

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.

On Appeal from the United States District Court

District of Oregon, Eugene

Case No. 6:17-cv-448-MC

Hon. Michael McShane, District Judge

**BRIEF OF AMICUS CURIAE THE OREGON ALLIANCE OF
INDEPENDENT COLLEGES AND UNIVERSITIES IN SUPPORT OF
DEFENDANT-APPELLEE UNIVERSITY OF OREGON'S PETITION FOR
REHEARING EN BANC**

JENNA L. MOONEY, OSB #993249

KEVIN H. KONO, OSB #023528

jennamooney@dwt.com

kevinkono@dwt.com

DAVIS WRIGHT TREMAINE LLP

1300 S.W. Fifth Avenue, Suite 2400

Portland, OR 97201-5682

Telephone: (503) 241-2300

Of Attorneys for *Amicus Curiae* The
Oregon Alliance of Independent
Colleges and Universities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(a)(4)(A), *amicus curiae* The Oregon Alliance of Independent Colleges and Universities hereby certifies it is an Oregon non-profit corporation and that no corporation or other public entity owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. FED. R. APP. P. 29(a)(4)(E) STATEMENT	3
III. INTRODUCTION	3
IV. ARGUMENT	5
A. Having the Freedom to Set Academic Priorities and Pursue Innovation Through Talented Professors is at the Core of Academic Institutions' Unique Setting and Must be Protected.	5
B. Retention of Talented Professors Is of Paramount Importance to the Ongoing Viability of Member Institutions.....	8
1. Institutions Must Have Flexibility to Fairly Recruit, Assess, and Retain Professors Through Individualized Salary Setting Exercises.....	9
2. Professor Freyd's Retention Strategy Is Fatally Flawed.....	11
V. CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	15
CERTIFICATE OF FILING AND SERVICE	16

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Freyd v. University of Oregon</i> , 990 F.3d 1211, 2021 WL 958217 (9th Cir. Mar. 15, 2021)	5, 10, 11, 12
<i>Hardie v. NCAA</i> , 876 F.3d 312 (9th Cir. 2017)	7
<i>Regents of Univ. of Mich. v. Ewing</i> , 474 U.S. 214 (1985).....	8
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957).....	7
Rules	
Circuit Rule 29-2(a)	1
Fed. R. App. P. 29(a)(4)(E).....	1, 3

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Oregon Alliance of Independent Colleges and Universities (“The Alliance”) submits this amicus curiae brief pursuant to Fed. R. App. P. 29(a)(2), Fed. R. App. P. 29(b), and Circuit Rule 29-2(a) and in support of the University of Oregon’s petition for en banc review. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2) (amicus curiae may file brief in support of petition “if the brief states that all parties have consented to its filing”); Circuit Rule 29-2(a) (same).

The Alliance is a non-profit corporation that represents and serves the interests of its member institutions, all of which are regionally accredited, nonprofit, private colleges and universities in Oregon.¹ The Alliance does so through raising public awareness of the value of private, nonprofit higher education; expanding affordability and access to Oregon’s private, nonprofit colleges and universities; supporting and expanding strategic partnerships with businesses, foundations, and public sector agencies and institutions; and providing and creating structures to encourage inter-institutional collaboration. The Alliance

¹ Although The Alliance represents the interests of its member institutions, The Alliance submits this brief on behalf of itself only, and the views and arguments set forth herein are the views and arguments specifically of The Alliance. Submission of this brief is not intended to suggest or imply the agreement or disagreement of any specific member of The Alliance with the views and arguments in this brief.

coordinates and programs affinity group meetings for positions across member campuses, including diversity officers, chief academic officers, disability and access services directors, human resources directors, Title IX coordinators, chief financial officers, and other key leadership. It is fully committed to pay equity and the fair and equitable support of the professors who are at the heart of every institution of higher learning.

The Alliance has an interest in this case because it has an interest in the proper and consistent interpretation of requirements and the application of the law when setting salaries and other supplemental pay within the unique context of the university and college setting. In connection with that interest, The Alliance serves the higher education community by providing information and resources to help colleges and universities comply with applicable federal laws and regulations; providing education and support to its members as they navigate these legal requirements and pursue their mission to provide an excellent education for their students; and advocating for private, nonprofit higher education to expand affordability and access and build student pathways from college to jobs and careers.

