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# MONEY TALKS: USING PRIOR SALARY AS AN AFFIRMATIVE DEFENSE IN EQUAL PAY CLAIMS

Mariah Savage\*

## *Abstract*

*The wage gap is alive and well, with women on average making 82 cents for every dollar a man makes. Moreover, the wage gap has stagnated, with no significant progress being made to close the gap for the past ten years. In light of this stagnation, it is important to review current practices and consider steps that could be taken in order to catalyze a modern effort at closing the wage gap. One commonplace business practice that should be addressed is an employer's use of an employee's prior salary to determine starting pay. Courts are divided as to whether employers can or should be allowed, under the Equal Pay Act of 1963, to rely on an employee's past salary to excuse any resulting wage differential between employees of the opposite sex performing substantially similar work.*

*This Note argues that, within the context of the Equal Pay Act, employers should not be able to excuse a wage gap by using an employee's prior salary. This Note proceeds by examining the history and current context of the Equal Pay Act of 1963, as well as the disparate court responses concerning whether employers can use their considerations of an employee's prior salary to defend a resulting wage gap. This Note finds that, while prior salary may appear to be an objective measure that helps facilitate setting current wages, prior salary is ultimately some third-party's determination of a person's worth. Prior salary is a shadowy concept and it is extraordinarily difficult, if not outright impossible, to discern what factors may have been used in setting it and whether that determination was at all prejudicial. Therefore, this Note ultimately urges courts and legislatures to recognize that prior salary should not be used to excuse a wage gap. People's livelihoods are at risk and it is important that the question of whether prior salary should continue to be considered and used as a defense by employers be resolved.*

## I. INTRODUCTION

In the United States, Equal Pay Day is a day of awareness, symbolic of the fact that women are paid less than men. It typically falls within the first or second week

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of April,<sup>1</sup> denoting the additional amount of time women must work into the new year to earn what men earned during the previous year.<sup>2</sup> On the eve of Equal Pay Day in April 2018, the U.S. Court of Appeals for the Ninth Circuit released its en banc decision in *Rizo v. Yovino*.<sup>3</sup> The court held that under the Equal Pay Act of 1963 (EPA)<sup>4</sup>—a means to ensure equal pay for equal work—“prior salary alone or in combination with other factors cannot justify a wage differential.”<sup>5</sup> That is, employers can no longer use prior salary to justify a wage gap in an EPA claim brought by an employee for wage discrimination.<sup>6</sup> Inconsistent with holdings in other circuits, *Rizo* highlights the existing circuit split concerning prior salary and the EPA.<sup>7</sup>

In 2019, the U.S. Supreme Court vacated *Rizo* because Judge Reinhardt, who authored the Ninth Circuit decision and cast the majority vote, died 11 days before the decision was issued and “the Ninth Circuit erred in counting him as a member of the majority.”<sup>8</sup> Although the decision has been vacated, *Rizo* is nonetheless exemplary of the steps that need to be taken to catalyze a modern effort at closing the wage gap, attaining equal pay for equal work<sup>9</sup> between men and women in the United States.<sup>10</sup>

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<sup>1</sup> In 2018, Equal Pay Day for women in general was April 10, but Equal Pay Day fell on February 22 for Asian women, April 17 for white, non-Hispanic women, August 7 for black women, September 27 for Native American women, and November 1 for Latinas. *Equal Pay Days*, EQUAL PAY TODAY (2018), <http://www.equalpaytoday.org/equalpaydays/> [<https://perma.cc/M5SA-WXYR>].

<sup>2</sup> Tristan Sullivan-Wilson, *Equal Pay Day 2018: Ending Secrecy to Close the Gender Wage Gap and Fight Sexual Harassment*, NAT’L. WOMEN’S L. CTR. (Apr. 10, 2018), <https://nwlc.org/blog/equal-pay-day-2018-ending-secrecy-to-close-the-gender-wage-gap-and-fight-sexual-harassment/> [<https://perma.cc/ADQ7-ZXNR>].

<sup>3</sup> *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc), *vacated per curiam on other grounds*, 139 S. Ct. 706 (2019).

<sup>4</sup> 29 U.S.C. § 206(d)(1) (2012). See *infra* Part III for discussion of the Equal Pay Act of 1963.

<sup>5</sup> *Rizo*, 887 F.3d at 456.

<sup>6</sup> See *infra* Part III.

<sup>7</sup> See *infra* Part III.C for discussion of different interpretations in appellate case law.

<sup>8</sup> *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019) (“[F]ederal judges are appointed for life, not for eternity.”). In a per curiam decision, the Supreme Court noted that “[w]ithout Judge Reinhardt’s vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the en banc panel who were still living when the decision was filed. Although the other five living judges concurred in the judgment, they did so for different reasons . . . Judge Reinhardt’s vote made a difference.” *Id.* at 708.

<sup>9</sup> 29 C.F.R. § 1620.13(a) (2018) (“The equal work standard does not require that compared jobs be identical, only that they be substantially equal.”).

<sup>10</sup> This Note uses the term “wage gap” to refer to a gap in pay median between working men and women in the United States. The Bureau of Labor Statistics is the government agency that reports these statistics using gender binary metrics. As such, this Note does not address wages of gender-nonconforming individuals.

Ultimately, this Note contends that *Rizo v. Yovino* was correctly decided, embodying the reformative spirit necessary to close the wage gap and end the need for Equal Pay Day. Part II of this Note considers the evolution and current status of the wage gap for women in the United States. Part III looks to the Equal Pay Act of 1963, reviewing: (A) the procedural application; (B) the history and intent behind its enactment, focusing on the fourth affirmative defense as enumerated in the EPA, which employers may exercise in response to an EPA claim; (C) case law addressing instances where prior salary was used as an affirmative defense in EPA claims; and (D) the EPA's current status in the U.S. Lastly, Part IV argues that decisions like *Rizo*, although narrow in effect, could have a broad impact, helping to drive proactive responses and reform, which are necessary to close the wage gap.

## II. THE WAGE GAP

Women in the United States have historically been paid less than men due to sexist economic policies and social beliefs.<sup>11</sup> “In 1955, women workers’ median income was 64% of that of men workers; in 1960, the median women’s wage was only 61% of that of men,”<sup>12</sup> and in 1961, women earned only 59% of what men made.<sup>13</sup> In response to this persisting differential, “equal pay legislation [was]

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<sup>11</sup> See *Letter to the Editor*, N.Y. TIMES (Feb. 18, 1869), <https://timesmachine.nytimes.com/timesmachine/1869/02/18/79386020.pdf> [<https://perma.cc/98QK-TYB5>] (noting that women employed by the government as clerks “earn about one-half the average salary paid to men clerks . . . engaged in the same kinds of labor . . .”); see also *Rizo v. Yovino*, 887 F.3d 453, 568 (9th Cir. 2018) (en banc), *vacated per curiam on other grounds*, 139 S. Ct. 706 (2019) (noting that the wage gap is not some “inert historical relic of bygone assumptions and sex-based oppression.”); *Corning Glass Works v. Brennan*, 417 U.S. 188, 191–94 (1974) (noting that men who worked night shifts were paid more than women who could only work day shifts because women were prohibited by state law from working night shifts); 109 CONG. REC. 9192, 9199 (1963) (statement of Rep. Green) (citing studies in which “employers . . . said they had a double standard pay scale for men and women . . . with the wage for women always the lower”).

<sup>12</sup> 109 CONG. REC. 9192, 9199–9200 (statement of Rep. Dwyer).

