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Time Is Money, Ladies: The Ninth Circuit Prohibited Prior Pay as a Factor Other Than Sex in *Rizo v. Yovino*

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TIME IS MONEY, LADIES: THE NINTH CIRCUIT PROHIBITED PRIOR PAY AS A FACTOR OTHER THAN SEX IN *RIZO v. YOVINO*

Abstract: On February 27, 2020, the U.S. Court of Appeals for the Ninth Circuit in *Rizo v. Yovino* held that prior salary is not a valid defense against an employee's claim under the Equal Pay Act (EPA). In so doing, the Ninth Circuit ruled that prior pay is an inherently gendered factor and became the first federal circuit court to eliminate it as a valid factor other than sex under the EPA. This Comment argues that *Rizo* was correctly decided but that it could have gone even further to narrow the pay gap in the United States.

INTRODUCTION

In 1998, Lilly Ledbetter, a female worker at Goodyear Tire, sued her employer, alleging that the company had suppressed her wages throughout her twenty-year career because of her sex.[1] Ledbetter's case went all the way up to the Supreme Court.[2] Although the Court ruled against Ledbetter, the case resulted in one of the most monumental dissenting opinions penned by the late

[1] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 622 (2007). Ledbetter originally brought claims under both Title VII of the Civil Rights Act of 1964 and the Equal Pay Act (EPA), in addition to other discrimination claims. *Id.* at 621–22. Ledbetter brought her case before the U.S. District Court for the Northern District of Alabama. Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137, 2003 WL 25507253, at *1 (N.D. Ala. Sept. 24, 2003). The district court denied or dismissed the majority of Ledbetter's discrimination claims, except for her Title VII claim. *See id.* (noting that the jury found strong evidence supporting Ledbetter's Title VII claim). As a result, the U.S. Court of Appeals for the Eleventh Circuit only reviewed the Title VII claim. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1175 n.7 (11th Cir. 2005). Accordingly, the lion's share of the U.S. Supreme Court's 2007 majority opinion in *Ledbetter v. Goodyear Tire & Rubber Co.* focused on Title VII, but there is relevant discussion of the EPA in Justice Ginsburg's dissent. *See* 550 U.S. at 658 (Ginsburg, J., dissenting) (referencing the distinction between Ledbetter's EPA claim and her Title VII claim, as well as the Court's precedents regarding the EPA). Title VII refers to a section of the Civil Rights Act of 1964 that prevents employers from discriminating against employees on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1991). EPA claimants often assert concurrent claims under Title VII because both laws apply to sex-based wage discrimination. *See Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 14, 2021), https://www.eeoc.gov/filing-lawsuit [https://perma.cc/YDM7-N8ZX] (recommending that plaintiffs filing under the EPA also file claims under Title VII). Title VII claims, however, require a different burden of proof than EPA claims. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the burden-shifting scheme applied to Title VII suits); *infra* note 31 and accompanying text (comparing the burdens of proof of plaintiffs in EPA litigation versus Title VII litigation).

[2] *Ledbetter*, 550 U.S. at 618. Justice Alito authored the majority opinion in *Ledbetter*, and Chief Justice Roberts, Justice Scalia, Justice Kennedy, and Justice Thomas joined. *Id.* at 620.

Justice Ruth Bader Ginsburg.[3] In her 2007 dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, Justice Ginsburg wrote that wage discrimination can be one of the most elusive forms of prejudice in the workplace.[4]

Despite her loss in court, Ledbetter prevailed in her fight for equality when President Obama signed the Lilly Ledbetter Fair Pay Act (FPA) into law.[5] Before this emblematic legislation, in 1963, Congress attempted to rectify sex-based pay inequality through the Equal Pay Act (EPA) that made it illegal to base an employee's wage on sex or a factor related to sex.[6] And yet, in 2020, the average American female still only made eighty-one cents on the dollar compared to her male counterpart.[7] Thus, the cautionary words of Justice Ginsburg have proved to bear an enduring relevance.[8]

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[3] *Id.* at 643 (Ginsburg, J., dissenting). With the passing of Justice Ruth Bader Ginsburg in September 2020, women across the United States, including Lilly Ledbetter, remembered her iconic *Ledbetter* dissent. Howard Koplowitz, *'I Lost a Dear Friend & a Champion': Lilly Ledbetter Mourns Ruth Bader Ginsburg*, ADVANCE LOCAL ALA. (Sept. 18, 2020), https://www.al.com/news/2020/09/i-lost-a-dear-friend-and-a-champion-lilly-ledbetter-mourns-death-of-ruth-bader-ginsburg.html [https://perma.cc/YUJ8-RMG7].

[4] *Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting) ("The realities of the workplace reveal why the discrimination with respect to compensation . . . does not fit within the category of singular discrete acts 'easy to identify.' . . . Compensation disparities . . . are often hidden from sight.").

[5] *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) (allowing successful plaintiffs under Title VII to receive back pay for lost wages due to discrimination). The Lilly Ledbetter Fair Pay Act (FPA) overturned the Supreme Court's decision in *Ledbetter* by amending the statutory provisions of Title VII to allow plaintiffs to bring discrimination claims against employers retroactively. *Equal Pay Act of 1963 & Lilly Ledbetter Fair Pay Act of 2009*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009 [https://perma.cc/6MS5-UVUP].

[6] *See* H.R. REP. NO. 88-309, at 2 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 688 (explaining that setting an employee's pay solely based on sex constitutes an "unfair labor standard"). The EPA amended the Fair Labor Standards Act (FLSA) of 1938 to make sex-based wage discrimination illegal. Equal Pay Act of 1963, sec. 3, § 206(d)(1), 77 Stat. 56, 56–57.

[7] Amy Stewart, *The 2020 Gender Pay Gap Report Reveals That Women Still Earn Less for Equal Work*, PAYSCALE (Mar. 24, 2020), https://www.payscale.com/compensation-today/2020/03/the-2020-gender-pay-gap-report-reveals-that-women-still-earn-less-for-equal-work [https://perma.cc/8U3U-A6CS]. This finding is consistent with the most recently published data from the federal government, which reported that the wage gap in 2018 was nineteen cents on the dollar. U.S. BUREAU LAB. STAT., HIGHLIGHTS IN WOMEN'S EARNINGS IN 2018, at 1 (2019), https://www.bls.gov/opub/reports/womens-earnings/2018/pdf/home.pdf [https://perma.cc/G96J-F684]. Although the pay gap has been closing incrementally over the past several decades, men and women in the United States are still not compensated equally for equal work. *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, NAT'L COMM. ON PAY EQUITY, https://www.pay-equity.org/info-time.html [https://perma.cc/K86V-DWGS] (Sept. 2020) (reporting that the pay gap has been closing by about half a cent every year between 1963 and 2010).

[8] *See Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting) (warning that sex-based pay discrimination is often imperceptible because it occurs in "small increments" that "develop[] only over time"); *infra* note 77 and accompanying text (enumerating enacted and pending legislation addressing the pay gap at the state and federal levels); *see also* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 566 (2020) (discussing the Obama administration's various efforts to rectify the pay gap).

In 2020, in *Rizo v. Yovino*, the U.S. Court of Appeals for the Ninth Circuit decided a case that embodied the shadowy discrimination Justice Ginsburg alluded to in *Ledbetter*.[9] In *Rizo*, a female teacher challenged her school district's compensation scheme, which based her pay on the salary she earned at her former job.[10] The teacher, Aileen Rizo, argued that because prior pay is a factor related to sex, the EPA forbid the school district from using it as the basis for her salary.[11] The Ninth Circuit held in Rizo's favor, setting a precedent that prior pay is inherently related to an employee's sex and thus can never serve as a defense to an EPA claim.[12] Meanwhile, other jurisdictions have maintained that, under certain circumstances, employers may base salary on an employee's prior pay.[13] Thus, the Ninth Circuit's novel ruling has reinvigorated the debate over prior pay and its role in EPA litigation.[14]

Part I of this Comment provides an overview of the legislative history behind the EPA, as well as the factual and procedural context of *Rizo*.[15] Part II examines the split among the federal circuit courts on the correct meaning of the EPA affirmative defense at issue in *Rizo*.[16] Finally, Part III argues that the

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[9] *See Ledbetter*, 550 U.S. at 649 (Ginsburg, J., dissenting) (explaining that female employees are frequently unaware that they receive disparate pay compared to male coworkers); Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020) (en banc) (holding that a public school district discriminated against a female math teacher's wage in violation of the Equal Pay Act), *cert. denied*, 141 S. Ct. 189 (2020).

[10] *See Rizo*, 950 F.3d at 1222 (summarizing the plaintiff Aileen Rizzo's central claim against the Fresno County school system).

