December 21, 2018

/s/ Rachel Bien
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APPENDIX OF AMICI

9to5, National Association of Working Women, is a non-profit organization with the mission to build a movement to achieve economic justice by engaging directly affected women to improve working conditions. 9to5 members have been on the front lines, working for economic security for all women—particularly women of color—for the past 45 years. We believe that there is more than one way to make our voices heard and achieve justice, including through the courts. 9to5 has worked for and won major national policies including the 1978 Pregnancy Discrimination Act, the Civil Rights Act of 1991, the Family Medical Leave Act, and the Lilly Ledbetter Fair Pay Act.

A Better Balance is a non-profit legal advocacy organization working nationally to promote fairness, equality, and justice in the workplace for women and families. A Better Balance helps employees meet the conflicting demands of work and family through policy advocacy, outreach, and direct legal services. As part of its core mission, A Better Balance leverages the power of the law to ensure that no worker has to make the impossible choice between their job and their family. We are leading advocates for policies that combat discrimination based on family status, caregiving responsibilities, and pregnancy, and policies that help support families, including paid sick leave and family leave, flexible work, and pay equity.

American Association of University Women ("AAUW") was founded in 1881 by like-minded women who had challenged society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education and equal employment opportunities. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with its member-adopted Public Policy Priorities, AAUW supports equitable access and advancement in employment, pay equity, as well as vigorous enforcement of employment discrimination statutes, including the ability to bring class actions to challenge systemic discrimination.

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace, including sexual harassment, pregnancy and caregiver discrimination, and discrimination against women in male dominated fields.

Asian Americans Advancing Justice – Asian Law Caucus (ALC) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. ALC is part of a national affiliation of Asian American civil rights organizations, including affiliates in Los Angeles, Chicago, Washington DC, and Atlanta. ALC's advocacy includes class-action and employment discrimination litigation.

Equal Justice Society (EJS) seeks to use social science, structural analysis, and real-life experience to fight against racial inequality by broadening conceptions of discrimination to include unconscious and structural bias in the criminal-justice system and elsewhere. EJS is concerned that in failing to recognize disparate impact theory as the overarching foundation for equal protection liability courts create insurmountable challenges for civil rights plaintiffs. EJS is a nonprofit 501(c)(3) organization based in Oakland, California.

Equal Rights Advocates (ERA) is a national non-profit civil rights organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated numerous class action and civil rights cases challenging gender discrimination at work and in school, including *Dukes v. Wal-Mart Stores, Inc.* Through litigation and other advocacy efforts, ERA has helped to secure

workplace protections and conferred significant benefits on large groups of women and girls. ERA also provides free legal assistance to individuals facing discrimination and other unfair or unlawful treatment on the job and at school through our national Advice and Counseling program. ERA has participated as amicus curiae in scores of cases involving the interpretation and application of Title VII of the Civil Rights Act, Rule 23 of the Federal Rules of Civil Procedure, and other legal rules and laws affecting workers' rights and access to justice.

Gender Justice is a nonprofit legal and policy advocacy organization based in the Midwest that is committed to the eradication of gender barriers through impact litigation, policy advocacy, and education. As part of its litigation program, Gender Justice represents individuals and provides legal advocacy as amicus curiae in cases involving issues of gender discrimination. Gender Justice has an interest in ensuring that class action is a possible means of challenging widespread and pervasive gender inequity.

The **Impact Fund** is a non-profit legal foundation that provides funding for impact litigation, offers innovative training and support, and serves as counsel in impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights class actions, including cases enforcing workers' rights and challenging employment discrimination, wage-and-hour violations, lack of access for those with disabilities, and violations of fair housing laws.

Legal Aid at Work is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. Legal Aid at Work has represented low-wage clients in cases involving a broad range of issues, including gender-based equal pay claims and discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid at Work has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an *amicus curiae* capacity. Legal Aid at Work has a strong interest in ensuring that workers can continue to enforce their rights through class actions.

Legal Voice is a non-profit public interest organization that works to advance the legal rights of all women and girls in the Pacific Northwest through impact litigation, legislation, and legal rights education. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has long advocated for equality and pay equity in the workplace. Toward that end, Legal Voice has pursued legislation and has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country, advocating for robust interpretation and enforcement of anti-discrimination and other laws protecting working women. Legal Voice serves as a regional expert on the laws and policies impacting women

in the workplace, including sex discrimination in the workplace, pregnancy discrimination, caregiver discrimination, pay equity, and family leave policies.

Muslim Advocates is a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation, including class actions, and through other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life.

The **National Center for Lesbian Rights ("NCLR")** is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBTQ people in the workplace through legislation, policy, and litigation, and represents LGBTQ people in employment and other cases in courts throughout the country.

The **National Employment Law Project** ("NELP") is a nonprofit organization with more than 45 years of experience advocating for the employment and labor rights of low wage and unemployed workers. NELP seeks to ensure that all employees receive the full protection of labor and employment laws, including the opportunity to join with their co-workers in class and collective actions. NELP prioritizes workplace equity and ensuring that workers are not discriminated against due to their race, sex, sexual orientation or other status. NELP has litigated and participated as amicus curiae in numerous cases in circuit and state courts and the U.S. Supreme Court addressing the importance of equal access to labor and employment protections for all workers.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that promotes fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of their jobs and families. Since its founding in 1971, the National Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades to combat sex discrimination and to ensure that all people are afforded protections against discrimination under federal law.

The **National Women's Law Center** (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. 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 through enforcement of the Constitution and laws prohibiting discrimination. NWLC has long sought to ensure that rights and opportunities are not restricted on the basis of gender stereotypes and that all individuals enjoy the full protection against sex discrimination promised by federal law.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs** ("Committee") is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy. In furtherance of this mission, the Committee represents vulnerable persons and populations, often as a class, seeking to prevent housing and employment discrimination, ensure humane and constitutionally adequate conditions for incarcerated juveniles and adults,

remediate inequities in the criminal justice system, and protect the rights of immigrants and persons with disabilities. The class action mechanism enables the Committee to vindicate the rights of many similarly-situated persons harmed by discriminatory practices whose injuries would otherwise likely go unredressed, and to prevent continuing violations of the law. In the Committee's practice, systemic discrimination affects protected classes of many different sizes and geographic distribution. To be meaningful and effective, the class action device must therefore remain sufficiently flexible to address illegal practices without arbitrary, pre-existing limitations, such as those related to size and geographic scope.

The **Women's Law Project** (WLP) is a nonprofit public interest law center with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP's mission is to create a more just and equitable society by advancing the rights and status of women throughout their lives. To meet these goals, the WLP engages in high impact litigation, policy advocacy, public education, and individual counseling. Throughout its history, the WLP has worked to promote economic justice and the elimination of sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by civil rights laws. WLP has advocated for equal opportunity in employment, law reform to strengthen federal, state, and local employment discrimination laws, and proper application of existing laws and

procedural rules to end the insidious perpetuation of sex discrimination in employment.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Local Rule 25.1(h), that on December 21, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the ECF system, which will send notification of the filing to the attorneys on that system.

/s/ Rachel Bien
Rachel Bien

Counsel for Amici Curiae