<sup>13</sup> *Id.* at 9199 (statement of Rep. Green) (stating that “[i]n 1961 the median income for women workers was \$3,351, while the median income for men workers was \$5,655. . .”). These figures and statistics likely come from the U.S. Census Bureau since the U.S. Bureau of Labor Statistics (“BLS”) only has comparable earnings data available starting in 1979. See *Frequently asked questions about earnings data from the Current Population Survey (CPS)*, U.S. BUREAU OF LAB. STAT. (June 28, 2018), <https://www.bls.gov/cps/earnings-faqs.htm> [<https://perma.cc/BUB4-X6R3>]. Any differences between the statistics from the Census Bureau and BLS may be due to BLS using “median usual *weekly* earnings” data and the Census Bureau using “median annual earnings” data. *Id.* This Note uses statistics from the BLS when available.

introduced in every Congress [from] 1945”<sup>14</sup> until the passage of the EPA in 1963.<sup>15</sup> In 1979, seven years after the EPA was expanded to include all workers<sup>16</sup> and the first year for which the Bureau of Labor Statistics has published comparable earnings data,<sup>17</sup> women earned 62% of what men earned.<sup>18</sup> In 2017, the median salary for women was 82% of what men earned that year.<sup>19</sup> While the wage gap has narrowed by about 0.5 percentage points per year since 1979, there has been very little progress since the early 2000s, with the differential stagnating around 80–83%.<sup>20</sup> Although the calculated wage gap does increase or decrease if factors such as race, age, occupation, location, or motherhood are controlled for, the average woman in the United States<sup>21</sup> makes 82 cents for every dollar a man makes.<sup>22</sup>

There is a presumption among wage gap skeptics that if women are being paid less, there must be a rational explanation. For example, some skeptics may attempt to explain away the wage gap as simply “statistics gone awry,” women choosing flexibility over larger salaries, or discounting influential factors like education and

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<sup>14</sup> 109 CONG. REC., at 9193 (statement of Rep. Bolton).

<sup>15</sup> Equal pay legislation also reemerged with the passage of Title VII of the Equal Rights Act in 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)) and the Lilly Ledbetter Fair Pay Act in 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended at 29 U.S.C. §§ 626, 633a, 794a; 42 U.S.C. §§ 2000a note, 2000e-5, 2000e-16). Additionally, if passed, the Paycheck Fairness Act would help clarify the EPA. *See, e.g., How the Paycheck Fairness Act Will Strengthen the Equal Pay Act*, WORK PLACE JUSTICE, NAT’L. WOMEN’S L. CTR. (2017), <https://nwlc.org/resources/how-the-paycheck-fairness-act-will-strengthen-the-equal-pay-act/> [<https://perma.cc/EHL6-285Z>]. The Paycheck Fairness Act is a proposed amendment to the EPA which was first introduced in 1997 and has been reintroduced in every session since. *See, e.g., H.R. 2023*, 105th Cong. (1997).

<sup>16</sup> The EPA originally excluded certain categories of workers because it was enacted as an amendment to the Fair Labor Standards Act, and all of the exemptions applied until the act was amended in 1972. *See H.R. REP. NO. 88-309*, 8 (1963) (“All of the fair labor standards exemptions apply: Agriculture, hotels, motels, restaurants, and laundries are excluded. Also, all professional, managerial, and administrative personnel, and outside salesmen are excluded.”); *see also* Education Amendments of 1972, Pub. L. No. 92-318, § 906(b)(1), 86 Stat. 375 (codified as amended at 29 U.S.C. § 213(a)(1) (2012)) (removing § 206(d)(1) from exemption).

<sup>17</sup> U.S. BUREAU OF LAB. STAT., REP. NO. 1075, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2017, 1 (Aug. 2018), <https://www.bls.gov/opub/reports/womens-earnings/2017/pdf/home.pdf> [<https://perma.cc/7PJ7-YXX3>] [hereinafter BLS HIGHLIGHTS].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1–2.

<sup>21</sup> The statistics referenced in this Note concerning the wage gap are based on surveys of wage and salaried workers ages 16 and older working 35 hours or more per week. *See id.*

<sup>22</sup> *Id.* Statistics can also vary based on how pay is measured, for example, hourly compared to weekly. *See* Nikki Graf et al., *The narrowing, but persistent, gender gap in pay*, PEW RES. CTR. (Mar. 22, 2019), <http://www.pewresearch.org/fact-tank/2018/04/09/gender-gap-facts/> [<https://perma.cc/268U-EXVG>].

experience.<sup>23</sup> In other words, if women are being paid less, they somehow deserve it by way of their independent choices—“unequal work, hence unequal pay.”<sup>24</sup> But this view ignores the compounding effects of history in addition to the fact that even when factors like education, occupation, and location are controlled for, an unexplainable differential still exists.<sup>25</sup>

The wage gap endures in all states<sup>26</sup> and persists at all economic levels.<sup>27</sup> Moreover, the wage gap is not projected to close until 2059, and that is only if progress continues at the current rate, narrowing by 0.5 percentage points each year.<sup>28</sup> To prevent the permanent stagnation of the wage gap, it is imperative to remain active and proactive, with ongoing efforts to achieve wage equality between men and women in the workforce. The trajectory offered by the Ninth Circuit’s decision in *Rizo v. Yovino* is one such encouraging attempt at a more equal economic

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<sup>23</sup> Rachel Greszler, “Pay Gap” Myth Ignores Women’s Intentional Job Choices, HERITAGE FOUND. (Apr. 9, 2018), <https://www.heritage.org/jobs-and-labor/commentary/pay-gap-myth-ignores-womens-intentional-job-choices> [https://perma.cc/8SZ5-E5WH]; see also Hanna Rosin, *The Gender Wage Gap Lie*, SLATE (Aug. 30, 2013), [http://www.slate.com/articles/double\\_x/doublex/2013/08/gender\\_pay\\_gap\\_the\\_familiar\\_line\\_that\\_women\\_make\\_77\\_cents\\_to\\_every\\_man\\_s.html](http://www.slate.com/articles/double_x/doublex/2013/08/gender_pay_gap_the_familiar_line_that_women_make_77_cents_to_every_man_s.html) [https://perma.cc/E3BT-GQYB]; Jimmy Kimmel Live, *Kids Explain Why Women Are Paid Less Than Men*, YOUTUBE (Mar. 25, 2016), <https://www.youtube.com/watch?v=S1Onniy08AY> [https://perma.cc/G5BW-BTVW].

<sup>24</sup> Bourree Lam, *What Gender Pay Gap Statistics Aren’t Capturing*, THE ATLANTIC (July 27, 2016), <https://www.theatlantic.com/business/archive/2016/07/paygap-discrimination/492965/> [https://perma.cc/8E2Q-BJAZ].

<sup>25</sup> *Id.* (“Pay-gap skeptics often note that the gap shrinks after taking these factors into account, but it’s supposed to—those statistical adjustments were intended to create a more definitive, standardized measurement.”); see also *America’s Women and the Wage Gap: Fact Sheet*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES 2–3 (May 2019), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf> [https://perma.cc/S2HG-V8K6].

<sup>26</sup> Kate Nielson, *The Gender Pay Gap by State: An Interactive Map*, AM. ASS’N OF U. WOMEN (2018), <https://www.aauw.org/resource/gender-pay-gap-by-state-and-congressional-district/> [https://perma.cc/4ULF-TESP].

<sup>27</sup> See Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 S.M.U. L. REV. 17, 23–28 (2010) (analyzing studies concerning the wage gap and women in different professions); see also Bourree Lam, *Why Does Progress on Women’s Wages Seem to be Stalling?*, THE ATLANTIC (Nov. 17, 2015), <https://www.theatlantic.com/business/archive/2015/11/gender-gap-women-wages-2015/415884/> [https://perma.cc/8E2Q-BJAZ] (listing theories as to why progress on the wage gap is stalling and presenting potential solutions to close it).

<sup>28</sup> *Women’s Median Earnings as a Percent of Men’s Median Earnings 1960–2017*, INST. FOR WOMEN’S POL’Y RES. (Sept. 12, 2018), <https://iwpr.org/publications/pay-equity-projection-1960-2017/> [https://perma.cc/8E2Q-BJAZ]. This date only accounts for women on average. For race-specific dates as to when the wage gap will close, see *Pay Equity & Discrimination*, INST. FOR WOMEN’S POL’Y RES. (2018), <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/> [https://perma.cc/T8LV-LL4K].

future, discussed further in Part IV. Nonetheless, before looking to the future, it is important to consider the past, including the procedure, passage, and development of the EPA, in an effort to understand how it can further evolve.

