

**[ORAL ARGUMENT NOT SCHEDULED]**

**No. 19-5130**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**NATIONAL WOMEN’S LAW CENTER, ET AL.,**

*Plaintiffs-Appellees,*

**v.**

**OFFICE OF MANAGEMENT AND BUDGET, ET AL.,**

*Defendants-Appellants.*

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**BRIEF OF STATISTICIANS, ECONOMISTS, MANAGEMENT  
RESEARCHERS, AND OTHER EMPLOYMENT ANALYSTS  
AS AMICI CURIAE  
IN SUPPORT OF APPELLEES AND SUPPORTING AFFIRMANCE**

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**On Appeal from the U.S. District Court for the District of Columbia  
Case No. 1:17-cv-02458-TSC, Hon. Tanya S. Chutkan**

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**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW,  
AND RELATED CASES**

A. Parties and Amici Curiae. All parties appearing in this Court are listed in the Brief for Appellants. All *amici curiae* participating in the district court are listed in the Brief for Appellants. All *amici* participating as *amici curiae* in support of Appellants in this Court are listed in the caption and Corporate Disclosure Statement of *Amici Curiae*, The Chamber of Commerce of the United States of America, *et al.* *Amici* participating as *amici curiae* in support of Appellees are listed in the caption of this brief and in Appendix A. There may be additional *amici* filing in support of Appellees.

Pursuant to Fed. R. App. P. 26.1 and 29, the undersigned counsel certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10 percent or more of its stock. This representation is made so that the judges of this Court may evaluate possible disqualification or recusal.

B. Rulings Under Review. An accurate reference to the rulings at issue appears in the Brief for Appellants.

C. Related Cases. An accurate statement regarding related cases appears in the Brief for Appellants.

Respectfully submitted,

Dated: October 25, 2019

/s/ Carolyn L. Wheeler  
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### **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are 41 statisticians, economists, management researchers, and other employment analysts who conduct research, teach, and consult about employment issues. Many have appeared as expert witnesses in employment discrimination cases in federal or state courts, some on behalf of employers and others on behalf of employees. Collectively, they have several hundred years of experience with the issues before the Court. They have an interest in the government's ability to collect accurate employment pay data from employers because those data are vital to their ability to provide accurate analyses on relevant pay issues to their students, clients, fellow researchers, public officials, and the general public. Their professional affiliations and selected examples of their scholarly research appear in Appendix 1.<sup>2</sup>

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<sup>1</sup> Counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Fed. R. App. P. 29(a)(4)(E). *Amici* are authorized to file this brief because all parties have consented to its filing. Fed. R. App. P. 29(a)(2).

<sup>2</sup> *Amici* sign this brief in their personal capacities and not on behalf of any organization with which they may be affiliated.

## SUMMARY OF ARGUMENT

*Amici* make four points:

- Pay discrimination based on gender and race/ethnicity remains a widespread social and economic problem in the American labor market today.
- EEO-1 data are central to EEOC's fulfillment of its mission of promoting compliance with the nation's employment discrimination laws. This has been the case for data collected for many decades through EEO-1 Component 1, and it promises to be equally the case for EEO-1 Component 2.
- EEO-1 Component 2 is well designed to support EEOC in fulfilling this mission.
- EEO-1 Component 2 imposes minimal reporting burdens on employers.

Accordingly, collection of pay data through EEO-1 Component 2 conforms to the relevant requirements of Title VII of the Civil Rights Act of 1964 and the Paperwork Reduction Act as *amici* understand them.

## ARGUMENT

### I. PAY DISCRIMINATION REMAINS WIDESPREAD

Inequality in earnings between women and men, and between racial/ethnic minorities and whites,<sup>3</sup> has been a widespread, persistent feature of the American

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<sup>3</sup> Demographic groups other than those discussed in this brief -- including persons with disabilities, older workers, and persons of certain sexual orientations or gender

labor market throughout its history. Gender and race/ethnic disparities in pay have long paralleled, reflected, and reinforced other aspects of employment disadvantage for those groups, including under-representation in (or total exclusion from) many occupations and conscious or unconscious policies and practices (including harassment) treating them unfavorably in the workplace.

