No. _____

In The

Supreme Court of the United States

JENNIFER SMITH,
Petitioner,

v.

FLORIDA AGRICULTURAL & MECHANICAL UNIVERSITY BOARD OF TRUSTEES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether, under federal equal pay laws, the employer unlawfully discriminated against a female employee by failing to apply its salary equity adjustment formula to her, as three circuits have held, because the outcome would result in a salary commensurate to the highest paid male (classified as an "outlier") in the employee's job category.

2. When a female employee receives a revised salary based on unknown "other factors" after an unsuccessful challenge to her prior salary as discriminatory under federal equal pay laws and the employer does not apply its salary adjustment formula to her as it did for her male comparators, whether collateral estoppel bars her from challenging her revised salary because the issue was not actually litigated as held in *New Hampshire v. Maine*, 532 U.S. 742 (2001).

3. When an employee's salary is not increased to the minimal amount required under the employer's salary equity formula, whether the loss of the higher salary is an "adverse employment action" under federal equal pay laws, and as defined under *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006).

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Jennifer Smith, Plaintiff and Petitioner;

2. Florida Agricultural and Mechanical University Board of Trustees, Defendant and Respondent.

LIST OF PROCEEDINGS

- *Smith v. Florida Agricultural and Mechanical University Board of Trustees*, Northern District of Florida, Docket #: 4:14-cv-00540-RH-CAS. Judgment entered July 27, 2015.

- *Smith v. Florida Agricultural and Mechanical University Board of Trustees*, United States Court of Appeals for the Eleventh Circuit, Docket # 15-14613, # 16-15582. Judgment entered May 8, 2017.

- *Smith v. Florida Agricultural and Mechanical University Board of Trustees*, Northern District of Florida, Docket #: 4:18-cv-00409-RH-CAS. Judgment entered June 4, 2019.

- *Smith v. Florida Agricultural and Mechanical University Board of Trustees*, United States Court of Appeals for the Eleventh Circuit, Docket # 19-12560. Judgment entered October 8, 2020.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its unpublished opinion affirming the decision of the United States District Court of the Northern District of Florida on October 8, 2020, App. 1. On March 19, this court extended the time to file this petition until March 7, 2021. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

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STATUTORY PROVISIONS INVOLVED

This case involves the provisions of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 as provided below:

Equal Pay Act, 29 U.S.C. § 206(d):

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which

measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The EPA incorporates the anti-retaliation provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3):

To discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Title VII, 42 U.S.C. § 2000e-2:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII, 42 U.S.C. § 2000e-3(a):

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate

against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The Eleventh Circuit Court of Appeals erroneously affirmed dismissal of Petitioner Jennifer Smith's second equal pay case and made significant law surrounding salary equity adjustments. This Court must grant the writ of certiorari to resolve a split between the Circuit Courts of Appeals, correct the Eleventh Circuit's error that is irreconcilable with this Court's precedent, and review significant interrelated, first impression issues with salary equity adjustments, including whether the Eleventh Circuit's decision conflicts with principles under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006) and *New Hampshire v. Maine*, 532 U.S. 742 (2001).

A. Factual Background

Petitioner Professor Jennifer Smith, a woman, joined the Florida A&M University College of Law in 2004 as an associate professor. App. 2, 64. In July 2014, Professor Smith filed a complaint against the University for gender discrimination and retaliation ("first action" or "*Smith I*"). App. 2, 66. She asserted that (1) as a female tenured associate professor, male tenured associate professors were paid more than she and other female tenured associate professors; and (2) she was retaliated against for complaining about gender-based unequal pay by being denied promotion to full professor. App. 66. These two issues were decided in favor of the University on July 27, 2015. App. 2-3, 22, 66. On August 25, 2015 and pursuant to Fed. R. Civ. P. 59, Professor Smith filed a motion for new trial. App. 66. The District Court denied the motion. App. 66.

A New Administration & Salary Equity Adjustment

In the middle of *Smith I* and before going to trial in 2015, the University obtained a new provost, Marcella David ("Provost David"), who requested a salary equity study before, during, or after *Smith I* as a result of Professor Smith's complaint surrounding her concerns of salary inequities. App. 66, 67. While *Smith I* was proceeding and unbeknownst to Professor Smith, the University completed or was completing the salary equity study, which suggested that "gender, years tenured, and rank played significant roles in determining salaries." App. 3, 34, 45, 61, 66, 67.

As a result of the salary equity study finalized in the fall of 2015, Provost David told Deans Green and Jones to review faculty salaries to see if they can "do something for salary equity." App. 67. Provost David found the law faculty salaries to be illogical, and she directed Deans Jones and Green to get "some sort of logic to your salary structure" and deal with the perceived salary inequity issue at the law school. App. 67.

To correct the illogical salaries, the University created a committee with Deans Jones and Green as principals of the effort, along with Dr. Gita Pitter ("Dr. Pitter") and her staff (Nathan Francis). App. 67. Even though all the faculty salaries were not changed, all faculty salaries were reviewed for a salary adjustment. App. 4, 67. The salary adjustment was applied "to about one third of the law school faculty." App. 3, 4.

