No. 19-35428

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER JOY FREYD,

Plaintiff-Appellant,

v.

UNIVERSITY OF OREGON, HAL SADOFSKY, AND MICHAEL SCHILL,

Defendants-Appellees.

Appeal from the United States District Court
District of Oregon, Eugene
(CV. 6:17-cv-448-MC)

DEFENDANTS-APPELLEES UNIVERSITY OF OREGON AND HAL SADOFSKY'S ANSWERING BRIEF

Paula A. Barran, OSB No. 803974
Shayda Zaerpoor Le, OSB No. 121547
Donovan L. Bonner, OSB No. 181929
BARRAN LIEBMAN LLP
601 SW Second Avenue, Suite 2300
Portland, Oregon 97204-3159
Telephone: (503) 228-0500
Facsimile No.: (503) 274-1212

Attorneys for Defendants-Appellees
University of Oregon and Hal Sadofsky

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JURISDICTIONAL STATEMENT

Defendant agrees with Plaintiff's jurisdictional statement.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court abuse its discretion in carrying out the gatekeeper function and rejecting the Cahill Declaration.

2. Did the District Court err in concluding that a public university does not violate anti-discrimination laws by increasing some salaries when necessary to retain key world-class faculty.

3. Did the District Court err in concluding that faculty do not perform substantially equal work or work of comparable character merely because all faculty work may be categorized generally as teaching, research, and service.

4. Can a faculty member complaining of pay discrimination limit comparators to just the four male full professors in one department who earn more than she does.

5. May an appellant supplement the record on appeal by filing an unsuccessful post-judgment motion for relief.

6. Did the District Court err in granting summary judgment.

STATEMENT OF THE CASE

I. THE UNIVERSITY OF OREGON

A. Defendant is a Research Intensive institution and a key contributor to cultural, scientific, and economic development, with a mission to produce world-class research, and is recognized as one of a small number of public research universities within the Association of American Universities, one of two such members in the Pacific Northwest. SER–72, 250, 302, 338. Its regular funding comes from a fragile state budget and student tuition. External funding, particularly large federal grants, are vital to its work. SER–65-66, 78, 250-251, 302, 22-23. Faculty who acquire such grants are targets for external recruitment. SER–78, 276.

B. Large federal grants, impose duties and responsibilities, and require skills and effort, in ways that substantially alter the day-to-day duties of faculty recipients as compared to faculty who do not have such grants. SER–79, 250-258, 331. Grant administration is a job in itself and often consumes nearly half of a principal investigator's time, with greater grant activity imposing different and greater responsibilities and requiring different and greater effort due to funding agency requirements and the supervision of employees. SER–251-256, 293-294. Failure to comply with grant requirements can have severe consequences, including withholding of payment or disallowing further awards to a recipient. SER–255.

C. Plaintiff's home department, Psychology, has at times successfully fended-off external recruitments and retained men and women, and has at times been unable to do so. SER–93. Recruitments correlate with grant funding, and retention is a high-stakes effort for Defendant. SER–78, 276. For years, Defendant has always made a retention offer to women faculty members in Psychology who presented an external offer. SER–93, 314. In 2017, Professor Dare Baldwin (a woman) was the first from Psychology to receive a very large retention offer. SER–288-289. The strength of Psychology is such that each faculty member can secure external offers. SER–319. Plaintiff personally chose not to pursue or entertain such external offers. SER–310.

Women faculty have long been among the top paid in Psychology at the University of Oregon. SER–102-103, 128-129. Until her retirement in 2016, the highest-paid full professor in Psychology was Professor Helen Neville, while from 2012-14, Dr. Kimberly Espy, who held an academic appointment in Psychology but with an external administrative assignment, was paid more than even Professor Neville. *Id.* In 2012-13, the top seven salaries went to four women and three men. *Id*. More recently, Defendant made a successful retention offer to Professor Jennifer Pfeifer, promoting her to full professor with a salary increase that placed her above some male faculty who are senior to her. SER–103.

Defendant recruited Plaintiff decades ago and, as part of the negotiation, agreed to her every request. SER–313-314. At the time she filed this lawsuit, Plaintiff was the sixteenth highest-paid of approximately 90 faculty in her Division of Natural Sciences. SER–95-96.

A year after Professor Neville's retirement, Plaintiff requested an equity adjustment to her salary. At that time, Defendant's comprehensive salary review concluded that she was paid non-discriminatorily and equitably based on comparisons with her division, department, and external benchmark data. SER–94-96.

II. PLAINTIFF'S MALE COMPARATORS

A. Plaintiff asserts she can be compared only to the small group of full professors within Psychology who, she believes, "have the most similar" job to her. SER–35, 310, 321, 323. But at the same time, she asserts, inconsistently, that all faculty have the same job duties and broadly do work of comparable character, regardless of their titles. *Id.* Her named comparators are: Department Head Ulrich Mayr and Professors Gordon Hall, Phil Fisher, and Nick Allen. SER–340-341.

B. As a University department head since 2013, Professor Mayr has performed a leadership role with responsibilities and duties that are not shared by Plaintiff or other regular faculty. He has a portfolio of management responsibilities, and supervises support staff and junior faculty. SER 97, 101-102,

112, 252-253, 269, 271, 291-292, 308-309. Plaintiff has not performed these duties or shouldered these responsibilities. SER–308-309. Plaintiff conceded in oral argument that department head duties are different from the duties of a full professor. SER–8.

C. Professor Hall's career work in University-wide diversity was through a longstanding external administrative appointment as Interim Director and Associate Director of Research of the Center on Diversity and Community (CoDaC). ER-289-290; SER–100-102. Within Psychology, where he sometimes had little or no FTE, he held two 4-year appointments as Director of Clinical Training, with broad responsibilities including obtaining program accreditations and reaccreditations. ER–290-292; SER–100-102, 282-283, 292, 333. Plaintiff has not had these responsibilities and she has not performed these duties. SER–101-102. Further, Professor Hall's current salary is also set under separate University-wide retirement policies. SER–101, 334.

D. Professor Fisher is the founding director and now co-director of the Center for Translational Neuroscience (CTN), where he manages professional development activities, supervises both Center and grant employees, and administers large external and federal grants which substantially affect his day-to-day duties and responsibilities in a way that differentiates his work from Plaintiff's. ER–282-285; SER–97-99, 251-256, 332. Along with that work, he took on the

responsibilities of directing clinical training from 2014 to the end of the 2016-17 academic year. ER–285. Plaintiff's work is substantially different. SER–99, 101-102, 272, 293.

E. Professor Allen's grant work involves large-scale federal funding agencies including the National Science Foundation, the National Institute of Mental Health and National Institute of Child Health and Development, as well as large private donors. ER–298-299; SER–99-100, 251-256. He is the Director of the Center for Digital Mental Health, which uses new technology to develop mental health treatments, and starting 2017-18, assumed the responsibilities of Director of Clinical Training including primary responsibility for reaccreditation. ER-298-300; SER–99-100, 332. Plaintiff's work is substantially different. SER–101-102, 272-273, 293.

F. Before the District Court, Plaintiff argued that all faculty do the same work, but simultaneously emphasized how her day-to-day work differed from her comparators. SER–6-9. She states on appeal that faculty are required to do original research and scholarship, and therefore apply different skills to the jobs that they perform in different ways so that they can chart their unique path of study with their individualized contributions. Brief–3-4, 21; ER–233-234. She works in an entirely different subfield from her colleagues. *Id*.; ER–58. She chooses work that does

not attract large public grants. ER–239. Her research is in part supported by the overhead paid by her colleagues' large public grants. SER–78-79.

III. THE RETENTION PROCESS

A. Better-funded institutions often recruit Defendant's important or grant-funded faculty. SER–278-279. When faculty are recruited, or there is compelling evidence that a preemptive action is necessary to prevent a departure, Defendant evaluates how serious the recruitment is, whether the professor is a real flight risk, whether the professor's unique contributions to the University justify a retention offer, and finally whether to fight to retain that professor. SER–106-108, 280.

Defendant evaluates the professor's contributions as well as how losing him or her harm its work, funding, reputation, or mission. SER–45, 81-83, 280. Some faculty cannot be readily replaced. SER–322. Some are core members who are central to a collaborating working group. SER–45, 98. Defendant evaluates multiple variables to decide whether to negotiate a retention offer and what kind of offer to make. SER–71, 81-82, 106-108, 280. It may be informed by the needs of other departments, not just the home department. SER–107, 282-283. A retention offer may include more research funding, lab space, higher compensation, or a promotion. ER–200; SER–51-52, 313. Retention offers are as varied as the faculty and the recruitments involved. SER–81-82, 106-108. While a recruitment presents

the occasion for this evaluation, Defendant's considerations are grounded in what the individual contributes to Defendant's overall mission and priorities. ER–70-71, 81-82, 200. In sum, the receipt of a competing offer is the trigger for an unplanned but necessary individual merit review. ER–180; SER–70-71, 82. The resulting retention offer is not a one-to-one match of the outside salary; the University offers what it believes is necessary to induce the individual to stay. SER–82; ER–201.