[11] *See id.* (outlining Rizo's principal argument that using prior pay to defend an employee's wage frustrates the legislative intent of the EPA).

[12] *See id.* at 1229 (holding that prior pay is too closely related to an employee's sex to defeat an EPA claim brought against an employer).

[13] *See, e.g.*, EEOC v. Md. Ins. Admin., 879 F.3d 114, 123 (4th Cir. 2018) (holding that employers need a job-related factor to establish salary); Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005) (noting that valid factors under the fourth defense must be somewhat related to the employee's job performance); Angove v. Williams-Sonoma, Inc., 70 F. App'x 500, 508 (10th Cir. 2003) (holding that salaries based on additional factors beyond prior pay are valid under the EPA); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995) (holding that prior pay must be used to set salary in combination with other job-related factors); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992) (reasoning that the legislative intent of the EPA was to prevent salary discrimination on factors unrelated to the employer's business objectives); *see also infra* note 55 and accompanying text (explaining the circumstances under which some circuit courts have found prior pay to be a permissible factor other than sex).

[14] *See* Jessica Gottsacker, Note, *Waging War Against Prior Pay: The Pay Structure that Reenforces the Systematic Gender Discrimination in the Workplace*, 64 ST. LOUIS U. L.J. 113, 138 (2019) (describing the "turmoil" over the proper interpretation of prior pay in the wake of *Rizo*); Patricia J. Martin et al., *Minding the Pay Gap: What Employers Need to Know as Pay Equity Protections Widen*, LITTLER MENDELSON, P.C. 12 (2019), https://www.littler.com/files/pay_equity_littler_report_0.pdf [https://perma.cc/ZU2X-AD9B] (explaining the challenges employers now face in salary-setting practices as a result of the new restrictions surrounding prior pay).

[15] *See infra* notes 18–47 and accompanying text.

[16] *See infra* notes 48–78 and accompanying text.

Ninth Circuit correctly decided *Rizo* because an employer cannot use prior pay to set an employee's salary without discriminating based on sex.[17]

I. A Brief History of the EPA and *Rizo v. Yovino*

In 1963, Congress passed the EPA to cure the ongoing pay disparity between men and women.[18] Yet, the pay gap still persists today.[19] Section A of this Part reviews the legislative history of the EPA and the mechanics of making an EPA claim.[20] Section B discusses the facts and procedural history of the U.S. Court of Appeals for the Ninth Circuit's 2020 decision in *Rizo v. Yovino*.[21]

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[17] *See infra* notes 79–106 and accompanying text.

[18] Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206). Congress passed the EPA as an amendment to the FLSA. *Id.* The FLSA regulates employment at the federal level through provisions such as minimum wage, child labor laws, and other actions employees may bring against their employers. 29 U.S.C. §§ 201–219.

[19] U.S. Bureau Lab. Stat., *supra* note 7, at 1. Typically, courts understand the pay gap as the average salary differential between men and women. *See* Rizo v. Yovino, 950 F.3d 1217, 1225 (9th Cir. 2020) (en banc) (citing Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (explaining that the legislative intent of the EPA was to address archaic conventions that men deserve a higher wage), *cert. denied*, 141 S. Ct. 189 (2020)). Some scholars, however, debate whether the EPA's reference to "sex," means gender or sexual orientation. *See* Adam P. Romero, *Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?*, 10 Ala. Civ. Rts. & Civ. Liberties L. Rev. 35, 39 (2019) (noting that the EPA discusses "opposite sexes," implying that the statute originally considered a binary understanding of the term). In the 2020 Supreme Court case, *Bostock v. Clayton County*, employees who brought discrimination claims under Title VII argued that "sex" encompasses sexual orientation. 140 S. Ct. 1731, 1739 (2020). Justice Gorsuch, writing for the majority, neither confirmed nor rejected this notion. *See id.* (explaining that it was not necessary for the decision to adopt a different definition of "sex" other than as a "biological distinction[]"). The terms "sex" and "gender" are not interchangeable or binary. *What Is Gender? What Is Sex?*, Can. Insts. Health Rsch. (Apr. 28, 2020), https://cihr-irsc.gc.ca/e/48642.html [https://web.archive.org/web/20210306211816/https://cihr-irsc.gc.ca/e/48642.html]. Yet, the terms are often conflated in scholarship on the pay gap, and the research frequently fails to honor the immense complexity behind sex and gender identities. *See Quick Facts About the Gender Wage Gap*, Ctr. for Am. Progress n.2 (Mar. 24, 2020), https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/ [https://perma.cc/BY2V-C9HR] (acknowledging that the pay gap historically refers to men and women, but that modern research is beginning to expand the definition to pay inequities between other groups in the American workforce); *see also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 571 (2016) (showing that transgender people are gaining traction in sex discrimination lawsuits based on their gender identities). Although the scope of this Comment is limited to discussing the pay disparity between males and females, sex-based wage discrimination and the pay gap is not an exclusively female issue. *See* Romero, *supra*, at 92 (showing that recent studies report systematic sex-based pay discrimination against the LGBTQ community). Therefore, this Comment uses the term "sex" to discuss the pay gap more broadly and limits the use of terms like "gender" and "gendered" in referencing women as a group, because "woman" is not a sex-based identity. *See What Is Gender? What Is Sex?*, *supra* (defining the term "sex" as a "set of biological attributes" versus "gender," which is a composition of "socially constructed roles, behaviors, expressions, and identities").

[20] *See infra* notes 22–31 and accompanying text.

[21] *See infra* notes 32–47 and accompanying text.

A. Making and Defending Against an EPA Claim

The goal of the EPA is simple: guarantee equal pay for equal work.[22] Specifically, the EPA requires employers to pay the same wage for work that demands equal "skill, effort, and responsibility" in substantially the same environment.[23] Congress understood, however, that an employer may have a genuine reason for paying a male employee more than a female employee in the same job.[24] Accordingly, the EPA permits unequal pay between the sexes if there is a "bona fide" reason.[25] The law divides the permissible justifications into four categories, which operate as the four affirmative defenses to an EPA claim.[26] The four affirmative defenses are (1) systems based on seniority; (2) systems based on merit; (3) systems that correlate salary to a quantifiable output or quality result; and (4) any distinction "based on any other factor other than sex."[27] The fourth defense, any factor other than sex, is the broadest.[28]

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[22] H.R. REP. NO. 88-309, at 2 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 687, 688.

[23] 29 U.S.C. § 206(d)(1). In relevant part, the text of the EPA provides that "[n]o employer . . . shall discriminate . . . between employees on the basis of sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility." *Id.*

[24] *See* H.R. REP. NO. 88-309, at 3, U.S.C.C.CA.N. 688–89 (recognizing that employers may have a multitude of legitimate reasons to pay a different wage to two employees of the opposite sex). For example, Congress said that availability to work a night shift, ability to perform physical labor, and previous skills and training would all be acceptable reasons for a pay disparity under the EPA. *Id.*

[25] *Id.*; *see Bona fide*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining bona fide as "made in good faith; without fraud or deceit").

[26] Jerald J. Director, Annotation, *Construction and Application of Provisions of Equal Pay Act of 1963 (29 U.S.C.A. § 206(d)) Prohibiting Wage Discrimination on Basis of Sex*, 7 A.L.R. Fed. 707 § 2(a) (1971); *see Affirmative defense*, BLACK'S LAW DICTIONARY, *supra* note 25 (defining affirmative defense as a defensive argument in which the defendant accepts all of the plaintiff's claims as true but asserts new "facts and arguments that, if true, will defeat the plaintiff's . . . claim").

[27] 29 U.S.C. § 206(d)(1). The House Report explained that the EPA lists four bona fide exceptions for employers. H.R. REP. NO. 88-309, at 3, U.S.C.C.C.A.N. 688–89. Three of these are narrow in scope, and the fourth exception is the broadest. *Id.* The original EPA bill brought before the Senate contained only the "factor other than sex" exception, leading some scholars to believe that the three preceding exemptions that Congress ultimately included were actually meant to limit, not broaden, the fourth defense. Nina Joan Kimball, *Not Just Any "Factor Other Than Sex": An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 324 (1984). For the sake of clarity and continuity, this Comment refers to the fourth affirmative defense or factor other than sex defense as "the fourth defense." *See* 29 U.S.C. § 206(d)(1) (listing the four defenses included in the EPA).