Dean Jones acknowledged that gender played a significant role in faculty salaries before they were reset, and he knew gender was a perceived problem. App. 68. Dean Jones testified that he did not address gender in the salary equity adjustment because he believed he would have to look at qualitative factors, such as faculty credentials; however, he "hoped that [the salary equity adjustment] would address those who thought that gender discrimination existed at the law school," but he was not seeking to correct a gender disparity. App. 4, 6, 68, 97. Dean Green, who worked alongside Dean Jones in the salary equity adjustment, testified that Dean Jones

considered many factors, including resumes, curriculum vitae and hiring packets. App. 68, 97. In addition, when Dean Jones reset Professor Smith's salary to $138,000, he was aware of her "top" credentials, but claimed that was not a factor in his recommending her for an increase to $138,000. App. 68, 97. However, months before the salary study was completed and immediately before *Smith I* was litigated, Dean Jones compiled a list of faculty publications, showing that Professor Smith had over three times the number of publications than Associate Professor Jeffrey Brown ("Professor Brown"), a male comparator in *Smith I*. App. 68.

Notwithstanding the above, Deans Jones and Green claimed that to reset the salaries, they followed the instructions given to them by Dr. Pitter in the Office of Academic Affairs/Provost's Office. App. 68, 69. First, they normalized all faculty salaries by bringing the twelve-month and nine-month salaries to comparable numbers on a nine-month scale; second, they put the salaries in order by salary, based on rank, to see where associate professors' salaries exceeded full professors; and third, they looked within each rank to determine where adjustments needed to be made based on rank, time in rank and years tenured. App. 4, 69. They implemented a base of $120,000 for tenured associate professors and $140,000 for tenured full professors, which eliminated salary inversion and compression, which was their initial stated goal. App. 4, 24, 69, 121. Implementing the base salaries, alone, cured the salary inversion and compression. App. 69. No faculty salaries were decreased. App. 25, 27, 69. The other goal was to make associate professors with tenure paid equally, which is why Professor Smith was recommended for a salary of $138,000 to nearly match Professor Brown, who is her equal. App. 115, 119.

Based on this new salary structure, Professor Smith, then a tenured associate professor, was slated to receive an increase to $138,000, whereas every other tenured associate professor was recommended for an increase to $120,000. App. 6, 69. According to Deans Jones and Green, Professor Smith was closer in tenure time to Professor Brown, a tenured associate professor

who was earning $138,500, and senior to everyone else, and it seemed right, said Dean Jones, to increase Professor Smith's salary to $138,000 "given the goal of trying to make associate professors with tenure paid equally." App. 6, 24, 69, 115. Each of the other tenured associate professors received the recommended increase to $120,000. App. 6, 70.

Soon after Professor Smith filed a motion for new trial of *Smith I* on August 24, 2015, the University's proposed salary of $138,000 for her was later reduced to $125,000, even though the reduction was inconsistent with the University's formula as she was considered equal to Professor Brown based on the proposal in rank, tenure, and length of tenure. App. 6, 70, 71, 119. The "mysterious" additional $5,000 over the $120,000 was based on unknown "other factors" no one could explain. App. 6, 70, 116. Dean Jones testified that he did not "know why she got an extra five." App. 70, 116. Deans Green and Jones claimed to have had numerous other salary drafts, but only forwarded a few as concrete recommendations because other drafts never became documents. App. 18, 70.

As the reason for the decrease for Professor Smith from $138,000 to $125,000, the University explained: (1) that it did not have the money but conceded it could find the money and (2) that it did not intend to match the "outliers" – the highest paid faculty who are all men and "classified" as "outliers." App. 6, 7, 70, 71. According to Dean Jones, Provost David believed that the outliers were probably paid more than they needed to have been offered in the first place. App. 71. Under the formula, the only tenured associate professor whose salary should have been comparable to an outlier was Professor Smith. App. 71.[1] At the time that Professor Smith's salary was recommended to be increased to $138,000, Professor Brown was not classified as an "outlier" – this became an

[1] The University also did not increase any of the female tenured full professors to the level of the "outlier" tenured full professors who were all men. App. 7, 24. Based on length of time, Rhonda Reaves and Patricia Broussard may have been raised to levels near the male "outliers," but they received something over $140,000 but not to levels of the "outliers." App. 7, 24.

afterthought of a defense in litigation. App. 71. Dean Pernell testified that Professor Brown was hired based on being a potential "emerging scholar." App. 71. However, Dean Pernell testified that Professor Brown "has not emerged as a scholar... he had the potential of doing that… but he has not achieved that level of scholarship… he hasn't published… consistent with the potential suggested [in the hire letter]." App. 71. Dean Pernell also consistently evaluated Professor Brown lower than Professor Smith, who was consistently evaluated as a top performer. App. 71.[2]

When Dean Jones was deposed, he was asked about Professor Smith's salary adjustment reduction from $138,000 to $125,000.

> *Q: Now, what happened between August 28 [2015] and September 22 [2015] to make that [reduction from $138,000 to $125,000] happen?*
>
> *Jones: I don't recall specifically…*

App. 71, 72.

On August 26, 2015, Professor Smith's recommended salary was $138,000 in a chart described with an attached email as "revised" and "final." App. 72. And according to Dean Jones' August 21, 2015 memorandum, there was money in the budget to fund the recommended salaries, which included Professor Smith's recommended salary of $138,000. App. 72. Provost David ratified and adopted the salary proposals as presented except for Professor Smith's, and none of the tenured female full professors' salaries were increased to those of the highest paid men "classified" as "outliers." App. 7, 72.