Statutes enacted during the 1960s, including Title VII of the Civil Rights Act of 1964,<sup>4</sup> the Equal Pay Act,<sup>5</sup> Executive Order 11246,<sup>6</sup> and analogous state and local laws, provide important legal tools for changing this pattern. In combination with evolving social norms and employment practices, these statutes have significantly contributed to reducing gender disparities in earnings. For example, in 1979, among persons employed full time for the full year, women's earnings averaged 62.3% of the earnings of counterpart men (that is, a wage gap of 37.7%), while by 2018, that

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identities -- also experience earnings inequality. They are not discussed herein because EEO-1 reports do not collect data on them.

<sup>4</sup> 42 U.S.C. § 2000e *et seq.*

<sup>5</sup> 29 U.S.C. § 206 *et seq.*

<sup>6</sup> Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (prohibiting employment discrimination on the basis of race, color, religion, or national origin), *amended by* Exec. Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967) (including sex as a protected class).

ratio had risen to 81.1% (a wage gap of 18.9%).<sup>7</sup> For racial/ethnic minorities, the disparities have reduced to a more limited extent. For example, in 1980, Hispanic men on average earned 69% of the earnings of counterpart white non-Hispanic men, and by 1980, that figure had risen to 71%.<sup>8</sup> Moreover, the rate at which disparities have diminished has slowed since the beginning of the twenty-first century, and in some instances may have reversed.<sup>9</sup>

Earnings disparities such as those discussed above are widely publicized in slogans such as “women earn only \$.78 on the dollar” and designation of a day about one-third of the way through the year as “Equal Pay Day.”<sup>10</sup>

The extent to which such pay disparities are attributable to employer discrimination is more difficult to measure. However, there is clear consensus

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<sup>7</sup> Women’s Bureau of the U.S. Department of Labor, *Facts over Time, Gender Earnings Ratio by Weekly Earnings 1979-2018*, available at [https://www.dol.gov/wb/stats/NEWSTATS/facts/earn\\_earnings\\_ratio.htm#earn-gender-weekly](https://www.dol.gov/wb/stats/NEWSTATS/facts/earn_earnings_ratio.htm#earn-gender-weekly).

<sup>8</sup> Eileen Patten, “Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress,” *Pew Research Fact Tank*, July 1, 2016, available at [www.pewresearch.org/fact-tank](http://www.pewresearch.org/fact-tank).

<sup>9</sup> Francine D. Blau and Lawrence M. Kahn, “The Gender Wage Gap: Extent, Trends, and Explanations,” *Journal of Economic Literature* 55 (2017), pp. 789-865.

<sup>10</sup> National Committee on Pay Equity, *The Next Equal Pay Day is March 31, 2020*, available at <https://pay-equity.org/day.html>

among researchers that, although discrimination-based disparities are smaller than the total disparities illustrated in the previous paragraph, they are nevertheless substantial.<sup>11</sup> For example, one study commissioned by the U.S. Department of Labor as part of the possible development of an EEO-1-based wage survey summarized multiple research studies to estimate the pay gap between women and men likely to reflect employer discrimination at about 8.5% for gender and 10% for race/ethnic minorities.<sup>12</sup>

For the 77 million women, 37 million non-whites, and 29 million Hispanics in the U.S. civilian labor force today,<sup>13</sup> these pay gaps represent many billions of dollars in lost earnings every year.

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<sup>11</sup> The extensive economic and statistical research supporting this conclusion is summarized, for example, in textbooks such as R. G. Ehrenberg and R. S. Smith, *Modern Labor Economics* (Boston: Pearson Addison Wesley, 13th edition 2018), Chapter 12 (“Race, Gender and Ethnicity in the Labor Market”) and Chapter 15 (“Inequality in Earnings”). The extensive sociological, psychological, and managerial research supporting the same conclusion is summarized in textbooks such as R. Hayes-Thomas, *Managing Workplace Diversity and Inclusion* (New York: Routledge, 2017).

<sup>12</sup> *Collecting Earnings Data to Guide OFCCP Compensation Compliance Evaluations: A Proposed Design* (Report under Contract DOLJ109E310110, May 2013).