[28] *See* Elizabeth A. Stevenson, Note, *Is Prior Salary a Factor Other Than Sex?: An Approach to Resolve the Ongoing Debate*, 98 NEB. L. REV. 996, 1001 (2020) (noting that the fourth defense has led to the most contention and confusion in the courts). Congress included the fourth affirmative defense as a practical measure because it would be impossible to list every potential exception or rationale an employer may have for offering different salaries to employees of different sexes. H.R. REP. NO. 88-309, at 3, U.S.C.C.A.N. 688–89. In practice, the fourth affirmative defense has become the most frequently cited affirmative defense by employers defending against EPA violations. 4 STATE & LOCAL GOV. C.R. LIAB. *Statutory Defenses—Any Factor Other Than Sex* § 7:14 (2020). There is much debate surrounding the language of the fourth affirmative defense, with some arguing that what Congress initially intend-

To prevail on an EPA claim, the plaintiff must prove a prima facie case of wage discrimination based on sex.[29] If the plaintiff succeeds, the burden shifts to the employer to demonstrate that the salary is justified under one of the EPA's four affirmative defenses.[30] If the employer is able to do so, the case ends there.[31]

B. Factual and Procedural History of Rizo

The Fresno County, California school district hired Aileen Rizo, an experienced educator, as a math consultant in October 2009.[32] Upon hiring Rizo, Fresno County set her salary according to its regular practice.[33] The practice in

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ed as a safety valve has actually become a "catchall" for employers to circumvent the EPA's requirements. *Id.*

[29] *See* Neonu Jewell, *Equal Pay Act*, 4 GEO. J. GENDER & L. 625, 632–33 (2003) (describing the courts' criteria for determining whether a plaintiff established prima facie that her work involves equal "skill, effort, and responsibility" as one of her male colleagues being paid a higher wage); *see also Prima facie*, BLACK'S LAW DICTIONARY, *supra* note 25 (defining prima facie as enough to "establish a fact," or something that appears true upon first impression).

[30] *See* Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974) (ruling that the Secretary of Labor, who represented female employees at the Corning plants, had established a prima facie case of pay discrimination, shifting the burden to Corning to show that the wage differentials between male and female employees were justified under one of the EPA's four defenses).

[31] *See* Wernsing v. Dep't of Hum. Servs., 427 F.3d 466, 469, 471 (7th Cir. 2005) (holding that the employee had lost her opportunity to present further evidence once the employer properly asserted the fourth defense). The plaintiff's opportunity to present evidence under the EPA is notably different than the burden-shifting scheme that exists under Title VII. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) (holding that in a Title VII claim, a plaintiff is afforded an additional opportunity to present evidence after the defendant employer has asserted its defense). Under the Title VII burden-shifting framework, plaintiffs may present evidence to show that the employer's defense is merely a pretext for discrimination. *Id.*; *see* Ross B. Goldman, Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1534 (2007) (explaining that the burden-shifting scheme allows the plaintiff to demonstrate the employer's "real motivation" to the court). In contrast, under the EPA, plaintiffs are barred from arguing that the employer's purported defense is a pretext for discrimination. *See Wernsing*, 427 F.3d at 469 (noting that the plaintiff's burden in EPA litigation is different from Title VII suits because there is no "disparate-impact component" (citing County of Washington v. Gunther, 452 U.S. 161, 170–71 (1981))). In 1981, in *County of Washington v. Gunther*, the Supreme Court explained that the difference in burden shifting schemes between Title VII claims and EPA claims is a reflection of the scope of each law. 452 U.S. 161, 178, 179 (1981). An EPA claim is only appropriate when a female employee can show she is paid less compared to a male employee performing equal work, whereas Title VII claims may be applied to any discriminatory practice by an employer, regardless of whether the plaintiff can juxtapose her salary against that of a male colleague. *Id.*

[32] Rizo v. Yovino, 950 F.3d 1217, 1220 (9th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 189 (2020). Before starting as a math consultant in Fresno County, Rizo taught middle school math for six years and spent three years as head of a math department. *Id.* Rizo had one master's degree in education technology and another master's degree in mathematics education. *Id.*

[33] *Id.* Standardized salary-setting procedures are common in public sector jobs and are a frequent source of EPA litigation. *See, e.g.*, EEOC v. Md. Ins. Admin., 879 F.3d 114, 116–17 (4th Cir. 2018) (reviewing the validity of a state agency policy to assign a salary based on a new employee's "grade level"); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 522 (2d Cir. 1992) (assessing the legiti-

Fresno County is to set an employee's starting salary at the rate of their previous salary plus five percent.[34] The resulting amount assigns the employee to a correlated step on the County's pay scale.[35]

After three years, Rizo learned that Fresno County placed a newly hired male colleague above her on the district's pay scale, despite him having less experience.[36] Shortly thereafter, Rizo found out she was, in fact, receiving lower pay than all three of the other math consultants in the department—all of whom were males.[37] Rizo raised her concerns about this disparity with a Fresno County administrator, who assured her that the pay scale system was applied indiscriminately of a new employee's sex.[38] Upon further research, Rizo learned that, on average, a newly hired female was more likely to start at a lower step on the pay scale than a newly hired male.[39] After determining that she was not the only female employee undervalued by Fresno County's pay scale system, Rizo decided to take legal action under the EPA.[40]

Originally, Rizo filed her claim in the Fresno County Superior Court, but the school district successfully removed the case to the U.S. District Court for the Eastern District of California.[41] The district court reasoned that Fresno

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macy of a New York county's policy to base pay eligibility on the results of a civil service exam as opposed to the actual work performed by the employees).

[34] *Rizo*, 950 F.3d at 1220. Thus, the pay scale system calculated Rizo's salary by increasing her prior wage of $50,630 by 5%, plus an additional bonus for her master's degree. *Id.*

[35] *Id.*

[36] *Id.* The male colleague's starting salary was $79,088 compared to Rizo's starting salary of $62,133. *Id.*

[37] Appellee's Answering Brief at 7, Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 189 (2020) (No. 16-15372), 2016 WL 5846093, at *7. In her brief to the Ninth Circuit, Rizo noted that the three other male math consultants were surprised to hear that Rizo was still working her way up the school district's pay scale given that she had the most experience. *Id.* at 5.

[38] *Id.* at 7–8.

[39] *See id.* at 13 (presenting statistical data that the present pay system placed the average female employee at a 6.7 pay step and the average male employee at a 7.7 pay step). Further, Fresno County performed an internal data study showing that under its previous pay system, which based wages on education and experience rather than prior pay, female employees received higher wages on average. *See id.* (introducing evidence that the experience-based pay scale assigned the average female employee at a step 7.2 on the pay scale, whereas it put the average male employee at a step 5 on the same scale).

[40] *See Rizo*, 950 F.3d at 1220 (describing how Rizo filed a claim in Fresno County Superior Court claiming that Fresno County's pay policy was discriminatory under the EPA). Rizo's initial action also cited a violation under Title VII, as well as claims for sex discrimination and failure to prevent discrimination under California's Fair Employment and Housing Act. *Id.*

[41] *Id.* The named defendant-appellant was Jim Yovino, the Fresno County Superintendent of Schools. Rizo v. Yovino, No. 14-cv-0423, 2015 WL 13236875, at *1 (E.D. Cal. Dec. 4, 2015), *vacated and remanded by* 854 F.3d 1161 (9th Cir. 2017), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017), *aff'd*, 887 F.3d 453 (9th Cir. 2018), *remanded and vacated on procedural grounds*, 139 S. Ct. 706 (2019), *aff'd*, 950 F.3d 1217 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 189 (2020). The court permitted Fresno County to remove the case to federal court because the case arose under a federal statute. *Id.* (citing 28 U.S.C. § 1441(c)(1)(A)).

County's pay system impermissibly perpetuated the existing gap between female and male teachers' salaries.[42] Fresno County appealed the ruling.[43] When *Rizo* first appeared before the U.S. Court of Appeals for the Ninth Circuit, Fresno County argued that its pay scale system was valid under the EPA's fourth defense.[44] A three-judge panel from the Ninth Circuit ruled in favor of Fresno County because, according its own precedent, prior pay is allowed under the fourth defense when the employer can show it serves a real business purpose.[45] The Ninth Circuit judges then voted to rehear the case en banc.[46] Upon rehearing, the court overruled its precedent and held that prior pay is not a factor other than sex under any circumstances.[47]

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[42] *See Rizo*, 2015 WL 13236875, at *9 (determining that discriminatory outcomes were a "virtual certainty" under Fresno County's system).

[43] *See id.* (denying Fresno County's motion for summary judgment, reasoning that a pay system based on prior pay contradicts Congress's intent behind the EPA).

[44] Rizo v. Yovino, 854 F.3d 1161, 1164–65 (9th Cir. 2017), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017), *aff'd*, 887 F.3d 453 (9th Cir. 2018), *remanded and vacated on procedural grounds*, 139 S. Ct. 706 (2019), *aff'd*, 950 F.3d 1217 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 189 (2020).