Termination and Revelation

During *Smith I*, Provost David called Dean Jones about being the interim dean. App. 72. Provost David appointed Dean Jones as the interim dean, and he was

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[2] It is unfortunate that the federal equal pay laws require employees to highlight the negatives of their colleagues to seek pay parity and achieve gender equality.

under the belief that Provost David intended to appoint him the permanent dean of the law school. App. 72. However, after *Smith I*, Provost David did not appoint Dean Jones as the permanent dean. App. 72. As a result, Dean Jones was disappointed and indignant. App. 72, 73. Dean Jones expressed his indignation in an email to the faculty, about how Felecia Epps ("Dean Epps"), who was selected as the permanent dean, was not qualified. App. 73. In response, Provost David called Dean Jones "screaming and hollering and basically threaten[ed]" him and then fired him as associate dean. App. 73. Dean Jones testified: "the revenge that Professor David took out on me was to have me fired from my position as Associate Dean"… "Provost David caused me to be fired because of this memo that I wrote." App. 73. Dean Jones further testified that he thought it was possible "the University could retaliate for a woman [such as Professor Smith] being aggressive and speaking up"…because "it happened to me"… "I do not put it past the University to watch as somebody is being retaliated against because they've done it to me." App. 73.

When he was not selected as the permanent dean, Dean Jones told Professor Smith after the *Smith I* trial that before the trial, the University was aware that women were significantly underpaid as compared to men at the College of Law by up to $30,000, and 2) the Plaintiff was unfairly denied promotion to full professor years earlier. App. 3, 73. Dean Jones told Professor Smith about the salary equity study, confirming the gender pay disparities, and in December 2015, he wrote a memorandum to Provost David pointing out the obvious and "inescapable" "Catch-22" in which the University was now trapped for its inconsistencies in the University's assessment of Professor Smith's promotion applications to full professor by failing to follow its own RPT rules. App. 73, 74. As a result of Dean Jones' confession, Professor Smith filed a public records request in early 2016 to obtain the salary study. App. 74.

Professor Smith was finally promoted to full professor in August of 2016 because Dean Jones realized that the University was in a catch-22 regarding the logical inconsistencies of the promotion denials, and he

felt like it was his responsibility to finally be "intellectually honest" about her scholarship that had always been "excellent" as the term was applied to previous successful promotion applicants since 2009, when she first applied. Doc. 65-2 – Pgs 25-27, 44; Doc. 62-5 – Pg 188. Since August 2016, Professor Smith is a tenured full professor at the law school. App. 76.

University Equal Opportunity Program Complaint

On December 15, 2016, Professor Smith filed a complaint with FAMU's Equal Opportunity Program (EOP) to give FAMU the opportunity to correct the salaries, based on gender disparities, as suggested in the salary equity study. App. 7, 33, 74. In its 2017 EOP Investigative Report, FAMU concluded – that "gender was not the sole or primary factor for any disparities in the August 2015 study." App. 8, 74, 75. FAMU's witness, Carrie Gavin ("Ms. Gavin"), who authored the 2017 EOP Investigative Report, but was not involved in applying the criteria for the salary resets, testified as well that "gender was not the sole or primary or the leading factor for any disparities in the August 2015 study." App. 75.

The Second Action (*Smith II)*

On July 30, 2018, Professor Smith, as a tenured full professor, filed a second complaint. App. 8, 76. In Professor Smith's 2018 complaint ("second action" or "*Smith II*"), she asserted that (1) after *Smith I*, her salary was fully reset since *Smith I*, she was also promoted to full professor and was challenging the pay of male full professors; she also asserted that (2) the University retaliated against her because when the University increased faculty salaries, the University reduced the amount that would have been consistent with the new salary formula because Professor Smith was in litigation with the University. App. 8, 9, 76. The University defended by asserting a novel "outlier" theory, which was not a consideration when resetting salaries, that the salary adjustment formula was not applied to her because it did not intend to match the salaries of the highest paid male "outliers" and admittedly faux budget constraints. App. 7, 9. Ultimately, the District Court granted the University's motion for summary judgment. App. 9, 77.

B. The District Court's Erroneous Dismissal of Professor Smith's Case

Professor Smith brought a second equal pay action against the respondents on July 30, 2018 in state court. App. 3, 8, 21, 62. On August 29, 2018, the respondents filed a notice of removal to the United States District Court for the Northern District of Florida. App. 8, 62. On September 7, 2018, the University filed a request for judicial notice of the prior proceedings between the parties. The District Court granted the request. App. 62. The respondents filed a motion to dismiss on September 11, 2018, based on *res judicata* and collateral estoppel. The District Court construed the motion as a motion to dismiss or for summary judgment and denied the motion on November 15, 2018, finding that Professor Smith's complaint was not precluded. App. 62.