<sup>13</sup> U.S. Bureau of Labor Statistics, *The Employment Situation - August 2019* (New Release USDL-19-1573, Sept. 6, 2019), Tables A-1 – A-3.

Research further documents that gender and race/ethnic earnings disparities are found in essentially all major occupations in the U.S. labor market, whether workers from an adversely-affected group constitute the majority of workers in the occupation or are rarely employed there. For example, among truck drivers, where 94% of workers are male, women earn on average 67.4% as much as counterpart men, while among secretaries and administrative assistants, where 94% of workers are female, they still earn only 83.4% as much as counterpart men.<sup>14</sup>

Thus, as the nation approaches the third decade of the twenty-first century, pay disparities based on gender and race/ethnic discrimination remain a major fact of life in the American labor market. These continuing disparities suggest the importance of analytical and legal tools to address the problem, including EEO-1 Component 2.

## **II. EEO-1 DATA ARE CENTRAL TO EEOC'S FULFILLMENT OF ITS MISSION**

Title VII of the Civil Rights Act of 1964 requires employers to make, preserve, and report records relevant to determining whether unlawful employment practices have been committed.<sup>15</sup> Since 1966, EEOC has directed employers with

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<sup>14</sup> *The Gender Wage Gap by Occupation 2018*, Institute for Women's Policy Research Fact Sheet C480, April 2019, available at <https://iwpr.org/publications/gender-wage-gap-occupation-2018/>

<sup>15</sup> 42 U.S.C. § 2000e-8(c).

100 or more employees to file what is known as Equal Employment Opportunity (EEO-1) Reports.<sup>16</sup> In 2017 (the latest year for which data have been publicly released), the EEO-1's "Component 1" collected data on the gender and race/ethnic composition of the workforce in 272,000 private sector establishments nationwide, covering 54.4 million total employees.<sup>17</sup>

The clearest indicator of how EEOC would use pay data collected through EEO-1 Component 2 is how the agency uses the non-pay data it has been collecting for decades through EEO-1 Component 1. In fulfilling its mission of promoting compliance with federal statutes against gender and race/ethnic employment discrimination, EEOC currently uses EEO-1 Component 1 data in at least eleven ways, as described below.

1) Processing EEOC Complaints. In Fiscal year 2018, EEOC received 24,600 charges of race discrimination, 24,655 of gender discrimination, 7,106 of national origin discrimination, and 3,166 of color discrimination. EEOC staff must determine the agency's response to each charge -- for example, whether to refer the charge to mediation; how to classify the charge for purposes of determining the extent of

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<sup>16</sup> 29 C.F.R. § 1602.7.

<sup>17</sup> Unless otherwise noted, data cited in this section are from *EEOC Enforcement and Litigation Statistics* available at [www.eeoc.gov/eeoc/statistics/enforcement/](http://www.eeoc.gov/eeoc/statistics/enforcement/).

investigative resources to devote to the charge; whether to make a determination of cause to believe discrimination has occurred; what amount to demand in conciliation of a charge; whether to initiate litigation; or whether to authorize the charging party to pursue private litigation. In making these tens of thousands of determinations annually, EEOC investigators and attorneys commonly examine EEO-1 statistics on the demographic composition of the charging party's workplace, as well as compare that workplace against EEO-1 data for other workplaces in the same industry and local labor market. To facilitate these analyses, EEOC makes EEO-1 data and specialized software available on desktop computers throughout the agency's 53 district and field offices where the complaints are processed.

2) Supporting EEOC Litigation. In Fiscal Year 2018, EEOC initiated 217 lawsuits, including 111 under Title VII of the Civil Rights Act of 1964. During litigation, EEO-1 data on the demographic profile of the defendant's workforce and comparison to other employers are commonly presented by EEOC as statistical evidence to support its allegations.

3) Supporting EEOC Commissioner's Charges. EEOC is empowered to initiate litigation against employers under "Commissioner's Charges" without worker charges having been filed. Statistical analyses of employers' workforces, including those based on EEO-1 data, are frequently a principal basis for initiating these charges.



