Nebraska Law Review

Volume 98 | Issue 4 Article 7

2020

# Is Prior Salary a Factor Other Than Sex? An Approach to Resolve the Ongoing Debate

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Note*

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## I. INTRODUCTION

Amy and Jack work as financial advisors at a national firm. They both attended the University of Nebraska-Lincoln, graduated in 2000, and earned a master's degree while working. Their qualifications and duties are the same, but Jack's yearly salary is $100,000 while Amy earns only $80,000. Amy is not alone. In the United States, on aver-



* Elizabeth A. Stevenson, J.D., University of Nebraska College of Law, 2020. I thank my parents, Randy and Laura Stevenson, for their support and encouragement throughout law school. I also thank Professor Steven Willborn for thoughtful comments on this Note. Finally, special thanks to the entire *Nebraska Law Review* Volume 98 Executive Board for their excellent work.

age, median earnings of full-time women working year-round are only 80% of men's earnings.[1] Despite explicit prohibition of gender wage discrimination with the passage of the Equal Pay Act[2] (the Act) and Title VII of the Civil Rights Act[3] (Title VII) in the early 1960s, the wage gap[4] has persisted and affects most working women in America across ages, races, states, minority statuses, and education levels.[5] The current rate of progress in closing the gap is slow and experts do not expect women to reach pay equity until 2059.[6] Although the wage gap has narrowed over the past century, its persistence, combined with Congress's lack of progress in eliminating pay inequality, indicates deficiencies in the law.

In 1963, Congress enacted the Act to end wage discrimination based on sex and promote the principle of equal pay for equal work.[7] In the 1980s—years after the Act's passage—gender wage discrimination began to consistently decrease. Improvement in narrowing the wage gap stalled again in 2000 and has since stagnated.[8] The persistent gap is attributable not only to overt gender discrimination, but also to non-discriminatory factors, including differences in experience

1. *See* Alexandra N. Phillips, Comment, *Promulgating Parity: An Argument for a States-Based Approach to Valuing Women's Work and Ensuring Pay Equity in the United States*, 92 TUL. L. REV. 719, 720 (2018) (citing ELISE GOULD ET AL., ECON. POL'Y INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID LESS THAN MEN AND WHY IT CAN'T BE EXPLAINED AWAY (2016)). In the course of an average working woman's lifetime, this amounts to a deprivation of approximately $530,000, or $800,000 for a college-educated woman. *Id.*
2. 29 U.S.C. § 206(d) (2012).
3. 42 U.S.C. §§ 2000e–2000e-17 (2012).
4. *See* Phillips, *supra* note 1, at 721 (explaining the gender wage gap "is a measure of what women workers are paid relative to their male counterparts.").
5. *See* Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385 (2013). It is important to note that the gender wage gap affects some women to a greater extent than others. For a discussion on the racial pay gap coupled with the gender wage gap, see Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 591–94 (2018). For a discussion on the wage gap by age and education, see SECTION OF LITIG., AM. BAR ASS'N, EQUAL PAY: IT'S ABOUT TIME (2013) (citing NAT'L WOMEN'S LAW CTR., 50 YEARS & COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY 2–3 (2013)). This Note acknowledges the disparate impact of the wage gap on certain classes of women, but focuses on the wage gap generally, referring to women as a whole.
6. Sabrina L. Brown, Note, *Negotiating Around the Equal Pay Act: Use of the "Factor Other Than Sex" Defense to Escape Liability*, 78 OHIO ST. L.J. 471, 476 (2017) (citing *The Wage Gap over Time: In Real Dollars, Women See a Continuing Gap*, NAT'L COMMITTEE ON PAY EQUITY, https://www.pay-equity.org/info-time.html [https://perma.unl.edu/DZ2P-D6K2] (last visited Feb. 18, 2020)).
7. *See* discussion *infra* section II.A.
8. *See* Bornstein, *supra* note 5, at 586. Essentially, there has been little to no change in the wage gap in the past twenty years. *Id.*

and occupational segregation into lower-paying jobs.[9] Additionally, a complex combination of implicit and explicit biases against women—including undervaluation of work historically done by women, women's perceived and actual behavior in negotiations, and working mothers' perceived role as a caretaker—have contributed to the gender wage gap in less obvious ways.[10] The Act simply fails to address these factors that are not overtly discriminatory. Moreover, it fails to recognize and account for implicit bias and other contributors to the wage gap that fall outside the Act's narrow focus of pay differences between men and women doing almost identical work. Thus, the Act is largely ineffective today and the twenty-year stall in progress toward pay equity begs either for federal legislation amending the Act or clearer judicial guidance for its interpretation.