On April 15, 2019, both parties filed motions for summary judgment. App. 9, 63. On May 30, 2019, the District Court heard the parties on their motions and ruled in favor of the University. App. 9, 63. On June 2, 2019, the District Court issued its order without reference to one salary equity adjustment case, denying Professor Smith's motion and granting the University's motion, finding that (1) Professor Smith was collaterally estopped from bringing her gender discrimination claim because the District Court said that Professor Smith's salary was simply "carried forward" from *Smith I*; and (2) although the University's failure to follow its own salary adjustment formula was an "adverse employment action" because it involved "a decision not to provide a raise or to provide a raise of a lower amount than would otherwise have been provided," there was no retaliation. App. 20, 63. The clerk of court entered a judgment on June 2, 2019. App. 20, 63.

Professor Smith filed a motion for reconsideration on June 14, 2019. App. 63. The District Court denied the motion on June 19, 2019. App. 29, 63. Professor Smith timely filed her notice of appeal on July 1, 2019. App. 10, 63.

C. The Eleventh Circuit's Erroneous Decision to Affirm the District Court

On appeal, Professor Smith argued that the District Court erroneously dismissed her Equal Pay and Title VII claims based on collateral estoppel and retaliation. App. 2, 48. Specifically, she argued that employers cannot circumvent paying women equally to men by classifying their "highest paid" men as "outliers"; that the salary adjustment formula was not applied to her salary because it was reset using unknown factors (the Eleventh Circuit called them "other factors") and thus collateral estoppel does not apply; that consistent with *Dawes,* in which there was no focus on eradicating gender discrimination, the salary adjustment had to apply equally to both sexes; and that reducing her salary proposal from $138,000 to $125,000 was inconsistent with University's salary structure and was retaliatory. App. 9, 48-112.

The Eleventh Circuit found that:

1) "In August 2015, about two weeks after judgment was entered on the verdict [in the first trial], and unbeknownst to Smith at the time, FAMU finalized an internal pay-inequity study which concluded that, on average, female law professors were paid less than male law professors at FAMU Law." App. 3.
2) "Not long after that, in early 2016, FAMU's law school applied a one-time 'salary adjustment' to about one-third of the law school faculty." App. 3.
3) "[C]orrecting 'gender disparity' simply 'wasn't the project.'" App. 6.
4) "FAMU ultimately decided against raising all tenured associate professor salaries closer to Brown and instead chose to consider his salary as an 'outlier.'" App. 6.
5) "Smith's salary was recommended to be increased to $138,000. This figure was very close to the actual salary of the highest paid male associate professor, Jeffrey Brown, who

at the time was paid $138,330 and was not subject to the one-time salary adjustment." App. 6.

6) "According to one of the deans in charge of making the salary adjustment, changes were based exclusively on 'rank, tenure status,' and 'length of time.'" App. 4.
7) "Smith received $5,000 more than the other tenured associate professors in part because she had been tenured for a greater length of time, and because of 'other factors.'" App. 6.
8) "And although '[t]here are high end "outliers" in each category' of rank and tenure status, the one-time salary adjustment 'does not attempt to make the level of compensation paid to the outliers the norm.'" App. 7.
9) Citing this Court's *Burlington"* "adverse action" standard, the Eleventh Circuit found that "Smith cannot show that she suffered an adverse action as a result of that protected activity. The record is devoid of any evidence that she was entitled to receive the same salary as Brown after the jury in *Smith I* concluded the salary discrepancy between them was not motivated by gender discrimination." App. 16-17.

Some of the Eleventh Circuit's factual bases or omissions are pure error as well as its interpretation of the law. The only "outliers" are men. App. 70, 119, 123. The only faculty whose salaries merited salaries comparable to the outliers and whose salaries were increased more than the standard $120,000 for associate professors and $140,000 for full professors were women. App. 24. Professor Smith's issue was not that her salary should be comparable to Professor Brown's – she argued she was entitled to equal application of the salary adjustment formula, which coincidentally would nearly-match her salary to Professor Brown's. App. 79, 84, 85, 88. The Eleventh Circuit claims, "the adjustment applied evenhandedly to both men *and* women," while simultaneously acknowledging that Professor Smith's salary adjustment included "other factors" and that the University never intended to increase her or other

women's salaries to the outliers, and thus, validating and creating an "outlier" defense to limit the female faculty salaries. App. 6, 13.

The Eleventh Circuit conflicts with several other Circuits, which stated a general rule that salary adjustments must be applied as created by the employer – there is no "outlier" exception. Furthermore, federal equal pay laws prohibit gender-based classifications of employees to deprive employees of employment opportunities or negatively impact status. The Eleventh Circuit stated that the University's pay-inequity study showed that women are paid less than men at the law school. App. 3. Therefore, creating an "outlier" classification of "highest paid" employees will favor men. App. 3, 33. This is prohibited under federal equal pay laws.

Subsequently changing a former litigant's salary in a pay equity lawsuit using "other factors" makes it impossible to determine whether the issue in the second lawsuit is the identical issue that was already litigated in the first lawsuit; collateral estoppel cannot apply, according to *New Hampshire v. Maine*, 532 U.S. 742 (2001). Furthermore, there is no "outlier" exception in salary equity adjustments as they have been applied by other Circuits.

Lastly, the District Court found that the failure of the University to apply its salary adjustment formula to Professor Smith was "an adverse employment action," but the Eleventh Circuit held the opposite – that she was not "entitled to receive the same salary as Brown after the jury in *Smith I"* found no gender discrimination. But the Eleventh Circuit changed the issue and answered a different question. The issue is really whether failure of the University to apply its own salary adjustment to Professor Smith was denial of salary to which she was entitled under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, and as defined under *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006). The answer is yes.

