IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 18-6102

DR. RACHEL TUDOR,
Plaintiff-Appellant,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,
Defendants-Appellees.

Appeal from the Judgment of the United States District Court for the Western District of Oklahoma (Cauthron, J.) No. 15-cv-324-C

BRIEF FOR *AMICI CURIAE* THE NATIONAL WOMEN'S LAW CENTER *ET AL.* IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel for *amici curiae* states that none of the *amici* has a parent corporation or issues stock because they are non-profit organizations.

Dated: November 26, 2018

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

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 1972, NWLC has worked to secure equal employment opportunities, and has advocated to ensure that anti-discrimination laws are interpreted correctly to include important protections against discrimination. NWLC has participated as counsel or *amicus curiae* in a range of cases before the United States Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, and to challenge sex discrimination, including cases addressing Title VII's protections for lesbian, gay, bisexual, and transgender (LGBTQ) individuals.

NWLC and the additional 31 *amici*[2] work to ensure that all individuals benefit from federal civil rights protections and related remedies. The Addendum to this brief provides more detail on the additional *amici* joining the brief.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel or person other than *amici* and their counsel authored any part of this brief, or contributed money intended to fund its preparation or submission.

[2] The additional *amici* are A Better Balance, Alliance for a Just Society, American Association of University Women, American Federation of Teachers, Atlanta Women for Equality, California Women Lawyers, Colorado Women's Bar Association, Colorado Organization for Latina Opportunity and Reproductive Rights, DC Coalition Against Domestic Violence, End Rape on Campus, Gender Justice, Girls for Gender Equity, If/When/How: Lawyering for Reproductive Justice, In Our Own Voice: National Black Women's Reproductive Justice Agenda, Lawyers Club of San Diego, Legal Aid at Work, Legal Voice, National Asian Pacific American Women's Forum, National Crittenton,

Amici are authorized to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) because all parties to this appeal have consented to the submission of the brief.

SUMMARY OF ARGUMENT

Enshrined in Title VII of the 1964 Civil Rights Act, Pub. L. 88-352, 42 U.S.C. §§ 2000e *et seq.*, are the dual remedial goals of making victims of discrimination whole and deterring future illegal discrimination. Title VII "compensation shall be equal to the injury . . . . The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975). "Congress designed the remedial measures in [Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) (quoting *Albemarle*, 422 U.S. at 417-18). Consistent with these goals, the presumptive Title VII remedy is reinstatement.

National Employment Lawyers Association, National LGBTQ Task Force, National Network of Abortion Funds, National Organization for Women Foundation, National Partnership for Women & Families, National Women's Political Caucus, Oklahoma Coalition for Reproductive Justice, Sargent Shriver National Center on Poverty Law, SisterReach, The Women's Law Center of Maryland, Women's Law Project, and the Women's Bar Association of the District of Columbia.

Dr. Tudor is a 54-year old Native American woman who is transgender and had worked as an English professor at Southeastern Oklahoma University for seven years. A jury found in her favor, concluding that Defendants violated Title VII by illegally discriminating and retaliating against her by denying her tenure, not allowing her to re-apply the following year, and then terminating her. Although the jury awarded her $1,165,000, the district court reduced the jury award to $300,000 in compensatory damages (citing the cap under 42 U.S.C. § 1981a(b)(3)(D)). Fourteen months after her termination, Dr. Tudor took an interim non-tenure track contract position teaching writing composition at Collin County Community College. That position offered inferior benefits and fewer job responsibilities, and failed to provide opportunities for advancement (*e.g.*, into a tenure-track role).

Following the jury award, the district court held that it would be infeasible to reinstate Dr. Tudor primarily due to alleged hostility between the parties during the Title VII litigation, and also due to Defendants' groundless assertion that Dr. Tudor was not qualified for a tenured position at Southeastern. The district court effectively penalized Dr. Tudor for mitigating her damages by taking a community college contract job by awarding front pay for solely the 14 months before she found that position—a mere sum of $60,040.77.

The district court ignored the remedial goals of Title VII in denying Dr. Rachel Tudor the presumptive remedy of reinstatement and, at the same time, issuing a front pay award that could not possibly make her whole. Failing to properly weigh Title VII's presumption of reinstatement, the district court overlooked considerable evidence showing that, actually, little hostility remains between the parties and working conditions at Southeastern have improved significantly. The district court further abused its discretion in awarding front pay for only 14 months as an alternative to reinstatement, ignoring compelling evidence that comparable work opportunities were not reasonably available to Dr. Tudor. Because the community college contract job that she was forced to take was substantially inferior, it should not have limited the district court's front pay assessment, nor should it have been deemed conclusive evidence in the district court's determination of the availability of comparable work opportunities.

The legal issues at stake here are important to all employees facing workplace discrimination. Title VII does not permit courts to penalize workers who take inferior, non-comparable employment out of financial necessity by then cutting off the time period for front pay awards. Doing so would undermine Title VII's requirement that employees mitigate their damages, creating a catch-22 in which employees who settle for lesser jobs would face curtailment of their front pay as a result.

NWLC and the additional 31 *amici* urge this Court to vacate and remand the district court's decision regarding reinstatement and front pay with instructions to conduct a meaningful assessment of Title VII's reinstatement and front pay requirements, including consideration of Dr. Tudor's circumstances as an older Native American woman who is transgender. Only by (*i*) reinstating her to a tenured position at Southeastern or, in the alternative, (*ii*) considering evidence regarding her individualized circumstances in awarding her front pay until she obtains a comparable tenure position can Title VII's make-whole objective be realized. Refusing Dr. Tudor these remedies due to Defendants' baseless claims of ongoing hostilities ultimately rewards, rather than deters, discrimination by this employer and creates a perverse incentive more generally for employers to assert ongoing tensions in order to avoid reinstating employees with successful employment discrimination claims.

ARGUMENT

I. The District Court Abused Its Discretion by Failing to Substantively Assess the Feasibility of Dr. Tudor's Reinstatement.

A. The District Court Did Not Afford Proper Weight to Title VII's Clear Preference for Reinstatement as the Presumptive Remedy After a Finding of Employment Discrimination.