A seemingly subtle but significant factor that may affect Amy's pay is prior salary. When Amy and Jack interviewed for their current positions, their employer asked what their last jobs paid. Because women have historically been paid less than men, Amy can argue her employer's reliance on her prior pay to set her current salary is discriminatory. The employer would respond that prior salary information is a "factor other than sex"—an exception to the Act[11]—and does not violate the law. Depending on the jurisdiction and the extent to which the employer relied on Amy's prior salary to set her current pay at $80,000 compared to Jack's $100,000, Amy may prevail.

This Note examines the uncertainty of the Act's "factor other than sex" exception. It does so through the lens of the most prominent case in this area, *Rizo v. Yovino*,[12] in which an employer based an employee's starting salary solely upon her prior pay. Part II discusses the Act, its exceptions, and how the Supreme Court has interpreted it. Part III examines the majority and concurring opinions in *Rizo* and their key differences, as well as the circuit split the decision deepened. Part IV explains how *Rizo* has led to uncertainty and left employers questioning whether they may consider an employee's prior salary when determining pay. It argues that a middle-ground approach is the best way to interpret the law. Finally, Part V concludes that courts should adopt the middle-ground approach to avoid pitfalls of a categorical rule and end the perpetuation of the wage gap based upon use of prior salary. This proposed approach will allow women to take charge of salary negotiations without systemic discrimination while granting employers flexibility to conduct business.

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9. *See* DelPo Kulow, *supra* note 5, at 393.

10. *See* Phillips, *supra* note 1, at 725–29.

11. *See* discussion *infra* subsection II.A.1.

12. Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019).

## II. BACKGROUND

### A. The Equal Pay Act of 1963

Congress enacted the Act in 1963 to end wage discrimination on the basis of sex.[13] The Act sought to promote an equal-pay-for-equal-work mantra through a simple purpose: to prohibit employers from paying men more than women for equal work.[14] The Act was adopted as a solution to the "serious and endemic problem of employment discrimination in private industry"[15] that was based on the outdated tradition of men being paid more than women. In *Corning Glass Works v. Brennan*,[16] the Supreme Court articulated the Act's purpose by explaining that Congress sought to remedy "the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.'"[17] Therefore, the Act prohibits wage discrimination between employees based on sex for equal work requiring equal skill, effort, and responsibility and performed under similar working conditions.[18] Overall, the Act serves a "broadly remedial" purpose to prohibit wage discrimination on the basis of sex.[19]

In *Corning*, the Court explained that Congress recognized the concept of equal pay for equal work, but that discussion was not reflected in a single piece of legislation that employers could understand and

13. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

14. *Id.*

15. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

16. *Id.*

17. *Id.* Specifically, Congress noted wage differentials based on sex have a depressing effect on wages and living standards for employees, prevent maximization of labor resources, cause inefficient labor disputes, burden commerce, and are a form of unfair competition.

18. *See* Rizo v. Yovino, 887 F.3d 453, 456 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019); 26 AM. JUR. PROOF OF FACTS 3D 269, § 9 (1994).

19. *Corning*, 417 U.S. at 208. Notably, Title VII did not modify or limit the scope of the Equal Pay Act. Like the Act, Title VII addresses pay discrimination issues, but the laws have different applications based on their different goals and remedies. *See* Ellen M. Bowden, Note, *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 COLUM. J.L. & SOC. PROBS. 225, 230–31 (1994) (explaining the Act focuses on providing equal pay for equal work, while Title VII generally forbids employment discrimination). Title VII does not supersede the Equal Pay Act and was designed to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974). Although some litigation and academic analyses consider the interaction between Title VII and the Equal Pay Act for certain claims, this Note looks at the Equal Pay Act only to analyze consideration of prior salary as a factor other than sex.

use to govern themselves.[20] By reducing this concept to statute, Congress intended to prohibit wage discrimination on the basis of sex and set clear rules for the private sector. To establish a cause of action, an employee bringing a wage discrimination claim under the Act must show that the employer pays different wages to employees of opposite sexes for equal work where the jobs require equal skill, equal effort, equal responsibility, and are performed under similar working conditions.[21]