REASONS FOR GRANTING PETITION

The Court should grant this petition for four reasons. First, the decision below generates important issues of first impression that flow from salary equity adjustments involving discrimination and retaliation under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 combined with a dangerous and gender-based unfair, novel "outlier" theory and an issue blocked by collateral estoppel inconsistent with *New Hampshire v. Maine*, 532 U.S. 742 (2001). Second, the decision below causes a split with the Eighth, Seventh, and Fourth Circuits, and its own Eleventh Circuit, that have held that salary equity adjustment formulas must be applied evenly to both sexes as created by the employer that devised the formula unless trying to remedy past gender discrimination. Third, the decision below conflicts with – and substantially distorts – this Court's decision regarding retaliation in *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006) and retaliation as defined under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. Fourth, the decision below may have unintended wide-ranging consequences in a time when many employers are employing salary equity adjustments in a developing body of law.

I. The Decision Below Generates Issues of First Impression, Creates a Circuit Split and is Inconsistent with Federal Law.

The Eleventh Circuit's approach is fundamentally inconsistent with decisions and reasoning of the Eighth, Seventh, and Fourth Circuits, and its own circuit. In *Dawes*, the Eighth Circuit held:

> We, of course, do not hold or imply that a University must establish salary schedules or even minimum salaries. We simply hold that when a University establishes and effectuates a formula for determining a minimum salary schedule for one sex and bases the formula on specific criteria such as

> education, specialization, experience and merit, it is a violation of the Equal Pay Act to refuse to pay employees of the opposite sex the minimum required under the formula.

522 F.2d at 384. Thus, in *Dawes,* the Eighth Circuit created a general rule that where individual criteria prompt a salary adjustment to certain plaintiffs, the failure to apply the formula evenly across the genders violates the Equal Pay Act. The Seventh Circuit in *Ende v. Bd. of Regents of Regency Universities*, 757 F.2d 176 (7th Cir. 1985) recognized that general rule and carved out an exception where the impetus of the adjustment is to remedy past discrimination after it was confronted by the office of Civil Rights "that there was reasonable cause to believe [the university] had discriminated against female faculty members with respect to promotion and salary," an employer need not apply the formula evenly across the genders. Similar to our case, the Fourth Circuit in *Smith v. Virginia Commonwealth Univ.,* 84 F.3d 672 (4th Cir. 1996) involved a salary equity study revealing gender imbalances prompting a voluntary salary equity adjustment and evaluation of salary increases against the requirements in *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979), but revealed that the university's formula as created was applied.

The case at bar is similar to *Dawes*, contrary to the Eleventh Circuit's attempt to distinguish it:

> *Dawes* is inapposite because there the university explicitly set out to overhaul its salary system by making adjustments based on sex. 522 F.2d at 381. Here, the evidence clearly shows that sex played no part in FAMU's 2016 one-time salary adjustment, or in any other change to faulty salaries since the verdict in *Smith I*.

App. 13. That is not accurate. *Dawes* and *Smith* engaged in a voluntary salary review to avoid loss of federal funds based on future claims of sex discrimination, but as *Ende* distinguished, in *Dawes*, like the case at bar, "the

previous existence of sex discrimination was not persuasively established." *Ende* at 181. Therefore, both *Dawes* and the case at bar involved voluntary salary equity adjustments not based on findings of sex discrimination.

Dean Jones testified that the University's goal was to eradicate salary compression and salary inversion, and "to make associate professors with tenure paid equally," but he "hoped that [the salary equity adjustment] would address those who thought that gender discrimination existed at the law school." App. 4, 6, 68-70. In *Dawes*, the issue was "whether the University unlawfully discriminated against the male professional employees of the College of Agriculture and Home Economics when it sought to equalize salaries paid to the male and female employees of those colleges." *Dawes* at 381. Here, the Eleventh Circuit admitted that "the internal pay-inequity study … concluded that, on average, female law professors were paid less than male law professors at FAMU Law." App. 3, 33-47. Thus, like *Dawes*, the University was prudent in engaging in a voluntary salary equity adjustment to eliminate potential claims of sex discrimination and avoid losing federal funds.[3] Therefore, the general rule in *Dawes* that salary adjustments must be applied across the board applies here. Had that been done in Professor Smith's case, then her salary would have increased to $138,000 based on the University's formula of rank, tenure status and length of tenure. However, the University did not apply the formula to Professor Smith, and validated an afterthought "outlier" defense that the University never intended to increase Professor Smith's salary (nor the salaries of the female full professors) to the levels of the "outliers," who were all male. Under *Dawes* and affirmed by *Ende* and *Smith*,

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[3] Universities are revising their salary structures via one-time salary equity adjustments to ensure compliance with federal and state laws because it is "illegal for contractors and subcontractors doing business with the federal government to discriminate in employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran." News Release, U.S. Department of Labor, U.S. Department of Labor and Nova Southeastern University Reach Agreement to Resolve Compensation Disparities (July 10, 2020), available at https://www.dol.gov/newsroom/releases/ofccp/ofccp20200710.