### III. THE EQUAL PAY ACT OF 1963

#### *A. Procedure*

Congress has enacted two key pieces of remedial legislation in response to the wage gap: the Equal Pay Act of 1963<sup>29</sup> and Title VII of the Equal Rights Act of 1964.<sup>30</sup> Both share certain similarities and are subject to enforcement by the Equal Employment Opportunity Commission (EEOC), a federal agency responsible for “enforcing federal laws that make it illegal to discriminate against a job applicant . . . .”<sup>31</sup> However, Title VII is broader in scope as it encompasses race, color, national origin, and religion, as well as sex.<sup>32</sup> It also prohibits multiple types of discriminatory practices in the workplace, including wage discrimination, based on any of the listed factors.<sup>33</sup> The EPA, in contrast, exclusively applies to sex-based wage discrimination that employers perpetuate between male and female coworkers in the same workplace.<sup>34</sup> Title VII also generally only applies to employers with 15 or more employees while the EPA applies to “[v]irtually all employers.”<sup>35</sup>

Additionally, Title VII requires certain procedures distinct from the EPA. For example, a Title VII plaintiff must first file a charge with the EEOC and receive a Notice of Right to Sue before a lawsuit in either state or federal court can commence.<sup>36</sup> In contrast, an EPA plaintiff can go directly to court without involving

<sup>29</sup> 29 U.S.C. § 206(d)(1) (2012).

<sup>30</sup> 42 U.S.C. § 2000e-2(a) (2012); *see also Facts About Equal Pay and Compensation Discrimination*, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> [<https://perma.cc/R7L2-Y9ZD>] (last visited October 17, 2018).

<sup>31</sup> *Overview*, EEOC, <https://www.eeoc.gov/eeoc/index.cfm> [<https://perma.cc/8633-5DQT>] (last visited Oct. 17, 2018).

<sup>32</sup> 42 U.S.C. § 2000e–§ 2000e-2(a) (2012).

<sup>33</sup> *Id.*

<sup>34</sup> 29 U.S.C. § 206(d)(1) (2012).

<sup>35</sup> *Coverage of Business/Private Employers*, EEOC, [https://www.eeoc.gov/employers/coverage\\_private.cfm](https://www.eeoc.gov/employers/coverage_private.cfm) [<https://perma.cc/6KRJ-UD8C>] (last visited June 23, 2019); *see also Know Your Rights: Title VII of the Civil Rights Act of 1964*, AM. ASS’N OF U. WOMEN, <https://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/title-vii/> [<https://perma.cc/5L6D-MEKW>] (last visited June 23, 2019).

<sup>36</sup> *Filing a Lawsuit*, EEOC, <https://www.eeoc.gov/employees/lawsuit.cfm> [<https://perma.cc/C9ZW-PAXZ>] (last visited Oct. 17, 2018). This assumes that the complainant is within the statute of limitations, which is another difference between Title VII claims and EPA claims. With Title VII claims, the complainant has 180 days from the time the discrimination took place (or 300 days if there is an equivalent state or local agency law) to file a charge and 90 days to file a lawsuit after receiving a Notice of Right to Sue. With EPA claims, the complainant has 2 years from receipt of the last discriminatory

the EEOC.<sup>37</sup> More importantly, plaintiffs bringing Title VII claims must show that they were intentionally discriminated against, whereas there is no intentionality component to EPA claims.<sup>38</sup> With regard to wage discrimination, the difference between the two statutes is essentially that the EPA “requires a plaintiff to prove that ‘I was paid less than a comparable man *and* I am a woman,’ while Title VII requires a plaintiff to prove, even in the absence of a comparable man, that ‘I was paid less than I deserved *because* I am a woman.’”<sup>39</sup>

Specifically, the EPA provides that:

No employer having employees subject to any provisions of this section shall discriminate . . . 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 . . . .<sup>40</sup>

In an EPA claim, the employee bears the initial burden of establishing a prima facie case. An employee establishes a prima facie case by showing that “[1] an employer pays different wages to employees of opposite sexes [2] for equal work on jobs, [3] the performance of which requires equal skill, effort, and responsibility, and [4] which are performed under similar working conditions.”<sup>41</sup> The employee does not need to show that the employer was intentionally engaging in discriminatory pay practices,<sup>42</sup> just that there is a wage differential that exists between the complainant and a proper comparator, i.e. a coworker of the opposite sex who performs “substantially equal” work.<sup>43</sup> Once a plaintiff establishes a prima

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paycheck to file a lawsuit (or 3 years if the discrimination was willful). Often, an employee files a Title VII claim with an EPA claim. *See Time Limits for Filing a Charge*, EEOC, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited June 23, 2019) [<https://perma.cc/AX6L-7WXG>].

<sup>37</sup> *Filing a Lawsuit*, *supra* note 36.

<sup>38</sup> *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (discussing Title VII’s burden shifting scheme); *see also* *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 120 (4th Cir. 2018) (discussing which party bears the ultimate burden of proof in an EPA claim).

<sup>39</sup> *McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 880 F. Supp. 900, 907 (D. Mass. 1995). Men can also sue under the EPA. *See Hicks v. Concorde Career College*, 695 F. Supp. 2d 779, 790 (W.D. Tenn. 2010).

<sup>40</sup> 29 U.S.C. § 206(d)(1) (2012).

<sup>41</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

<sup>42</sup> *Md. Ins. Admin.*, 879 F.3d at 120. This is another key difference between Title VII and the EPA. Title VII claims require a plaintiff to show that the employer acted in an intentionally discriminatory manner to prevail at the summary judgment stage. *See, e.g., Stanziale v. Jargowsky*, 200 F.3d 101, 105 (3d Cir. 2000).

<sup>43</sup> 29 C.F.R. § 1620.13(a) (2018) (“The equal work standard does not require that compared jobs be identical, only that they be substantially equal.”).

facie case, the burden shifts to the employer. Courts have described this burden as “heavy”<sup>44</sup> because the employer “must show that the factor of sex provided *no basis* for the wage differential.”<sup>45</sup>

Under the EPA, an employer has four affirmative defenses that will excuse a wage gap. The first three defenses are specific and the fourth defense is considered a catchall provision.<sup>46</sup> Specifically, the EPA stipulates that:

No employer . . . shall discriminate . . . between employees on the basis of sex . . . 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.<sup>47</sup>

The EPA thus “creates a type of strict liability for employers who pay men and women different wages for the same work.”<sup>48</sup> If an employer’s justification for a wage differential does not fall under one of the EPA’s four exceptions, the employer may be held liable for pay discrimination.

#### B. History and Intent

After a complainant establishes a prima facie case, disputes often occur when it is not clear if an employer’s justification for a wage differential falls under one of the EPA’s four affirmative defenses. Because “a seniority system,”<sup>49</sup> “a merit system,”<sup>50</sup> and “a system which measures earnings by quantity or quality of production”<sup>51</sup> are less ambiguous in meaning and application,<sup>52</sup> this section will focus on the history, intent, and interpretation of the fourth affirmative defense, termed a “catchall provision.”

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<sup>44</sup> *Md. Ins. Admin.*, 879 F.3d at 120.

<sup>45</sup> *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995) (emphasis in original).

<sup>46</sup> *Corning*, 417 U.S. at 196 (describing the fourth affirmative defense as a “catchall provision”).

<sup>47</sup> 29 U.S.C. § 206(d)(1) (2012).

<sup>48</sup> *Rizo v. Yovino*, 887 F.3d 453, 459 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019) (internal quotation marks omitted) (quoting *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986)).

<sup>49</sup> 29 U.S.C. § 206(d)(1).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Edward J. Gaffney Jr., *Factors Other than Sex: The Catchall Exception to the Equal Pay Act*, 3 COOLEY L. REV. 75, 76 (1985) (“By far the most problematic and litigated exception to the Equal Pay Act is the fourth or catchall exception. This exception has been the subject of more legal action than the three other exceptions combined.”).

The catchall provision is the subject of much debate due to its ambiguity.<sup>53</sup> It acts as an affirmative defense if a wage differential is based on “any other factor other than sex.”<sup>54</sup> Depending on how broadly or narrowly a court construes the catchall provision, an employer’s success in using certain ambiguous factors as affirmative defenses, e.g. prior salary, worth, flexibility, and future potential, can vary from jurisdiction to jurisdiction.<sup>55</sup> It is therefore important to look to the history and intent behind the EPA’s enactment in order to understand how courts should interpret and apply the catchall provision.