B. Plaintiff has never presented a competing offer to Defendant nor engaged in a retention negotiation. SER–310. Other women have, however, and for many years, every woman who has presented a recruitment has received a retention offer. SER–89, 93, 314. At about the same time that Professor Allen received his preemptive retention offer, Professor Pfeiffer similarly received a preemptive retention offer, even though she did not yet have an official outside offer. SER–88. As a response to her first recruitment, Professor Baldwin initially negotiated a very large retention offer. SER–288. In her second negotiation, however, she asked Defendant to discuss retention when she was only one of four finalists, and ultimately did not receive an offer from the recruiting institution. ER–51-53, 106-108, 103. Around the same time, Professor Allen's retention negotiation was conducted when he was the sole targeted candidate and Defendant had no doubt that he would leave without a retention offer. *Id*. Defendant does not

always succeed in retraining recruited males, and lost two to the University of Chicago. SER–93, 303.

When retention offers include a salary increase, that increase affects both men and women in the Department by either increasing the gap between the retained faculty and all others earning less, or by rearranging the order of highest to lowest paid faculty. A retention offer may result in leapfrogging both men and women. ER–82, 94, 143.

IV. PSYCHOLOGY COMPENSATION

During some academic years, Plaintiff has been paid more than the people about whom she complains, including Professor Allen (for three of his five years with the University) and Professor Mayr (for three years since 2012). SER–104-105, 128-129. Shortly before Plaintiff filed her lawsuit, Professor Neville was paid more than all her male colleagues, Professors Hall, Fisher, and Edward Awh, as well as more than Plaintiff. Professor Marjorie Taylor was paid more than male Professor Awh and more than Plaintiff. SER–103. Currently, Professor Pfeifer's promotion placed her at a salary level greater than the mostly male faculty equivalent, as well as some with greater seniority. ER–103, 453.

Plaintiff has also received other extraordinary payments. When Plaintiff took 2018-19 off to be a fellow at Stanford, Defendant voluntarily provided her with half salary. SER–79, 110.

V. PROCEDURAL HISTORY

A. Plaintiff does not discuss and therefore has abandoned four of her original claims: a claim for breach of contract, a claim under the Oregon Constitution Equal Rights Amendment, and claims against Defendants Sadofsky and Schill.

B. With the exception of conceding the statute of limitations for her Equal Pay Act claim, (Brief–31), Plaintiff did not and does not discuss, and therefore does not challenge, that her claims are substantially barred by the applicable statutes of limitations. Motion-4-5, footnotes 1-6 (Dkt. 56). Her claims were largely untimely, although the District Court's decision on the merits meant it did not need to address timeliness.

C. Plaintiff asserted a disparate impact theory based upon Psychology's practice "of paying retention raises when presented with competing offers," but altered her theory in the Opposition to Defendant's Motion for Summary Judgment when she argued that women other than Plaintiff who negotiate retention offers are treated differently from males. ER–351; Opposition–25-26, 37 (Dkt. 68). She argues now that an impact is caused by "failing to adjust salaries of other professors at the same rank and comparable merit and seniority." She criticizes the District Court for mischaracterizing her theory. Brief–49-50.

D. While this appeal was pending, Plaintiff unsuccessfully attempted to supplement the District Court record by filing a motion for relief from judgment, then making new arguments in her Appellant's Brief based on that submission. Brief–32. On October 25, 2019, the District Court rejected the motion for relief from judgment. (Dkt. 114.)

SUMMARY OF ARGUMENT

I. THE DISTRICT COURT FOLLOWED LONG-ESTABLISHED LAW WHEN IT REJECTED PLAINTIFF'S CLAIMS

A. While Plaintiff and amici point out the persistence of gender bias in compensation in workplaces around the country, they do not show that such bias affects compensation at the University of Oregon nor that Plaintiff has experienced such bias. Plaintiff is one of the highest-paid faculty in her Division, works in a department in which for many years the highest-paid professor was a woman, and to which Plaintiff was recruited with a welcoming compensation and benefit package. SER–96, 102, 313. She has been highly regarded by her employer, her department head, and her colleagues. Her chosen work, which brings in almost no external funding, is supported both financially and substantively by Defendant and with overhead from her colleagues' grants. SER–78-79. Her department consistently attempted to provide her with merit increases. SER–55.

The claims in this lawsuit are narrow. Plaintiff focuses on the small group of full professors in Psychology and, within that, identifies four men who are currently paid more. SER–340-341.

The laws under which Plaintiff sues do not contemplate that a gender differential in compensation is alone sufficient to prove discrimination; it does not even suffice to prove a prima facie case. Each law imposes exacting standards and recognizes that there are myriad reasons for pay variations.

Many years of clear and authoritative case law, including from this Circuit, have interpreted the Equal Pay Act and its regulations, Title VII and its burdens of proof for treatment and impact cases, and Title IX. Oregon's state laws are plain on their face and generally follow federal principles. As a state university, Defendant is also subject to enabling statutes that set out its scope of authority.

The District Court followed these laws carefully. Consistent with decades of controlling case law, Plaintiff was tasked with presenting a prima facie case which, required her to show that her day-to-day duties could properly be compared to her comparators under the required legal standards. A showing of gender discrimination in compensation must be based upon a comparison of what a man and a woman do on a day-to-day basis, not by their job titles.

Key to the legislative, regulatory, and case law commands, the substantial equality of jobs is not determined by a job title ("team member" or even "faculty")

or a generalized description of duties ("research, teaching, service"). Rather, Plaintiff had to show that what she actually did within the generalized job description of faculty duties, and the way she did it, equated to what her colleagues did and the way they did their jobs. Her argument, that all faculty do the same job, fails because of the substantial differences in her day-to-day work from her comparators.

Department Head Mayr's broad duties cannot be compared to Plaintiff's. She does not supervise faculty, plan tenure, assign space, supervise 10 department employees, investigate misconduct, resolve grievances, manage human resources, or carry out the weighty responsibilities of heading the department. SER–78, 97, 101-102, 112, 252-253, 264, 269-271, 279, 291, 308-309. Professor Hall did his work largely outside Psychology as CoDaC's Interim Director and Assistant Director of Research, and while in Psychology held years-long appointments wherein he worked on accreditation and reaccreditation for its clinical training. ER–289-292; SER–100, 333-334. Professors Fisher and Allen fill their day-to-day work with grant administration, supervise layers of employees, and have responsibilities to the federal government that Plaintiff does not have. ER–281-285, 289-300; SER–451-457, 97-99, 101-102, 272, 293, 332. They direct or co-direct Centers. *Id*. Professor Fisher also works at a Harvard Center, and his

external funding pays his full salary. SER–99. All four have unique day-to-day duties that are very different from Plaintiff's. ER–238-239, 272, 293; SER 96-102.

B. Plaintiff's Equal Pay Act claim requires substantially equal day-to-day work, which is not present here. Her Title VII disparate treatment and Title IX claims and related state claims require the same, or a showing of discriminatory animus in the setting of her compensation.

Plaintiff failed to provide the District Court with sufficient admissible evidence to create a genuine issue of material fact as to whether her compensation was motivated by discriminatory animus, and failed to meet Defendant's nondiscriminatory explanations or otherwise demonstrate pretext. Her enthusiastic recruitment, her awards and accolades, her Department Head's admissions that every time there was merit money available there were efforts to advance her, and her Division Dean's finding the funds to keep her on half salary for her year at Stanford (in the middle of this lawsuit) all speak to her positive and nondiscriminatory treatment. SER–55, 79, 110, 313; ER–231-235.

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II. THE DISTRICT COURT PROPERLY CONCLUDED THAT RETENTION OFFERS DO NOT PROVE THE BASIS FOR DISPARATE IMPACT CLAIMS, NOR SUPPORT PLAINTIFF'S TREATMENT CLAIMS

Plaintiff claims there is a disparate impact against women caused by Defendant's retention practices, but fails to satisfy her burden on any of the required elements.

A. A disparate impact claim requires proof of an impact. The District Court properly exercised its gatekeeper role to reject the deficient statistical analyses Plaintiff offered. Her economist, Dr. Cahill, looked at so few individuals that his calculations were unreliable. ER–38-39. His analysis could also have been rejected because of its many errors, such as relying on inaccurate or unexplained data, or unexplained exclusions from the data set. ER–38-40. Plaintiff did not fill the void with her personal scatterplots which plotted faculty compensation based on time in service and failed to analyze relevant key information, focusing instead on departmental merit, and H index (citation count) which is not meaningful for this purpose. Brief–11-12; ER–146.

B. Plaintiff failed to isolate and identify a specific requirement or practice disparately impacted women. Complaining about "retention practices" does not suffice in the face of complicated case-by-case procedures to determine whether

and how to construct a unique offer that would retain an individual considering an outside recruitment.

C. Even if Plaintiff had satisfied her burdens, Defendant readily demonstrated that its offers to retain important faculty are job related and consistent with business necessity. Defendant evaluates each individual professor's contribution when deciding whether to make a retention offer, and negotiates individually to determine the lowest possible cost of an offer that would prevent the individual from leaving. SER–44, 46-47, 71, 81-82, 280. If a key member of the faculty left Defendant, his or her contributions would be gone, possibly along with graduate students, specialties, and funding. SER–44-45, 78-79.