*1. The Act's Four Exceptions*

The first section of the Act describes four affirmative defenses, or exceptions, that allow an employer to pay a member of one sex higher wages than a member of another sex even if the employee establishes a cause of action. The Act reads:

> [E]xcept where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[22]

These affirmative defenses authorize an employer to justify paying different wages to members of different sexes when a pay differential otherwise violates the Act on its face.[23] In other words, even when male and female employees perform substantially equal work, an employer does not violate the Act when it can prove that a difference in wages is due to a seniority system, merit system, production earnings system based upon quantity or quality, or "a differential based on any other factor other than sex." This might include, for example, certain training programs, education, or the employee's amount of experience.[24]

Courts consistently understand and apply the Act's three straightforward exceptions—a seniority system, a merit system, or a produc-

20. *See Corning*, 417 U.S. at 198–99 (stating the Act "was more readily stated in principle than reduced to statutory language which would be meaningful to employers and workable across the broad range of industries covered by the Act.").

21. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012). The Act states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

*Id.*

22. *Id.* (emphasis in original).

23. *See Corning*, 417 U.S. at 197.

24. 29 U.S.C. § 206(d).

tion earnings system. Compensation pursuant to these exceptions relates to concrete characteristics, such as qualifications, performance, or experience.[25] Some courts have used the term "bona fide" when analyzing this portion of the Act, determining a pay differential pursuant to these first three exceptions is permissible because the system was not designed to and does not actually discriminate on the basis of sex.[26] Overall, these exceptions are narrow and specific, and courts can apply them with reasonable consistency.[27]

Conversely, courts experience widespread confusion and disagreement regarding the fourth exception, "a differential based on any other factor other than sex . . . ."[28] The Supreme Court has deemed this the catchall exception to the Act because it is far more general than the previous three.[29] With no clear definition or judicial standard for what constitutes a factor other than sex, this exception has led to inconsistent outcomes.[30]

Although the Supreme Court has explained that Congress structured the Act "to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use

25. *See* Rizo v. Yovino, 887 F.3d 453, 462 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019). For instance, under the first affirmative defense, a compensation system that pays higher salaries to employees who have been with the organization longer would be permissible as long as that payment is made pursuant to a bona fide seniority system.

26. *See, e.g.*, *Corning*, 417 U.S. at 201 (discussing Congress's intent to "ensure that wage differentials based upon bona fide job evaluation plans" would not constitute a violation of the Act); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992) (explaining "Congress indicated its intention that only a '*bona fide* job classification program' where job-related distinctions underlie the classifications will qualify as a 'valid defense to a charge of discrimination'" and holding an employer bears the burden of proving a bona fide, business-related reason exists to justify the wage differential); Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989) (same).

27. *See* NAT'L WOMEN'S LAW CTR., CLOSING THE "FACTOR OTHER THAN SEX" LOOPHOLE IN THE EQUAL PAY ACT (2011); *see also* Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 851–53 (2004) (explaining "the defendant may seek refuge under one of three specific defenses" or a fourth, more general and uncertain factor other than sex affirmative defense).

28. 29 U.S.C. § 206(d); *see* Bridget Sasson, Comment, *The Equal Pay Act: Almost Fifty Years Later, Why Wage Gap Still Exists*, 15 DUQ. BUS. L.J. 73, 77 (2012) ("The appellate courts have interpreted the affirmative defenses differently. The factor 'other than sex' has become a broad catchall defense for *any* factor that does not involve sex.").

29. *See Corning*, 417 U.S. at 204. Although the other exceptions hold defendants to a certain standard that requires evidence, there is no clear standard of proof courts must require for a defendant to prevail under the fourth exception.

30. *See* Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1087 (1989); Bowden, *supra* note 19, at 234.

of 'other factors other than sex,'"[31] it has not clarified what may constitute such a defense. Several points of confusion have arisen from the meaning of the exception, including, for example, how broadly to read the exception, whether it covers only job-related factors (or business reasons or the like), and whether an employee's prior salary is a factor other than sex within the exception. These issues are unresolved and the ongoing debate about the provision's meaning has led to circuit splits and uncertainty among plaintiff–employees and defendant–employers alike. This Note analyzes *Rizo*—the case that redefined the "factor other than sex" exception in the Ninth Circuit—and proposes a different approach to develop a better, uniform understanding of the Act.