As this Court has repeatedly recognized, victims of employment discrimination are presumptively entitled to reinstatement under Title VII. *See, e.g., Jackson v. City of Albuquerque*, 890 F.2d 225, 233-35 (10th Cir. 1989); *see*

also McInnis v. Fairfield Cmtys., Inc., 458 F.3d 1129, 1145 (10th Cir. 2006) (citing *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir. 1985)); *Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003). "This rule of presumptive reinstatement is justified by reason as well as precedent." *Jackson*, 890 F.2d at 234. Indeed, this presumption of reinstatement as the appropriate remedy for discriminatory discharge follows precedent in *every* other circuit.[3]

Reinstatement can make a victim whole in a way that monetary damages cannot—by providing direct relief for the subjective harms caused by discrimination that are difficult or impossible to wholly quantify. *See Jackson*, 890 F.2d at 234 ("When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole." (internal quotation marks omitted)).[4] The remedy of reinstatement also deters future discriminatory conduct

[3] *See, e.g.*, *Selgas v. Am. Airlines, Inc.*, 104 F.3d 9, 12 (1st Cir. 1997); *Reiter v. MTA N.Y.C. Transit Auth.*, 457 F.3d 224, 230 (2d Cir. 2006); *Nance v. City of Newark*, 501 F. App. 123, 126 (3d Cir. 2012); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1423 (4th Cir. 1991); *Reeves v. Clairborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1101 (5th Cir. 1987); *Shore v. Fed. Exp. Corp*., 777 F.2d 1155, 1159 (6th Cir. 1985); *Hicks v. Forest Pres. Dist. of Cook Cty., Ill.*, 677 F.3d 781, 792 (7th Cir. 2012); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 572 (8th Cir. 2002); *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1020 (9th Cir. 2000); *Nord v. U.S. Steel Corp.,* 758 F.2d 1462, 1473 (11th Cir. 1985); *Webb v. District of Columbia*, 146 F.3d 964, 976 (D.C. Cir. 1998).

[4] In Dr. Tudor's case, her $1,165,000 jury award was reduced to $300,000, the statutory cap for employers with 501 or more employees—a cap which has not increased since Title VII was amended nearly three decades ago in 1991. *See* 42 U.S.C. § 1981a(b)(3)(D).

by thwarting an employer's efforts to circumvent Title VII requirements. *See Nelson v. Geringer*, No. 99-cv-132D, 2000 WL 34292678, at *9 (D. Wyo. May 23, 2000), *aff'd*, 295 F.3d 1082 (10th Cir. 2002). Contrary to the district court's findings, reinstatement is particularly favored as a remedy for professors given the highly-specialized nature of academia.[5] Typically, very few comparable academic, tenured positions are available to a terminated professor.[6]

Although the district court referred to reinstatement in passing as the presumptive remedy for Title VII violations, *see* TA 4:127,[7] it failed to assign proper weight to that presumption in its individualized assessment of Dr. Tudor's circumstances, as explained further below, *see* Pt. I.B, *infra*. Contrary to the district court's finding, that reinstatement may not "be pleasing and free of irritation" does not justify its denial to a victim of discriminatory discharge. *Jackson*, 890 F.2d at 234 (citation omitted). Absent "unusual" facts, denying an equitable remedy to a victim of employment discrimination such as Dr. Tudor perpetuates the effects of that discrimination and rewards the employer for its

[5] *See, e.g.*, *Fuhr v. Sch. Dist. of City of Hazel Park*, 364 F.3d 753, 760-61 (6th Cir. 2004); *Ellis v. Ringgold Sch. Dist.*, 832 F.2d 27, 30 (3d Cir. 1987); *Reeves*, 828 F.2d at 1101-02; *Allen v. Autauga Cnty. Bd. of Educ.*, 685 F.2d 1302, 1305-06 (11th Cir. 1982); *Edwards v. Sch. Bd. of City of Norton, Va.*, 658 F.2d 951, 955 (4th Cir. 1981).

[6] *See* Pt. II.A, *infra* (explaining the dearth of comparable positions available to Dr. Tudor).

[7] Dr. Tudor's Appendix is referred to as "TA," with citations to [volume]:[page(s)].

discriminatory and illegal conduct, undermining Title VII's goals. *Bingman v. Natkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991).

B. The District Court Relied on Improper Factors in Assessing Whether to Reinstate Dr. Tudor.

The district court relied on two impermissible factors in denying Dr. Tudor reinstatement: (*i*) "ongoing hostility between the parties" "throughout this litigation," and (*ii*) Defendants' baseless assertion that Dr. Tudor is not fit for a tenured position at Southeastern. TA 4:127-29. Remarkably, the district court violated the spirit of Title VII by denying Dr. Tudor reinstatement based on ill feelings resulting from her decision to challenge the very discriminatory conduct by Defendants that the jury found illegal. The district court then credited Defendants' assertion about Dr. Tudor's fitness for her former position, relying solely on *Defendants' own discriminatory conduct* as supporting "evidence."

1. The District Court Improperly Relied on Alleged Hostility During the Title VII Litigation in Finding Reinstatement To Be Infeasible.

The district court's conclusion that reinstatement was infeasible was driven primarily by hostility observed during the Title VII litigation. TA 4:128. However, "friction arising from the litigation process itself is not alone sufficient . . . since a court might deny [employment] in virtually every case if it considered the hostility engendered from litigation as a bar to relief." *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281 (8th Cir. 1983). "Antagonism

between parties occurs as the natural bi-product of any litigation." *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir. 1981).[8]

This Court acknowledged as much in reversing a denial of reinstatement that was based on hostility evidenced in the courtroom in *Jackson v. City of Albuquerque*, 890 F.2d 225 (10th Cir. 1989). *Jackson* explained that "[u]nless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify non reinstatement." *Id.* at 234. Moreover, in *Jackson*, the perpetrators of the discrimination were "determined to run [the victim] off the job. If [the victim] is denied reinstatement, they will have accomplished their purpose." *Id.* at 235. Put another way, "[t]o deny reinstatement to a victim of discrimination merely because of hostility engendered by the prosecution of a discrimination suit would frustrate the make-whole purpose of Title VII." *Taylor*, 648 F.2d at 1138-39.

As in *Jackson*, here, the district court focused on hostility exhibited exclusively during the pendency of the Title VII case. *See* TA 4:128. Litigation hostility is the *only* type of inter-party friction evidenced; in fact, during the trial, Defendants repeatedly *denied* that any hostility remained between Southeastern and Dr. Tudor. TA 7:218-19, 8:147-48.