D. As a final point, Plaintiff failed to meet her burden to demonstrate a viable alternative practice that would meet all of Defendant's needs. Plaintiff offered first that the University should pay faculty at market so they would not be tempted by recruitments, but acknowledged she knew of no structural solution. SER–31-33. She presented no evidence this suggestion had ever been offered or tested or that any public university could afford this. She later said that Defendant could avoid the problem by offering the recruited individual half what he or she wanted and make some targeted raises to others, another insufficient and untested proposal, but offered no evidence that this would be viable or effective. SER–12-13, 71; Opposition–21 (DKT. 68). On appeal, Plaintiff argues, without evidence,

that Defendant can just raise other salaries every time there is a retention. Brief–52-53. Plaintiff's proposals have not satisfied her legal burden. SER–59-60, 71, 80-82.

E. Plaintiff has abandoned her other claims.

STANDARD OF REVIEW

Plaintiff's statement of the standard of review is incomplete; Defendant offers the following:

The Court reviews the District Court's decision to reject evidence in deciding a summary judgment motion for abuse of discretion, even when the ruling determines the outcome of a motion for summary judgment, and must affirm unless the ruling was manifestly erroneous and prejudicial. *General Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997), *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002), *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005).

The District Court has a special obligation to ensure reliability and the soundness of an expert's methodology. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ["*Daubert 2*"]. If an expert did not conduct the research independent of the litigation, the District Court must determine whether there is objective verifiable evidence that the testimony is based on scientifically valid principles. *Daubert 2*, 43 F.3d at 1317-18.

The Court reviews the District Court's grant of summary judgment *de novo* and may affirm on any ground supported by the record. *Cal. v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 964 (9th Cir. 2018). "If the decision below is correct, it must be affirmed, even if the district court relied on the wrong grounds or wrong reasoning." *Jackson v. S. Cal. Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989) (citing *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir. 1985); *Alcaraz v. Block*, 746 F.2d 593, 602 (9th Cir. 1984)).

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S EQUAL PAY ACT CLAIM

A. Day-To-Day Job Duties Are Determinative and Must Be Considered on a Case-By-Case Basis

Plaintiff argues that faculty jobs are the same because they all require faculty to do unique and fundamentally different day-to-day work. Brief–3, 13, 23. That contravenes this Court's many decisions establishing and reinforcing the instruction to determine whether the jobs to be compared share a "common core" of tasks, and whether any additional tasks, incumbent on one but not the other, make the two jobs "substantially different." *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1074 (9th Cir. 1999). Actual job requirements are determinative, not job classifications or titles. *Gunther v. Cnty. of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1979), *aff'd on other grounds*, 452 U.S. 161 (1981). Jobs requiring different

skills are not substantially equal. *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 914 (9th Cir. 1983).

A prima facie case requires the court to consider what the job duties require; even impressive academic credentials do not make up for a difference in duties. *Id*. ("The lower court may have been impressed by Dr. Hein's academic credentials, and considered them as a counterweight to Dr. Hein's lack of coaching duties. This sort of consideration is improper.")

B. The District Court Relied Upon Substantial Controlling Precedent

The District Court applied the rules for establishing a *prima facie* equal pay claim that this Court has required for decades: that a plaintiff must show that the jobs being compared are substantially equal in their day-to-day duties. *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414 (9th Cir. 1988) (a court should rely on actual job performance); *Stanley*, 178 F.3d at 1074 (a prima facie case requires a plaintiff to establish that he or she did not receive equal pay for equal work). *Stanley*, in particular, has informed decision-making in cases for years. *See Baron v. Arizona*, 270 F. App'x 706, 712 (9th Cir. 2008); *Szaley v. Pima Cty.*, 371 F. App'x 734, 735 (9th Cir. 2010); *Negley v. Judicial Council of Cal.*, 458 F. App'x 682, 684 (9th Cir. 2011); *Washington v. Lowe's HIW, Inc.*, 692 F. App'x 413, 413-

14 (9th Cir. 2017); *Hollowell v. Kaiser Found. Health Plan of the Nw.*, 705 F. App'x 501, 504 (9th Cir. 2017).

The Supreme Court decision in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2406 (2019), stressed that adherence to precedent is a foundation stone of the rule of law, and "any departure from the doctrine demands 'special justification,'" and more than usually so where there is a long line of precedents each reaffirming the rest. Justice Kagan added a cautionary reminder that Congress remains free to alter what the Court has done; Congress has always been free to alter what this Court has done over the years in ruling on equal pay cases, but has not seen the need to amend the law. *Id.*

The District Court applied this longstanding precedent. Plaintiff criticizes Judge McShane for failing to apply leading case law (Brief–16-17), but unfairly so since he cited, discussed, and applied each of the decisions Plaintiff references, and followed the mandate that "Courts necessarily must determine the issue of substantial equality on a case-by-case basis." *Forsberg*, 840 F.2d at 1414; *Spaulding v. Univ. of Wash.*, 740 F.2d 686, 697 (9th Cir. 1984) ("each claim that whether jobs are substantially equal necessarily must be determined on a case-by-case basis"); *Hein*, 718 F.2d at 913 ("The question of whether two jobs are substantially equal is one that must be decided on a case-by-case basis").

C. Plaintiff's Regulatory Argument Was Not Presented to the District Court, and is Waived

Plaintiff's Opposition to Defendant's Motion for Summary Judgment did not present an analysis of EEOC regulations, as she does now. Brief–21-30. She provided a bare citation, and a 10-word parenthetical that said only that the regulations provide information. Opposition–22-23 (Dkt. 68). Plaintiff's failure to present this argument to the District Court precludes its consideration here. *United States v. Waechter*, 195 F.2d 963, 964 (9th Cir. 1952) (government cannot fairly urge as a ground for reversal a theory it did not present while the case was before the trial court); *Bustamante v. Cardwell*, 497 F.2d 556, 559 (9th Cir. 1974) ("this point was not presented to the district court, and is not properly before this court").

D. Plaintiff Failed to Present Evidence to Support Her Legal Theories

Plaintiff failed to meet the requirement to present a day-to-day and case-by-case analysis of her job duties as compared to her colleagues. As a substitute, she cites her own accolades and references the value of her work, and emphasizes that the job requires faculty to carry out an innovative and groundbreaking research program in an area of the professor's choosing which, she agrees, "inevitably results in differences in how each professor meets it." Brief–13. This is complex and varied intellectual work. By the time a candidate is standing for promotion to

full professor, he or she must have developed a national or international reputation in an area of specialty. Brief–23, quoting ER–191. Plaintiff, however, provides no authority for the thought that the legal test permits her to substitute accolades when her work is of a different kind requiring different skills in a different subfield. The authorities are to the contrary. Plaintiff agrees that her job requires her to do different work. Brief–3, 13, 23; SER–8.

Judge McShane properly followed precedent when he rejected Plaintiff's argument that a teacher is a teacher. ER–13. *Penk v. Or. State Bd. of Higher Educ.*, No. 80-436 FR, 1984 U.S. Dist. LEXIS 24437, at *33 (D. Or. Aug. 10, 1984), aff'd 816 F.2d 458 (9th Cir. 1987) ("Spaulding explicitly rejects the notion that all university faculty engage in substantially equal work without regard to discipline, without regard to differences in background and training, and without regard to the actual content of the jobs"). This Court's instruction that "the determinative factor is actual job content," *Spaulding*, 740 F.2d at 698, disposes of Plaintiff's argument that Defendant did not present the District Court with authority addressing two professors who were in the same department. That argument is also inaccurate. Defendant cited *Penk v. Or. State Bd. of Higher Educ.*, No. 80-436 FR, 1985 U.S. Dist. LEXIS 22624, at *104 (D. Or. Feb. 13, 1985), aff'd 816 F.2d 458 (9th Cir. 1987), (comparing Dr. Penk and Dr. Wright, both in the same department). *Stanley*, 178 F.3d at 1069, compared two members of the Athletic Department. There is no

rule that jobs from different disciplines cannot be substantially equal. *Spaulding*, 740 F.2d at 697-698. The District Court properly pointed out the inconsistencies Plaintiff's position. ER–13. Plaintiff cannot say that all faculty are the same yet pick out only four as comparators. SER–35, 340-341.

E. Plaintiff's Comparators Are Differentiated by Job Content and Day-To-Day Duties

1. The District Court considered a fully-developed record which demonstrated that Plaintiff's comparators spent little time performing the tasks that occupy the majority of Plaintiff's time, and conversely, spend most of their time performing different work that Plaintiff has not done and does not do. Plaintiff did not submit evidence sufficient to create a genuine issue of material fact as to whether she did equal or even similar work. She pointed out how her work was different from her colleagues (Brief–3-4, 21; ER–58, 233-234, 238-239) while still maintaining that all faculty are the same, at least as long as they are at the same level in the same department. Brief–23, footnote 4; Opposition–35 (Dkt. 68); ER–16; SER–321. Neither approach meets the standards for a prima facie case established by this Court, and the District Court properly rejected both.