### B. Supreme Court Interpretation of the Equal Pay Act

Although the Supreme Court has only analyzed the Act a handful of times, its interpretation of the Act's purpose and procedure is critically important to reach an understanding of the exception. Still, great uncertainty remains as to what this exception means. In 1992, the Court denied certiorari on an opportunity to clarify the "factor other than sex" defense by determining whether the factor must be supported by a legitimate business-related reason.[32] Since then, the Court has not considered the increasingly debated question of whether an employer may use an employee's prior salary to justify a wage differential under the defense.[33] Without precedent specifically address-

31. Washington Cty. v. Gunther, 452 U.S. 161, 170–71 (1981).

32. *See* Randolph Cent. Sch. Dist. v. Aldrich, 506 U.S. 965 (1992). In a dissent joined by Chief Justice Rehnquist and Justice O'Connor, Justice White explained this issue presented "an important and clear-cut issue of law that is fundamental to the further conduct of the case . . . ." *Id.* Acknowledging the uncertainty and need for further clarification of this exception, he stated, "I would grant certiorari to resolve the acknowledged conflict among the Circuits regarding the interpretation of the federal Equal Pay Act." *Id.*

33. The closest the Court has come to addressing this issue was *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 181, 123 Stat. 5 (2009). In that case, the petitioner argued a Title VII statute of limitations issue and asserted "Title VII is violated each time an employee receives a paycheck that reflects past discrimination." *Id.* at 640. The Court declined to adjudicate this argument. *Id.* Congress overturned the case in 2009 with an amendment to Title VII that expanded the time period during which individuals can bring claims of discriminatory compensation. *See* Lilly Ledbetter Fair Pay Act § 181. Most notable, however, was Justice Ginsburg's dissenting opinion criticizing the court for its decision. She explained how using prior pay under Title VII leads to discriminatory pay differentials and stated, "Paychecks perpetuating past discrimination . . . are actionable . . . because they discriminate anew each time they issue." *Ledbetter*, 550 U.S. at 647. *See also* Garrett M. Fahy, Note, Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007): Faithful to Title VII or Blind to Sex Discrimination?*, 2. J. BUS. ENTREPRENEURSHIP & L. 359, 384–89 (2009) (explaining the same). Al-

ing this issue, *Corning*—the Court's most in-depth analysis of the Act to date—and *Gunther*—a more recent look at the Act's fourth exception—provide the most significant guidance for lower courts to understand and apply the Act and its ambiguous fourth exception.

*1.* Corning Glass Works v. Brennan

*Corning* is the most thorough of the Court's few discussions of the Equal Pay Act. As such, it provides important guidance for lower courts' analyses of the Act. The plaintiff brought the case because the Corning manufacturing plant's night inspectors—who were all male due to a state law that prohibited women from working at night—earned significantly higher wages than the all-female day inspectors. The Court considered whether Corning violated the Act by paying a higher base wage to male night shift inspectors than female day shift inspectors performing the same work.[34] Corning argued the shift differential justified disparate wages and the day and night shift work were not performed under similar working conditions as defined by the Act.[35] The Court analyzed this issue within the Act's fourth exception, holding the differential was not justifiable as a factor other than sex.[36]

To decide whether Corning violated the Act, the Court turned to the Act's purpose and legislative history.[37] Several representatives and witnesses who testified during hearings for the Act, including a representative from Corning, noted private employers in America were using "formal, systematic job evaluation plans to establish equitable wage structures in their plants" that accounted for a variety of factors to determine job value, including wages.[38] These individuals criticized the Act's drafts for having an "unduly vague and incomplete" definition of equal work that did not take into account the job evalua-

though this assessment echoes of the prior salary and discrimination issue this Note addresses, it was directed at Title VII—not Equal Pay Act—litigation. Therefore, while the Supreme Court has contemplated issues similar to the one this Note discusses, it has remained silent on whether an employee's prior salary can justify a wage differential under the Act's fourth exception.