[8] *See also Bruso v. United Airlines, Inc.*, 239 F.3d 848, 861-62 (7th Cir. 2001) (reversing and remanding denial of reinstatement on the ground that "[a] court must be careful . . . not to allow an employer to use its anger or hostility toward the plaintiff for having filed a lawsuit as an excuse to avoid the plaintiff's reinstatement").

Under the district court's logic, any violator of Title VII would be able to eviscerate Title VII's legislative objectives by manufacturing hostility between the parties. In finding hostility, the district court relied on the assertions of Dr. Randy Prus, the Department Chair, who in expressing concerns about disruption cited only litigation hostility and testified that he believed Dr. Tudor deserved tenure in the 2010-11 cycle. *See* TA 8:12. Also, Dr. Tudor presented ample evidence showing that all of her other former colleagues still in Southeastern's English Department agree that it would be safe and appropriate for her to return, and that she should be reinstated. *See* TA 4:229-36, 6:147; 7:122, 124-25, 197, 218.

Two additional factors that persuaded this Court that reinstatement was feasible in *Jackson* are also present here, further suggesting that any inter-party friction should not bar reinstatement. First, almost all of the administrators at Southeastern when Dr. Tudor suffered discrimination—the University's President, Vice President, Dean, affirmative action officer, human resources director, and various assistants—have since left. TA 6:147; 8:84, 194-95; *see also Jackson*, 890 F.2d at 232 (noting that "most of those making complaint against plaintiff are no longer employed" by defendant). Second, the victim of the discrimination, Dr. Tudor, has always sought to be reinstated and "can't think of any reason not to return" to Southeastern, which she considers her "home," notwithstanding any

ongoing friction. TA 6:138, 147-49; *see also Jackson*, 890 F.2d at 234 ("[P]laintiff here has always sought reinstatement to his former position.").

Additionally, due to a separate settlement in this matter reached with the United States Department of Justice, Southeastern has reformed its employment practices under the federal government's ongoing supervision. *See* TA 2:191-213. In fact, there are already clear signs that Southeastern's practices have drastically improved: By Spring 2017, Southeastern had significantly bolstered its health care, insurance, civil rights, and Title IX policies regarding transgender faculty, staff, and students. *See* TA 2:137-38, 214-18.

In fact, in March 2015, Dr. Tudor returned to Southeastern for a successful trial-run. Dr. Tudor was selected through a competitive process to give a lecture at a state-wide conference of the American Association of University Professors hosted at Southeastern. During her visit, Dr. Tudor interacted with several past and current administrators, and English Department faculty. This trial-run was very well-received, and Dr. Tudor herself attests she felt welcomed, respected, and safe. TA 4:186-88, 230-36. Southeastern has been shown to be an increasingly inviting environment to which Dr. Tudor can now return.

2. The District Court Improperly Credited Defendants' Contentions That Dr. Tudor Could Not Be Reinstated.

The district court also credited the Defendants' false contention that Dr. Tudor is not qualified to receive tenure at Southeastern. This was improper—as

the jury found, but for sex discrimination and retaliation perpetrated by Defendants, Dr. Tudor would have earned tenure.

As such, reinstatement is appropriate here. "[O]nce a university has been found to have impermissibly discriminated in making a tenure decision, . . . the University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII." *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 359-60 (1st Cir. 1989) (awarding tenure to a discrimination victim was "the only way to provide her the most complete relief possible" under Title VII). The district court below denied Dr. Tudor reinstatement based on the very actions that the jury unanimously found to constitute illegal discrimination and retaliation—denial of her 2009-10 tenure application and her ability to re-apply in 2010-11—concluding that those discriminatory actions constituted "substantial competent evidence demonstrating that [Defendants] are convinced" she was not "qualified to be a tenured professor." TA 4:127-29, 5:81. Yet, "[d]enial of reinstatement is unwarranted unless grounded in a rationale which is harmonious with [Title VII's] legislative goals . . . ." *Squires v. Bonser*, 54 F.3d 168, 172 (3d Cir. 1995). The district court's decision does the exact opposite: relying on Defendants' illegal behavior to deny reinstatement directly contravenes Title VII's underlying goals of

placing Dr. Tudor in the position that she would have been but for the illegal discrimination she suffered and deterring future discriminatory conduct.[9]

In effect, the district court flipped Title VII's presumptive remedy of reinstatement on its head by putting the burden on Dr. Tudor, the victim of discrimination, to prove affirmatively that reinstatement was viable, rather than requiring Defendants to demonstrate that reinstatement would be infeasible. *See* TA 4:127-29, 5:45-46. The district court's denial of Dr. Tudor's reinstatement must therefore be vacated and remanded.

II. The District Court Failed to Consider Critical Evidence in Making the Front Pay Determination.

In keeping with Title VII's dual make-whole and deterrence goals, "a district court, when fashioning a front pay award, should ascertain the amount required to compensate a victim for the continuing future effects of discrimination *until the victim can be made whole*." *Carter v. Sedgwick Cnty., Kansas*, 36 F.3d 952, 957 (10th Cir. 1994) (commonly known as *Carter III*) (internal quotation marks

[9] *See Jackson*, 890 F.2d at 234 ("If an employer's best efforts to remove an employee for unconstitutional reasons are presumptively unlikely to succeed, there is, of course, less incentive to use employment decisions to chill the exercise of constitutional rights."); *cf. Albemarle*, 422 U.S. at 417-18 (Title VII aims to spur employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination).

omitted).[10] The district court failed to do so in awarding Dr. Tudor front pay for only 14 months, ignoring compelling evidence that comparable work opportunities were not reasonably available to her. In awarding front pay, the district court departed from this Court's well-established framework of "consider[ing] all evidence presented at trial concerning the individualized circumstances of both the employee and employer." *Whittington v. Nordam Grp., Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005).

Specifically, the district court failed to consider available evidence of three key factors: (*i*) the unavailability of jobs with comparable status, responsibilities, working conditions, and promotional opportunities in Dr. Tudor's geographic area; (*ii*) the particular challenges she faced in light of her age and status as a Native American woman who is transgender; and (*iii*) the difficulty she faced in looking for a new job after enduring, and after a jury finding of, discrimination. Failure to consider these factors is antithetical to Title VII's remedial goals, and the fact-intensive, individualized front pay analysis required by this Court.