Plaintiff's negligible description of her duties did not provide the District Court the factual information it needed to compare day-to-day duties. Opposition–11-12 (Dkt. 68); SER–260, 342-373. She said she had taken on "similar time-

consuming, effortful, and important roles" without providing the details of how she performed those roles. Opposition–24 (Dkt. 68); ER–232-236. She did not address or contrast the details of Professor Hall's substantial CoDaC work outside of Psychology or what he did as Interim Director or in his Associate Director of Research role, nor Professor Fisher's Harvard work or his or Professor Allen's Center duties of managing large federal grants. She did not address how her day-to-day work could be compared at all during her year away at Stanford. SER–79. She used the broadest generalities to describe her private grant responsibilities, merely characterizing them as "no different" from her colleagues' federal duties and non-delegable responsibilities. Brief–25; ER–239. She did not compare the consequences of failing on a small private grant to the potential disqualification of the entire University; an accountability that permeates the work of her colleagues who administer large federal grants. She did not discuss the quantitative issues arising from her colleagues' administering more than one grant at a time, or the grant staff they had to supervise. She asserted that her lab "functions similarly" to her colleagues' Centers (Opposition–3 (Dkt. 68); Brief–27; ER–232), without discussing what that means or how to reconcile the differences in size and scale and employee headcount.

Plaintiff criticizes the District Court for not examining what she actually does. Brief–27-28. If the District Court failed to conduct such an examination, it

was because Plaintiff failed to present evidence the Court could have used. The District Court did not overlook what Plaintiff submitted; rather what Plaintiff submitted was generalized, conclusory, reinforced her admission that she lacked information about her colleagues' work, and confirmed that her work differed. SER–300; Brief–3-4, 21; ER–58, 233-34, 238-239.

Contradicting her current argument that faculty do unique autonomous work, Plaintiff argues her work is substantially equal by referring to Defendant's general guidelines on merit raises (Brief–40), a summary of criteria for reviews which states that faculty are expected to develop "a mature program of independent scholarly research" (ER–184), and a promotion and tenure policy which states that "standardized criteria cannot exist that will apply equally to all faculty members." ER–185. She also refers to policy language that "the ability to attract outside funding is an important indicator of recognition in the field and future productivity." ER–185.

2. In his leadership role as department head, Professor Mayr shoulders duties and responsibilities that other faculty do not. SER–114-115, 252-253. He supervises a business manager who also has direct reports, along with information technology staff, office staff who interface with students, executive assistants, and junior faculty. SER–269, 291. He runs faculty meetings, manages personnel, addresses the poaching of faculty and their retention, resolves grievances,

investigates misconduct, manages tenure, oversees faculty reviews, implements policies, leads department policy development, and is the appeal of last resort on personnel and educational matters. SER–97, 269, 279, 286, 291-292. These are not Plaintiff's duties. SER–8. Also, Professor Mayr is not a member of the bargaining unit. SER–334.

Plaintiff erroneously cites the District of Rhode Island's decision in *Melanson v. Rantoul*, 536 F. Supp. 271, 287 (D.R.I. 1982), as authority for her argument that department chair duties do not differentiate. *Melanson,* however, held that the plaintiff could not compare herself to a department head because "he had more responsibility and therefore his position cannot be characterized as equal." The excerpt Plaintiff cites was limited to the time "after it was established that Udvardy's base salary was higher than the plaintiff's for equal work." *Id.* at 289.

3. For years, Professor Hall had substantial time allocated to his CoDaC appointment as Interim Director and as Associate Director of Research, work that required different skills and imposed different responsibilities directing CoDaC and the advancement and inclusion of minority populations. That was University-wide work, not just in Psychology, with a reporting relationship to the Vice President for Equity and Inclusion, and a role representing the Division of Equity and Inclusion in Central Administration meetings. ER–289-292; SER–100-102, 333. Plaintiff

lacked information about Professor Hall's duties at CoDaC. SER–300. Additionally, within Psychology, Professor Hall held two years-long terms as Director of Clinical Training, ensuring the integrity of that program, the development of curriculum staffing, and the arduous accreditation and reaccreditation work. ER–290-292; SER–159-187. Contrary to Plaintiff's assertions (Brief–30), he was also a co-investigator on a National Institute of Mental Health grant. SER–185. Plaintiff presented no evidence she performed substantially equal or similar work.

Professor Hall did this separate work until Spring 2017, when he left CoDaC. ER–292. Plaintiff's brief states that from Spring 2017, she "continues to work alongside Hall" but provides no specifics and does not cite to the record. Nor does she explain how she could have since she was absent the entire 2018-19 academic year at Stanford. Brief–31; SER–79, 110. Professor Hall's return from his administrative duties and notice of retirement both determine his current compensation under separate University policies (SER–101, 334-335; ER–229) which are inapplicable to Plaintiff.

4. Professor Fisher is the founding director and now co-director of the Center for Translational Neuroscience. ER–292-293; SER–130-158. His administration of large and federal grants carries supervisory and management work with responsibilities on a large scale, including supervision of 10-15

employees directly or indirectly, large budget accountability, federal compliance, data security and certification mandates, and providing required federal sign-offs. ER–292-293; SER–97-98, 101-102, 251-257. His failure to fulfill his federal grant duties could result in the loss of federal funding to the University as a whole. SER–255, 281; ER–282-284. He works with Harvard University's Center for the Developing Child, and has secured external funding which has paid increasing percentages of his University of Oregon salary; by 2017-2018 his external funding paid 100% of his salary. SER–99; ER–282. He has also served as Director of Clinical Training for the Psychology Department. ER–285; SER–293. Plaintiff presented no evidence that she performed any of these duties or had any accountability of this nature, and she never did work that resulted in another institution's paying her University of Oregon salary. She presented no evidence that a failure to meet her responsibilities could cause Defendant to lose its federal funding.

5. Professor Allen is the Director of the Center for Digital Mental Health, which uses new technology to develop mental health treatments and is responsible for the supervision and direction of employees who work as research personnel, and for maintaining broad external funding. ER–299-300; SER–99, 188-249. His research involves brain imaging and the collection of biological samples, and oversight over the scanning process and imaging processes, as well as over the

technological staff working with brain scans. ER–299. He is also the principal investigator or co-principal investigator on federal grants, and his responsibilities reflect the duties and responsibilities of Professor Fisher with similar government-imposed verification requirements, ensuring scientific integrity and fiscal oversight, and maintaining accountability for certifications and other specific federal compliance obligations. ER–298-299; SER–99, 101-102, 251-257. His grant work involves large-scale federal funding agencies, including the National Science Foundation, the National Institute of Mental Health, and National Institute of Child Health and Development, as well as large private donors. ER–298. He has assumed the responsibilities of Director of Clinical Training, a role which presently requires specialized work in the preparation of a self-study on data collected over many years, alumni surveys, and reporting of procedures and processes for contingencies such as misconduct and performance. ER–300-301; SER–293. He has been responsible for management of the accreditation site visit, work on the strategic direction of course work, and negotiating for the hire additional faculty. *Id.* Plaintiff presented no evidence of work that could be compared to Professor Allen's portfolio of duties and accountability.

6. Plaintiff complains that the District Court did not examine her "similar" duties and responsibilities in running her lab (Brief–32), but that is unwarranted criticism. The District Court's opinion examined the evidence she

provided of her duties and responsibilities (ER–4-5), but she provided little to examine. She offered that she manages one private grant for which she provided no description of the nature of reporting or certification. Professors Allen and Fisher manage various large federal grants at a time with complex federal requirements. ER–283, 298. Plaintiff supervises one lab manager. She has "weekly lab meetings," but did not articulate what she does in them. Her entire description occupies only eight lines in the declaration she submitted. ER–232-233.

Additionally, Plaintiff's briefing to this Court is heavily embellished. Instead of citing her words from the record, she copied the content from Professors Fisher and Allen's declarations and put their words into her mouth. Brief–27-28; ER–284, 299. She did not tell the District Court about submitting reports to funders, managing administrative staff, managing the ethical aspects of the research, driving the scientific process, ensuring scientific integrity, and handling media. Compare ER–232-33 (two pages of Plaintiff's declaration), with ER–284, 299 (Professor Allen's and Fisher's declarations).

Plaintiff's evidence and arguments reinforce that her work was and is substantially different from that of Professors Allen and Fisher. She argued to the District Court that she and Professor Allen and others were "fulfilling the job duties

of a full professor" but ignored differences in "how they conduct their research." Opposition–11 (Dkt. 68).

7. The District Court, having properly considered the evidence that Plaintiff offered, found it insufficient to carry her burden to demonstrate the substantial equality of her day-to-day work. This Court should affirm. Plaintiff's factual presentation to the District Court was based on subjective evaluations rather than objective comparisons of facts. Brief–3-4, 21; ER–58, 233-234, 238-239. *Schuler v. Chronicle Broad. Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986) ("subjective personal judgments do not raise a genuine issue of material fact").