[45] *See id.* at 1167 (noting that when the use of prior pay "effectuate[s] some business policy" it qualifies as a factor other than sex (quoting Kouba v. Allstate Ins. Co., 691 F.2d 873, 876–77 (9th Cir. 1982))). In 1982, in *Kouba v. Allstate Insurance Co.*, the Ninth Circuit held that prior pay may be a factor other than sex under the EPA as long as it is supported by a legitimate business-related practice. 691 F.2d at 878. The court also ruled that a factor other than sex does not need to be job-related in and of itself. *Id.* at 877. Thus, in the Ninth Circuit's 2017 opinion in *Rizo v. Yovino*, Fresno County was entitled to present evidence showing a legitimate business reason for using prior pay in its system. *See Rizo*, 854 F.3d at 1167. As a result, the three-judge panel ruled that the case should be remanded to the trial court for further findings of fact regarding Fresno County's true purpose for using prior pay as a salary-setting factor. *See id.* (noting further that Fresno County would bear the burden at trial to show its use of prior pay was non-discriminatory).

[46] *Rizo v. Yovino*, 869 F.3d 1004, 1004 (9th Cir. 2017), *aff'd*, 887 F.3d 453 (9th Cir. 2018), *remanded and vacated on procedural grounds*, 139 S. Ct. 706 (2019), *aff'd*, 950 F.3d 1217 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 189 (2020). Pursuant to Federal Rule of Appellate Procedure 35(a), active service circuit judges may, by a majority vote, elect to rehear a previous decision en banc. Fed. R. App. P. 35(a).

[47] *See* Rizo v. Yovino, 950 F.3d 1217, 1232 (9th Cir. 2020) (en banc) (ruling that prior pay is not a valid defense under the EPA), *cert. denied*, 141 S. Ct. 189 (2020). The en banc opinion the Ninth Circuit issued in 2020 was actually the court's second en banc opinion. *See generally* Rizo v. Yovino, 887 F.3d 453, 479 (9th Cir. 2018), *remanded and vacated on procedural grounds*, 139 S. Ct. 706 (2019), *aff'd*, 950 F.3d 1217 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 189 (2020). (constituting the court's original en banc opinion). In its first en banc ruling from 2018, the Ninth Circuit reasoned that prior pay could theoretically be permissible under the EPA if an employer could prove a female employee's prior pay was not discriminatory. *Id.* at 478. The court concluded, however, that sex discrimination is so entwined with the American job market that this is a nearly insurmountable burden of proof for the employer. *Id.* at 479. Therefore, as a practical matter, the court ruled that prior pay can never be a factor other than sex. *See id.* (overturning the Ninth Circuit's precedent in *Kouba* that allowed for prior pay under the fourth defense in some circumstances). Fresno County appealed the Ninth Circuit's en banc ruling to the U.S. Supreme Court. *See* Yovino v. Rizo, 139 S. Ct. 706, 707 (2019) (granting Fresno County's appeal). The Court granted certiorari to cure an error that the Ninth Circuit committed. *See id.* at 710 (granting certiorari and then promptly vacating and remanding the case to the Ninth Circuit); *see also Rizo*, 950 F.3d at 1221 n.2 (explaining why the Supreme Court

II. In an Effort to Narrow the Pay Gap, the Ninth Circuit Widened the Circuit Split

In 2020, in *Rizo v. Yovino*, the U.S. Court of Appeals for the Ninth Circuit ruled that prior pay is never a factor other than sex.[48] In doing so, the Ninth Circuit became the only circuit court to wholly eliminate prior pay as a possible defense to an EPA claim.[49] Section A of this Part outlines the three principal ways circuit courts have interpreted the fourth defense.[50] Section B provides the historical context behind prior pay and describes how this history has colored courts' treatment of it as a factor other than sex.[51]

A. The Chasm Between the Ninth and Seventh Circuits (and Everything in Between)

The circuit courts hold a range of views on the fourth defense.[52] At one end of the spectrum, the U.S. Court of Appeals for the Seventh Circuit has held that prior pay may always be a factor other than sex.[53] At the opposite end, in

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remanded the case back to the Ninth Circuit after the circuit court issued its first en banc opinion). The Supreme Court noted that Judge Stephen Reinhardt, who authored the Ninth Circuit's first en banc opinion, passed away eleven days before the opinion was published. *Yovino*, 139 S. Ct. at 710. The Court ruled that the Ninth Circuit should not have issued an opinion after one of its majority judges had died. *See id.* (reasoning that the Ninth Circuit essentially allowed one of its judges to make a ruling from the grave by issuing the opinion after his death). The Court reasoned that a judge's power does not extend after life and thus remanded the case to the Ninth Circuit. *Id.* In 2020, on remand, the Ninth Circuit ruled against Fresno County for a second time. *See Rizo*, 950 F.3d at 1221 (affirming the denial of Fresno County's motion for summary judgment). After the second en banc ruling from the Ninth Circuit, Fresno County again petitioned the Supreme Court for certiorari, but the Court denied the petition. Yovino v. Rizo, 141 S. Ct. 189, at *1 (July 2, 2020) (mem.).

[48] Rizo v. Yovino, 950 F.3d 1217, 1229 (9th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 189 (2020). Procedurally, the en banc Ninth Circuit effectively ended the case by affirming the lower court's decision to deny Fresno County's initial motion for summary judgment. *Id.* at 1221. Substantively, the Ninth Circuit confirmed its previous 1982 ruling in *Kouba v. Allstate Insurance Co.* that an employee's previous salary does not fall within the scope of the EPA but went even further to say that the fourth defense is limited to factors related to an employee's current job. *See id.* at 1230 (narrowing the factor other than sex defense to "job-related factors"); Kouba v. Allstate Ins., Co., 691 F.2d 873, 876 (9th Cir. 1982) (holding that employers may base wages on "acceptable business reason[s]").

[49] *See Rizo*, 950 F.3d at 1230 (distinguishing itself from the interpretation other circuit courts have adopted about the fourth defense); *see also* Jennifer Safstrom, Note, *Salary History and Pay Parity: Assessing Prior Salary History as a "Factor Other Than Sex" in Equal Pay Act Litigation*, 31 Yale J.L. & Feminism 135, 137–38 (2019) (noting that the Ninth Circuit's ruling was particularly significant because it changed legal precedent on the EPA's fourth defense and simultaneously exacerbated the split among the circuit courts over what constitutes a factor other than sex).

[50] *See infra* notes 52–71 and accompanying text.

[51] *See infra* notes 72–77 and accompanying text.

[52] *See infra* notes 53–55 and accompanying text.

[53] *See* Wernsing v. Dep't of Hum. Servs., 427 F.3d 466, 468–69 (7th Cir. 2005) (reasoning that construing the fourth defense broadly would best further Congress's original intent). In 2005, in *Wernsing v. Department of Human Services*, the Seventh Circuit rejected the notion that prior pay

Rizo, the Ninth Circuit eliminated prior pay as a factor other than sex altogether.[54] The majority of circuit courts fall somewhere in between, limiting factors other than sex to a legitimate business or job-specific reason.[55]

The Seventh Circuit has maintained that employers may always set wages based on an employee's prior pay because prior pay is not related to sex.[56] In 1994, in *Dey v. Colt Construction & Development Co.*, the Seventh Circuit maintained that Congress intended the fourth defense to be a broad exception.[57] The court held that Congress's only goal was to stop sex discrimination, not to dictate how employers should compensate their employees.[58]

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counteracts the legal rule Congress set through the EPA, even if this factor is rooted in market forces. *Id.* at 469–70; *see infra* note 62 (discussing the market force theory the *Wernsing* court denounced).

[54] *See Rizo*, 950 F.3d at 1231 (rejecting the idea that *Rizo* deepened the circuit split on prior pay because only the Seventh Circuit staunchly defends prior pay as a factor other than sex).

[55] *See, e.g.*, EEOC v. Md. Ins. Admin., 879 F.3d 114, 123 (4th Cir. 2018) (reasoning that although the defendant compensated employees in a "gender-neutral" way, the justification for the system had to be based on job-related factors); Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005) (using experience and education as examples of valid factors under the fourth defense); Angove v. Williams-Sonoma, Inc., 70 F. App'x 500, 508 (10th Cir. 2003) (holding that a pay system was valid because it did not rely solely on prior pay); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995) (holding that prior pay must be a "mixed-motive" justification for pay in combination with another factor); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992) (interpreting that Congress meant for employers to have a business reason for pay distinctions under the EPA).