[10] Strikingly, the district court below cited to *Carter v. Sedgwick County, Kansas*, 929 F.2d 1501 (10th Cir. 1991) (*Carter II*), as requiring that a front pay award take into account "'any amount that the plaintiff could earn using reasonable efforts,'" TA 5:48 (quoting *Carter II*, 929 F.2d at 1505), but ignored the fact that this Court subsequently remanded the next front pay award in that case because the trial court calculated a time period for front pay "simply [to] attempt to compensate for future loss during which the plaintiff will find commensurate employment," rather than fashioning a front pay award "[i]n keeping with the 'make whole' nature of the remedies required under Title VII," *Carter III*, 36 F.3d at 957 (internal quotation marks omitted).

Instead of considering these critical factors, the district court relied on Dr. Tudor's subsequent community college employment as conclusive evidence of the reasonable availability of work opportunities. In doing so, the district court improperly assumed that the community college position was comparable to Dr. Tudor's Southeastern position, failing to consider evidence that the new position was vastly inferior in many respects. Indeed, Dr. Tudor's having to settle for an inferior, non-tenure track contract position should have been considered as additional evidence that commensurate work opportunities were *not* reasonably available to her.

A. The District Court's Front Pay Award Failed to Account for the Unavailability of Comparable Positions.

1. The District Court Failed to Consider the Unavailability of Tenure-Track English Department Jobs in Awarding Dr. Tudor Front Pay.

The district court used salary as the sole means of comparing Dr. Tudor's former Southeastern and temporary community college employment, and in doing so, decided to limit her front pay to the 14 months between the two jobs. *See* TA 5:46-49, 80. This approach ignored the roles' differences in status, responsibilities (including teaching different courses), working conditions, benefits, and promotional opportunities—all of which have been recognized as appropriate factors for evaluating whether job. Even a surface comparison of these positions demonstrates that the non-tenure track position Dr. Tudor took at the community

college was significantly inferior to her prior tenure-track professorship at Southeastern, amounting to a demotion. This failure to make Dr. Tudor whole through an assessment of the individualized factual circumstances constituted an abuse of discretion.

"Substantially equivalent employment for purposes of Title VII litigation has been defined as employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status . . . ." *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1138 (5th Cir. 1988) (internal quotation marks omitted). District courts within this Circuit have repeatedly considered these factors in determining whether a new position is "substantially equivalent," including one case that this Court affirmed. *See Rutherford v. Am. Bank of Commerce*, 12 Fair Empl. Prac. Cas. (BNA) 1184, 1190 (D.N.M. 1976), *aff'd*, 565 F.2d 1162 (10th Cir. 1977) (finding no "reason why [the victim] should be required to accept inferior employment" that "offered only remote possibilities for comparable advancement").[11]

[11] *See also Stanphill v. Health Care Serv. Corp.*, No. 06-cv-985 (BA), 2008 WL 4056284, at *1-2 (W.D. Okla. Aug. 22, 2008) (determining that offered job was not substantially equivalent to position denied due to discrimination because of differences in "processes, administrative issues, and compensation"); *EEOC v. W. Trading Co.*, 291 F.R.D. 615, 620 (D. Colo. 2013) (finding alternative job not comparable despite its higher hourly rate given "the irregularity of the hours, lack of benefits, and instability of the work").

Although this inquiry is most frequently articulated in assessing whether a victim mitigated damages by seeking appropriate alternative employment, courts have also considered a plaintiff's "reasonable prospects of obtaining comparable employment" in assessing the proper time period for a front pay award. *Shorter v. Hartford Fin. Servs. Grp., Inc.*, No. 3:03 CV 0149 WIG, 2005 WL 2234507, at *4 (D. Conn. May 31, 2005); *see, e.g.*, *id.* at *4 (awarding front pay for six years to "provide Plaintiff with the opportunity . . . to find comparable employment"); *Thornton v. Kaplan*, 961 F. Supp. 1433, 1440-41 (D. Colo. 1996) (factoring limited comparable positions in geographical area and job market into front pay award).

Requiring a victim of discrimination to accept a lesser or inferior position would create perverse incentives that Congress could not have intended in enacting Title VII. "Since Title VII claimants are currently not obliged to accept noncomparable employment, a rule requiring these individuals to remain in such positions, once accepted, would effectively deter claimants from seeking or accepting any type of noncomparable work," as they would be penalized for taking that work (as ended up being the case for Dr. Tudor). *Sellers*, 839 F.3d at 1137. Thus, "the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982).

Sister circuit courts have expressly recognized what is implicit in this Court's application of the above analysis: "comparability in salary, although important, is *not the sole test* of a reasonable offer of alternative employment." *Id.* (emphasis added). In fact, "*[c]omparability in status is often of far more importance*—especially as it relates to opportunities for advancement or for other employment—than comparability in salary," particularly in academia. *Williams v. Albemarle City Bd. of Educ.*, 508 F.2d 1242, 1243 (4th Cir. 1974); *see also Rutherford*, 12 Fair Empl. Prac. Cas. (BNA) at 1190 (holding plaintiff not required to take "inferior employment" with inferior opportunities for advancement). An inferior job "might injuriously affect the employee's future career or reputation in his profession." *Williams*, 508 F.2d at 1243. Thus, "[c]omparability in salary . . . is only one fact to be considered" in an assessment of front pay. *Id.*

Tenured positions—such as the one that Dr. Tudor would have enjoyed but for Southeastern's discriminatory denial—provide greater promotional opportunities, job responsibilities, working conditions, and status than non-tenure track positions—such as the one Dr. Tudor took after leaving Southeastern. As numerous witnesses, including Dr. Tudor and Southeastern professors, testified at trial, tenure is a "big milestone[]" and a "critical point in an academic career" because "the rest of [a professor's] career is on the line." TA 6:59, 235-36, 241; 7:101-03, 202-05. Courts across the country have recognized that non-tenure

positions are not similarly situated to tenured positions, and state statutes expressly distinguish between the contractual rights of probationary versus permanent, tenured teachers employed by the state.[12] Similarly, teaching opportunities can differ substantially as schools have "dissimilar classroom sizes, pay scales, or student disciplinary problems, all of which are important factors in a teacher's employment decisions." *Caufield v. Ctr. Area Sch. Dist.*, 133 Fed. App. 4, 11-12 (3d Cir. 2005). According to a recent study, among the "disadvantages" that non-tenure-track faculty members experience relative to their tenure-track peers are unfair disparities in pay and representation in university governance, lack of job security, and perceived "second-class" treatment. Alvin C. Merritt Boyd III, *Experiences and Perceptions of Full-Time, Non-Tenure-Track Faculty at a Four-Year University*, 38, 110 (2016).