Professor Smith was entitled to the minimum salary under the formula. In *Dawes* and here, the employers were trying to equalize salaries.

The Eleventh Circuit's own prior decision, involving equalizing male and female faculty salaries, also is in conflict. In *Schwartz v. Fla. Bd. of Regents*, 807 F.2d 901 (11th Cir. 1987), a male faculty settled his first equal pay case challenging his base pay and subsequently brought another to challenge an equity adjustment; the Eleventh Circuit held that he was "entitled to appropriate systems of salary adjustment that are accorded to other employees." *Id.* at 906. The court further held that, "[f]or a fair comparison the same general formula should have been applied to Schwartz as to his comparators." This is exactly what Professor Smith has been arguing. The minimum required under the formula (rank, tenure status and length of tenure) for Professor Smith would be the $138,000 that the University initially set for Professor Smith. It is clear that the University did not apply the formula to Professor Smith, did not pay her the minimum under the formula because it created an "outlier" exception, and added unknown "other factors" to calculate her revised salary.

While establishing this new body of law, the Eleventh Circuit also established a novel, untested "outlier" defense to circumvent pay parity. Had the University applied its formula to Professor Smith as it created it (before adding in the unknown "other factors"), then Professor Smith's salary would have increased an additional $13,000 to $138,000. Almost irrationally, the Eleventh Circuit then suggests that the mysterious extra $5,000 that it tried to explain away when the University decision-makers could not or would not themselves, was gratuitous and generous, and she cannot be allowed to complain. In other words, Professor Smith received $5,000 more than the other associate professors, rather than she did not receive the amount she would have received had the University followed its own salary equity adjustment formula – an extra $13,000. The University defended that it did not increase Professor Smith's salary to $138,000, which would have been comparable to Professor Brown's salary, because it did not intend to increase salaries to the

level of "outliers." This is indefensible and conflicts with the circuits requiring application of the University's created salary adjustment formula.

Next, the Eleventh Circuit applied collateral estoppel (issue preclusion), which barred challenge of her revised salary that she was not treated any worse than prior male comparators, even though the court acknowledged that unknown "other factors" were included in the University's increase of Professor Smith's salary. Collateral estoppel cannot possibly be used to bar a subsequent lawsuit where unidentified controlling facts where changed, and no witness could or would testify how.

Issue preclusion, which applies "in the context of a different claim," "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (emphasis added) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)). This Court has always recognized if a "second suit is upon a different cause of action, though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question *actually litigated* and determined, and not as to other matters which might have been litigated and determined." *Nesbit v. Indep. Dist. of Riverside,* 144 U.S. 610, 618 (1892) (emphasis added); *Cromwell v. County of Sac,* 94 U.S. 351 (1876); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319 (1927); *Bravo-Fernandez v. United States,* 137 S. Ct. 352, 358 (2016); *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) ("The Restatement explains that subject to certain well-known exceptions, the general rule is that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.' *Restatement (Second) of Judgments,* § 27, p. 250 (1980))." However, "changes in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979). It is fundamental

that the principle of collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts remain unchanged." *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-600 (1948). Because the "other factors" could not be explained, there is no way to determine whether the issues in the first and second lawsuits are identical and were actually litigated in the first as compared to the second lawsuit.

The Eleventh Circuit buys into the University's novel "outlier" theory that the University acknowledged developed as an afterthought, *post-application* of the salary equity formula to defend its failure to apply the formula to her, and using collateral estoppel, the Eleventh Circuit claims that because of *Smith I*, Professor Smith was not entitled to the same salary as Professor Brown. But, that was never her argument or the issue; Professor Smith argues that she was entitled to fair application of the University's salary formula (rank, tenure status, and length of time = $138,000) to her and that setting Brown aside as an "outlier" did not insulate the University from applying its formula to her as it did for the male comparators. There is absolutely no precedent for that, and it is inconsistent with other circuits. Because the University assessed and reviewed all salaries, including the outliers' salaries, then failure to apply the formula to her as it did for all others was gender-based or retaliatory to not do so for her as well. The District Court and Eleventh Circuit stated that Professor Smith was not treated worse than any male after *Smith I*, but that is not true. The males received the benefit of the salary adjustment formula applied to them, and she did not. Even Professor Brown, whose salary was not changed, received the benefit of the formula, but under the formula, his salary was already where it needed to be and thus, there did not need to be an increase for his salary. Thus, she cannot be collaterally barred from pursuing this issue in a second lawsuit. That application of the University's salary equity adjustment formula would match her salary to Professor Brown's, who was her comparator in *Smith I,* is coincidental and irrelevant, but not a bar to a second lawsuit as to whether she was discriminated against in

the application of the salary equity adjustment after *Smith I.*

The outlier theory bears no legislative support, nor support from any case because it is nothing more than an admission of gender discrimination. In *Jepsen v. Fla. Bd. of Regents*, 754 F.2d 924, 926 (11th Cir. 1985), the Eleventh Circuit found that the defendant-university's business necessity defense that it was focused on hiring men because the defendant-university was moving from a woman's college to co-educational was almost an "outright admission of sex discrimination." The University cannot circumvent federal equal pay laws by shielding "highest paid" male faculty from faculty salary rationalization. Women will never catch up to the pay disparities if allowed, or be paid equally.