34. *See Corning*, 417 U.S. at 190. This higher wage was paid in addition to a separate night shift differential the plant paid all employees for night work. To fill the night shift, the plant moved male workers from day inspection jobs to night inspection jobs for which the male workers demanded and received higher wages. After the law was amended and women were permitted to seek night shift jobs, male employees retained the same higher wage they demanded when they were moved to the night shift, while female inspectors' wages remained lower for both day and night work. *Id.* at 190–94.
35. *Id.* at 197.
36. *Id.* at 205.
37. *See supra* notes 13–21 and accompanying text (discussing the Act's intent and purpose).
38. *Corning*, 417 U.S. at 199.

tion systems upon which employers relied.[39] This is why, the Court observed, Congress amended the Act to include equal effort, skill, responsibility, and similar working conditions within the concept of equal work.[40] Therefore, Congress indicated that a "bona fide job classification program that does not discriminate on the basis of sex" may serve as a defense to a charge of discrimination under the Act.[41]

The Court distinguished the wage differential as compensation for night work from added payment based upon sex.[42] Thus, Corning violated the Act and could not justify its wage differential as a factor other than sex because "the higher night rate was in large part the product of the generally higher wage level of male workers" who demanded greater compensation for work that female employees were performing at a lower base wage rate.[43] Notably, the Court rejected Corning's market argument—the idea that an employer can pay men more than women for equal work because men will not work at lower rates and the wage differential reflects the job market. It clarified that taking advantage of that market situation is "understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."[44] Although this holding was influential and has provided lower courts with some guidance for interpreting the Act, the Court did not define a standard for what constitutes a factor other than sex, which contributed to the current state of confusion.

*2.* Washington County v. Gunther

Seven years after *Corning*, the Supreme Court analyzed the Act's "factor other than sex" exception through a case brought under a Title VII sex-based wage discrimination claim.[45] The Court acknowledged

39. *Id.* at 202.
40. *Id.* at 201 (citing H.R. REP. NO. 88-309, at 3 (1963), which emphasized that "there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay.").
41. *Id.* at 201.
42. *Id.*
43. *Id.* at 204–05.
44. *Id.* at 205. For an explanation of the market theory defense, see Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807 (2010). For a more specific discussion of the market defense as it relates to the Act's fourth exception and the Act's failure to end gender wage discrimination, see Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159 (2011).
45. *See* Washington Cty. v. Gunther, 452 U.S. 161 (1981). Female jail guards sued the County of Washington for being paid "substantially lower wages" in the female section of the jail than the male guards were paid in the male section of the jail. *Id.* at 163–64. They argued they were paid unequal wages for substantially equal work and, because of intentional sex discrimination, the county had set the pay scale for female guards lower than the pay scale for male guards. *Id.* at 163–66.

"[t]he starting point for any discussion of sex-based wage discrimination claims must be the Equal Pay Act of 1963 . . ." and, mirroring *Corning*, looked to the purpose and legislative history of the Act to interpret it.[46] Through this analysis, the Court accorded some clarity to the definition of equal work, holding the term means men's and women's jobs are so identical that they are "unarguably of equal worth."[47]

Although the main issue in *Gunther* was whether claims of sex-based wage discrimination were limited to the Equal Pay Act or whether Title VII could also be used to attack wage discrimination, the case presented the Court with an opportunity to examine the Act's fourth exception. It explained that a pay differential must be based on a bona fide factor other than sex.[48] In other words, employers may exercise judgment in using a bona fide job rating system to differentiate pay among jobs and employees.[49] However, the Court did not specify what job rating practices constitute bona fide systems, nor did it give examples or guidance of discrimination and non-bona fide job rating systems. Therefore, although *Corning* and *Gunther* provide valuable insight into what the Supreme Court has found meaningful when interpreting the Act, there remains uncertainty and room for varying interpretations of the broad "factor other than sex" exception in lower courts.[50]

## III. *RIZO V. YOVINO*

In *Rizo*, the Ninth Circuit Court of Appeals sought to clarify whether an employee's prior salary can be a factor other than sex under the Act's ambiguous fourth exception. Few scholars have addressed the merits and implications of this important equal pay decision. Of note is the case's procedural posture; the court heard the case en banc and reversed its own panel decision, thus overruling a 1982 Ninth Circuit decision directly on point.[51] In 2018, the defendant filed a petition for a writ of certiorari to the Supreme Court. On February

46. *Id.* at 184.
47. *Id.* at 188.
48. *Id.* at 170. Before *Gunther*, the Supreme Court had not used this term that some appellate courts had contemplated. The Court explained the Act permits employers to defend against charges of sex-based discrimination "where their pay differentials are based on a *bona fide* use of 'other factors other than sex.'" *Id.* (emphasis added).
49. It is not within courts' or administrative agencies' powers to "substitute their judgment for the judgment of the employer" if the employer's job rating system—a bona fide job rating system that is not based in discriminatory intent or practice—does not discriminate on the basis of sex. *Id.* at 171.
50. *See* Hamburg, *supra* note 30, at 1089.
51. The Ninth Circuit's en banc decision in *Rizo* overruled *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).