4) Publishing EEOC Research Reports. Periodically, EEOC prepares research reports on key issues in employment discrimination and makes them publicly available at [www.eeoc.gov](http://www.eeoc.gov). Currently-available reports examine, for example, the situation of women and/or race/ethnic minorities in industries such as high technology, high-end department stores, retail distribution centers, broadcast media, and investment banking.<sup>18</sup> EEO-1 data are extensively reported in these studies.

5) Making Summary Data Publicly Available. Each year, EEOC summarizes EEO-1 data to the greatest level of detail consistent with confidentiality, and publicly posts the resulting summaries on its website.<sup>19</sup> These data are then readily available to all interested parties, including Congress and other public officials, advocates for both workers and employers, the news media, and the general public. Because they are collected under consistent procedures from year to year and across a broad range of industries and occupations, these data provide one of the most reliable, widely-cited “report cards” on where the nation currently stands, and how it is changing, in terms of employment disparities among gender and race/ethnic groups.

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<sup>18</sup> Diversity in High Tech, Diversity in the Finance Industry, Diversity in the Media, Retail Distribution Centers, High End Department Stores, *available at* [www.eeoc.gov/eeoc/statistics/reports/](http://www.eeoc.gov/eeoc/statistics/reports/).

<sup>19</sup> Job Patterns for Minorities and Women in Private Industry (EEO-1) *available at* [www.eeoc.gov/eeoc/statistics/employment/](http://www.eeoc.gov/eeoc/statistics/employment/).

6) Assisting Employer Compliance. When proactively seeking to comply with federal equal opportunity or affirmative action requirements, employers commonly examine EEO-1 data on their own workforce and that of comparable other employers. For example, using the publicly-posted data described above, an automobile manufacturer in Detroit can readily determine the representation of women in senior executive positions throughout its industry nationwide, and a hospital in Atlanta can readily compare its employment of African American technicians to that in the hospital industry throughout Georgia.

7) Empowering the Office of Federal Compliance Programs (OFCCP). EEOC collects EEO-1 data on behalf of a “Joint Reporting Committee” that includes itself and the OFCCP. Under Executive Order 11246, the OFCCP is responsible for compliance with anti-discrimination statutes and affirmative requirements by private sector firms contracting with the federal government. OFCCP staff commonly use EEO-1 data in examining complaints received by the agency concerning contractor violations of these mandates. In addition, the agency conducts detailed compliance evaluations of a sample of contractors each year, and it has often used statistical models based on EEO-1 data to prioritize contractors where it is particularly likely violations will be found.<sup>20</sup>

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<sup>20</sup> See, e.g., *Methodology for Developing the Supply and Services Scheduling List FY 2019, Release-1* available at <https://www.dol.gov/ofccp/scheduling/>.

8) Empowering Fair Employment Practice Agencies (FEPAs). EEOC contracts with about 90 state and local counterpart agencies nationwide to process more than 48,000 employment complaints filed each year under state and local anti-discrimination laws as well as federal statutes.<sup>21</sup> To support this FEPA activity, EEOC makes available to each state the EEO-1 data for all employer establishments within their jurisdiction.

9) Supporting Resolution of Non-Government Enforcement Actions. Workers who believe themselves to have experienced gender or race/ethnic discrimination may seek redress through a variety of non-governmental enforcement mechanisms, including mediations or arbitrations, complaints through labor unions, or privately-initiated litigation in federal or state courts. In support of their respective positions in these processes, both plaintiffs and defendants often cite EEO-1 data on the workplace in question and comparisons to other, similar workplaces.

10) Standardizing Employers' Voluntary Disclosure: In recent years, a small number of major employers -- most prominently, Wal-Mart and Google -- have voluntarily informed their stakeholders and the general public about the

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<sup>21</sup> See e.g., *State and Local Agencies*, Washington Field Office <https://www.eeoc.gov/field/washington/feпа.cfm/>; 29 C.F.R. § 1601.74 (listing FEPA agencies).

representation of women and race/ethnic minorities in their workforce by publicly releasing their annual EEO-1 data.<sup>22</sup> By providing a standard format in which such information is released, the EEO-1 reporting system enhances the comparability of these data among companies and therefore their utility in examining the possibility of employment discrimination.