Congress enacted the EPA in 1963 to eliminate “one of the most persistent and obnoxious forms of discrimination.”<sup>56</sup> The goal was to end the “economic exploitation of women workers.”<sup>57</sup> For the majority of supporters, the EPA was not a ploy to preserve an unequal economic status quo.<sup>58</sup> Instead, it was seen as “a starting point,”<sup>59</sup> a way to “get a foot in the door”<sup>60</sup> to catalyze further reform with the ultimate goal being wage equality between men and women in the workforce. The catchall provision was included in the EPA due to the impossibility of listing all potential, legitimate justifications for wage differentials.<sup>61</sup> Summarizing the effect of the affirmative defenses, Representative Goodell stated that wage differentials “based upon a bona fide job classification system” would not violate the EPA.<sup>62</sup> In relation to the catchall provision, Representative Griffin further

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<sup>53</sup> *See id.*

<sup>54</sup> 29 U.S.C. § 206(d)(1).

<sup>55</sup> Courts agree that sex can provide no basis for determining an employee’s salary. The issue with the catchall provision pertains to situations where employers use ambiguous factors like prior salary, worth, future potential, and flexibility to set salaries, whether those factors are a proxy for sex, and which party has the burden of proof. *See Keziah v. W.M. Brown & Son, Inc.*, 888 F.2d 322, 326 (4th Cir. 1989) (“One of the things undermining the company’s defense is the pure subjectivity of the salary-setting process. The salaries were based on nothing more than [a] subjective evaluation of [the employees’] worth. . . .”).

<sup>56</sup> 109 CONG. REC. 9192, 9200 (1963) (statement of Rep. Dwyer).

<sup>57</sup> *Id.* at 9199 (statement of Rep. Green). The EPA can also be used by men. *See, e.g., Stanziale v. Jargowsky*, 200 F.3d 101 (3d Cir. 2000).

<sup>58</sup> The Congressional Record does reveal that some proponents may actually have had the idea of preserving inequality in mind as the overall outcome of the EPA. 109 CONG. REC. at 9205 (statement of Rep. Findley) (noting that “others are convinced [the EPA] would . . . cause employers to quit hiring women for some jobs and thus it would be a subtle but effective way to get some women out of the labor force. They support it for that reason.”). However, this was also a reason some people gave for not supporting the EPA. *See id.* at 9193 (statement of Rep. Colmer) (noting that “employers may find it advantageous to employ men in positions now filled by women.”).

<sup>59</sup> *Id.* at 9202 (statement of Rep. Kelly).

<sup>60</sup> *Id.* at 9193 (statement of Rep. St. George).

<sup>61</sup> *See id.* at 9210 (noting that it would be “impossible to list each and every exception”).

<sup>62</sup> *Id.* at 9209 (statement of Rep. Goodell).

clarified that “[r]oman numeral iv is a broad principle, and those preceding it are really examples.”<sup>63</sup>

In 1974, the Supreme Court analyzed the legislative history of the EPA and its four exceptions in *Corning Glass Works v. Brennan*.<sup>64</sup> The Court determined that the EPA was enacted to “remedy what was perceived to be a serious and endemic problem of employment discrimination in the private industry.”<sup>65</sup> The Act is “broadly remedial” and its objective was and still is “to raise women to the levels enjoyed by men . . . .”<sup>66</sup> In other words, equal pay for equal work. The Court found that the EPA’s language and its affirmative defenses were meant to “incorporate . . . the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act.”<sup>67</sup> The Court affirmed that “a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.”<sup>68</sup>

Recently, the Ninth Circuit examined the applicability of the catchall provision in *Rizo v. Yovino*. The court looked to the doctrines of *noscitur a sociis* and *eiusdem generis*, principles of statutory interpretation:

The canon *noscitur a sociis*—a word is known by the company it keeps—provides that words grouped together should be given related meaning. Here, the catchall phrase is grouped with three specific exceptions based on systems of seniority, merit, and productivity. These specific systems share more in common than mere gender neutrality; all three relate to job qualifications, performance, and/or experience. It follows that the more general exception should be limited to legitimate, job-related reasons as well.

A related canon, *eiusdem generis*, likewise supports our interpretation of the catchall term. We apply this canon when interpreting general terms at the end of a list of more specific ones. In such a case, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.<sup>69</sup>

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<sup>63</sup> 109 CONG. REC. at 9203 (statement of Rep. Griffin).

<sup>64</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 188 (1974).

<sup>65</sup> *Id.* at 195.

<sup>66</sup> *Id.* at 207–08 (quoting Rep. Dwyer) (internal quotation marks omitted).

<sup>67</sup> *Id.* at 201.

<sup>68</sup> *Id.*

<sup>69</sup> *Rizo v. Yovino*, 887 F.3d 453, 461–62 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019) (internal citations omitted). *But see* Petition for Writ of Certiorari at 20, *Yovino, Fresno Cty. Superintendent of Schools v. Rizo*, 139 S. Ct. 706 (No. 18-272) (Aug. 30, 2018) (interpreting the meaning of “based on” within the EPA and concluding that “based on” means “because of” which indicates that “a wage disparity is ‘based on’ sex only if sex is the reason that the employer paid male and female workers differently.” (internal quotation marks omitted)).

The above-mentioned congressional history and judicial review of the statute make it clear that Congress intended for the EPA to eliminate pay disparities between men and women. It also appears that Congress intended for the catchall provision to only apply to factors related to the actual job being performed. Any broader interpretation would allow the exception to swallow the rule: employers could simply maintain discriminatory wage rates through an indirect use of sex as a factor. This potential loophole could encompass ambiguous factors like prior salary that are not necessarily related to the current job being performed and are also not per se based on sex, but could still be sex-related.

Although Congress did not expressly bar the use of prior salary or other ambiguous factors unrelated to the actual job being performed, it is difficult to believe that prior salary would have been viewed as a defensible “factor other than sex” under the catchall provision in 1963. Using a woman’s prior salary to determine her starting pay in 1963 would have most likely preserved the very same economic inequalities Congress sought to eliminate with the EPA. Consider a male and a female candidate in the 1960s, both transferring from the same old job where the employer intentionally paid women less, to the same new job where the employer uses prior salary to determine starting salary. The male candidate would necessarily receive a higher salary than his female coworker, essentially nullifying the EPA. To say that prior salary is a factor other than sex ignores the context of the EPA’s enactment. The wage gap was the impetus behind the EPA.<sup>70</sup> The concern was equal work deserves equal pay. Salary and wages—prior, current, and future—are, arguably, an inherent part of the scheme Congress intended to remedy and, as a natural result, preclude from use as an affirmative defense.

### C. Interpretations in Case Law

The EPA is meant to be “broadly remedial,” but there are ambiguities as to its application.<sup>71</sup> *Corning* is the main Supreme Court decision that specifically looks at and discusses Congress’s intent in enacting the EPA,<sup>72</sup> but *Corning* was also decided over forty years ago and new questions have arisen pertinent to a modern workforce.

The main problem with the “any other factor other than sex” affirmative defense, or catchall provision, is that different courts have different interpretations about what constitutes a “factor other than sex.”<sup>73</sup> So, when employers invoke ambiguous factors to avoid EPA wage discrimination liability, their success depends

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<sup>70</sup> *Supra* Part II.

<sup>71</sup> *Corning Glass Works v. Brennan*, 417 U.S. 188, 207–08 (1974) (quoting Rep. Dwyer).

<sup>72</sup> *See, e.g., Eisenberg, supra* note 27, at 32 (contemplating the “relatively low number of appellate cases for a statute that is [over forty] years old” and how the U.S. “Supreme Court has interpreted the EPA only once . . . which has led to conflicting interpretations among the circuits . . .”).