25, 2019, the Court granted the petition and vacated the Ninth Circuit's judgment on procedural grounds.[52] Notwithstanding, the substantive issue exists all the same and *Rizo* is still a key case in this area, adding major ideas to the discussion of prior salary as a factor other than sex, deepening a circuit split, and furthering the need for clarity regarding the Act's catchall exception.

### A. Background

Plaintiff Aileen Rizo worked as a math consultant for the Fresno County Office of Education (the County) in California beginning in October 2009. Before the County hired her, Rizo worked as a middle and high school math teacher in Arizona.[53] The County determined Rizo's starting salary using a standard operating procedure that detailed ten salary levels with ten steps in each level.[54] According to its procedure, the County placed Rizo at step one of level one.[55] While conversing with her colleagues in 2012, Rizo learned she was hired at a lower salary step than her male math consultant counterparts.[56] Later that year, she filed a complaint with the County regarding the pay disparity. The County responded by explaining all salaries were set in accordance with the procedure.[57] In 2014, Rizo sued Jim Yovino, the County's Superintendent, alleging a violation of the Act.[58] The County moved for summary judgment, stating as an affirmative defense that the discrepancy between Rizo's salary and her male counterparts' sal-

52. Yovino v. Rizo, 139 S. Ct. 706 (2019) (per curiam). The Court vacated the case because Judge Reinhardt of the Ninth Circuit, who wrote the majority opinion in *Rizo*, died before the opinion was issued. Thus, the Court held that the Ninth Circuit erred in counting the judge's vote in the en banc majority. *See id.* at 710; *infra* notes 102–06 and accompanying text.

53. Rizo v. Yovino, 887 F.3d 453, 457 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019). At her previous job, Rizo earned $50,630 each year for 206 working days with a stipend of $1,200 per year as compensation for her two master's degrees.

54. *Id.* at 457–58. The procedure instructed the County to determine a new hire's salary by adding five percent to the individual's prior salary, then placing the individual in the corresponding salary step. This was a formulaic procedure that did not factor experience to determine initial salary.

55. *Id.* This corresponded to a salary of $62,133 for 196 working days with an additional stipend of $600 for her master's degrees.

56. *Id.* at 458.

57. *Id.* The County stated the procedure had placed more women at higher compensation steps than men over the past twenty-five years (which included time before the County adopted this specific procedure). Rizo disputed this assertion, claiming the data showed men were actually placed at a higher average salary step. Regardless, it was undisputed that Rizo was placed at a lower salary step than her male math consultant counterparts.

58. Rizo also alleged sex discrimination in violation of Title VII, as well as sex discrimination and failure to prevent discrimination under two California Government Code provisions. This Note, like the Ninth Circuit's analysis, focuses solely on the alleged violation of the Equal Pay Act.

aries was based upon her prior salary in Arizona. The County pointed to the Act's "factor other than sex" exception as its basis for this defense.[59]

The district court denied the County's motion for summary judgment, holding a pay structure based exclusively on prior wages conflicts with the Act because it may "perpetuate a discriminatory wage disparity between men and women."[60] The County appealed to a panel of the Ninth Circuit Court of Appeals, maintaining prior salary was a permissible factor other than sex to justify the pay disparity. The court followed *Kouba v. Allstate Ins. Co.*,[61] which determined prior salary constitutes a factor other than sex under the Act, and held it was permissible for the County to consider only Rizo's prior salary as a factor to set her current salary.[62] The Ninth Circuit Court of Appeals granted a petition for rehearing en banc to clarify the law, including the validity of *Kouba*, and review the district court's denial of the County's motion for summary judgment.[63]