Dr. Tudor testified at trial that the Collin College contract position was not only a non-tenure track position at a community college, but also inferior to both

[12] *Kramer v. Logan Cnty. Sch. Dist. No. R-1*, 157 F.3d 620, 628 (8th Cir. 1998) ("Needless to say, tenured teachers are not similarly situated to probationary teachers." (citing Nebraska statutes distinguishing between contractual rights of probationary and "permanent certificated" employees)); *Chen v. Sch. Dist. of Kan. City*, No. 06-01039-CV-W-JTM, 2008 WL 11429382, at *2 (W.D. Mo. Mar. 17, 2008) (same for Missouri); *Gilhaus v. Gardner Edgerton Unified Sch. Dist. No. 231*, 138 F. Supp. 3d 1228, 1247 (D. Kan. 2015) (same for Kansas); *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 477 (10th Cir. 1978); (acknowledging that "[t]he term 'tenure,' in the constitutional context, . . . provides [state college professor] with a property interest"); *Helm v. Eels*, 642 Fed. App. 558, 556-57 (6th Cir. 2016) (discussing "the general reluctance to find a property interest in non-tenured employment when a school has in place a formal tenure system").

her former tenure-track Southeastern position and the tenure job she earned in other regards. For example, when she was terminated from Southeastern, she lost health, vision, dental, and retirement benefits. TA 6:139. Also, the composition and introductory community college classes she taught required only a master's degree and a less advanced skill set than required for the Southeastern classes she previously taught. Finally, the specialized upper-level courses she taught at Southeastern required a Ph.D, and had been in her areas of academic interest and expertise. TA 6:140-42.

Given the significant differences between the jobs in question, the district court's perfunctory assessment of her ability to be re-employed should be rejected. The district court's determination that comparable work opportunities were reasonably available to Dr. Tudor was predicated on the improper, incorrect assumption that her Southeastern and community college contract positions were substantially equivalent solely due to their supposedly similar salaries. The district court wholly ignored status, responsibilities, working conditions, benefits, and promotional opportunities in assessing whether the two positions were comparable—namely, the very evidence of "individualized circumstances" that this Court requires in assessing front pay, *Whittington*, 429 F.3d at 1001.

2. The District Court Failed to Consider the Scant Comparable Jobs in Dr. Tudor's Local Geographic Area in Assessing Front Pay.

In analyzing front pay and determining that Dr. Tudor could be re-employed after 14 months, the district court was also silent on the dearth of comparable tenure-track English professor positions in Oklahoma. *See* 5:46-49. As of the filing of this brief, there was *not a single opening for a tenured English professor* listed in the Chronicle for Higher Education *in the State of Oklahoma*, let alone any of the same caliber as Southeastern.[13] It is well-established that a victim need not "'accept employment which is located an unreasonable distance from his [or her] home.'" *Sellers,* 839 F.2d at 1138 (quoting *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1319 (D.C. Cir. 1971)); *see also, e.g.*, *Tratree v. BP Pipelines (N. Amer.), Inc.*, 2009 WL 678153, at *2 (S.D. Tex. Mar. 11, 2009) (finding defendant's evidence of jobs more than 150 miles from victim's home to be outside of the "reasonable distance . . . which would allow [the victim] to remain in the general geographic area as his pre-termination work"); *Howell v. New Haven Bd. of Educ.*, No. 3:02-cv-736 (JBA), 2005 WL 2179582, at *8 (D. Conn. Sept. 8, 2005) (considering the "reasonable difficulties in the present and immediate future in locating a comparable teaching position," where schools aside from the

[13] *See* Chronicle of Higher Education, https://chroniclevitae.com/job_search?job_search%5Bemployment_type%5D=Full-time&job_search%5Blocation%5D=88&job_search%5Bposition_type%5D=44 (last accessed Nov. 19, 2018) (under "Location," click check box next to Oklahoma).

defendant paid less and "offered less job security"); *cf. Carr v. Fort Morgan Sch. Dist.*, 4 F. Supp. 2d 989, 996 (D. Colo. 1998) ("[P]laintiff's limited job opportunities in the [local] area and his need to remain in that area for very real and pragmatic reasons" "dictate[d] [re]instatement as the most appropriate remedy . . . .").

This is especially true where there are few institutions of the same caliber of a plaintiff's former employer in the region. In *Thornton*, front pay was awarded until a professor's retirement age of 65 where only 11 positions were announced in the preceding two years in the whole state, few of which were at "schools . . . comparable" to his former school. 951 F. Supp. at 1441.

For Dr. Tudor, the job landscape is even bleaker than in it was for the professor in *Thornton*. In 2014 alone, Nationwide English Department faculty positions decreased 8.4 percent. *See* Scott Jaschik, *An Economist's Critique of Job Market for English Ph.D.s*, Inside Higher Ed (Jan. 8, 2015), https://www.insidehighered.com/news/2015/01/08/economist-offers-critique-job-market-phds-english. As trial witnesses testified, even securing a tenure-track English department position is a "big milestone[]" because it is "super competitive." *See* TA 6:235-37, 7:104. The district court thus abused its discretion in failing to consider the lack of comparable positions within a reasonable distance of Dr. Tudor's home and former job in awarding front pay.

B. In Awarding Front Pay, the District Court Ignored How Difficult It Has Been, Is, and Will Be for Dr. Tudor, a 54-Year Old Native American Woman Who Is Transgender, to Find a New Job.

In assessing front pay, the district court also failed to take into account evidence of job market realities whereby, absent reinstatement, Dr. Tudor, as a 54-year old Native American woman who is transgender, would face numerous hurdles in securing comparable employment, *see* TA 4:126-29, 5:45-46.