[56] *See Wernsing*, 427 F.3d at 469 (noting that nowhere in the text of the EPA does Congress require a business-related reason to bolster the use of prior pay as a factor other than sex); Covington v. S. Ill. Univ., 816 F.2d 317, 322 (7th Cir. 1987) (referencing the Seventh Circuit's previous rulings in which the court also rejected the notion that prior pay cannot be a factor other than sex). The U.S. Court of Appeals for the Eighth Circuit has come the closest to sliding out of the "middle lane" and into accordance with the Seventh Circuit's hardline view. *See* Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989) (summarizing the view that a factor other than sex under the fourth defense does not need to be job-related); Drum v. Leeson Elec. Corp., 565 F.3d 1071, 1073 (8th Cir. 2009) (rejecting an employer's policy basing an employee's starting salary on a prior wage because the policy outline did not include an additional factor such as education or experience). The Eighth Circuit has demonstrated a commitment to examining EPA claims on a case-by-case basis but generally disapproves of employers relying solely upon prior pay to satisfy the fourth defense. *See* Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2003) (reasoning that Congress included a broad exception to the EPA purposefully and, thus, an ad hoc approach is best). Some argue, however, that the Eighth Circuit's interpretation of the EPA is essentially the same as the Seventh Circuit and lump the two together. *See, e.g.*, Mariah Savage, *Money Talks: Using Prior Salary as an Affirmative Defense in Equal Pay Claims*, 2020 UTAH L. REV. 289, 303 (grouping the Seventh and Eighth Circuits together); Jeffrey K. Brown, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other Than Sex" Defense*, 13 HOFSTRA LAB. L.J. 181, 184–85 (1995) (same).

[57] 28 F.3d 1446, 1462 (7th Cir. 1994).

[58] *See id.* (reiterating the court's willingness to trust an employer's judgment to distinguish salary on a "bona fide" factor, unless there is evidence to show that factor is, either in application or substance, discriminatory). In 2017, in *Lauderdale v. Illinois Department of Human Services*, the Seventh Circuit affirmed its previous holdings, stating that because the plaintiff failed to adequately connect her employer's consideration of her prior pay with her sex, the practice did not violate the EPA. *See* 876 F.3d 904, 909 (7th Cir. 2017) (pointing to evidence in the record that the employer had legitimate budget concerns and was looking to make cuts, therefore the plaintiff could not establish her decreased salary was sex discrimination). Some scholars, however, view the Seventh Circuit's ruling in *Lauderdale* as

In 1992, in *Aldrich v. Randolph Central School District*, the U.S. Court of Appeals for the Second Circuit established the "middle lane" view: pay distinctions must be rooted in job-related factors.[59] Following *Aldrich*, other circuit courts similarly held that employers could not rely solely on prior pay to determine salary.[60] These courts were concerned that prior pay flirts too closely with the market force theory the Supreme Court rejected in *Corning Glass Works v. Brennan*.[61] The theory provides that many female-dominated jobs are simply lower in demand and, therefore, that lower female wages are the result of natural economic forces, not discrimination.[62] The Court debunked this theory as a hollow justification for underpaying female employees.[63] Consequently, the "middle lane" courts require employers to cite a job-related factor to ensure that sex was unrelated to their wage-setting process.[64]

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a confirmation that the court is looking for "bona fide" factors to justify the fourth defense. *See* Jessica L. Lindsted, *The Seventh Circuit's Erosion of the Equal Pay Act*, ILL. INST. TECH. CHI.-KENT COLL. L. (Mar. 24, 2021), https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1124&context=seventhcircuitreview [https://perma.cc/Y7R2-M6WD] (implying that the Seventh Circuit tends to look for business-related justifications in its assessment of a "bona fide" factor unrelated to sex, even if the court has never stated this explicitly).

[59] *See Aldrich*, 963 F.2d at 526 (noting that the House Committee Report on the passage of the EPA described valid defenses against potential claims as "*bona fide*" or job-related reasons for distinctions in pay (citing H.R. REP. NO. 88-309, at 2 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 689)). The Second Circuit's 1992 holding in *Aldrich v. Randolph Central School District* carved out an important precedent for other circuits to follow. *See id.* at 525 (noting that if employers could rely solely on prior pay under the fourth affirmative defense, this would result in a "gaping loophole" in the EPA). Both the Fourth and Tenth Circuits have cited *Aldrich* as authority for holding that employers invoking an affirmative defense under the fourth exception must provide job-related reasonings. *See Md. Ins. Admin.*, 879 F.3d at 123 (citing *Aldrich*, 963 F.2d at 525); Riser v. QEP Energy, 776 F.3d 1191, 1198 (10th Cir. 2015) (same).

[60] *See, e.g.*, *Riser*, 776 F.3d at 1199 (confirming that employers may look to prior pay in some circumstances); Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005) (holding that employers cannot use prior pay as the only justification for a salary challenged under the EPA); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995) (upholding the district court's ruling that allowing prior salary to be the sole defense for pay disparity would "swallow up the rule" of the EPA (citing Irby v. Bittick, 830 F. Supp. 632, 636 (M.D. Ga. 1993))).

[61] *See* Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988) (rejecting General Motors's market force theory argument). In 1974, in *Corning Glass v. Brennan*, the Supreme Court reasoned that, although paying women less might make fiscal sense in some industries, this would directly contradict the principle of the EPA to ensure equal pay for equal work. *See* 417 U.S. 188, 208 (1974) (alluding to the concept later to be formalized as the "market force theory," in which employers attempt to make an economic justification for discriminating against their female employees).

[62] *Corning Glass*, 417 U.S. at 207. Some scholars argue that allowing employers to use prior pay as a metric for setting salary is merely an extension of these "market excuses" that the Supreme Court denounced in *Corning Glass*. *See, e.g.*, Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 176 (2011) (describing prior pay, initial salary offers, and wage negotiations as the three vestiges of the market force theory that remain legal in the courts).

[63] *Corning Glass*, 417 U.S. at 207.

[64] *See Gen. Motors*, 841 F.2d at 1571 (citing experience or training as potential job-related factors). In 1988, in *Glenn v. General Motors Corp.*, U.S. Court of Appeals for the Eleventh Circuit di-

The Ninth Circuit formerly held the "middle lane" view but charted a new course in *Rizo*.[65] The majority reasoned that prior pay is merely a "proxy" for other gendered factors, therefore, any use of prior pay to defend against an EPA claim would perpetuate sex discrimination.[66] Meanwhile, the two concurring opinions in *Rizo* advocated against the majority's departure from the "middle lane."[67] Both concurrences expressed a concern that the majority ignored the realities of the business world.[68] The majority acknowledged this concern and admitted that allowing prior pay during salary negotiation but forbidding it during litigation may stymie employers.[69] The majority maintained, however, that the EPA pertains only to what is permissible for an affirmative defense and explicitly confined the holding to that context.[70] As such, after *Rizo*, an employer may still consider prior pay during salary negotiations, but the court will not allow it as a valid factor other than sex under the EPA.[71]

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rectly criticized the Seventh Circuit for ignoring the Supreme Court's holding in *Corning Glass* by allowing an employer to properly invoke the fourth defense with prior pay as the only justification. *See id.* (citing Covington v. S. Ill. Univ., 816 F.2d 317, 321 (7th Cir. 1987)) (criticizing the Seventh Circuit for using the market force theory as grounds for holding prior pay as a factor other than sex).

[65] *See* Rizo v. Yovino, 950 F.3d 1217, 1229–30 (9th Cir. 2020) (en banc) (reasoning that the holding in *Kouba* was contrary to the inherent purpose of the EPA (citing Kouba v. Allstate Ins. Co., 691 F.2d 873, 876–77, 878 (9th Cir. 1982)), *cert. denied*, 141 S. Ct. 189 (2020).

[66] *See id.* at 1228 (noting that sex-based wage discrimination is so deeply entrenched in American culture that it is impossible to entirely separate sex from prior pay).

[67] *Id.* at 1232 (McKeown, J., concurring); *id.* at 1237 (Callahan, J., concurring). *Rizo* contained two concurring opinions: one penned by Judge M. Margaret McKeown, joined by Judges Richard Tallman and Mary Murguia, and the other by Judge Consuelo Callahan, joined by Judge Tallman and Judge Carlos Bea. *Id.* at 1232 (McKeown, J., concurring); *id.* at 1237 (Callahan, J., concurring). Judge Morgan Christen wrote the majority opinion. *Id.* at 1219 (majority opinion).

[68] *Id.* at 1232 (McKeown, J., concurring); *id.* at 1237 (Callahan, J., concurring). In her concurring opinion, Judge McKeown stated that the majority made the same "categorical error" as the Seventh Circuit by eliminating consideration of prior pay altogether. *Id.* at 1235 (McKeown, J., concurring). Likewise, Judge Callahan wrote that the majority confused the standard of the fourth defense by imposing a job-related requirement. *Id.* at 1238 (Callahan, J., concurring). Judge Callahan argued that there is no legal justification for preventing employers from incorporating prior pay as one factor among many when determining an employee's salary. *Id.* at 1240. Further, Judge Callahan noted that allowing employers to incorporate prior pay into a salary calculation is a sanctioned practice by the Equal Employment Opportunity Commission (EEOC). *Id.* at 1241 (citing Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions, 29 C.F.R. § 1604 (1997)). Judge Callahan's opinion openly disagreed with the majority's premise that prior pay is always an inherently gendered factor and argued that employers should have the opportunity to demonstrate through the fourth defense that their salary system is not discriminatory. *Id.*

[69] *Id.* at 1232 (majority opinion). In doing so, the majority drew an important distinction between factors that employers are permitted to consider when negotiating salaries versus factors permitted in an affirmative defense to an EPA claim. *Id.* at 1231.