## B. Majority Opinion

The court's en banc majority opinion began with a discussion of the Act's purpose.[64] The court set the tone for its purpose-based opinion by establishing that "Congress enacted the Equal Pay Act in 1963 to put an end to the 'serious and endemic problem of employment discrimination in private industry' and carry out a broad mandate of equal pay for equal work regardless of sex."[65] Beginning with an analysis of the Act's legislative history, the majority first held the Act should be applied to end historical wage discrimination against women.[66] When Congress passed the Act in 1963, the use of an employee's prior pay to set current pay would have reflected a "discriminatory marketplace that valued the equal work of one sex

59. *Rizo*, 887 F.3d at 458.
60. *Id.*
61. 691 F.2d 873 (9th Cir. 1982), *overruled by* Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019).
62. *Rizo v. Yovino*, 854 F.3d 1161, 1167 (9th Cir. 2017). The panel directed the district court to consider the reasonableness of the County's reliance on prior salary on remand, as the consideration of prior salary could only be permissible if it was reasonable and effectuated some business policy for the County. The *Rizo* majority opinion summarized this notion as a bona fide factor other than sex.
63. *Rizo v. Yovino*, 869 F.3d 1004 (9th Cir. 2017) (vacating the prior decision and granting rehearing en banc).
64. *Rizo*, 887 F.3d at 456.
65. *Id.*
66. *Id.* at 460. The court explained the Act "should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." *Id.* Based on its intent and purpose, the court reasoned an employer cannot justify setting an employee's starting salary based on her prior pay as a factor other than sex. *Id.* at 467–68.

over the other."[67] Therefore, the majority explained, "Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials."[68]

After concluding that Congress's intent barred an employer's use of prior salary to justify a wage differential, the majority evaluated whether prior salary is a permissible factor other than sex within the meaning of the Act. First, the court turned to two canons of statutory interpretation to determine the meaning of the exception. Noting this exception is grouped with exceptions based upon seniority, merit, and productivity, the court explained "[i]t follows that the more general exception should be limited to legitimate, job-related reasons as well."[69] Additionally, the court interpreted the Act's phrasing in the provision "a differential based on any *other* factor other than sex"[70] to mean any other, similar factor. Such a factor, the court reasoned, must be similar to the other legitimate, job-related reasons provided in the first three exceptions.[71]

Next, the court supported its reasoning that its interpretation is limited to legitimate, job-related factors with the Act's legislative history. The Ninth Circuit traced the Supreme Court's analysis in *Corning* to interpret the Act's "similar working conditions" provision.[72] The author of the majority opinion, Judge Reinhardt, marshaled statements from lawmakers and industry representatives to hold the exception covers only job-related factors.[73] Concluding that Congress

67. *Id.* at 461.
68. *Id.*
69. *Id.* at 461–62. The court used the canon *noscitur a sociis*, meaning "it is known from its associates" to ascertain the meaning of the catchall phrase grouped with the first three exceptions.
70. *Id.* (emphasis added).
71. *Id.* at 462. Here, the majority applied the canon *ejusdem generis*, which translates to "of the same kind, class, or nature" and provides that general terms used at the end of a list are construed to encompass ideas similar to those enumerated by the preceding, more specific terms.
72. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195–200 (1974). In *Corning*, the Supreme Court evaluated records of House and Senate hearings and compared language in proposed bills to the final Act to determine Congressional intent and interpret the provision.
73. *See Rizo*, 887 F.3d at 462–65. The court discussed testimony at congressional hearings from industry representatives who worried the introduced Act lacked an "understanding of industrial reality" and proposed job-related exceptions that would include job classification programs. *Id.* at 463. One representative explained there are "countless reasons for wage variations . . . which are not discriminatory in nature," and argued for an exception to the Act that would allow employers to consider differences in shift times, duties, and training, for example, when determining employees' pay. *Id.* (citing *Equal Pay Act: Hearings Before the H. Special Subcomm. on Labor of the H. Comm. on Educ. & Labor on H.R. 3861, 4269, and Related Bills*, 88th Cong. 135 (1963) (statement of W. Boyd Owen, Vice President of Personnel Administration, Owens-Illinois Glass Co.)). The court ob-

added the fourth exception in response to testifying employers' concerns that their legitimate, job-related procedures for setting pay would become illegal under the Act, the court held that employers may use "legitimate, job-related means of setting pay but may not use sex directly or indirectly as a basis for establishing employees' wages."[74] The opinion also pointed to two other circuits that have construed the Act's fourth exception as limited to job-related factors,[75] reiterating their arguments and emphasizing the importance of limiting the exception to job-related factors in light of the Act's purpose.[76]