As an important part of its support, The Alliance educates and informs its members regarding changes in legislation, training needs, and other compliance concerns and requirements. The Alliance is deeply interested in program

effectiveness, the laws and regulations as they apply to institutions of higher education, and in particular, that such laws are clearly and consistently interpreted so that its members can understand them, apply them properly, and adhere to them in their programs and practices. The Alliance is deeply concerned about the confusion that will result from the majority's rulings as well as the substantive impact of the rulings on its members and therefore supports the University of Oregon's petition for en banc review.

II. FED. R. APP. P. 29(a)(4)(E) STATEMENT

Counsel for the University of Oregon authored this brief in part. No party or party's counsel or person other than The Alliance or its members contributed money intended to fund preparing or submitting the brief.

III. INTRODUCTION

The Alliance recognizes the vital importance of equity (in pay and otherwise) in institutions of higher learning and is deeply committed to pay equity. The Alliance does not argue the Equal Pay Act does not apply to colleges and universities or that it does not apply to faculty. To the contrary, it is because of its *commitment* to equity that The Alliance files this brief in support of rehearing. To ensure that all professors are paid fairly—that is, to ensure pay equity—stitutions must be able to consider all aspects of a professor's work, contributions, and value added. Despite this, the majority abdicated its obligation to apply the law to

determine proper comparators and thereby opens the door to pay *inequity*. By allowing claims to go to a jury where professors share a high-level “common core” of duties, the decision improperly undermines the academic freedom institutions require to remain competitive and ensure professors are fairly paid. The decision effectively limits an institution’s ability to exercise business judgment in valuing each professor’s unique role and contributions in setting salaries and implementing other tools to recruit and retain professors. That academic freedom and business judgment are fundamental parts of recruiting and retaining all professors, including underrepresented professors.

The ability to exercise business judgment and budgetary discretion is also critical to maintaining affordability and access to higher learning, which are core values of The Alliance’s members. Thirty-two percent of undergraduate students at Alliance member institutions identify as a student of color and twenty-one percent of undergraduate students are the first in their family to attend college. Eighty-five percent of undergraduate students at Alliance member institutions receive institutional aid in the form of grants and scholarships. By incorrectly comparing professor jobs and unduly constraining institutions’ freedom to determine their unique business needs, the decision adversely (and wrongly) impacts access and affordability to underrepresented students in addition to impacting the ability to recruit and retain professors.

IV. ARGUMENT

The majority's rulings impinge on Alliance members' academic freedom, business judgment, and ability to compete for and retain talent. An academic institution must have the academic freedom and ability to exercise business judgment to identify and retain key faculty members and make individual compensation adjustments to retain talent in the face of competition from other institutions and private industry. This is particularly true where a departure would negatively affect other faculty members, students, and the university's educational mission. The rulings at issue here disrupt an academic institution's ability to exercise that academic freedom and business judgment by incorrectly treating professors as having the same "overall job" if they share high-level attributes like conducting research, teaching, advising students, and performing administrative functions. *Freyd v. University of Oregon*, 990 F.3d 1211, 2021 WL 958217, *7 (9th Cir. Mar. 15, 2021).

A. Having the Freedom to Set Academic Priorities and Pursue Innovation Through Talented Professors is at the Core of Academic Institutions' Unique Setting and Must be Protected.

The majority's decision confuses the manner in which jobs are compared under federal pay equity laws and may disrupt and displace the salary setting systems and retention devices in higher learning. By acknowledging that it is the "overall job, not its individual segments, that must form the basis of comparison"

when analyzing equal pay claims but then placing the responsibility of doing a “detailed analysis of job tasks” with a jury, the Court has impermissibly shifted gatekeeping functions to the jury. At the most basic level, this ruling impedes the ability of academic institutions to set academic priorities, make salary decisions based on those priorities within the complex framework of the institution, identify tools to meet the challenges of the competition, and retain talent.

Academic work can and does vary greatly among faculty members, even within the same discipline and the same department. That is the nature of the autonomy provided to faculty within the academic context. To be able to recruit and retain faculty members, an institution must be able to discern how best to compensate them. The majority’s decision threatens that necessary autonomy by now making these individualized and complicated decisions subject to jury review regardless of the plaintiff’s proffered evidence at summary judgment. Even if a jury had the skillset to conduct the necessary type of review, this holding effectively eliminates the court’s gatekeeping function in these types of claims, relegating it to a cursory examination of shallow similarities. But that gatekeeping function—properly applied—is critical not just to a consistent administration of laws and regulations, but also to protecting against unnecessary and expensive legal process.