<sup>73</sup> 29 U.S.C. § 206(d)(1) (2012).

on how broadly or narrowly a court interprets “any other factor other than sex.” If an affirmative defense applies,<sup>74</sup> courts must defer to the employer’s justification for the wage differential and the burden then shifts to the plaintiff to show that the employer’s justification was a pretext for sex discrimination, as stated by the U.S. Supreme Court in *Washington County v. Gunther*.<sup>75</sup> But if an affirmative defense does not apply, if the employer’s justification for the wage differential is ambiguous, the burden remains with the employer to disprove any basis for sex-related discrimination.<sup>76</sup>

As congressional records do not explicitly reveal the scope envisioned for the catchall provision, courts are split on the issue of whether or not prior salary is an affirmative defense as a “factor other than sex.”<sup>77</sup> If prior salary *is* viewed as a “factor other than sex,” a plaintiff will not prevail in an EPA claim when an employer uses prior salary as an affirmative defense, unless the plaintiff can show there is a discriminatory, sex-based motive behind the wage differential. However, if prior salary *is not* viewed as a “factor other than sex,” or as having the potential to not be a “factor other than sex,” the burden of proof remains with the employer to negate any notion of sex-based discrimination.<sup>78</sup>

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<sup>74</sup> For example, the Federal Government’s General Schedule is a classic example of a pay system that clearly appears to not use sex as a factor, but instead uses a discernible seniority- or merit-based system. *Pay & Leave*, U.S. OFF. OF PERSONNEL AND MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/> [<https://perma.cc/3TFL-U79A>] (“[T]he grade of each job is based on the level of difficulty, responsibilities, and qualifications required.”) (last visited June 30, 2019). But this is not to say that a pay disparity can never arise, just that if one does, the burden will likely shift to the plaintiff to show discrimination. *See Taylor v. White*, 321 F.3d 710, 712–13 (8th Cir. 2003).

<sup>75</sup> In *County of Washington v. Gunther*, the Supreme Court noted that “courts . . . are not permitted to substitute their judgment for the judgment of the employer.” 452 U.S. 161, 171 (1981) (internal quotation marks omitted) (quoting Rep. Goodell, principal exponent of the EPA). Thus, so long as the employer’s justification for the wage differential unambiguously falls under one of the four exceptions in the EPA, courts must defer to the employer’s pay scheme.

<sup>76</sup> The Federal Circuit, however, appears to be an outlier. In *Yant v. United States*, the Federal Circuit held that an EPA plaintiff must make a prima facie showing that “discrimination based on sex exists or at one time existed” in addition to the statutory requirements required by the Equal Pay Act discussed *supra* Part III.A. 588 F.3d 1369, 1373 (Fed. Cir. 2009); *see also Gordon v. United States*, 903 F.3d 1248, 1254, 1256 (Fed. Cir. 2018) (vacated on other grounds) (Reyna, J., additional views) (noting that the holding in *Yant* is “at odds with Supreme Court precedent and the law of other circuits” by improperly “shift[ing] the burden onto the plaintiff to affirmatively prove discrimination, rather than on the employer to disprove discrimination” with an affirmative defense).

<sup>77</sup> 29 U.S.C. § 206(d)(1); *see also infra* Part III.C.1–3.

<sup>78</sup> *See generally* *EEOC v. Md. Insurance Admin.*, 879 F.3d 114, 120 (4th Cir. 2018) (discussing which party bears the ultimate burden of proof in an EPA claim).

As detailed below, courts take approximately three views as to whether prior salary falls under the catchall provision: (1) prior salary *is not* a “factor other than sex”; (2) prior salary *is* a “factor other than sex”; and (3) prior salary *alone* is not a “factor other than sex,” but when considered with other factors, it could be a “factor other than sex.” These views are relevant to how easily an employer’s burden of proof is satisfied and thereby the likelihood of a plaintiff’s success in an EPA claim.

*1. Prior salary is not a factor other than sex and is not an affirmative defense in EPA claims*

In *Rizo v. Yovino*, a female math consultant sued the school district in which she taught, alleging an EPA violation.<sup>79</sup> One day during lunch, Aileen Rizo learned that her salary was about 20% less than a recently hired male math consultant with less experience, performing the same work as her.<sup>80</sup> The plaintiff’s initial salary was determined based entirely on her prior salary, plus a 5% raise.<sup>81</sup> The employer sought to use this pay scheme as an affirmative defense under the catchall provision, maintaining that the use of prior salary to determine starting salary was a legitimate and gender-neutral business policy.<sup>82</sup>

The Ninth Circuit held as a matter of law that “prior salary does not constitute a factor other than sex”<sup>83</sup> and that “prior salary alone or in combination with other factors cannot justify a wage differential.”<sup>84</sup> The court reasoned that “to hold otherwise [would be] to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum* . . . .”<sup>85</sup> The court found it “inconceivable” that Congress intended prior salary to be a “factor other than sex” under the catchall provision since the EPA was enacted to remedy the problem of discriminatory salaries.<sup>86</sup> Prior salary is simply a proxy, “a second-rate surrogate that likely masks continuing inequalities” with an “attenuated” relationship to legitimate factors like

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<sup>79</sup> *Rizo v. Yovino*, 887 F.3d 453, 458 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019).

<sup>80</sup> *Id.*; Yuki Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, NPR (May 30, 2017), <https://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history> [<https://perma.cc/W4PK-ELZM>].

<sup>81</sup> *Rizo*, 887 F.3d at 457. Aileen Rizo transferred from a job in Arizona, meaning that Fresno County School District in California had no hand in determining the salary on which it based Rizo’s starting pay apart from adding 5%. Bill Chappell, *Women Can’t Have Prior Salaries Used Against Them, Court Says in Equal Pay Case*, NPR (Apr. 10, 2018), <https://www.npr.org/sections/thetwo-way/2018/04/10/601096889/women-cant-have-prior-salaries-used-against-them-court-says-in-equal-pay-case> [<https://perma.cc/VZ2N-93JD>].

<sup>82</sup> *Rizo*, 887 F.3d at 458.

<sup>83</sup> *Id.* at 457.

<sup>84</sup> *Id.* at 456.

<sup>85</sup> *Id.* at 456–57.

<sup>86</sup> *Id.* at 460.

training, experience, or education.<sup>87</sup> The Ninth Circuit is the only court that has taken the position that prior salary is a sex-related factor within the scope of the EPA, providing no defense to employers.<sup>88</sup>

*2. Prior salary is a factor other than sex and acts as an affirmative defense in EPA claims*

In *Wernsing v. Dept. of Human Services*,<sup>89</sup> a female employee sued the Department of Human Services in Illinois alleging an EPA violation. The Department had a policy of determining salary for lateral candidates based on their prior salary and raising it according to experience and years of service.<sup>90</sup> As a result of this policy, the plaintiff and her male comparator did the same work for different pay. The plaintiff's starting monthly salary was \$2,478, whereas her comparator's was \$3,739 simply because his prior job had paid more.<sup>91</sup> As raises in the Department were uniform at 10%, the differential would be preserved despite any efforts the plaintiff could make.<sup>92</sup>

The Seventh Circuit ultimately held that “wages at one’s prior employer are a factor other than sex.”<sup>93</sup> The use of prior salary is simply “a common personnel-management practice.”<sup>94</sup> To prevail in an EPA claim, an employer only needs “a factor other than sex—not . . . a ‘good’ reason.”<sup>95</sup> The court did acknowledge that “wage patterns in some lines of work could be discriminatory, but [that] is something to be proved rather than assumed.”<sup>96</sup>

The Eighth Circuit holds a similar view.<sup>97</sup> In *Taylor v. White*,<sup>98</sup> a female Army employee sued under the EPA alleging unequal pay. The pay differential arose when the plaintiff was transferred to a new project and she retained the pay grade from her prior position.<sup>99</sup> Two men were also transferred to the project, and they also retained their higher pay grades from their prior positions.<sup>100</sup> Thus, although the plaintiff and

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<sup>87</sup> *Id.* at 467.

<sup>88</sup> *See infra* Part III.C.2–3.

<sup>89</sup> *Wernsing v. Dep’t. of Human Services*, 427 F.3d 466 (7th Cir. 2005).

<sup>90</sup> *Id.* at 467.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 468 (internal quotation marks omitted).

<sup>94</sup> *Id.* at 467.

<sup>95</sup> *Wernsing*, 427 F.3d at 468.

<sup>96</sup> *Id.* at 470.

<sup>97</sup> *See id.* (noting that the Seventh Circuit’s position has the support of the Eighth Circuit).

<sup>98</sup> 321 F.3d 710 (8th Cir. 2003).

<sup>99</sup> *Id.* at 712.