[70] *Id.*

[71] *Id.* In her concurrence, Judge McKeown described the majority's delineation between acceptable factors during salary negotiation and acceptable factors for constructing an affirmative defense as confusing for employers. *Id.* at 1235 (McKeown, J., concurring). She explained that in an effort to avoid potential liability under an EPA claim, employers will stop considering prior pay during salary negotiations as well. *Id.* The majority did not share Judge McKeown's concerns, reasoning that if

B. How the Sausage Is Made: The Economic and Cultural Influences Behind an American Woman's Salary

In her concurring opinion in *Rizo*, Judge M. Margaret McKeown suggested that eliminating prior pay from the EPA's fourth defense would harm female job candidates.[72] Some scholars share her concern, believing that employers who cannot consider prior pay may resort to stereotypes detrimental to women.[73] Other experts argue, however, that prior pay is dangerous because even a benevolent employer who genuinely wants to pay a woman more can be adversely affected by knowledge of her previous salary.[74]

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employers were truly basing salary on non-sex factors, then these employers would have plenty of other justifications available to them (i.e., experience, education, etc.) and would not need to resort to prior pay to justify their choices. *Id.* at 1231 (majority opinion).

[72] *See id.* at 1232, 1235–36 (McKeown, J., concurring) (expressing concern that the majority's ban on an employer's consideration of prior pay may be to the detriment of female candidates, particularly those applying for jobs in highly competitive fields). As an example, Judge McKeown drew attention to industries with a limited pool of qualified job applicants, such as artificial intelligence, where consideration of prior pay during salary negotiations can result in more competitive job offers. *Id.* at 1235–36 (citing Cade Metz, *Tech Giants are Paying Huge Salaries for Scarce A.I. Talent*, N.Y. TIMES (Oct. 22, 2017), https://www.nytimes.com/2017/10/22/technology/artificial-intelligence-experts-salaries.html [https://perma.cc/4ZSX-A6G4]). Other evidence has shown, however, that even highly educated females in executive positions of the type Judge McKeown alludes to are generally paid less than male executives. Eric Frazier, *Raises for Female Executives Match Those for Men, but Pay Gap Persists*, CHRON. OF PHILANTHROPY (Oct. 2, 2008), https://www.philanthropy.com/article/Raises-for-Female-Executives/167407/ [https://perma.cc/MY7R-34ZV].

[73] *See, e.g.*, Sabrina L. Brown, *Negotiating Around the Equal Pay Act: Use of the "Factor Other Than Sex" Defense to Escape Liability*, 78 OHIO ST. L.J. 471, 489 (2017) (noting that women must often overcome negative assumptions about female behaviors in the workplace during salary negotiations); Liz Davidson, *A Powerful Way to Close the Pay Gap: Don't Negotiate Salaries*, FORBES (Apr. 11, 2018), https://www.forbes.com/sites/financialfinesse/2018/04/11/a-powerful-way-to-close-the-pay-gap-dont-negotiate-salaries/ [https://perma.cc/JVY5-675F] (explaining how salary negotiations tend to yield less favorable results for women); *see also* Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/business/economy/salary-history-laws.html [https://perma.cc/66SR-A7FZ] (reporting that some people believe employers that are unable to inquire about prior pay may assume female candidates will settle for lower salary offers based on the stereotype that women tend to make less than men). Fortunately, there is a legal barricade against such stereotyping. *See* JAMES KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 7.1 (2020) (noting that courts routinely reject employers' attempts to pay women less based on antiquated ideas of female gender roles (citing as examples *Sessions v. Moralles-Santana*, 137 S. Ct. 1678 (2017); *United States v. Virginia*, 518 U.S. 515 (1996); and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982))). Other countries, such as the United Kingdom, deter companies from pay discrimination by requiring them to publicly disclose their gender pay ratio. *See* Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123, 1194 (2019) (discussing the difference between gender gap ratios and general pay ratios and the impact of their respective disclosures).

[74] *See* Bourree Lam, *The Government Thinks That Interview Questions About Salary History Are Holding Women Back*, The ATLANTIC (Aug. 10, 2015), https://www.theatlantic.com/business/archive/2015/08/hiring-interview-gender-gap-pay-salary-history-opm/400835/ [https://perma.cc/X66J-ES8N] (discussing the effect of anchoring, a phenomenon in behavioral economics that refers to the brain's implicit bias to skew a final decision toward the first piece of information given). One study on the

An array of studies and reports on the pay gap from recent years show that the issue cannot be distilled to one cause.[75] That said, the *Rizo* court is not alone in promulgating the theory that prior pay perpetuates the pay gap.[76] Several state and federal legislatures, for example, have proposed schemes that forbid hiring managers from asking a female job candidate her current wage.[77] Regardless, the reality remains that there is a persistent pay gap in the United

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effects of anchoring reported that anchoring is particularly common in salary negotiations. Todd J. Thorsteinson, *Initiating Salary Discussions with an Extreme Request: Anchoring Effects on Initial Salary Offers*, 41 J. APPLIED SOC. PSYCHOL. 1774, 1775 (2011). Further, anchoring can have an especially large impact in salary negotiations for high-level positions without a defined pay range. *Id.* at 1789.

[75] *See* Sarah Jane Glynn, *Gender Wage Inequality: What We Know and How We Can Fix It*, WASH. CTR. FOR EQUITABLE GROWTH 11 (2018), http://cdn.equitablegrowth.org/wp-content/uploads/2018/04/09040142/040918-pay-inequality2.pdf [https://perma.cc/P389-SYSQ] (noting that many argue the pay gap is likely the result of a combination of forces including education, work history, family life, and labor force participation). One factor hugely correlative to the pay gap is race, as women of color experience even greater discrepancies in their compensation compared to white men than white women. *See* Stephen Miller, *Black Workers Still Earn Less Than Their White Counterparts*, SOC'Y FOR HUM. RES. MGMT., https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx (June 11, 2020) (stating that Black women in high-paying jobs, such as lawyers or doctors, earn about 63% of the salary paid to white men holding the same positions); Danielle Paquette, *Court: Employers Can't Pay Women Less Because of Their Salary History*, WASH. POST (Apr. 9, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/04/09/court-employers-cant-pay-women-less-because-of-their-salary-history/ [https://perma.cc/3PUE-CNRF] (reporting that Black and Hispanic women make even less money per dollar than the average man as compared to white women).

[76] *See* Memorandum from Beth F. Koburt, Acting Director, on U.S. Office on Personnel Management, on Additional Guidance on Advancing Pay Equality in the Federal Government (July 30, 2015), https://www.chcoc.gov/content/additional-guidance-advancing-pay-equality-federal-government [https://perma.cc/BB3T-YWM4] (releasing a government-wide memorandum encouraging federal employers not to consider an employee's existing salary during wage negotiations). For example, the Office of Personnel Management released a memorandum instructing federal hiring managers to focus on factors such as the candidate's experience because an applicant's current pay may not be an accurate representation of their suitability for the job. *Id.*

[77] *See, e.g.*, CAL. LAB. CODE § 432.3(a) (West 2021) (forbidding employers from using "salary history" to set wages); CONN. GEN. STAT. ANN. § 31-40z(7)(c) (2021) (noting that prospective employees are not required to reveal their previous salary to an employer); DEL. CODE ANN. tit. 19 § 709B(b)(2) (2021) (stating employers shall not "seek the compensation history" of job candidates); MASS. GEN. LAWS ch. 149, § 105A(c)(2) (2021) (making it unlawful for an employer to inquire about the previous wage of a "prospective employee"); Ill Exec. Order No. 2019-02 (Jan. 15, 2019) (specifically stating that requesting prior wage information "disadvantages women"); *see also* Savage, *supra* note 56, at 307 (discussing local efforts to pass legislative reform on prior pay). At the federal level, the Senate proposed a piece of legislation called the Paycheck Fairness Act that would disallow employers from using prior pay in the hiring process. Paycheck Fairness Act, S. 819, 115th Cong. § 8(a) (2017). The House of Representatives passed the legislation in March 2019, the Senate read it for a second time in April 2019, and it remains pending on the Senate's Legislative Calendar. *H.R.7—Paycheck Fairness Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/7/actions [https://perma.cc/2BBK-4LHT].