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS FOR INTENTIONAL DISCRIMINATION UNDER TITLE VII AND TITLE IX

A. The undisputed facts and application of the correct legal standards show the District Court properly dismissed Plaintiff's Title VII claim. The District Court used the same "substantially equal" standard this Court directed it to use for both the Equal Pay and Title VII equal pay claim. *Forsberg*, 840 F.2d at 1418 ("[e]qual pay claims asserted under Title VII must satisfy the same substantial equality test applied to claims asserted under the [Equal Pay Act]"). Plaintiff's unsupported assertion, that *Gunther* rejected substantial equality as a standard, ignores this Court's thoughtful discussions of the standard. *Gunther*, 623 F.2d at 1303. *See Forsberg*, 840 F.2d at 1418, and its conclusion that "Forsberg's EPA

claim could not survive summary judgment; therefore, her equal pay claim under Title VII also fails" for which it cited *Gunther* as authority. The same point was made by another decision which Plaintiff cites: *Lanegan-Grimm v. Library Asso. of Portland*, 560 F. Supp. 486, 490 (D. Or. 1983) (applying "same standards in evaluating claims of unequal pay for equal work in cases brought pursuant to Title VII [or] the Equal Pay Act"). Plaintiff gains no support from her citation to *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840 (9th Cir. 2004), which did not involve equal pay.

As the District Court discussed, a plaintiff may show intentional discrimination without a comparator, provided she satisfies the requisite burdens and presentation of proof. Judge McShane properly evaluated Plaintiff's claims under this separate standard even though Plaintiff's claims were specific as to her comparators. He went beyond the issue of "substantial equality" of the jobs and analyzed Plaintiff's Title VII claim on the familiar framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), concluding that Plaintiff failed to meet her burden to show discriminatory animus. That conclusion was proper.

Plaintiff's evidence before the District Court fell into several categories: that she was paid less than four male faculty, that she unsuccessfully requested an equity raise, that she had a high H index (the number of times cited), that two other women had dissatisfying experiences when they asked for raises under different

circumstances, and that Division Dean Sadofsky asked a question about her research. Opposition–2, 12, 18, 20, 34, 51 (Dkt. 68); ER–242-243.

The fact that Plaintiff was paid less at times than four of the male faculty is insufficient. *Spaulding*, 740 F.2d at 700 (no inference of discriminatory animus arises from wage differences between jobs that are only similar), *Rudebusch v. Hughes*, 313 F.3d 506, 517 (9th Cir. 2002) ("there can be no compelling government interest in adjusting salaries on the basis of race when the differences in pay are neither statistically significant nor conspicuously out of balance overall"). Plaintiff did not dispute the key historical facts, which pointed away from discriminatory animus: her own enthusiastic recruitment from another university; the highest-paid faculty member in her department was a woman; and just before she filed this lawsuit, Plaintiff's salary was well above the average of full professors in her department, much higher than her Division average, and higher than Defendant's external benchmark. SER–96, 313. At times there was back-and-forth, with Plaintiff being paid more than two men she later identified as comparators. SER–55, 78-79, 102-103, 313. She was strongly supported by her department, and those faculty who were paid more had substantially different career trajectories and different course-changing events, including retention offers to fend off other schools. Other women in Psychology demonstrated that offers from other schools were available to women as well as men, and every externally-

recruited woman received a retention offer from Defendant, with the first really large one made to a woman. SER–72, 93, 314. Plaintiff observed men who left Defendant because of dissatisfaction with their retention offers. SER–303.

In fall 2015, Plaintiff received an 8% post-tenure salary increase, the highest normal increase available. SER–105. Much later, Plaintiff asked for an additional raise, a request that led to a comprehensive analysis by Divisional Dean Sadofsky which concluded that her compensation was non-discriminatory and which noted that in the case of the four males about whom Plaintiff complained, the University had needed to respond to recruitments in order to retain them. SER–105-6. Plaintiff was not similarly-situated to them.

Though Plaintiff chose not to engage in retention negotiations herself, she believed two women colleagues were not treated well in theirs. Brief–56. Defendant presented unrebutted evidence that Professor Baldwin had one excellent retention experience (SER–288-289), and one that did not satisfy her, and that the latter was a result of her asking too early, at a time when she was not a true finalist. SER–51-53, 106-108. Still, Professor Baldwin was offered more than the offer she was considering. SER–77. At the same time, Professor Allen was a true finalist and the only person being targeted by the recruiting institution, which announced its intention to make it impossible for him to say no. SER–76-77, 106-108.

Plaintiff also thought that Professor Hodges had an unsatisfactory negotiation when she moved out of Psychology to an administrative position for which she received a very generous salary offer, much higher than her faculty salary. Brief–56-57. She asked to trade that for a later increase if she returned to Psychology. ER–229. The request was declined for a structural reason, the size of the disparity between her and more junior faculty. ER–230. Misquoting Professor Hodges, Plaintiff represents that Defendant refused to pay her more on her return to Psychology because she would "earn more than a man." Instead, the issue was not "more," but rather how much more and who the other faculty member was, not his gender. She said she was told she would be earning "too much more" than other colleagues, with the "exceptionally talented" Professor Elliot Berkman being an example. ER–230. Professor Hodges received her generous salary offer as well as the additional funding that she had wanted. *Id.*

These two examples, which do not even involve Plaintiff, do not provide the "specific and substantial" evidence that this Court requires. *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996).

Plaintiff asked the District Court to assume discriminatory animus because Divisional Dean Sadofsky asked about her research data when she was looking into assaults on campus. Brief–51; ER–242-243. The entire written exchange about

statistical techniques is in the record and before the Court, and did not permit an inference of discrimination nor demonstrate pretext. SER–77, 108-110, 114-123.

The District Court also properly rejected Plaintiff's arguments that it could find pretext in the application of Defendant's policies that require reporting discrimination, a failure to consider her time in rank in reviewing her request for a raise, and failure to follow non-mandatory policies in retentions. Brief–58. On the undisputed facts, however, these examples fail to raise any issues of pretext nor rebut Divisional Dean Sadofsky's thorough explanation of his work on Plaintiff's concerns. SER–94-105. The record shows that he was provided with salary data at a faculty meeting with no advance notice, told the faculty he had not done a complete study of the just-provided data, reminded them about remedies under the bargaining agreement, and encouraged them to press the union and administration to allocate some funds from the next increases to equity raises. ER–116; SER–94. He explained there were campus-wide equity issues unrelated to protected classes, and mechanisms to address them, and that he believed Defendant was working on a memorandum of understanding. ER–116. After the meeting, he did a thorough review of data he had been provided, concluded Plaintiff's salary had not been discriminatorily set and that he saw the issue framed as a perceived inequity from retention raises, and not discrimination. SER–105-106; ER–118. His detailed description of his analysis occupies many pages in the record and cannot accurately

or fairly be represented as "choosing to ignore" faculty concerns. SER–94-106. And see ER–193, cited by Plaintiff, showing that she was invited to share information about her concerns, and which uses permissive rather than mandatory language to discuss University practices.

Plaintiff asserts that Sadofsky was required to consider her time-in-rank as a metric when he looked into her request. Brief–58. She cites ER–114 and 119, in which Sadofsky explained that the considerations were "being substantially below the average for the department in that rank or substantially below the AAU averages for the discipline in that rank" and that the additional raise was for "rare cases" to address issues with faculty of comparable merit and time in rank or relative to AAU average salaries. Neither of those exchanges identifies a required policy to use time in rank as a metric; he explained to her that "we have neither lengthy policy nor practice." ER–119.

Finally, Plaintiff asserts that Defendant "failed to follow UO policy governing retention raises," citing ER–200-201; Brief–59. That policy recommends but does not require a written narrative, and Plaintiff acknowledged as much in oral argument. SER–13. Defendant cannot be accused of pretext for failing to follow policies it was not required to follow.

The ultimate burden of persuasion in summary judgment proceedings under Title VII is with the Plaintiff. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054,

1062 (9th Cir. 2002). That burden cannot be met by "purely conclusory allegations of alleged discrimination, with no concrete, relevant particulars." *Forsberg* 840 F.2d at 1419. The District Court correctly rejected the Title VII treatment claims.

B. Plaintiff did not address her burdens under Title IX, except to absorb that law into her discussion of Title VII. Brief–54. The District Court properly concluded that the failure to present a genuine issue for trial on the Title VII treatment claim disposed of the Title IX claim. ER–16.

III. PLAINTIFF FAILED TO MEET HER BURDEN AT EACH STEP OF HER IMPACT CLAIM

Disparate impact claims have exacting requirements. At the outset, Plaintiff must identify a "particular employment practice" that causes a disparate impact. 42 USC § 200e-2(k)(1)(A)(i).

A. Plaintiff must isolate and identify the specific facially neutral practice that is responsible for an observed impact for "it is not enough to simply allege that there is a disparate impact." *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005). Otherwise, employers could be liable for the "myriad of innocent causes that may lead to statistical imbalances." *Id.* (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989)). The statistical disparities must be sufficiently substantial that they raise such an inference of causation, with the significance or substantiality judged on a case-by-case basis. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424

(9th Cir. 1990) (prima facie case of disparate impact requires proof of causation, "that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion … because of [] membership in a protected group"). Congress codified the requirement in 1991.

Collapsing all the steps, factors, and considerations of Defendant's many retention decisions under the general description of "practice of paying retention raises" (Brief–43, 49-50), is just another way of alleging a bottom-line disparity or pointing, insufficiently, to a generalized policy. *City of Jackson*, 544 U.S. at 241.