<sup>100</sup> *Id.* at 713.

her two male coworkers were performing equivalent work on the project, the plaintiff was doing so for less pay.<sup>101</sup>

The Eighth Circuit “refused to adopt a per se rule that would exclude salary retention or past salary as qualifying ‘factors other than sex.’”<sup>102</sup> Rather, an employer’s use of prior salary is examined on a case-by-case basis, with the burden on the employee to disprove the employer’s claim of gender-neutrality.<sup>103</sup> A showing of mere uncertainty is not enough for the plaintiff to prevail.<sup>104</sup>

In both the Seventh and Eighth Circuits, once a plaintiff establishes a prima facie case, “all the employer need do is articulate a ground of decision that avoids reliance on the forbidden grounds. The plaintiff then bears the burden to show that the stated reason is a pretext for a decision really made on prohibited criteria.”<sup>105</sup> So long as the employer is not openly relying on sex as a factor, the burden shifts back to the plaintiff to show that there was a discriminatory pretext. This is because, under *Washington County v. Gunther*, courts must defer to the employer’s pay scheme when a wage differential can be explained by one of the four exceptions listed in the EPA.<sup>106</sup> Such a broad interpretation of the catchall provision makes it very difficult for plaintiffs to prevail, which also likely deters employees from pursuing an EPA claim in the first place.<sup>107</sup>

*3. Prior salary alone is not a factor other than sex and is not an affirmative defense in EPA claims, but when prior salary is considered with other factors, it may support an affirmative defense in EPA claims*

In *Glenn v. General Motors*,<sup>108</sup> three female employees who worked for General Motors (GM) sued pursuant to an EPA violation. All three women made less than the lowest-paid male employee performing substantially equal work, and all three had received lower starting salaries than their male comparators who were hired around the same time.<sup>109</sup> GM argued that the men were paid more because they all had higher prior salaries.<sup>110</sup>

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<sup>101</sup> *Id.* at 713–15.

<sup>102</sup> *Id.* at 719.

<sup>103</sup> *Id.*

<sup>104</sup> *Taylor*, 321 F.3d at 721.

<sup>105</sup> *Wernsing*, 427 F.3d at 469; *Taylor*, 321 F.3d at 719.

<sup>106</sup> *Cty. of Washington v. Gunther*, 452 U.S. 161, 171 (1981).

<sup>107</sup> See Eisenberg, *supra* note 27, at 33–35; see also Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL STREET J. (Feb. 19, 2009), <https://www.wsj.com/articles/SB123500883048618747> [<https://perma.cc/5LCZ-VW9F>].

<sup>108</sup> *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988).

<sup>109</sup> *Id.* at 1569.

<sup>110</sup> *Id.* at 1570.

The Eleventh Circuit ultimately held that “prior salary alone cannot justify pay disparity.”<sup>111</sup> As the Eleventh Circuit later noted in *Irby v. Bittick*,<sup>112</sup> employers have no defense if they only rely on an employee’s prior salary to determine starting pay, but “there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay *and* more experience” when setting initial wages.<sup>113</sup> That is, as explained in *Glenn*, prior salary can support an affirmative defense under the catchall provision when it is considered in tandem with “unique characteristics of the job,” “an individual’s experience, training, or ability,” or “special exigent circumstances connected with the business.”<sup>114</sup> So, once a plaintiff “establish[es] a prima facie case, the burden shift[s] to [the employer] to prove that the difference in pay was justified by one of the four exceptions in the Equal Pay Act . . . .”<sup>115</sup> If the employer used prior salary, the employer must show that it was part of a permissible “mixed motive” scheme for setting pay.<sup>116</sup> As GM made no such assertion in *Glenn*, GM was not able to meet its burden by relying solely on prior salary.<sup>117</sup>

This interpretation is shared by the Sixth Circuit,<sup>118</sup> the Tenth Circuit,<sup>119</sup> the EEOC by way of its compliance manual,<sup>120</sup> and four of the five concurring judges

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<sup>111</sup> *Id.* at 1571. The Ninth Circuit maintained an analogous position in *Kouba v. Allstate Ins. Co.*, before *Rizo v. Yovino* was decided. See *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982). *Rizo* expressly overruled *Kouba*. *Rizo v. Yovino*, 887 F.3d 453, 468 (9th Cir. 2018).

<sup>112</sup> 44 F.3d 949 (11th Cir. 1995).

<sup>113</sup> *Id.* at 955.

<sup>114</sup> *Glenn*, 841 F.2d at 1571.

<sup>115</sup> *Id.* at 1569.

<sup>116</sup> *Irby*, 44 F.3d at 955.

<sup>117</sup> *Glenn*, 841 F.2d at 1571.

<sup>118</sup> See *Hicks v. Concorde Career College*, 695 F. Supp. 2d 779, 790 (W.D. Tenn. 2010), *aff’d*, 449 F. App’x 484 (6th Cir. 2011) (“A new employee’s prior salary also constitutes a factor other than sex as long as the employer does not rely solely on prior salary to justify a pay disparity.”).

<sup>119</sup> See *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (noting that “the EPA precludes an employer from relying solely upon a prior salary to justify pay disparity.” (internal citations omitted)).

<sup>120</sup> See EEOC Compl. Man. (BNA), Interpretative Manual, Vol. 2, Sec. 10-IV(F)(2) (“An employer asserting a ‘factor other than sex’ defense also must show that the factor is related to job requirements or otherwise is beneficial to the employer’s business.”); see also Brief for the EEOC as Amicus Curiae Supporting Rehearing En Banc, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (Civ. No. 14-cv-4932 (AWI-MJS)) (discussing an employer’s burden of proof). It is unclear whether the EEOC believes the Ninth Circuit went too far in classifying prior salary as a per se sex-related factor, or whether they support that decision. Oral arguments tended to show a noncommittal attitude about the EEOC’s overall position. See Oral Argument of EEOC at 00:54:55, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (No. 16-15372), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000012817](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012817) [<https://perma.cc/5TPA-7D3Z>] (questioning the EEOC’s position concerning prior salary in EPA claims).

in *Rizo*.<sup>121</sup> The idea is that “employers do not necessarily violate the Equal Pay Act when they consider prior salary among other factors when setting initial wages.”<sup>122</sup> Within this construal, employers in EPA claims cannot rely solely on prior salary and, moreover, it remains the employer’s burden to show that its use of prior salary was permissible, even when using other factors, due to its potential sex-related origins.

Relatedly, some courts that have not yet addressed the issue of prior salary uphold a comparable interpretation. For example, in *Aldrich v. Randolph Central School District*,<sup>123</sup> a female employee filed an EPA claim alleging sex-based wage discrimination. The plaintiff was hired as a “cleaner” and was paid less than her male “custodian” coworkers despite performing substantially similar duties.<sup>124</sup> The employer invoked the catchall provision as an affirmative defense but did not specify that prior salary had been a factor in setting wages. Rather, the employer justified the wage differential on the basis that the higher salary went to “custodians,” who happened to be male, because that job entailed ranking third or higher on a civil service exam, distinct from being a “cleaner” which demanded no such prerequisite.<sup>125</sup>

The Second Circuit in *Aldrich* held that “an employer bears the burden of proving that a *bona fide business-related reason* exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense.”<sup>126</sup> This view that the catchall provision encompasses a business or job-related factor is held by federal courts that have specifically considered the question of prior salary, as well as those that have not yet addressed that question.<sup>127</sup> Thus, for the Second Circuit, unlike the Seventh Circuit, an employer’s use of prior salary would not seem to automatically shift the burden to the plaintiff to show a discriminatory motive for the wage differential. The burden would remain with the employer to disprove any possibility of discrimination. However, unlike the Eleventh Circuit, the Second Circuit may not require the presence of other factors if

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<sup>121</sup> See *Rizo*, 887 F.3d at 468–78 (McKeown, Callahan, Tallman, & Murguia, JJ., concurring).

<sup>122</sup> *Id.* at 469 (McKeown, J., concurring).

<sup>123</sup> 963 F.2d 520 (2d Cir. 1992).

<sup>124</sup> *Id.* at 522–23.

<sup>125</sup> *Id.* at 523–24.

<sup>126</sup> *Id.* at 526 (emphasis added).