States, and scholarly reports and available data suggest that prior pay may be partly to blame.[78]

III. THE NINTH CIRCUIT CORRECTLY DECIDED THAT PRIOR PAY IS NOT A FACTOR OTHER THAN SEX

The U.S. Court of Appeals for the Ninth Circuit's 2020 decision in *Rizo v. Yovino* honors the heart of the EPA: ending wage discrimination on the basis of

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[78] *See* Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RSCH. CTR.: FACT TANK BLOG (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/ [https://perma.cc/S8P2-B5UP] (reporting that the rate of decrease in the pay gap has been stagnant for the past several years). Scholars have noted that it is nearly impossible to pin the entire problem on one culprit. *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 843, 845, 847 (2007) (weighing a conglomeration of factors such as labor force participation rates, educational attainment, trends in de-unionization of male-dominated professions, and market demand for experienced workers). Only half of the pay gap can be explained by non-gendered factors such as education or experience, thus sex-based discrimination likely plays a role. *See* Savage, *supra* note 56, at 289 (noting that prior pay is a "shadowy concept," and it can be difficult to discern its particular impact on the pay gap). For example, women are generally relegated to positions that are lower paid. *See* LEANIN.ORG & MCKINSEY & CO., WOMEN IN THE WORKPLACE 11 (2019), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2019.pdf (reporting that women hold 38% of managerial positions compared to 62% of men because women are promoted less often); *see also* NAT'L WOMEN'S L. CTR., ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB 2 (Dec. 2018), https://nwlc.org/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.pdf [https://perma.cc/5WXY-MJ2K] (stating that women are more likely to have work experience in jobs that pay less). Therefore, some argue, a prior salary may not be a true reflection of a woman's potential productivity but merely a result of unrelated social forces outside of her control. *See* Sarah Green Carmichael, *Women Dominate College Majors That Lead to Lower-Paying Work*, HARV. BUS. REV. (Sept. 20, 2017), https://hbr.org/2017/04/women-dominate-college-majors-that-lead-to-lower-paying-work [https://perma.cc/8KTR-BZJW] (showing that college-educated women tend to major in fields that lead to lower paying jobs than college-educated men). Others argue that women are paid less than men because, traditionally, women have borne the brunt of childrearing and household responsibilities. *See* Jillian Berman, *Women's Unpaid Work Is the Backbone of the American Economy*, MKT. WATCH (Apr. 15, 2018), https://www.marketwatch.com/story/this-is-how-much-more-unpaid-work-women-do-than-men-2017-03-07 [https://perma.cc/JD49-YSQ6] (reporting that women are often overlooked for career opportunities because it is presumed that they will be laden with family responsibilities and that once a woman leaves her job for more than six months, her baseline salary never recovers). Although evidence shows traditional gender roles have been evolving in recent years, events like the global COVID-19 pandemic have revealed that American women are still more inclined to take on unpaid household and family duties. *See* LEANIN.ORG & MCKINSEY & CO., *supra*, at 38 (showing that, overall, younger women in dual-income households bear less of the household responsibility than the older generation); Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling, 3 Percent of Women Agree*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html [https://perma.cc/C4XH-ZR7D] (reporting that the COVID-19 pandemic has entrenched traditional gender roles); *see also* Rebecca Sewall, *The Pandemic Brings the Value of Women's Unpaid Work into Focus*, CREATIVE ASSOCS. INT'L INSIGHTS BLOG (Apr. 9, 2020), http://www.creativeassociatesinternational.com/insights/the-pandemic-brings-the-value-of-womens-unpaid-work-into-focus/ [https://perma.cc/EPQ6-QFTR] (projecting that if American women were paid minimum wage for their unpaid labor, they would have earned approximately $1.5 trillion in 2019).

sex.[79] Although Congress included the fourth defense to give employers leeway in their business practices, that flexibility was not meant to overpower the EPA's underlying spirit of sex equality.[80] Section A of this Part explains why a woman's salary is intrinsically gendered and thus can never be a factor unrelated to sex.[81] Section B discusses the *Rizo* majority and concurrences and suggests that the majority could have more brazenly rejected the role prior pay plays in salary negotiations.[82]

A. Female Salaries Cannot Be Separated from Gendered Influences

Courts cannot properly decide whether a particular factor, such as prior pay, is a factor other than sex without fully understanding it.[83] The Ninth Circuit correctly understood that prior pay can never be a factor other than sex because female salaries are loaded with decades of socioeconomic baggage.[84] The fact is: prior pay is inextricably entangled with sex.[85]

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[79] *See* H.R. REP. NO. 88-309, at 2 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 688 (summarizing that the primary purpose of the EPA was to eliminate sex-based wage discrimination).

[80] *See id.* at 3, U.S.C.C.A.N. 689 (clarifying that the purpose of the exceptions to the EPA was simply to make room for "legitimate differences in pay"); Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974) (affirming that Congress intended the EPA to be "broadly remedial," and any policy that supports paying the genders differently for the same work would run against the legislative intent); Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (discussing bona fide intents (citing Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989)). The EPA has challenged the courts to balance the freedom to allow businesses to pay their employees according to their needs and the desire to prevent continued discrimination against women. *See* Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2003) (describing the court's difficulty balancing Congress's dual intent to prevent employers from implementing discriminatory policies while also allowing them flexibility to make business decisions).

[81] *See infra* notes 83–93 and accompanying text.

[82] *See infra* notes 94–106 and accompanying text.

[83] *See* Rizo v. Yovino, 950 F.3d 1217, 1229 (9th Cir. 2020) (en banc) (referencing previous holdings from the Eighth, Eleventh, and Ninth Circuits that have observed the statistically gendered nature of prior pay and factored that observation into their reasoning (citing *Taylor*, 321 F.3d at 718; Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982))), *cert. denied*, 141 S. Ct. 189 (2020). In 2020, in *Rizo v. Yovino*, the Ninth Circuit discussed data showing how the wage gap between men and women has persisted over decades, the pronounced negative effects of wage discrimination on women of color, and other factors such as education that have historically disadvantaged women in the workplace. *Id.* (citing U.S. BUREAU LAB. STAT., HIGHLIGHTS OF WOMEN'S EARNINGS IN 2017, at 1–2 (2018) https://www.bls.gov/opub/reports/womens-earnings/2018/pdf/home.pdf [https://perma.cc/K2TX-8BFL]). This analysis directly impacted the court's ultimate decision that prior pay is an inherently gendered factor. *Id.*

[84] *See* Glynn, *supra* note 75, at 7 (enumerating the confluence of factors that contribute to lower salaries for women). Women tend to be siloed to professional roles and industries that receive less compensation than men, creating an approximately $404 billion difference in total wages earned between the two genders. *Id.* Other factors such as race, region, and blatant discrimination also exacerbate the gender pay gap. *Id.*

[85] *See id.* (enumerating myriad sex-based factors that affect prior pay). Studies have shown that a female candidate's previous wage can influence even the most benevolent employers. Thorsteinson, *supra* note 74, at 1786; *see also* NAT'L WOMEN'S L. CTR., *supra* note 78, at 1 (noting that even if an

Judge McKeown criticized the majority's ruling as extreme.[86] She suggested that women vying for competitive jobs may lose out on higher salary offers if the law bans prior pay from the conversation.[87] First, nothing in the majority's ruling prevents a woman from volunteering her previous wage to a prospective employer to leverage a better offer.[88] The majority was clear that its holding is cabined to factors an employer may raise in an EPA suit, not a salary negotiation.[89] Second, it was misleading for Judge McKeown to imply that the majority's decision will disadvantage a significant number of women.[90] On the contrary, data suggests that previous wage numbers hinder more women than they help.[91] Thus, Judge McKeown's reasoning, which Judge Consuelo Callahan echoed, reveals a misunderstanding of what goes on behind the curtain of a woman's salary.[92] The majority was correct in holding that pri-

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employer has the budget or desire to pay a female employee a higher wage, knowledge of her previous salary may sway the employer to make a lower offer due to the influence of anchoring). Knowing a woman's prior pay hugely tips the scales to an employer's advantage during salary negotiation, regardless of the employer's intentions. Thorsteinson, *supra* note 67, at 1786; *see also* Davidson, *supra* note 73 (pointing out that employers in negotiations are motivated to pursue the lowest salary they think a woman will accept). Moreover, before the negotiation process even begins, female job applicants are swimming upstream to fight against economic and cultural currents that have been working against them for decades. *See* Blau & Kahn, *supra* note 78, at 845 (contextualizing the pay gap among a range of socioeconomic forces such as educational attainment, on-the-job training, and other factors that have determined a woman's position in the workforce since World War II).