Institutions routinely adjust salaries based on more than just the “common core” of tasks to which the majority incorrectly limited the court’s inquiry here. Institutions take into account workload and additional duties. Market coefficients are considered in certain fields. Institutions employ various tools to recruit and retain underrepresented professors, including top women and diverse professors in STEM and other fields in which they are underrepresented.

Indeed, courts recognize that the university setting is unique and “courts must take caution before displacing reasonable business judgments.” *Hardie v. NCAA*, 876 F.3d 312, 323 (9th Cir. 2017) (court properly declined to disturb employer judgment about the administrative burden of changing its screening of coaching applicants). Principles of academic freedom entitle an institution to determine its own priorities, including allocation of resources and salaries. The principles of academic freedom permitted Professor Freyd to determine for herself the scholarly and academic work she wished to pursue. The same principles of academic freedom permitted Professor Freyd’s colleagues in the Psychology Department to determine for themselves the different scholarly and academic work they wished to pursue. And those same principles of academic freedom entitle an academic institution to set priorities and policies around how it uses its resources to meet its educational mission. These “essential freedoms” are afforded great respect. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). As a result, courts

have further articulated “a reluctance to trench on the prerogatives of state and local educational institutions and [their] responsibility to safeguard their academic freedom” and have cautioned the exercise of “great respect for the faculty’s professional judgment” when the question is the substance of a genuinely academic decision. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

The academic freedom faculty members enjoy and the related necessity of preserving the institution’s academic freedom in setting salary-related and other policies go hand-in-hand. Perhaps in no other employment setting are individuals given such autonomy and wide latitude to chart their own individual paths of unique work and study. It is therefore essential that an academic institution have the commensurate ability to allocate resources as the institution deems necessary to balance the autonomy of the individuals along with the academic mission of the institution and the needs of each department, accounting for each individual’s different work and monetary contributions.

B. Retention of Talented Professors Is of Paramount Importance to the Ongoing Viability of Member Institutions.

Setting salaries of tenured professors is not only about academic freedom. It is also about the financial viability of the institution and competing for the talent that is at the heart of the institution, including preserving grant funding and protecting against competitive faculty recruitment efforts from other institutions, private practice, and industry.

1. Institutions Must Have Flexibility to Fairly Recruit, Assess, and Retain Professors Through Individualized Salary Setting Exercises.

Academic institutions vary significantly in funding and financial resources, and certain faculty members bring significant economic value to an institution not simply by virtue of their intellectual contributions but also by the grant funding they attract and obtain. Major grant funding does more than support a professor's own research; its benefits inure to the institution by helping to pay for salaries for a research team, infrastructure, equipment, graduate students, and even the work of other faculty who do not attract such external funding. Grant funding is essential to the institution because it provides resources for the institution's core academic and strategic missions.

Faculty with significant grants are at a greater risk of recruitment efforts from other institutions, and the result of such recruitment is significant financial loss to the institution. To further explain the high stakes involved: a faculty departure of this nature would result in not only a loss of that individual and their specialty, but also their broader funding, their Facilities and Administrative funds, their lab, and maybe even graduate students and other colleagues who work with them. And the loss of a single high-performing and effective faculty member has an even greater impact to an academic department at a small or poorly funded school.

Each institution must therefore be given the freedom to assess the value of retaining the individual in the context of the institution's needs and resources as a whole and to utilize the tools at its disposal to retain her. This may result in a salary increase to one professor without raising other salaries or some other mechanism to encourage retention, or the institution may decline to respond to the recruiting event and lose that faculty member.

Salary setting and retention events are not straightforward decisions about a single individual's compensation. They represent decisions at the intersection of university mission, policy and programmatic decisions, department needs, research priorities, budgetary constraints, growth opportunities, research status, existing and planned future investment, the interconnected nature of an individual's research and teaching work with others, and more. Salary setting and retention or supplemental payments are also important tools in attracting and retaining underrepresented professors. For example, institutions must be able to implement strategies to attract more women professors to their business, science and technology departments. This is a complicated evaluation that requires insight into the nature of academic programs and the specific attributes of each professor and her work.