Age is a key factor in the front pay analysis, especially in the educational context. *See, e.g. Ortega v. Chi. Bd. of Educ.*, 280 F. Supp. 3d 1072, 1113 (N.D. Ill. 2017) (awarding front pay until pension-vesting date to older teacher "less likely to be able to compete effectively for more limited positions"); *Thornton*, 961 F. Supp. at 1440 (awarding front pay until age 65 to "plaintiff, who has late in life embarked on a second career, [and] will face difficulties in obtaining other comparable academic employment that may not be encountered by recent, younger college graduates"). The difficulty of finding new work for individuals in their 50s is well-recognized. "Statistics show that older workers have far more difficulty finding new jobs than their younger counterparts[,] and [w]hen older employees do find work, it is often at a salary much lower than the one they had previously earned." *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 374 n.6 (3d Cir. 1987). A majority of U.S. adults acknowledge this, believing that age discrimination begins among workers in their 50s. *See* Carole Fleck, *Forced Out, Older Workers Are*

Fighting Back, AARP Bulletin (May 2014) (citing U.S. Bureau of Labor Statistics). The rate of receiving callback interviews is substantially lower for older applicants, especially older female applicants. In administrative assistant and sales jobs alone, female applicants over the age of 60 were called back 47 and 36 percent less often, respectively, than younger female applicants.[14]

In addition, Native Americans and individuals who identify as transgender have significantly higher rates of unemployment compared to the general population. *See* Jamie M. Grant, Lisa A. Mottet, Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf. In the 2011 National Transgender Discrimination Survey, transgender respondents reported unemployment at double the national average. *Id.* at 51, 55. Nearly a quarter of transgender Native American respondents reported unemployment, well over three times the national average. *Id.* at 55.

Thus, Dr. Tudor's age, along with her status as a Native American woman who is transgender, only makes it harder for her to secure one of the few extraordinarily competitive, comparable tenure-track English jobs. *See* Pt. II.A, *supra*; TA 6:96-97. The district court therefore should have factored Dr. Tudor's

[14] Edith S. Baker, *Is there age discrimination in hiring?*, Monthly Labor Rev., U.S. Bureau of Labor Statistics (Apr. 2017), https://www.bls.gov/opub/mlr/2017/beyond-bls/is-there-age-discrimination-in-hiring.htm.

age and status as a Native American woman who is transgender into its front pay assessment.

C. The District Court's Front Pay Award Ignored the Difficulty of Finding a New Job After Enduring Discrimination and Retaliation.

In assessing front pay, the district court also failed to consider evidence of the (*i*) psychological and emotional impact, and (*ii*) reputational harm that Defendants' discrimination and retaliation caused Dr. Tudor, both of which significantly hindered her ability to find a new job. *See* TA 4:126-29, 5:45-46. At trial, Dr. Tudor repeatedly explained how "impossible [it is] to overcome" her denial of tenure at Southeastern, as it is a "black mark" on her reputation, making her look unworthy and unqualified, and feel humiliated. TA 6:115, 140, 143-46. Dr. Meg Cotter-Lynch, a tenured Southeastern English professor, agreed, testifying that she views a tenure denial on an application as "suspicious," and had she been denied tenure, she "would probably be teaching high school at this stage." TA 7:103-05. Further, because Dr. Tudor taught at Southeastern for a number of years before being denied tenure, as her trial expert witness on tenure explained, she is now "too advanced" to be hired for a tenure-track position. TA 7:49. The district court did not account for any of this evidence in awarding Dr. Tudor front pay for only 14 months.

Both the U.S. Supreme Court and this Court have recognized that front pay is ordered as a substitute for reinstatement where a victim has suffered "psychological injuries . . . as a result of the discrimination" that significantly affect her ability to return to work. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001); *Abuan*, 353 F.3d at 1176 (10th Cir. 2003); *see also, e.g.*, *Hackworth v. Progressive Cas. Inc. Co.*, No. 05-cv-1467-M, 2007 WL 1188344, at *1 (W.D. Okla. Apr. 19, 2007) (accounting for impact of defendant's prior discrimination "on plaintiff's ability to become re-employed, particularly in [the same] industry," in awarding front pay). The effect that discrimination has on a victim's reemployment should therefore be considered in awarding front pay.

The considerable negative impact that discriminatory job loss has on victims' well-being, duration of unemployment, and re-employment is well-documented. *See* Myrtle P. Bell et al., *Introducing discriminatory job loss: antecedents, consequences, and complexities*, 28 J. Managerial Psych. 584, 585-96 (2013) (detailing impact of discriminatory job loss on victims). Discriminatory job loss not only affects victims' self-esteem and psyche, but also imposes a "stigma induced by dismissal [that] limits the pool of employers willing to provide opportunities to reclaim a comparable position." *Id.* at 594. In addition to having to explain any gaps in employment—which are often viewed as suspicious—victims of discrimination may receive unfavorable references from employers that

discriminated against them. They can also be disadvantaged when they explain the reasons for leaving their prior jobs, as prospective employers who are already fearful of litigation negatively perceive answers of discrimination or sexual harassment. *Id.*

Only by taking into account the impact that suffering discrimination and retaliation have on Dr. Tudor's re-employability can the district court truly ascertain the amount "required to compensate a victim for the *continuing future effects of discrimination* until the victim can be *made whole*." *Carter III*, 36 F.3d at 957. It is therefore imperative that this Court find, consistent with its prior decisions, that it was improper for the district court to ignore the continuing future effects of discrimination on Dr. Tudor's re-employment, as well as evidence of her other individualized factual circumstances, in awarding front pay.

CONCLUSION

For all the reasons detailed above, NWLC urges this Court to grant Dr. Tudor's request to vacate and remand the district court's denial of reinstatement and award of front pay, with instructions to consider evidence concerning her individualized circumstances in order to make her whole and deter future discriminatory conduct.

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Respectfully submitted,

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ADDENDUM

The following *amici* join the National Women's Law Center in submitting this brief:

- **A Better Balance:** A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ discrimination—particularly workplace discrimination—through its national LGBTQ Work-Family project and Defending Local Democracy project. A Better Balance is committed to ensuring the health, safety, and security of all LGBTQ individuals and families.
- **Alliance for a Just Society:** The Alliance for a Just Society's mission is to execute regional and national campaigns, and build strong state affiliate organizations and partnerships that address economic, racial, and social inequities. The Alliance supports equitable employment standards for women and transgender people.
- **American Association of University Women (AAUW):** In 1881, AAUW was founded by like-minded women who had defied society's conventions by

earning college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. 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 Program, AAUW supports civil rights for LGBTQ Americans and advocates for economic self-sufficiency for all women through pay equity and fairness in compensation and benefits.

- **American Federation of Teachers (AFT):** AFT, an affiliate of the AFL-CIO, was founded in 1916 and today represents approximately 1.7 million members who are employed across the nation and overseas in K-12 and higher education, public employment, and healthcare. The AFT has a longstanding history of supporting and advocating for the civil rights of its members and the communities they serve. AFT regularly participates in litigation fighting bias and discrimination in the workplace. AFT considers the fair and equal treatment of transgender Americans at work as an important part of its mission to advance the workplace rights of all employees. Since its founding, AFT has filed numerous *amicus* briefs seeking equal treatment under the law. We continue that tradition with this case.