B. Plaintiff failed to meet her burden to prove a disparate impact through the Cahill Declaration, and the District Court did not abuse its discretion in rejecting it. *Daubert*, 509 U.S. at 589; *Daubert 2*, 43 F.3d at 1318. As a preliminary consideration, Dr. Cahill's work was done for this litigation and did not involve independent research, so the District Court was obligated to "determine whether there is objective verifiable evidence that the testimony is based on scientifically valid principles." *Daubert 2*, 43 F.3d at 1317-18 ("a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office"). This Court reviews for abuse of discretion. *Joiner*, 522 U.S. 136, 118 (1997); *Orr*, 285 F.3d at 773.

The District Court properly concluded that the very small size of the underlying data set required Dr. Cahill's analysis to be disregarded. ER–18.

Dr. Cahill had reduced his data set to between nine and 13 full professors per year from 2007 to 2017, omitting without explanation three full professors and up to 18 associate and assistant professors in Psychology. ER–39, 245-247; SER–83, 96. There is no rule and no persuasive argument to compel the Court to accept any statistical analysis regardless of the small size of the underlying data set. Reliable analysis based on sufficient data are essential to admissibility. *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir. 1986), affirmed summary judgment, and held that the plaintiff's department of 28 employees was "too small." Other out-of-circuit authorities cited by amicus ERA predate the decisions in *Daubert*, and this Court's decision in *Sengupta*, some by more than a decade.

The District Court's decision was proper, given the infirmities of the Cahill Declaration which include his failure to identify data on which his scatterplots rely, his failure to explain his decision to remove people from consideration, his decision to change to a calendar year from a November-October year for part of the data, his failure to describe his regression theory or the reasons for his choice of variables, and his failure to explain why he included stipends in base salary for some full professors and not others. ER–36-41; SER–83-84.

The District Court could also have rejected the Cahill Declaration for other reasons, for he neglected many of the basic requirements for statistical evaluation. He failed to record his data properly; for example, he reported that there were 26

retention offers between 2007 and 2017 when there were only 25, and he counted 21 offers to men when there were only 20. ER–95, 246, 472-473. He inaccurately recorded the amounts of retention raises actually paid in salary in 2017. ER–246 compared to ER–453-454. When he cites sources, they do not accurately or sufficiently support his conclusions. For example, for each academic year, he used base annual salaries and ignored stipends except in the case of three of Plaintiff's male comparators, Professors Allen, Mayr, and Fisher. ER–246-247 compared to ER–394-394, 402-403, 410-411, 417-418, 426-427, 433-434, 441-442, 449-450. Without explanation, he added to their base salaries the stipends they received for endowed chairs while omitting stipends paid to other faculty, including the women faculty Professors Hodges, Arrow, and Baldwin. *Id.* This manipulation of data distorted and exaggerated differences in salaries, and his analysis was contrary even to Plaintiff's insistence that such additional pay is not relevant to a comparison of common duties. Opposition–34 (Dkt. 68); SER–8. He manipulated data by using "base annual rates as of November 1" for each year from 2007 to 2015, then switched in 2016 and 2017 to "base annual rates as of January 1" of the next year, without explanation. ER–40, 247. Had he stayed with the November 1, 2017 value, for example, Professor Hall would have fallen below the regression line instead of being above it, as his Declaration presents. ER–457 compared to ER–247. Likewise, if he had not switched timeframes midstream in his analysis,

Professor Mayr would have been close to the regression line, but the switch placed him above it. *Id.* Changing the timeframes midstream exaggerates and distorts any differences in pay, like having one analysis through 2015 and a different one from 2016 to 2017, but drawing conclusions by mixing the two. *See* DAVID H. KAYE & DAVID A. FREEDMAN, FEDERAL JUDICIAL CENTER REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 231 (3d ed. 2011) (identifying several parameters to test the data, including whether the measurements are recorded properly and whether the categories are appropriate). His analysis omits grants and does not address how Professor Fisher's funding, which pays his salary from external sources, should be treated here.

Without explanation, Dr. Cahill eliminated Professors Pfeiffer, Espy, Tucker, and Slovic from the analysis, and the exclusion of Professor Pfeiffer is particularly noteworthy since she had been on the very cusp of her promotion to full professor, and, according to the promotion policies Plaintiff relies upon elsewhere (ER–191), was already meeting the duties and requirements of a full professor, missing only the title. The removal of two, or three, or four people from his analysis illustrates the Second Circuit's warning: "[i]n any large population a subset can be chosen that will make it appear as though the complained of practice produced a disparate impact." *Smith v. Xerox Corp.*, 196 F.3d 358, 369 (2d Cir. 1999).

This declaration does not meet the reliability standards of the DANIEL L. RUBINFELD, FEDERAL JUDICIAL CENTER REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 311-317 (3d ed. 2011), and does not provide critical information that the Court needs in order to evaluate methodology. Dr. Cahill did not sufficiently describe the data he reviewed or its sources, stating that he has "records and files" and "materials." ER–245. He plotted "all" professors in Psychology, while at the same time and with no explanation, said he removed two, though his chart shows he removed three. ER–245-248. The record shows he did not consider a fourth, Professor Pfeiffer. He did not describe how his data were compiled, did not identify his regression theory, did not discuss the suitability of his model, nor provide a rationale for the choice of independent variables. His declaration is five paragraphs, only two of which discuss his analysis, and he attached two charts that do not identify the names of the people he evaluated. The Court is not obliged to assume that Plaintiff's statistical evidence is reliable. *See Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011).

No meaningful statistical inferences of discrimination can be drawn from so small a data set as Plaintiff's. *Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 976-77 (9th Cir. 1994) ("the district court rejected precisely the kinds of 'fallacies and deficiencies' that must be excluded as unreliable"); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 996-97 (1988) (statistical evidence may not be probative if

based on a "small or incomplete data set"); *Shutt v. Sandoz Crop Prot. Corp.*, 944 F.2d 1431, 1433 (9th Cir. 1991) (statistical evidence may not be probative if data are "small or incomplete"); *Morita v. S. Cal. Permanente Med. Grp.*, 541 F.2d 217, 220 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977) ("statistical evidence derived from an extremely small universe…has little predictive value and must be disregarded"); *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002) ("pool of 38 applicants likely too small to produce statistically significant results"); *Sengupta*, 804 F.2d at 1076 (department of 28 employees "too small").

Plaintiff's argument that this declaration presents an issue of fact for the jury is error. The District Court carried out its responsibility to evaluate its admissibility and properly exercised its discretion.

C. The separate scatterplots Plaintiff submitted are no substitute for proper statistical analysis and did not meet Plaintiff's obligation to present admissible evidence showing a statistically significant disparity. "It is not enough to simply allege that there is a disparate impact on workers." *City of Jackson*, 544 U.S. at 241. That is what Plaintiff does, however, with her "pay gap" argument. Brief–43. She does not explain her variables, and misapplied the four-fifths rule by comparing raw numbers rather than selection rates. Brief–47. *See* 29 C.F.R. § 1607.4(D) (comparing selection rates to rates, not individuals to individuals). If the four-fifths rule is applied, it must be applied properly. *See Stout*, 276 F.3d at

1124 for an example. The record shows that the rate of retention offers made to women who presented recruitments was 100%. SER–72, 89, 93, 314.

Plaintiff does not rescue her insufficient statistical analysis with anecdotal evidence. *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (rarely, if ever, can anecdotal evidence show a systemic pattern of discrimination). That is so here, where Plaintiff omits evidence in the record. She cites observations about pay gaps, but fails to mention Professor Mayr's warnings (ER–102) about the unreliability of the samples and his explanation that when he analyzed the department and included Professor Neville, her compensation information single-handedly reversed the outcome. ER–102-103. *See Stout*, 276 F.3d at 1123, 1125 n. 2 (commenting that if just one more female applicant had received an interview, women would have had a higher percentage of interviews granted). The District Court was mindful of those concerns. *See Freyd v. Univ. of Or.*, 384 F. Supp. 3d 1284, 1296 (D. Or. 2019), citing *Contreras v. Los Angeles*, 656 F.2d 1267, 1273 (9th Cir. 1981) ("Statistics are not trustworthy when minor numerical variations produce significant percentage fluctuations").

Plaintiff's personal scatterplots show insufficient variables – salary and time since appointment, the inconsequential H index which measures citations (whether the citations are positive or negative), and one merit score. SER–104. They do not consider other important factors such as real day-to-day duties, time since terminal

degree, grant administration, whether work was done externally, whether external work was considered for some (Professor Hall) but not for others (Professor Espy). Fewer than a dozen faculty were included in Plaintiff's illustrations. ER–146, 372.

Plaintiff's excerpts from the department self-study leave out important details, such as that two highly meritorious male faculty have "relatively low salaries" for the same reason as female colleagues: they had not had recent retention negotiations. ER–131, 146. *See Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993) (employee population in general must not be affected by policy to same degree), *Stockwell v. City & Cty. of S.F.*, 749 F.3d 1107, 1115 (9th Cir. 2014) (group-based disparity required). Plaintiff avoids consideration of important grant work in the department (ER–132, 138), the absence of identified compensation decisions involving Plaintiff that were based on gender (ER–125), and her ongoing merit raises. *Id.*

The District Court's conclusion that Plaintiff had not provided sufficient statistical evidence to establish a prima facie case was not an abuse of discretion.