11) Providing Unique Data to Researchers. Under the Intergovernmental Personnel Act,<sup>23</sup> EEOC has appointed a number of academic researchers as unpaid federal employees, thereby providing them access to the EEO-1 data for scholarly research. EEO-1-based studies by these researchers have provided important new understandings of employment discrimination and related issues useful both to scholars and in guiding government efforts to combat discrimination.<sup>24</sup>

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<sup>22</sup> Stacy Jones and Grace Donnelly, “Why We Logged Every Fortune 500 Company’s Data, or Lack Thereof,” *Fortune*, available at <https://fortune.com/2017/06/16/why-we-logged-every-fortune-500-companys-diversity-data-or-lack-thereof/>

<sup>23</sup> 5 U.S.C. § 3371 *et seq.* As unpaid federal employees, these researchers are bound by the same strict requirements as regular EEOC staff to preserve the confidentiality of individual employers’ EEO-1 data. *See* 5 U.S.C. § 3372(e)(2); 42 U.S.C. 2000e-8(e) (confidentiality provisions of Title VII).

<sup>24</sup> *See, e.g.,* Donald Tomascovic-Devey, Professor of Sociology, University of Massachusetts, Amherst, Written Testimony at *Meeting of July 1, 2015, EEOC at 50: Progress and Continuing Challenges in Eradicating Employment Discrimination*, available at [www.eeoc.gov/eeoc/meetings/](http://www.eeoc.gov/eeoc/meetings/)

Once pay data are collected through EEO-1 Component 2, it is reasonable to assume that EEOC would use these data in the same ways it has long used data from Component 1. Thus, the agency would be able for the first time to promote compliance with pay discrimination laws using the same tools it has long deployed to promote compliance with other prohibitions on employment discrimination.

### **III. EEO-1 COMPONENT 2 IS DESIGNED TO PROVIDE USEFUL DATA**

Throughout the process of designing Component 2, inputs were obtained from multiple researchers with both scholarly and practical perspectives.<sup>25</sup> Consistent

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<sup>25</sup> Among these efforts:

- In April 2000, the OFCCP conducted a pilot project collecting wage data through the EEO-1 system from 7,000 federal contractors, and the results were evaluated by two independent research organizations. *The Equal Opportunity Survey: Analysis of a First Wave of Survey Responses* (Report under Contract B9EO2165, Office of Contract Compliance Programs, U.S. Department of Labor, September 2000).
- In 2013, the OFCCP commissioned independent researchers to develop a design for a wage survey to support its operational needs. *Collecting Earnings Data to Guide OFCCP Compensation Compliance Evaluations: A Proposed Design* (Report under Contract DOLJ109E310110, May 2013).
- In 2012, EEOC commissioned the National Academy of Sciences to advise it on the need for, and appropriate design of, a wage survey. Committee on National Statistics, National Research Council of the National Academy of Sciences, *Collecting Compensation Data from Employers* (Washington, DC: National Academies Press, 2012), available at [www.nap.edu](http://www.nap.edu).

with those inputs, the technical aspects of Component 2 -- such as the demographic categories in which employees are to be reported, the time period over which employees' compensation is to be computed, the elements of compensation to be included in these calculations, and the definition of hours that employees worked -- are consistent with standard professional practices and appropriate for the uses to which the data are likely to be put.

EEOC has many decades of experience receiving, preparing, and using data from EEO-1 Component 1, as well as providing technical assistance to employers preparing their reports. Annual summary data from EEO-1 reports have been reliably produced by the agency for every year since 1996.<sup>26</sup> Within EEOC's Office of Research, Information, and Planning (ORIP), the Program Research and Surveys Division maintains a staff of professional statistical analysts to assist EEOC attorneys and other staff in understanding and applying EEO-1 data and to conduct descriptive and inferential statistical analyses on their behalf.<sup>27</sup> It is reasonable to

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- In 2012, EEOC conducted a formal design consultation that included statisticians and similar experts. *EEOC Survey System Modernization Work Group Meeting*, March 2012 available at [www.eeoc.gov/employers/eo1survey/survey-modernization.pdf](http://www.eeoc.gov/employers/eo1survey/survey-modernization.pdf).

<sup>26</sup> See footnote 19 above.