In addition, if the unknown "other factors" that the University relied upon to revise her salary were not identical to those litigated in *Smith I*, then she could not possibly be barred under collateral estoppel; however, there is no way to know because no witness knew what the "other factors" were. Collateral estoppel surely cannot be used to bar *unknown* factual changes since the first lawsuit because there is no way to tell if these were "actually litigated" in the first lawsuit to then be barred in the second lawsuit. This is fundamentally inconsistent with collateral estoppel jurisprudence. The Eleventh Circuit glosses over that the University applied unknown "other factors" to Professor Smith. Thus, *Smith II* is not identical in all respects to *Smith I* and controlling facts did not remain unchanged as required in this Court's precedent in *New Hampshire* and its progeny. The Eleventh Circuit's conclusion that Professor Smith was collaterally estopped from litigating her pay equity adjustment violates the well-established precedent of this Court.

Lastly, under the Equal Pay Act and Title VII, an employer can classify jobs if the classifications are based on differences in work but cannot create artificial job classifications to circumvent federal equal pay laws. *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265-66 (3d Cir. 1970); *Thomas v. Sawyer*, 678 F.2d 257, 285 n. 30

(D.C. Cir. 1982) ("[W]e do not foreclose the possibility that in an appropriate case plaintiffs might establish that unequal pay based on a job classification system violates Title VII, even though the jobs classified under the system are not equal for purposes of the Equal Pay Act. *See County of Washington v. Gunther,* 452 U.S. 161 (1981). Moreover, the "gender-neutral classification" is not "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Aldrich v. Randolph Cent. School Dist.,* 963 F.2d 520, 525 (2d Cir. 1992). Here, the University created a "gender-neutral" job classification based on "highest paid," which, according to the University's pay-inequity study will always be a male carveout because men are paid more than women at the College of Law and will leave women with no or limited comparators for pay parity challenges. App. 45-46. This violates federal equal pay laws, has no basis in law and conflicts with other circuits. Therefore, such a defense will be a mockery to equal pay laws and women's rights because it stands to further the loopholes and interpretations that prevent women from realizing the protections of the EPA.[4]

II. The Decision Below Cannot Be Reconciled with this Court's Precedent or Federal Law.

Closely related to the first two issues, the third issue asks whether the University's failure to apply its salary formula to Professor Smith deprived her of salary to which she was "entitled," and thus, is an "adverse employment action" under the retaliatory provisions of the Equal Pay Act, 29 U.S.C. § 215(a)(3), and Title VII, 42 U.S.C. § 2000 e-3(a) as set forth in *Burlington.*

The Eleventh Circuit claims Professor Smith advanced a "bald allegation that [the University] did not apply its 'new salary formula' to her." App. 15. The Eleventh Circuit states that "[n]o other associate

[4] H.R. Rep. No. 116-18, at 17 (2019)(" Many women have been unable to utilize the protections afforded under the EPA because loopholes, court interpretations, and ineffective sanctions have made enforcement extremely difficult.").

professor . . . received a salary to match Brown's" and the University was "under no obligation to match his" as an "outlier." App. 15. According to the Eighth, Seventh, Fourth and another Eleventh Circuit opinion, the University was indeed under an obligation to apply its salary formula to Professor Smith (which coincidentally would have raised her salary near Brown's), and again she was the *only* then-associate professor whose rank, tenure status and length of tenure paralleled Brown's. And thus, Professor Smith, as the District Court found, was "entitled" to the salary she would have received had the formula been applied to her.

Burlington holds that: "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. at 59. The Eleventh Circuit cites *Burlington* to determine that Professor Smith "was not entitled to receive the same salary as Brown after the jury in *Smith I* concluded that the salary discrepancy between them was not motivated by gender discrimination." App. 17. But that was not what Professor Smith argued. She argued that the University created its own one-time salary equity formula and applied it to every faculty member, but her, resulting in a $13,000 gap. It was only coincidental that the proper application of the University's own salary formula would have put her near-equal to Professor Brown. But she was indeed treated worse than male faculty who received the benefit of the formula. The Eleventh Circuit acknowledges that deprivation of pay to which an employee is entitled is retaliation but finds that Professor Smith was not entitled to this additional $13,000. This was contrary to what the District Court found. Professor Smith argues that she was entitled to have the University's self-created salary adjustment formula applied to her like the other faculty, which would have placed her salary near-equal to Professor Brown. By mis-framing the issue, the Eleventh Circuit avoids the real issue. Cleary, under *Burlington's* definition, the University retaliated against Professor Smith when it did not apply the salary formula to her as it did for her colleagues, resulting in a significant pay gap.

This is salary to which she was *entitled* and a materially adverse action.

As shown above, the Eleventh Circuit's opinion is inconsistent with its own circuit and three other circuits. Eleventh Circuit precedent holds that an employee is "entitled to [seek] appropriate systems of salary adjustment that are accorded to other employees" under Title VII and the EPA, despite having previous pay disparities. *See Schwartz,* 807 F.2d at 906. The Eighth Circuit holds that for pay equity cases, a plaintiff establishes her prima facie case under the EPA if her employer "refuse[s] to pay employees . . . the minimum required under the formula." *See Dawes*, 522 F.2d at 384. And the Seventh and Fourth follow.