D. Plaintiff adjusted her retention theories before the District Court and again before this Court. She initially identified "the practice of paying retention raises when presented with competing offers" as having a disparate impact on women (ER–351), but in her Opposition to Summary Judgment argued treatment theories such as how retentions treated other women rather than discussing neutral

practices. Opposition–17-19, 30 (Dkt. 68). She presented no evidence of women leaving because of dissatisfaction with a retention offer, whereas the record identifies two dissatisfied men who left. SER–93, 303. Because Plaintiff never participated in a retention negotiation herself, she cannot make such a challenge on an intent or treatment theory.

E. Plaintiff now confirms she does not challenge retention raises *per se*, but rather the practice of giving raises without at the same time adjusting the salaries of other professors of "comparable" merit and seniority. Brief–42-43. That is not an identified neutral practice suitable for an impact analysis. The decision to enter into a retention negotiation involves individualized considerations, gathering input from colleagues and administration, evaluations of overall merit that differ from the general merit process, consideration of expected trends for the future, proposals, and counterproposals, all with a goal of retaining a scholar but by spending only so much as is necessary. SER–70-71, 81-82.

Retention offers are "widely varied" (SER–44, 280, 314-315); persuading someone to stay depends on factors including salary, lab space, spousal hires, teaching loads, tenure, and parking spaces. *Id*. Plaintiff knows of no common denominator that makes an offer attractive (*Id*.), and she never identified what part of Defendant's multi-faceted analysis resulted in an impact.

F. The District Court correctly held that Defendant demonstrated that its retention practices are both job-related and consistent with business necessity. ER–19-20. 42 U.S.C.S. § 2000e-2. Plaintiff concedes that retaining key faculty is consistent with business necessity (SER–130, 308), the departure of her former colleagues was a loss (SER–303), the University is "better off" with Professor Fisher (SER–307-308) and his retention is worth an effort (*Id.*), it is important to have world class scientists doing world class research (SER–302-303), some faculty cannot easily be replaced (SER–322), and the grant money some faculty bring to Defendant is of enormous value. SER–302. Failed retentions can be highly disruptive. ER–126. Plaintiff does not challenge that on appeal, but argues instead that Defendant's practice is not job-related. Brief–50.

When faced with a recruitment, Defendant does not look just to the fact that a competitor is attempting to lure away a professor as a proxy for its decision-making. Rather, Defendant evaluates the job and business basis for making a retention offer. ER–180; SER–71. Offers may be made only where faculty have demonstrated sustained productivity and are judged to have exceptional potential for future contributions. ER–200-201. Department heads gather performance information, and deans and the provost evaluate that faculty member's contributions "to the department and the field" to judge whether they are "worthy of further investment." SER–70-71, 81. Defendant evaluates whether there is

interrelated grant activity, such that if one faculty leaves, others may leave also. SER–45, 281. Proposals can include performance information. *See* ER–215, citing Professor Allen's track record with Defendant.[1]

Plaintiff unfairly criticizes Judge McShane for his reference to "any business justification" (Brief–49), but he accurately described the respective burdens of proof and summarized that "the University must show that the employment practice is both job-related and consistent with business necessity." *Id*. at 1297. An external recruitment is the triggering event, but there is real work in the analysis Defendant undertakes to decide whether the faculty member's University of Oregon record supports a retention offer. Defendant easily met its burden and the District Court was correct in its analysis.

G. Although it is not part of the statutory analysis, Plaintiff argues that some women have historically hesitated to seek other jobs (Brief–51; ER–241-242, 279), or that they have complicating life circumstances (ER–241); she assumes that men are better able to seek outside offers to build their salaries. ER–241, 270. Plaintiff offered no evidence of a male colleague "gaming" the system (SER–33),

[1] Plaintiff suggests that this Court should consider the vacated opinion in *Rizo v. Yovino*, 887 F.3d 452 (9th Cir. 2018). Regardless of its lacking authority, the excerpt Plaintiff quotes reflects that "job relatedness" can be shown by work experience, ability, performance or any other job-related quality" (Brief–51); Defendant's retention decisions would not be questioned, even under this opinion.

and the record fails to support this broad gender theory. Professors Hall and Fisher had not sought the outside offers they had received (ER–285-86, 292-93), and Professor Allen not only did not seek his recent outside offer but also preferred to remain with Defendant. ER–215. Plaintiff agrees her Psychology colleagues (men and women) are so strong that anyone who wanted an outside offer could have one. SER–319. Moreover, this record shows that Professor Baldwin, a woman, was willing to move twice, once to British Columbia and once to England, and had excellent success in her first retention negotiation. ER–265, 269-270. Professor Allen did not want to leave Eugene, but had an offer designed to make it difficult for him to refuse. ER–215. Professor Hall entertained an attractive external offer for family reasons. ER–292-293. Plaintiff moved from Cornell to join Defendant, and her husband made sacrifices for her career. ER–242, 313. In this record, generalized life circumstances affect both men and women and do not supply the missing statistical or even anecdotal evidence to support this claim.

H. This record demonstrates that retention practices are unsuited for an impact analysis because they affect all men and all women who are displaced when a colleague receives a retention offer. This is illustrated by Professor Pfeiffer's recent offer, raising her compensation above more senior male colleagues, and Professor Allen's recent retention which increased his compensation above Professor Mayr (previously paid more), and further increased the distance between

him and male Professors Moses and Gerard Saucier. In the case of both Professors Allen and Fisher, their proposals were specifically designed to provide benefits for their female colleague, Professor Pfeiffer. ER–215, 219, 281.

I. As a final step, Plaintiff failed to prove that Defendant refused to adopt an alternative employment practice that would serve its legitimate interests without causing an impact and which would be equally effective as Defendant's practices, taking into account costs or other burdens. *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975); *Watson,* 487 U.S. at 998; *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,* 135 S. Ct. 2507, 2518 (2015); *Ricci v. DeStefano,* 557 U.S. 557, 578 (2009). During this litigation, Plaintiff spoke inconsistently of different practices, each of which involved greater cost. She first said that paying faculty at market would make them less likely to leave. SER–31. When summary judgment was argued, she said that Defendant should offer the recruited faculty member only half what he or she wanted, and then give others raises with the remaining half. SER–12-13; Opposition–21 (Dkt.68). On appeal, she argues that Defendant should accompany any retention with raises after performing an equity and merit analysis. Brief–52. Those examples fail to satisfy her burden. Each one would impose added costs and burdens on Defendant, requiring that each time one faculty member was recruited, several or all of his or her colleagues would also receive raises. SER–60, 71, 80-81. Performing a merit and equity analysis at the

time of every recruitment imposes additional cost and additional administrative burdens. And the proposal to negotiate by meeting a recruited faculty member halfway would most certainly guarantee the loss of that scholar. SER–30, 71.

Plaintiff's suggestions did not include a showing that they would meet Defendant's needs or that they would even be financially workable, and Plaintiff admitted she knew of no viable structural change. SER–33, 80. The District Court properly found that Plaintiff's suggestions did not satisfy her burden. ER–20-21. *See MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 772-73 (11th Cir. 1991) (plaintiff was required to prove it would be economically possible for university to raise pay of longer serving faculty where new faculty were hired at market; directed verdict affirmed); *Allen v. City of Chi.*, 351 F.3d 306, 313, 316 (7th Cir. 2003) (plaintiffs were required to specify an alternative, prove it was equally valid, and prove it was less discriminatory; "vague or fluctuating proposed alternative" insufficient); *Lopez v. City of Lawrence*, 823 F.3d 102, 121 (1st Cir. 2016) (requiring evidence that alternative would improve upon challenged practice, not just that it exists in the abstract); *IBEW v. Miss. Power & Light Co.*, 442 F.3d 313, 319 (5th Cir. 2006) (presentation so tenuous that it could not be considered "alternative"); *Watson*, 487 U.S. 977, 997-78 (1988) (O'Connor, plurality) (cost or other burdens relevant in determining if alternative is equally effective).

IV. THE DISTRICT COURT PROPERLY REJECTED PLAINTIFF'S STATE LAW CLAIMS

A. Plaintiff also sued under state law, citing ORS 659A.030 and 652.220, but both claims are timely only after August 13, 2016. Motion–4, footnote 3 (Dkt. 56). The claim under ORS 652.220 is the state equivalent to the federal Equal Pay Act, and the claim under 659A.030 is the state equivalent to Title VII. While both state laws use different phrasing, they are subject to the same requirements of proof.

B. While this lawsuit was pending, the 2017 Oregon Legislative Assembly enacted House Bill 2005, which amended ORS 652.220. The amendments to ORS 652.220 became effective January 1, 2019, but with delayed effective dates for various provisions. Plaintiff did not assert a claim under the new law when she last amended her complaint, nor did she address it in her Opposition to the summary judgment motion. Opposition–33-35. She mentioned it in passing at oral argument, inquiring, "if the court wants me perhaps to amend the complaint to make allegations under the new version of the law." SER–15.