- **Atlanta Women for Equality:** Atlanta Women for Equality is a 501(c)(3) nonprofit organization dedicated to providing free legal advocacy for women and girls facing sex discrimination in the workplace or at school, protecting and expanding economic and educational opportunities for women and girls, and helping our community shape our workplaces and schools according to true standards of equal treatment.
- **California Women Lawyers (CWL):** CWL is a non-profit organization that was chartered in 1974. CWL is the only statewide bar association for women in California and maintains a primary focus on advancing women in the legal profession. S ince its founding, CWL has worked to improve the administration of justice, to better the position of women in society, to eliminate all inequities based on sex, and to provide an organization for collective action and expression related to those purposes. CWL participates as *amicus curiae* in a wide range of cases to secure the equal treatment of women and other classes of persons under the law.
- **Colorado Women's Bar Association (CWBA):** The CWBA is an organization of over 1200 Colorado attorneys, judges, legal professionals, and law students founded in 1978, and dedicated to promoting women in the legal profession and the interests of women generally. The CWBA has an interest in this case because its members, their clients, and other women in Colorado

continue to experience discrimination in the workplace based on sex and other protected statuses.

- **Colorado Organization for Latina Opportunity and Reproductive Rights:** Job loss and reduced economic opportunity in the workplace due to discrimination hurts individuals, as well as families who may struggle to get by. There are impacts on physical and mental health, as well as on relationships. Children's well-being also diminishes when a parent loses their job. Economic insecurity can be compounded for lesbian, gay, bisexual, and transgender people of color who live at the intersection of other marginalized identities. Transgender people experience unemployment at twice the rate of the general population at with rates for people of color up to four times the national unemployment rate. Over one-quarter (26%) of transgender people report that they have lost a job due to being transgender or gender non-conforming. The Colorado Organization stands for policies that help to provide anti-discrimination protections and stands with individuals who are harmed by ongoing systemic oppression. Ensuring that people are provided with reasonable protections in the workplace helps to build strong families, strong businesses, and strong communities. It is also the right thing to do to ensure the health, rights, and dignity of marginalized communities.

- **DC Coalition Against Domestic Violence (DCCADV):** DCCADV, founded in 1986 and incorporated in the District of Columbia, is a non-profit organization serving as the professional association for the District's domestic violence service providers and is the primary representative of battered women and their children in the public policy arena. Members of DCCADV share the goal of ending domestic violence, community violence, and institutional violence through education, outreach, public policy development, and comprehensive, trauma-informed services for survivors. DCCADV is vested in assuring that our human right to be free from harm is recognized and protected. The Universal Declaration of Human Rights codifies various fundamental human rights, including the right to life, the right to non-discrimination, the right to freedom from torture and cruel, inhuman or degrading treatment, and the right to judicial remedies.
- **End Rape on Campus (EROC):** EROC is a national 501(c)(3) nonprofit organization that works to end campus sexual violence through direct support for survivors and their communities; prevention through education; and policy reform at the campus, local, state, and federal levels. EROC seeks to change culture in order to create a world free from sexual violence, and work to end gender based discrimination and all forms of violence in educational settings, for students, faculty, and all members of a university community.

- **Gender Justice:** Gender Justice is a nonprofit legal advocacy organization based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its impact litigation program, Gender Justice acts as counsel in cases involving gender equality in the Midwest region, including advocating against employment discrimination and for the rights of transgender persons. The organization has an interest in ensuring that remedies under Title VII are interpreted correctly to put plaintiffs as close as possible to the position they would be in if they had not experienced discrimination.
- **Girls for Gender Equity (GGE):** GGE is a youth development and policy advocacy organization committed to the well-being of trans and cis girls and gender non-conforming youth of color. Through education, organizing, and physical fitness GGE encourages communities to remove barriers and create opportunities for girls and women to live self-determined lives. Trans girls and women of color have every right to pursue their educational and professional goals without the interference of discriminatory employers. Employers should not be permitted to use hostility to push out an employee for being a person of color or for being transgender, and in turn use that animus to thwart the court's responsibility to remediate the harm caused. GGE signs this *amici* brief in

support of the trans women who are affected by all forms of discrimination, in particular workplace discrimination.

- **If/When/How: Lawyering for Reproductive Justice (If/When/How):** If/When/How is a national, non-profit organization that trains, networks, and mobilizes law students and legal professionals to work within and beyond the legal system to champion reproductive justice. Reproductive justice will exist when all people have the ability to decide if, when, and how to create and sustain families with dignity, free from discrimination, coercion, or violence. Achieving reproductive justice requires a critical transformation of the legal system, from an institution that often perpetuates oppression to one that realizes justice, and dismantling gender stereotyping and sex discrimination is a key step in that process**.**
- **In Our Own Voice: National Black Women's Reproductive Justice Agenda (In Our Own Voice):** In Our Own Voice is a national Reproductive Justice organization focused on lifting up the voices of Black women at the national and regional levels in its ongoing policy fight to secure Reproductive Justice for all women and girls. For In Our Own Voice, Reproductive Justice is the human right to control our bodies, our sexuality, our gender, our work, and our reproduction. That right can only be achieved when all women and girls have the complete economic, social, and political power and resources to make

healthy decisions about our bodies, our families, and our communities in all areas of our lives. As a Reproductive Justice organization, In Our Own Voice approaches these issues from a human rights perspective, incorporating the intersections of race, gender, class, sexual orientation and gender identity with the situational impacts of economics, politics and culture that make up the lived experiences of Black women in America.

- **Lawyers Club of San Diego:** Lawyers Club of San Diego is a 1,300+ member legal association established in 1972 with the mission "to advance the status of women in the law and society." In addition to presenting educational programs and engaging in advocacy, Lawyers Club participates in litigation as *amicus curiae* where the issues concern the advancement of status of women in the law and society. Lawyers Club joins this *amici* brief because eradicating sex and gender-based discrimination is imperative to ensure that women can meaningfully advance in their chosen careers and society.
- **Legal Aid at Work (LAAW):** LAAW (formerly the Legal Aid Society – Employment Law Center), founded in 1916, is a public interest legal organization that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, LAAW has represented low-wage clients in cases involving a broad range of employment-related issues, including sex discrimination cases. LAAW's

interest in preserving the protections afforded employees by this country's antidiscrimination laws is longstanding.