[86] *See Rizo*, 950 F.3d at 1232 (McKeown, J., concurring) (stating that the majority "goes too far" by eliminating prior pay from the scope of EPA defenses entirely).

[87] *See id.* at 1235 (discussing the possibility that the majority opinion may prevent employers from offering salaries attractive enough to draw female candidates with a rare or specific skill set within competitive industries).

[88] *Compare id.* at 1236 (arguing that the legislature should decide whether a woman can reveal her salary history during a job negotiation, not the judiciary), *with id.* at 1231 (majority opinion) (rebutting the concurring judges' suggestion that the holding hinders women in competitive job markets who choose to share their previous wage during salary negotiations).

[89] *See id.* at 1231 (majority opinion) (clarifying that the holding applies only to employers in the context of EPA litigation and the available affirmative defenses and has no bearing on the factors an employer may consider during a salary negotiation).

[90] *See id.* (McKeown, J., concurring) (raising the possibility that the majority's decision might inhibit women vying for high profile jobs in vanguard industries, such as artificial intelligence) (citing Metz, *supra* note 72)).

[91] *See* Frazier, *supra* note 72 (reporting that in 2006, female CEOs and executives at large corporations saw a 7.4% median increase in their salaries compared to the 7.2% increase enjoyed by their male counterparts, but still earned less money overall); Davidson, *supra* note 73 (noting that even women with graduate degrees in business achieve worse outcomes than men do in salary negotiations); *see also* Miller, *supra* note 75 (noting the disproportionate effect of the pay gap on Black women); Paquette, *supra* note 75 (showing how women of color experience heightened pay discrimination).

[92] *Compare Rizo*, 950 F.3d at 1237 (McKeown, J., concurring) (arguing that a woman's previous salary can symbolize her achievements), *and id.* at 1241 (Callahan, J., concurring) (stating that prior pay is not an automatically gendered factor), *with supra* note 78 (discussing the many studies and reports that have consistently shown how socioeconomic trends have depreciated women's salaries and persisted the pay gap in the United States for generations).

or pay cannot be parsed from the confluence of gendered forces that have deflated female wages for decades and, therefore, that it can never be a factor other than sex.[93]

B. The Rizo *Holding Could Have Gone One Step Further*

The Ninth Circuit was also correct to invalidate the "middle lane" argument the concurrences supported.[94] The idea that prior pay is discriminatory when standing alone, but not discriminatory when accompanied by a job-related factor, is untenable.[95] What separates the permissible scenario from the impermissible one is the job-related factor, not prior pay.[96] Therefore, prior pay does not need to be part of the equation at all.[97]

The concurring judges were concerned that the *Rizo* decision would trap employers by allowing them to use prior pay during salary negotiation, thereby exposing them to liability.[98] The majority dismissed the issue by reiterating that the holding has no bearing on what an employer can do during salary negotiation.[99] This is where the majority missed an opportunity to take *Rizo* one

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[93] *See Rizo*, 950 F.3d at 1229 (recognizing the history of "wage discrimination" against women in the United States). The majority concluded that because pay inequity is so entrenched in the American labor economy, prior pay cannot serve as a reliable indicator of an employer's neutrality about an employee's sex. *Id.* Further, the Ninth Circuit noted that Congress passed the EPA to be a stopgap against this long-standing inequality and, therefore, that allowing any trace of discrimination to persist under the guise of the law would be repugnant to the legislative purpose. *See id.* (reasoning that "prior pay may carry with it the effects of sex-based discrimination" Congress meant to target by passing the EPA).

[94] *See id.* at 1230 (first citing Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015); then citing Balmer v. HCA, Inc., 423 F.3d 606, 612–13 (6th Cir. 2005); and then citing Irby v. Bittick, 44 F.3d 949, 955, 957 (11th Cir. 1995)) (criticizing other circuits for holding that prior pay is valid when used in conjunction with another non-sex factor).

[95] *See id.* (accusing the other circuit courts of "shift[ing] gears" on prior pay once other factors are involved).

[96] *Compare* Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570 (11th Cir. 1988) (holding that an employer's salary scheme violated the EPA because it relied solely on the employees' previous wages), *with* Angove v. Williams-Sonoma, Inc., 70 F. App'x 500, 508 (10th Cir. 2003) (holding an employer's wage-setting procedure as permissible under the EPA's fourth affirmative defense because the system factored in the employee's experience along with prior pay).

[97] *See Rizo*, 950 F.3d at 1230 (stating unequivocally that of the permissible factors other than sex, prior pay is "not one of them").

[98] *See id.* at 1236 (McKeown, J., concurring) (describing the "tension" the majority caused for employers trying to navigate salary negotiations legally and claiming the holding "handcuffs employers"); *infra* note 99 and accompanying text (addressing this concern over the majority opinion).

[99] *See Rizo*, 950 F.3d at 1232 (majority opinion) (acknowledging the "tension" referenced in Judge McKeown's concurring opinion). The majority reasoned that any potential confusion between factors an employer may consider in salary negotiation versus EPA litigation is a result of how Congress constructed the statute. *Id.* The language is limited to the parameters of the four available affirmative defenses, and, therefore, the court may only address what the employer can do within that context. *Id.*

step further.[100] On a purely practical basis, Judge McKeown is right that *Rizo* effectively bars employers from using prior pay in salary negotiations if they wish to avoid future liability.[101] Indeed, if an employer incorporates prior pay into its salary decision-making at all, the employee could later claim that her salary was based on a discriminatory factor.[102] The majority discounted this consequence when it could have openly embraced it.[103]

The Ninth Circuit's reasoning that prior pay is intrinsically discriminatory should have equally powerful implications for salary negotiations as it does for litigation if the pay gap is ever to be closed.[104] Instead of assuaging its naysayers by saying its new precedent will not impact salary negotiation, the Ninth Circuit should have been unapologetic about the natural effect its decision will have on the future of salary negotiations.[105] In other words, the Ninth Circuit should have said: prior pay can never be a factor other than sex, and yes, that means it would be ill-advised for an employer to consider prior pay when determining a prospective female employee's salary.[106]

CONCLUSION

Congress passed the EPA over fifty years ago, and yet women in this country still do not receive equal pay for equal work. As Justice Ginsburg

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[100] *See id.* (asserting that nothing in the opinion prevents employers from raising the topic of a job candidate's previous wages in a salary negotiation).

[101] *See id.* at 1236 (McKeown, J., concurring) (stating that the majority's holding leaves "little daylight" for employers to treat salary negotiations differently from EPA defenses).

[102] *See id.* at 1232 (majority opinion) (recognizing the "inherent tension" in allowing employers to include prior pay in their salary-setting practices on the frontend but then disallowing prior pay as a defense for those same practices during litigation).

[103] *See id.* (dismissing the concerns of the concurring judges).

[104] *Contra id.* at 1231 (reasoning that prior pay should not be treated the same in EPA litigation as in salary negotiations because the EPA statutory construction is limited to the permissible factors available to employers in litigation). Allowing prior pay to be a part of salary negotiations perpetuates the pay gap because, statistically, a woman's previous wage will not be an accurate reflection of her worth. *See id.* at 1229 (explaining that the pay gap remains an ongoing problem in the United States). *See generally supra* note 78 and accompanying text (discussing the breadth of research available to explain why female employees tend to receive lower wages than male employees in the same job).

[105] *See Rizo*, 950 F.3d at 1232 (reassuring the concurring judges that the majority opinion will not impact employers in salary-setting). It is not the court's role to dole out legal incentives, but it is certainly well within the court's purview to promote Congress's legislative intent and give deference to its policy goals. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) (placing Congress's intent in passing the EPA at the center of its holding to reject an employer's unequal pay to male and female employees). Restricting an employer's ability to consider prior pay furthers the EPA's legislative purpose. *See* H.R. REP. NO. 88-309, at 2, *as reprinted in* 1963 U.S.C.C.A.N. 688 (stating the purpose of the legislation is to compensate employees performing the same work equally "regardless of sex"). Prior pay and its role in salary-setting is repugnant to the EPA's purpose because, as the data shows, women continually receive lower salaries despite performing the same work as men. Stewart, *supra* note 7; Glynn, *supra* note 75, at 7; LEANIN.ORG & MCKINSEY & CO., *supra* note 78, at 11.

[106] *See* Rizo, 950 F.3d at 1231 (limiting its analysis to the EPA's affirmative defenses).

warned, nebulous obstacles like prior pay continue to lurk in the shadows and impede women from closing the nineteen-cent gap that separates them from their male colleagues. The decision in *Rizo v. Yovino* will help stem the tide of the pay gap by eliminating prior pay as an affirmative defense in EPA litigation. Only time will tell if other legislative or judicial reforms will help close the pay gap for good. But one thing is certain: in the meantime, women across America will continue to wake up every morning and go to work for a country that consistently underpays them.

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