Plaintiff's few sentences at the end of oral argument admitted the new law was not at issue in her lawsuit. SER–15. That is not sufficient to have presented this issue to the District Court, and this issue is therefore not properly before this Court. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) (an issue is generally deemed waived if it is not "raised sufficiently for the trial court

to rule on it"); *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 768 (1997) (to have been properly raised below, "the argument must be raised sufficiently for the trial court to rule on it").

C. The District Court properly rejected Plaintiff's state-law claims. Like the federal Equal Pay Act, ORS 652.220 prohibits discrimination on the basis of a protected class in the payment of compensation and uses "work of comparable character the performance of which requires comparable skills" and allowed for "a differential in wages between employees [that] is based in good faith on factors other than sex." Like Title VII, ORS 659A.030 makes it an unlawful employment practice to discriminate on the basis of sex. Plaintiff pleaded her state law claims by asserting that Defendant "knowingly and intentionally" paid her "less than men in the same job because of her sex" and that Defendant's "practice of paying retention raises when presented with competing offers has a disparate impact on women." ER–355.

Regardless of the differences in phrasing, Plaintiff's state statutory claims are analyzed the same way as are her Equal Pay Act and Title VII claims. *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001) ("The standard for establishing a prima facie case of discrimination under Oregon law is identical to that used in federal law"); *Henderson v. Jantzen, Inc.*, 79 Or. App. 654, 657, 719 P.2d 1322, 1324 (1986) ("we now adopt for ORS Chapter 659 actions the

formulation in *Burdine* (*Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)) of what constitutes a plaintiff's prima facie case").

"Comparable character" has been construed and applied by Oregon courts and this Court. *Smith v. Bull Run Sch. Dist.*, 80 Or. App. 226 (1986) (applying the same analysis for plaintiff's state equal pay claim to her claim under the federal Equal Pay Act though remarking that "comparable" is a "more inclusive" term but finding that "the two acts are so similar" and evaluating whether jobs were "equal"); *Bureau of Labor & Indus. v. City of Roseburg*, 75 Or. App. 306, 309 n.2 (1985), *rev. den.* 300 Or. 545 (1986) (claim under ORS 659.030 (1)(b), and holding that "comparable" requires important common characteristics); *see Forsberg v. Pac. Nw. Bell Tel. Co.*, No. 84-1401-FR, 1986 U.S. Dist. LEXIS 31238, at *22 (D. Or. July 21, 1986), aff'd, *Forsberg*, 840 F.2d at 1409 (summary judgment on plaintiff's wage discrimination state law claims, asserted under ORS 659.030 (now renumbered as 659A.030), using the same analysis applied to her Equal Pay Act and Title VII claims). The standard requires proof of substantially equal work.

Even if the current state regulations issued in connection with the state's new legislation were to be considered, OAR 839-008-0010 incorporates the standards the District Court applied. "Work of comparable character" involves "substantially similar knowledge, skill, effort, responsibility and working conditions," meaning ability, mental exertion, complexity of job tasks, accountability, decision-making

discretion or impact, degree of significance of job tasks, extent to which employee exercises supervisory functions, extent to which employee's work exposes employer to risk, the intensity of the work, the impact of an employee's exercise of job functions on an employer's business, and the significance of job tasks, with none of those being determinative. Plaintiff's day-to-day work is so substantially different from her comparators, it would not meet the requirements of the new state standard.

D. Nothing in the District Court's opinion justifies Plaintiff's criticism that it excludes tenured faculty from the coverage of the law. Brief–41. The District Court's conclusion was informed by a careful application of the standards required by the law. The law applies to tenured faculty just as it applies to high school teachers. In each case, a plaintiff is required to present facts that show the level of similarity of day-to-day job duties. "[B]ecause job duties vary so widely, each suit must be determined on a case-by-case basis." *Gunther*, 623 F.2d at 1309.

Plaintiff's claims did not fail because she is tenured faculty. They failed because of the great differences in the work she does and how she does it in her separate subfield.

MOTION TO STRIKE

Plaintiff's brief includes references to information which are not in the record. That is impermissible and such reference should be disregarded. *Tonry v. Sec. Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994) ("parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below"), *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) ("[l]itigants who disregard this process impair the court's ability to perform its appellate function").

While this appeal was pending, Plaintiff filed a motion for relief from judgment which included a new declaration from Professor Allen. ER–25-29. This should be stricken from the record along with the arguments relying on that declaration. Those appear in Plaintiff's opening brief, pages 3-4, page 32, and pages 53-54, all of which reference and quote from the post-appeal filing.

Additionally, Plaintiff's opening brief, page 9, footnote 3, references three outside sources which are not in the underlying record, and page 45 references and cites from a statistics text which was not cited to the District Court and is not in the record.

Defendant's Reply on its Motion for Summary Judgment included motions to strike inadmissible evidence submitted by Plaintiff in her Opposition. The District Court did not find it necessary to rule on the motions given its decision to

grant summary judgment, but Defendant believes they should be considered where Plaintiff refers to the respective submissions.

CONCLUSION

Variations in compensation among employees are not surprising, and do not permit a presumption that they were caused by discrimination. *Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012); *see also Spaulding* 740 F.2d at 700 ("That payments are different is insufficient alone to establish a prima facie case"). Each of the laws under which Plaintiff claimed requires proof that the day-to-day work can be compared in accordance with the law's standards and none of the laws invalidate employer judgments, so long as the exercise of those judgments does not violate the requirements of the law.

In its 2016 decision in *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016), the Court reflected that "A university is in large part defined by those intangible 'qualities which are incapable of objective measurement but which make for greatness'" (citing *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950)), and it cited the importance of deference with respect to those intangible characteristics that are central to its identity and educational mission, allowing for public universities to serve as "laboratories for experimentation." *Id.* (citing *United States v. Lopez*, 514 U. S. 549, 581 (1995). Plaintiff's arguments in this case attack those principles. She has asked the Court to ignore the requirements of the law and instruct a state

institution how to value its academic needs or, worse, require it to adopt a lock-step seniority-based compensation system to avoid lengthy and expensive litigation based on sweeping generalizations. *See EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 257 (2d Cir. 2014). That faculty are held to the same standards does not mean they do the same work. *Id.* ("The use of identical evaluative criteria such as 'project management,' 'communication,' 'flexibility and adaptability,' and 'attendance,' moreover, speaks only to the breadth of the standards used, not to whether the attorneys subject to evaluation face varying workplace demands.")

The law strikes the proper balance. Defendant has not compensated Plaintiff in ways that violate any of the laws under which she sues, and Plaintiff has failed to demonstrate that the rulings and decisions of the District Court are in error. Defendant respectfully requests the Court to affirm the decision of the District Court.

RESPECTFULLY SUBMITTED this 22nd day of November, 2019.

BARRAN LIEBMAN LLP

By s/ *Paula A. Barran*

Paula A. Barran, OSB No. 803974
Shayda Zaerpoor Le, OSB No. 121547
Donovan L. Bonner, OSB No. 181929
Attorneys for Defendants-Appellees
University of Oregon and Hal Sadofsky

CERTIFICATE OF COMPLIANCE

PURSUANT TO FED. R. APP. P. 32(a)(7)(B)

The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,182 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font, Times New Roman.

BARRAN LIEBMAN LLP

By s/ *Paula A. Barran*
Paula A. Barran, OSB No. 803974
Shayda Zaerpoor Le, OSB No. 121547
Donovan L. Bonner, OSB No. 181929
Attorneys for Defendants-Appellees
University of Oregon and Hal Sadofsky

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned, on behalf of Defendants-Appellees University of Oregon and Hal Sadofsky, certifies that there are no cases related to this case pending in this Court.

BARRAN LIEBMAN LLP

By s/ *Paula A. Barran*
Paula A. Barran, OSB No. 803974
Shayda Zaerpoor Le, OSB No. 121547
Donovan L. Bonner, OSB No. 181929
Attorneys for Defendants-Appellees
University of Oregon and Hal Sadofsky

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that service on all parties represented by counsel who are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

Jennifer J. Middleton
jmiddleton@justicelawyers.com
Johnson Johnson Lucas & Middleton, PC
975 Oak Street, Suite 1050
Eugene, OR 97401-3124
Attorney for Plaintiff-Appellant

Stephen F. English
senglish@perkinscoie.com
Cody M. Weston
cweston@perkinscoie.com
Nathan R. Morales
nmorales@perkinscoie.com
Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, Oregon 97209-4128
Attorneys for Defendant-Appellee Michael H. Schill

Kelly M. Dermody
kdermody@lchb.com
Lieff Cabraser Heimann & Bernstein
275 Battery Street, 29th Fl.
San Francisco, CA 94111
Counsel for Amicus Curiae Equal Rights Advocates, et al.

Glenn Rothner
grothner@rsglabor.com
Rothner, Segall & Greenstone
510 South Marengo Ave.
Pasadena, CA 91101
Counsel for Amicus Curiae American Association of University Professors

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DATED this 22nd day of November, 2019.

BARRAN LIEBMAN LLP

By s/ *Paula A. Barran*

Paula A. Barran, OSB No. 803974
Shayda Zaerpoor Le, OSB No. 121547
Donovan L. Bonner, OSB No. 181929
Attorneys for Defendants-Appellees
University of Oregon and Hal Sadofsky