Given the conflict among the federal circuits, the inconsistency with this Court's precedent, and the increased use of salary equity adjustments, it is axiomatic that challenges to these adjustments will lead to inconsistent outcomes and unfair loopholes. This must be reviewed and reversed.

III. Failure to Review this Case will Have Far-Reaching Consequences and the Decision Below Is Fundamentally Unfair to Women.

Collateral estoppel is a discretionary doctrine, not an inexorable command, that should not be employed here. There is too much at stake in negatively impacting women's salaries, and too much evidence that gender is likely being used to set salaries – the University's own documents and witnesses indicated that. The courts below attempt to explain away what the University decision-makers were unable to articulate – how Professor Smith's revised salary was actually set.

In addition, Professor Smith is not just saying that the University failed to correct its past discrimination, which is true, and its own documents reveal, but also that there is new, different or additional discrimination in the application and implementation of the salary equity adjustment. *See Dawes, Ende, Smith* and *Schwartz*. In assessing the University's substantial reasons, the

District Court apparently found a *prima facie* case and evaluated the University's justifications for the salary disparity – this is not a dismissal under collateral estoppel.

More egregiously, the University creates a male-favoring "outlier" theory or job classification that is unfair to women. The University's witnesses testified that there were no employees classified as "outliers" initially in the salary equity adjustment process – the "outlier" theory developed later to justify failure to increase Professor Smith's salary to $138,000, thus the "outlier" defense was an afterthought – no one knows why the University failed to apply its salary adjustment formula to her. And Dean Jones testified that the University really did not have "budget constraints" and could find the money. App. 70.

The Supreme Court has found that "where important human values are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016), *as revised* (June 27, 2016) (citing *Restatement* § 24, comment *f). See also Jaffree v. Wallace,* 837 F.2d 1461, 1469 (11th Cir. 1988). A discretionary doctrine, like collateral estoppel, should not be used to allow such illegalities to remain – this is fundamentally unfair and egregious. *See also Restatement (Second) of Judgments*, § 28(2)(b))(stating that relitigation of the issue in a subsequent action between the parties is not precluded where "a new determination is warranted in order to avoid inequitable administration of the laws."). This appears to be such a human issue that the court would decline to use collateral estoppel.

A judge can decide if a woman deserves equal pay – and his or her decision does not just impact one woman. It can become the blueprint to impact the salaries of all women, their daughters, and their granddaughters. This is why the application of collateral estoppel to issues of great importance is not favored. But more importantly, the crux of *Smith I* was litigating the criteria to set salaries. Thus, the unknown or unidentified "other factors" that were changed in the salary reset completely

take this case out of the realm of collateral estoppel. Collateral estoppel should not be used to deny equal pay to women or create an "outlier theory" that allows employers to label "highest paid," historically men, as "outliers" and make them untouchable for discrimination challenges. This is unconscionable and will be a disaster to equal pay laws. It literally limits or denies the male comparators for women.

Given the resurgence of equity adjustments, there is a dire need for this Court to use this case as a vehicle to close judicial loopholes and ensure the protections of the Equal Pay Act are finally realized. This is an ideal case because of the numerous issues it has involving salary equity adjustments. If the lower court's decision is allowed to remain, employers will have a license to discriminate in their allocation of salary equity adjustments. This impinges the very purpose and intent of the federal equal pay statutes. Equal pay is one of the most popular topics in America. This case has the potential for far-reaching negative consequences for women if not reviewed.

Finally, in an unpublished opinion, the Eleventh Circuit decided several significant interrelated issues regarding salary/pay equity adjustments that will likely become law. Justice Clarence Thomas and other justices have asserted that the federal circuits refuse to publish opinions to avoid binding law. *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting) (explaining that the Fourth Circuit did not publish its opinion to avoid creating binding law, but that the unpublished opinion "preserves its ability to change course in the future"). However, unpublished opinions become "secret law" that was never appropriately scrutinized because the secret law initially went undetected and unchallenged in unpublished opinions only to later become law in a published decision. *County of Los Angeles v. Kling*, 474 U.S. 936, n. 1 (1986) (Marshall, J., dissenting) (referring to the practice of issuing unpublished opinions and no citation rules as "secret law").[5]

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[5] Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 AM. U. L. REV.

Here, the Eleventh Circuit split with other Circuits on whether an employer's salary adjustment formula must be applied as created; validated a novel "outlier" theory shielding highest paid male salaries from salary rationalization; allowed collateral estoppel to bar a subsequent lawsuit under federal equal pay laws when the revised salary was changed in significant aspects based on unknown "other factors" that made the lawsuits not identical; and determined that the employer's failure to follow its own salary adjustment formula that deprived the employee of a higher salary was not an "adverse employment action" under federal equal pay laws and *Burlington.*

This Court has not yet opined on these aspects of salary equity adjustments, and before becoming unchallenged precedent from an unpublished opinion, the Eleventh Circuit's opinion must be reviewed and reversed. The unpublished decision below is the epitome of secret law that will serve as a formula for establishing harmful precedent. If this petition is not granted that very outcome is inevitable. The fate of women hangs in the balance.

757, 788 (1995) (providing examples to show "the seriousness of the courts of appeals' creation of a body of 'secret law' by failing to publish opinions in important cases").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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