<sup>127</sup> See, e.g., *Dubowsky v. Stern, Lavinthal, Norgaard, & Daly*, 922 F. Supp. 985, 990 (D.N.J. 1996) (“Acceptable factors other than sex include education, experience, prior salary, or any other factor related to performance of the job.”); see also *Aldrich*, 963 F.2d at 525 (“Congress intended for a job classification system to serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue.”).

the use of prior salary could be proven to be job-related on its own merits.<sup>128</sup> In the Second Circuit, an employer must prove that it used legitimate job-related factors.<sup>129</sup>

#### D. *The EPA Today*

The EPA is stringent, requiring plaintiffs to establish that they have been paid less than a coworker of the opposite sex performing substantially equal work.<sup>130</sup> Studies show that courts are increasingly granting summary judgment to employers at the prima facie stage.<sup>131</sup> Moreover, in certain industries today, like education and athletics, it is becoming increasingly difficult to establish a prima facie case due to an employer's ability to manipulate potential comparators by way of flexible job duties and descriptions.<sup>132</sup> As a result, scholars have suggested that the EPA is nothing more than an "empty promise,"<sup>133</sup> an idealistic piece of legislation, but ultimately unrealistic and impractical to pursue.<sup>134</sup>

Nonetheless, the U.S. Supreme Court has recognized that Congress intended the EPA to be "broadly remedial."<sup>135</sup> To further that legislative intent, the EPA should be adapted to suit a modern workforce and prevailing economic practices. Adopting a uniform bar on prior salary as an affirmative defense, as in *Rizo*, has the potential to encourage further reform to attain the goal of equal pay for equal work. Ideally, such a bar would be implemented by Congress to avoid the piecemeal interpretations and applications seen today.<sup>136</sup> However, this Note maintains that any action is better than no action.

### IV. CATALYZING EQUAL PAY REFORM

Congress enacted the EPA to remedy the wage gap between women and men by "requir[ing] that . . . depressed wages be raised."<sup>137</sup> As the Supreme Court stated in *Corning*, "[t]he Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to

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<sup>128</sup> See *Aldrich*, 963 F.2d at 526.

<sup>129</sup> *Id.*

<sup>130</sup> See *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

<sup>131</sup> See Eisenberg, *supra* note 27, at 33–34.

<sup>132</sup> See *id.* at 38; see also Laura Woodworth Keohane, *Universities, Colleges and the Equal Pay Act: The Fourth Circuit Analyzes a Salary Dispute in Strag v. Board of Trustees*, 19 CAMPBELL L. REV. 333, 347 (1997).

<sup>133</sup> Eisenberg, *supra* note 27, at 22.

<sup>134</sup> See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 658 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (noting that plaintiff abandoned her EPA claim on appeal).

<sup>135</sup> *Corning*, 417 U.S. at 207–08.

<sup>136</sup> See *infra* Part III.C.

<sup>137</sup> *Corning*, 417 U.S. at 207.

achieve.”<sup>138</sup> As demonstrated in the discussion above, allowing employers to use prior salary as an affirmative defense in EPA wage discrimination claims works to entrench the remnants of discrimination in the economy, even when there is no discriminatory motive. This Note argues for the elimination of the wage gap between male and female workers, best achieved by altering routine practices to address the actual problem, not by focusing on an employer’s intent and deferring to an unequal status quo.

While the EPA has clearly left a gap at the federal statute level, states and cities have started to take independent action to promote wage equality. For example, certain states and cities have enacted legislation affecting an employer’s ability to use prior salary in hiring, or more broadly, limiting the potential defenses an employer may use in wage discrimination claims, though not necessarily precluding prior salary’s use as a defense.<sup>139</sup> For example, in *Chamber of Commerce v. Philadelphia*,<sup>140</sup> the City of Philadelphia enacted a wage equity ordinance which (1) prohibited employers from asking about a prospective employee’s salary history and (2) prohibited employers from relying on salary history to determine an employee’s salary.<sup>141</sup> The Chamber of Commerce sued the City and moved for a preliminary injunction. The district court concluded that the first provision was an unconstitutional violation of the First Amendment’s free speech clause and granted the Chamber’s motion.<sup>142</sup> The court denied the preliminary injunction for the second provision, concluding that it was within constitutional bounds.<sup>143</sup>

As the district court said, the City’s efforts were laudable.<sup>144</sup> *Philadelphia*, however, shows that there is opposition to reform and there can be roadblocks in attaining pay equity. Moreover, independent efforts by states and cities are not something to depend or rely on to eliminate the wage gap. Even before the EPA was adopted in 1963, states had started to take matters into their own hands, enacting laws requiring equal pay for equal work.<sup>145</sup> Congress, however, was unimpressed. Representative Sickles explained, “We cannot rely on the States to take care of the problem of unequal pay practices since only 23 States have equal pay laws.”<sup>146</sup> He also noted that state laws were “spotty in their coverage” and “not very effective in

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<sup>138</sup> *Id.* at 209.

<sup>139</sup> See Kate Nielson, *AAUW Policy Guide to Equal Pay in the States*, AM. ASS’N OF U. WOMEN, <https://www.aauw.org/resource/state-equal-pay-laws/> [<https://perma.cc/D793-QTCZ>] (last visited July 3, 2019) [hereinafter Nielson, *Policy Guide*].

<sup>140</sup> *Chamber of Commerce v. City of Philadelphia*, 319 F. Supp. 3d. 773 (E.D. Pa. 2018) (order granting preliminary injunction), *appeal docketed*, No. 18-2175, (3d Cir. May 30, 2018).

<sup>141</sup> *Id.* at 779.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 109 CONG. REC. 9192, 9205 (1963).

<sup>146</sup> *Id.* (statement of Rep. Sickles).

their terms or enforcement.”<sup>147</sup> State action was and remains too sporadic and too scattered, with results that are too uneven.<sup>148</sup>

At the same time, some action is better than no action. Even though current state and city legislative efforts could be termed “spotty,” a continuation of such action could also eventually spur Congress to act. Ultimately, achieving equal pay for equal work will require uniform, nationwide action that is easily enforced and unambiguous. But in the meantime, while Congress fails to act, state action and even action by the courts can be an effective means to reduce the wage gap, as exemplified by the Ninth Circuit’s decision to preclude prior salary as an affirmative defense in EPA claims. Such small, focused steps with the potential for others to follow can be more effective than giant reformative leaps that may leave others behind.

Although a minority position, the Ninth Circuit’s decision that prior salary is not a job-related factor and does not excuse a wage gap is the correct decision if wage equality is to be achieved. The overall effect of this decision is narrow: it only applies to sex-based wage discrimination claims.<sup>149</sup> Moreover, prior salary only becomes an issue when an employee brings an EPA claim and establishes a prima facie case. Under *Rizo*, employers are not barred from considering an applicant’s salary history, nor are applicants precluded from using their prior salaries to negotiate. Rather, if there is a wage differential and an employee brings an EPA claim, the employer bears the risk of having used prior salary as a factor. This is appropriate because employers are better able than their employees to ensure that their wages do not promote wage differentials.<sup>150</sup> Employees likely do not know what their coworkers make. “Compensation disparities . . . are often hidden from sight. It is not unusual . . . for management to decline to publish employee pay levels, or for employees to keep private their own salaries.”<sup>151</sup> Employers thus have the ability and flexibility to use their own legitimate factors without any unknown discriminatory taint to set salaries.<sup>152</sup> Barring the use of prior salary as an affirmative defense does not create any affirmative duty on the part of the employer to close the wage gap by paying all employees equally regardless of other legitimate job-related

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<sup>147</sup> *Id.*

<sup>148</sup> See Nielson, *Policy Guide*, *supra* note 139.

<sup>149</sup> Title VII claims as well as EPA claims would likely be affected since the four affirmative defenses contained in the EPA were made applicable to Title VII by the Bennett Amendment. See *Cty. of Washington v. Gunther*, 452 U.S. 161, 167 (1981) (holding that the Bennett Amendment “was designed to incorporate the four affirmative defenses of the Equal Pay Act into Title VII for sex-based wage discrimination claims.”).

<sup>150</sup> See Eisenberg, *supra* note 27, at 63–64.

<sup>151</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 649–50 (2007) (Ginsburg, J., dissenting).

<sup>152</sup> The best solution would be for businesses to be transparent about what they pay their employees or how they value their positions. See Eisenberg, *supra* note 27, at 66 (opining that pay secrecy hinders wage equity progress and that “sunshine is the best disinfectant” (citing *United States v. Hubbard*, 650 F.2d 293, 330 (D.C. Cir. 1980) (quoting Justice Brandeis))).

factors like education or experience. Rather, it simply creates a risk that employers are better able to bear than employees. Essentially, employers should not need to use prior salary to determine an employee's starting pay, as employers should already know what they are paying their current employees in the same, or substantially similar, positions.