- **Legal Voice:** Legal Voice is a nonprofit public interest organization that works to advance and defend the legal rights of women and LGBTQ people in the Northwest through litigation, legislative advocacy, and education. Since its founding in 1978 as the Northwest Women's Law Center, Legal Voice has worked to eradicate all forms of sex discrimination. Because discrimination based on gender identity is a form of sex discrimination, Legal Voice has long advocated for the rights of transgender people and has a strong interest in this case.
- **National Asian Pacific American Women's Forum (NAPAWF):** NAPAWF is the only national, multi-issue Asian American and Pacific Islander (AAPI) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for AAPI women, girls, and transgender and gender non-conforming people. NAPAWF approaches all of its work through a reproductive justice framework that seeks for all members of the AAPI community to have the economic, social, and political power to make their own decisions regarding their bodies, families, and communities. NAPAWF's work includes fighting for economic justice for AAPI women, and

advocating for the adoption of policies that protect the dignity, rights, and equitable treatment of AAPI women workers.

- **National Crittenton:** National Crittenton is honored to join NWLC and its law firm partner, Cohen & Gresser LLP, in the filing of this *amici* brief. National Crittenton catalyzes social and systems change for girls, young women and gender non-conforming young people impacted by chronic adversity, violence, discrimination, and injustice. The organization serves as the umbrella for the 26 members of the Crittenton family of agencies providing direct services in 31 states and the District of Columbia. Together, the Crittenton family works to advance services, systems, and policies that address the unique needs of girls and young women at the national level and in local communities across the country.
- **National Employment Lawyers Association (NELA):** NELA is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members litigate daily in every circuit, affording

NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

- **National LGBTQ Task Force:** The Task Force is the nation's oldest national LGBTQ advocacy group. As a progressive social-justice organization, the Task Force works to achieve full freedom, justice, and equality for LGBTQ people and their families. The Task Force trains and mobilizes activists across the Nation to combat discrimination against LGBTQ people in every aspect of their lives, including housing, employment, healthcare, retirement, and basic human rights. Recognizing that LGBTQ persons of color are subject to multifaceted discrimination, the Task Force is also committed to racial justice. To that end, the Task Force hosts the Racial Justice Institute at its annual Creating Change Conference, which equips individuals with skills to advance LGBTQ freedom and equality.
- **National Network of Abortion Funds (NNAF):** NNAF is a non-profit organization that organizes at the intersections of racial, economic, and reproductive justice, and builds power with members to remove financial and logistical barriers to abortion access by centering people who have abortions, inclusive of people who identify as transgender, gender non-conforming, and

non-binary. With over 70 member organizations across the United States and abroad, NNAF advocates for all people to have the autonomy, power and resources to care for and affirm their bodies, identities, and health for themselves and their families—in all areas of their lives, which includes access to healthcare and workplaces free from violence and discrimination based on one's gender identity, race, class, and other social identities.

- **National Organization for Women Foundation (NOW Foundation):** NOW Foundation is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization, NOW Foundation is also dedicated to eradicating sex-based discrimination—which it believes pertains to discrimination against LGBTQIA persons.
- **National Partnership for Women & Families:** The National Partnership (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve 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, including on the basis of sex stereotypes, and to ensure that all people are afforded protections against discrimination under federal law.

- **National Women's Political Caucus:** The Caucus supports equality for all genders, and strongly opposes discrimination based on sex, gender, gender identity, and sexuality.
- **Oklahoma Coalition for Reproductive Justice (OCRJ):** OCRJ works to support the LGBTQ community to gain the same rights and privileges of Oklahoma's Cisgender community. Through political advocacy, public education and legal challenges, OCRJ advocates for protections against LGBTQ discrimination in the workplace, which it believes Dr. Tudor has clearly experienced.
- **Sargent Shriver National Center on Poverty Law (Shriver Center):** The Shriver Center has a vision of a nation free from poverty with justice, equity and opportunity for all. The Shriver Center provides national leadership to promote justice and improve the lives and opportunities of people with low income, by advancing laws and policies, through litigation and policy advocacy,

to achieve justice for its clients. The Shriver Center is committed to economic security and advancement, including the achievement of equal opportunities for women, people of color, and transgender individuals.

- **SisterReach:** SisterReach, founded in October 2011, is a Memphis, Tennessee based grassroots 501(c)(3) non-profit supporting the reproductive autonomy of women and teens of color, poor and rural women, LGBT+ and gender non-conforming people, and their families through the framework of Reproductive Justice. SisterReach's mission is to empower its base to lead healthy lives, raise healthy families and live in healthy communities. SisterReach provides comprehensive reproductive and sexual health education, and advocate on the local, state, and national levels for public policies which support the reproductive health and rights of all women, youth, and their families.
- **The Women's Law Center of Maryland (WLC):** WLC is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law, and reproductive rights. Through its direct services and advocacy, WLC seeks to protect women's legal rights and ensure equal access to resources and remedies under the law. WLC is participating as an *amicus* in this case because it agrees with the proposition that sex, gender, and sexual orientation are intrinsically intertwined, particularly

in the realm of discrimination. The concerns and struggles of the transgender community impact all women, regardless of sexual orientation.

- **Women's Law Project (WLP):** WLP is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, WLP engages in high impact litigation, policy advocacy, and public education. For over forty years, WLP has challenged discrimination rooted in gender stereotyping and based on sex.
- **Women's Bar Association of the District of Columbia (WBA):** Founded in 1917, the WBA is one of the oldest and largest voluntary bar associations in metropolitan Washington, DC. Today, as in 1917, WBA continues to pursue its mission of maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among WBA members. WBA believes that the administration of justice includes women's right to be free from discrimination based on their sex.

CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,491 words.

The brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

I certify pursuant to 10th Circuit Rule 25.5, all required privacy redactions have been made. I also certify that pursuant to the 10th Circuit ECF User Manual Section II, the electronic submission of this brief was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Dated: November 26, 2018

/s/ Erica C. Lai
Erica C. Lai

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of November 2018, the foregoing *amici curiae* brief was filed and served on all counsel of record through this Court's CM/ECF system, and, pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B) and Tenth Circuit Local Rules 25.4 and 31.5, seven paper copies have been mailed through a third-party commercial carrier for delivery to the Clerk of Court within two business days, and these paper copies are exact copies of the version submitted electronically.

Dated: November 26, 2018

/s/ Erica C. Lai
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