<sup>27</sup> *Services Provided by the Office of Research, Information, and Planning Program Research and Surveys Division* available at <https://www.eeoc.gov/litigation/manual/>.

expect this pool of internal agency experts to provide similar support with respect to EEO-1 Component 2.

To manage the large volume of data that EEO-1 Component 2 will add to the extensive data already being collected through EEO-1 Component 1, EEOC has contracted with one of the nation's leading non-profit, non-partisan research institutions, NORC (formerly National Opinion Research Center) at the University of Chicago. Founded in 1941, NORC has many decades of highly-respected experience developing and maintaining large social and economic surveys, including the U.S. Department of Labor's National Longitudinal Survey of Youth (since 1966) and the nationwide General Social Survey (since 1972).<sup>28</sup> Under this relationship, it is reasonable to expect that data from EEO-1 Component 2 will be promptly and accurately processed into data bases readily usable by EEOC staff and others.

#### **IV. EEO-1 COMPONENT 2 IMPOSES MINIMAL REPORTING BURDENS**

For each employee to be included in an employer's EEO-1 Component 2, employers have to determine the employee's race/ethnicity and gender as well as the employee's occupational category.<sup>29</sup> This requirement imposes close to zero

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<sup>28</sup> See [www.norc.org](http://www.norc.org) .

<sup>29</sup> The requirements discussed in this section are based on Ogletree Deakins, "EEOC Provides Guidance on EEO-1 Component 2 Filing," July 5, 2019 at <https://ogletree.com/insights/2019-07-05/> and Society for Human Resource

additional reporting burdens on employers because EEO-1 Component 2 uses the same race/gender and occupational categories as EEO-1 Component 1, which employers filing EEO-1 reports will have already determined.

For each employee to be included in Component 2, employers will also have to determine the employee's total compensation. This requirement imposes close to zero additional reporting burdens on employers because EEO-1 Component 2 uses the same definition of compensation as "Box 1– Wages, Tips, Other Compensation" on IRS W-2 forms, which employers must already compute for income tax reporting purposes.

Finally, for each employee to be included in Component 2, employers have to determine the employee's total hours worked. This requirement imposes close to zero additional reporting burdens on employers because employers already routinely record hours worked for workers who are paid hourly, and for salaried employees, employers are allowed to report proxy numbers, such as 40 hours per week for full-time and 20 hours per week for part-time employees.

Thus, the primary source of any additional reporting burden imposed by Component 2 is the need to place each employee into a "Compensation Band" within her/his race/ethnicity/gender and occupational category, compute the number of

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Management, "Employers Should Review EEO-1 Guidance Before Pay-Data Reporting Deadline," July 11, 2019 at [www.shrm.org/ResourcesandTools/](http://www.shrm.org/ResourcesandTools/).



employees falling into each of these groupings, and enter those numbers into the appropriate boxes in the Component 2 reporting form. Only employers with at least 100 employees are required to complete Component 2, and almost all such employers already have computerized payroll systems to pay their employees. Most also have computerized human resource information systems (HRIS) for other reporting and management purposes. In those circumstances, all that is required to complete the new calculations is modest re-programming of existing computerized systems. Periodic re-programming is a routine occurrence for these systems -- for example, whenever tax rates are changed -- and typically engenders little cost or disruption.

## CONCLUSION

As the Government has acknowledged, Title VII authorizes EEOC to direct employers to make and keep relevant records that are reasonable, necessary, or appropriate for enforcement of the law, and the Paperwork Reduction Act only requires agencies to minimize the burden of this information collection and to ensure its utility and necessity.<sup>30</sup>

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<sup>30</sup> *Brief for Appellants*, document #1802127 filed August 19, 2019, at page 13 (citing 42 U.S.C. § 2000e *et seq.*) and page 12 (citing 44 U.S.C. § 3506 (c)(2)(A)).

Considering these requirements through the lenses of their professional experience and the relevant scholarly research, *amici curiae* believe that collection by EEOC of pay data through EEO-1 Component 2 clearly meets these statutory requirements.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 3347 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also 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 this brief has been prepared in a proportionally spaced typeface, Times New Roman 14-point, using Microsoft Word 2013.

Dated: October 25, 2019

By: /s/ Carolyn L. Wheeler  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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*Three Publications Related to Subject*

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