Unfortunately, consideration of a potential employee's prior salary is a longstanding and accepted business practice.<sup>153</sup> The reality is that “[p]rior salary is a prominent consideration for both a job applicant and the potential employer. The applicant presumably seeks a job that will pay her more and the potential employer recognizes that it will have to pay her more if it wants to hire her.”<sup>154</sup> Prior salary is viewed as a proxy for other legitimate job-related factors. Recognizing this, the Seventh Circuit and Eighth Circuit have chosen to defer to employers because they posit that prior salary is not expressly sex-based and thus has some legitimate basis.<sup>155</sup> But this shortcut is risky. The supposed link between prior salary and legitimate factors like education and experience is misleading.<sup>156</sup> Prior salary is ultimately some third-party's determination of an employee's worth. It is subjective, and subjective factors leave room for sex-related bias.<sup>157</sup> To eliminate the wage gap, employers need to start examining and, in certain instances, eliminate their use of subjective factors like prior salary.<sup>158</sup>

Similar to the Seventh and Eighth Circuits, the Eleventh Circuit maintains that as long as prior salary is considered alongside other legitimate factors, there is a rebuttable presumption that the employer's pay scheme is not sex-based.<sup>159</sup> The Eleventh Circuit's concern is that if prior salary is deemed categorically discriminatory and an employer uses it to determine an employee's pay, the overall effect would be too harsh: the employer would be liable regardless of its consideration of other legitimate factors like prior experience or education.<sup>160</sup>

Even if prior salary is a legitimate job-related factor unrelated to sex, the risk of perpetuating discrimination remains. Women were historically discriminated against in the workplace on the basis of sex. They were hired at lower wages because

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<sup>153</sup> See *Rizo v. Yovino*, 887 F.3d 453, 472 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019) (McKeown, J., concurring) (“In the real world, an employer relies on prior salary to set initial wages.”).

<sup>154</sup> *Id.* at 473 (Callahan, J., concurring).

<sup>155</sup> See *Wernsing v. Dep't. of Human Services*, 427 F.3d 466, 467–68 (7th Cir. 2005); see also *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003).

<sup>156</sup> See *Rizo*, 887 F.3d at 467.

<sup>157</sup> See Eisenberg, *supra* note 27, at 50.

<sup>158</sup> Factors like past performance and prior experience can be legitimate considerations for setting salary as they can more likely be objectively corroborated, but other factors like prior salary, future potential, flexibility, and worth can easily leave room for bias to color wage determinations due to their more subjective nature.

<sup>159</sup> *Irby v. Bittick*, 44 F.3d 949, 955–56 (11th Cir. 1995).

<sup>160</sup> *Rizo*, 887 F.3d at 477 (Callahan, J., concurring).

that is what employers offered.<sup>161</sup> A wage gap did result and it still exists today.<sup>162</sup> To say that prior salary is a defensible “factor other than sex,” or even that it can become defensible if considered with other factors, trivializes history and distorts the legislative intent behind the EPA. As the Ninth Circuit correctly recognized, prior salary is a sex-related factor precisely because of the sex-based discrimination that created the wage gap.<sup>163</sup> Moreover, because it is practically impossible to know whether an individual’s prior salary was ever initially discriminatory, it is better to err on the side of caution rather than risk institutionalizing the very same sex-based discrimination Congress sought to eliminate with the EPA. This can be done by precluding the use of prior salary as an affirmative defense—a significant and much-needed step forward in attaining wage equality.

Although it is important for employers to have flexibility and freedom in their hiring practices, this freedom does not necessarily extend to allowing employers to use someone else’s determination of a new hire’s salary to set starting pay. In response to the Eleventh Circuit’s view, the Ninth Circuit aptly questioned “how what is impermissible alone somehow becomes permissible when joined with other factors.”<sup>164</sup> Allowing prior salary to only be used as a defense if other legitimate factors are also considered is “distinction without reason.”<sup>165</sup> It is akin to saying that marijuana by itself is illegal, but marijuana edibles are legal because there are some extra, valid ingredients. The Eleventh Circuit’s supposed compromise between two bright-line rules merely enlarges a loophole through which employers may maneuver when they perpetuate a wage gap.

As the Ninth Circuit recognized, the wage gap is not some “inert historical relic of bygone assumptions and sex-based oppression.”<sup>166</sup> It remains a reality, with the average woman earning 18% less than what the average man earns.<sup>167</sup> There have been varying levels of response to this issue. Some states and a few cities have taken independent action aimed at closing the wage gap.<sup>168</sup> There is pending legislation in

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<sup>161</sup> 109 CONG. REC. 9192, 9199 (1963) (Statement of Rep. Green) (citing studies in which “employers . . . said they had a double standard pay scale for men and women . . . with the wage for women always the lower.”).

<sup>162</sup> See BLS HIGHLIGHTS, *supra* note 17, at 1–2.

<sup>163</sup> See *Rizo*, 887 F.3d at 460.

<sup>164</sup> *Id.* at 468.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> BLS HIGHLIGHTS, *supra* note 17, at 1–2. It is also important to note that the wage gap varies based on race and ethnicity. For example, the wage gap between black women and black men in 2017 was 9%, whereas the wage gap between black women and white, non-Hispanic men in 2017 was 32%. *Id.* at 4, 10; see also Ariane Hegewisch & Heidi Hartmann, *The Gender Wage Gap: 2018 Earnings Differences by Race and Ethnicity, Table 1*, INST. FOR WOMEN’S POL’Y RES. (Mar. 7, 2019), <https://iwpr.org/publications/gender-wage-gap-2018/> [<https://perma.cc/F5B8-4N7T>].

<sup>168</sup> See Nielson, *Policy Guide*, *supra* note 139.

Congress.<sup>169</sup> The Ninth Circuit has held that employers may not use prior salary as an affirmative defense in EPA claims.<sup>170</sup> There are also grassroots movements that aim to promote economic equality between men and women.<sup>171</sup> All of these actions, although not uniform in impact, still contribute to the goal of closing the wage gap and more importantly, can inspire further action with the potential for widespread, uniform effects.

## V. CONCLUSION

There is a longstanding history of discrimination against women in the workplace and, because of that, prior salary is an intrinsically sex-related factor. An employer's use of prior salary, even when seemingly neutral, still encompasses a determination of worth by a third-party that risks perpetuating discrimination both directly and indirectly due to that history. Justifying a wage gap on the basis of prior salary institutionalizes the very sex-based discrimination that Congress sought to eliminate over 55 years ago. As Aileen Rizo stated, "low wages will follow you wherever you go as long as someone keeps asking you how much you were paid."<sup>172</sup> The Equal Pay Act of 1963 gave pay equality a proverbial foot in the door<sup>173</sup> and the Ninth Circuit's decision in *Rizo v. Yovino* was another step forward, important in drawing attention to and furthering the goal of equal pay for equal work. To continue building on this important progress, action needs to be taken, whether by Congress, courts, or state legislatures, because ultimately, prior salary should not determine future salary and thus, should not be construed as a defensible "factor other than sex"<sup>174</sup> within the EPA.

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<sup>169</sup> See Paycheck Fairness Act, H.R. 1869, S. 819, 115th Cong. §3 (2017); see also Pay Equity for All Act of 2019, H.R. 1864, 116th Cong. §8 (2019).

<sup>170</sup> See *Rizo*, 887 F.3d at 456. Unfortunately, *Rizo*'s future is uncertain, the decision thwarted by a legal technicality. The Supreme Court did not address the merits of the case, but it still remains unclear whether the Ninth Circuit will issue an opinion on remand consistent with Judge Reinhardt's original opinion. See *Yovino v. Rizo*, 139 S. Ct. 706, 711 (2019) (remanding the *Rizo* en banc decision).

<sup>171</sup> For example, the American Association of University Women, <https://www.aauw.org/> [<https://perma.cc/QHN7-JMF5>]; National Organization for Women, <https://now.org/resource/women-deserve-equal-pay-factsheet/> [<https://perma.cc/G2NB-SLT2>]; and National Women's Law Center, <https://nwlc.org/> [<https://perma.cc/HN7J-CCJF>].

<sup>172</sup> Chappell, *supra* note 81.

<sup>173</sup> 109 CONG. REC. 9192, 9193 (1963) (statement of Rep. St. George).

<sup>174</sup> 29 U.S.C. § 206(d)(1) (2012).