Yet the majority's ruling ignores the very nature of professors' work, wrongly characterizing the *core* aspects of professorship as "granularity." *Freyd,*

2021 WL 958217 at *8. The court's rulings place any detailed assessment of job comparisons and salary decisions, whether under an equal pay or disparate impact theory, in the hands of a jury. Absent en banc review, the decision of the majority would be devastating to colleges and universities in the Ninth Circuit which are not generally placed to compete with better-funded institutions absent the flexibility to make salary adjustments. Academic institutions in the Ninth Circuit will be relegated to step increases based on only the most basic of job duties, unless they are willing to accept the risk of a jury trial. Their most aggressive competitors outside of the Ninth Circuit will not be so constrained.

2. Professor Freyd's Retention Strategy Is Fatally Flawed.

The decision contains another error of potentially far-reaching impact on Alliance members. To survive summary judgment on a disparate impact claim where, as here, the challenged practice is job-related or consistent with business necessity, a plaintiff must show the employer refused to adopt an available alternative that had a less disparate impact. *Id.* at *10. Here, to alleviate the perceived pay equity issue, Professor Freyd argued that where an individual faculty member is being recruited, is at imminent risk of departure absent a salary increase, and is offered one, other faculty members who have not been recruited and are not at imminent risk of departure should receive commensurate salary adjustments. The decision incorrectly gave credence to Professor Freyd's *post hoc*

suggestion, never offered before litigation. *Id.* at *13. Now, to avoid the possibility of having to justify every retention tool to a jury based on the plaintiff's bald assertions alone, the institution will potentially have to consider every possible alternative—even alternatives they may not know exist—for fear of being second-guessed by a jury based on a professor's unproven theories and after-the-fact arguments. This outcome is both legally incorrect and creates a significant burden and competitive disadvantage to smaller, non-profit institutions like members of The Alliance.

In addition to creating a rule that leaves Alliance members open to having their decisions challenged by any proffered after-the-fact alternative, there are at least two other significant shortcomings to Professor Freyd's argument. First, a faculty member who is at imminent risk of departure due to recruitment is not similarly placed to a faculty member who is not at imminent risk of departure due to recruitment. While their contributions, skills, abilities, seniority, and other factors may lend themselves to evaluation and generalized comparison, their circumstances are entirely different, and they are not comparators. Professor Freyd and the majority fail to make this distinction.

Second, a recruitment and retention event is taking place precisely *because* the target institution cannot raise all other salaries and is being priced out by a better-funded institution and must therefore make a decision about retaining or

losing a single key individual. Were the institution in a position where it could afford to raise the salaries of multiple members of a department, the members of a whole department, or the institution as a whole, it would be much less likely to be the target of a recruiting event to begin with.

Professor Freyd's argument and the majority's holding would mean that only the best-funded institutions could keep their most desirable faculty. Those institutions with deep pockets will be able to set all salaries above market rates and recruit away professors from smaller and lower-funded institutions, knowing that other institutions cannot compete. Lower-funded institutions will always lose to an institution that is better funded if they are prohibited from retaining an individual faculty member absent raising the salaries of others who are not at risk of leaving. In such an environment, the lower-funded institution will be prevented from retaining both women and men.

V. CONCLUSION

For the foregoing reasons and the reasons set forth in the University of Oregon's petition, The Alliance respectfully requests that the Court grant the petition for en banc review.

Dated this 8th day of April, 2021.

DAVIS WRIGHT TREMAINE LLP

By: s/ Jenna L. Mooney

Jenna L. Mooney, OSB #993249

jennamooney@dwt.com

Kevin H. Kono, OSB #023528

kevinkono@dwt.com

1300 S.W. Fifth Avenue, Suite 2400

Portland, OR 97201-5682

Telephone: (503) 241-2300

Of Attorneys for *Amicus Curiae*
The Oregon Alliance of Independent
Colleges and Universities

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2). The brief is 2,890 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated April 8, 2021.

s/ Jenna L. Mooney
Jenna L. Mooney, OSB #993249
Kevin H. Kono, OSB #023528
Of Attorneys for *Amicus Curiae*
The Oregon Alliance of Independent
Colleges and Universities

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 8, 2021, I 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Jenna L. Mooney

Jenna L. Mooney, OSB #993249

Kevin H. Kono, OSB #023528

Of Attorneys for *Amicus Curiae*

The Oregon Alliance of Independent

Colleges and Universities