After this analysis, the majority concluded prior salary is not a factor other than sex within the meaning of the Act's fourth exception.[77] The opinion explained that although prior salary may "bear a rough relationship to legitimate factors other than sex," that relationship is attenuated and prior salary is not a legitimate measure of experience, ability to perform, training, or other job-related factors.[78] Further, it argued that using prior salary to set an employee's pay may "perpetuate the wage disparities prohibited under the Act."[79] Worrying prior pay could mask continuing unequal pay, the majority required em-

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served that most of the exceptions the representatives sought were job-related. *Id.* Additionally, the court noted the Act's first three job-related exceptions are examples and the fourth is a broad principle created to cover additional, similarly job-related factors. *Id.* at 464. Specifically, the court cited a House Committee Report explaining "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." H.R. REP. NO. 88-309, at 3 (1963). A similar Senate Committee Report led the court to conclude that the factor other than sex exception only covered factors insofar as they were job related. *Rizo*, 887 F.3d at 464–65.

74. *Rizo*, 887 F.3d at 465. The court noted the employer has the burden of proving it uses a bona fide job classification system or relies on bona fide job-related factors to set pay. *Id.*

75. *Id.* at 465–66. The court interpreted the Eleventh Circuit's statement in *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) that "the 'factor other than sex' exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability . . . " to mean job-related reasons. *Id.* Additionally, the court cited the Second Circuit's interchangeable use of the terms "job-relatedness requirement" and "legitimate business-related considerations" to describe an employer's legal standard for using the Act's fourth exception as an affirmative defense. *Id.* (citing Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir. 1992)). Although *Rizo* acknowledged many of the reasons underlying use of the phrases "business-related," "legitimate business reason," and "job-related" are similar, the court argued "job-related" was superior, as the other phrases could "permit the use of far too many improper justifications for avoiding the strictures of the Act." *Id.* at 466. For example, the court explained that the market argument asserted in *Corning* that provides women will be willing to accept lower salaries than men may qualify as a business reason but is unacceptable as a "job-related" factor. *Id.*

76. *Rizo*, 887 F.3d at 465–67.

77. *Id.* at 467.

78. *Id.*

79. *Id.*

ployers to prove that job-related factors underlie the employee's prior salary in order to justify a wage differential.[80] In holding prior salary is not a factor other than sex, the court overruled its previous decision in *Kouba* that the Act "does not impose a strict prohibition against the use of prior salary."[81] Once again emphasizing the Act's purpose, the majority reiterated that an employer's use of prior salary perpetuates past gender discrimination that the Act was designed to eliminate and, therefore, cannot be used as a factor other than sex in initial wage setting.[82]

Finally, the majority presented statistical evidence of the gender wage gap to connect the holding to the Act's purpose.[83] The court concluded, consistent with its purpose-focused analysis, that "[a]llowing prior salary to justify a wage differential perpetuates [the message that women are not worth as much as men], entrenching in salary systems an obvious means of discrimination—the very discrimination that the Act was designed to prohibit and rectify."[84] The majority maintained that prior salary, regardless of other factors, is not job-related and perpetuates wage disparities caused by sex.[85] Therefore, because the County relied upon Rizo's prior salary to set her pay, it failed to establish prior salary as a factor other than sex for purposes of the defense.[86]

### C. Concurring Opinions

Three judges filed concurring opinions with the decision, drawing attention to the contrast between Rizo's straightforward case and the complexity of the underlying law and its multiple possibilities for in-

80. *Id.* In other words, the majority ruled that prior salary is not a factor other than sex. However, if an employer can prove that legitimate, job-related factors were used to set an employee's prior salary, it may instead use those factors as an affirmative defense under the Act's fourth exception.

81. *Id.* In *Kouba*, the court held that a pay differential based upon prior salary was permissible if the employer could show that using prior salary to set pay (1) effectuated some business policy and (2) was reasonable in light of the employer's practices and purposes for using prior pay. Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982), *overruled by* Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018).

82. *Rizo*, 887 F.3d at 467.

83. *Id.* The majority considered excerpts from an amicus brief that included information that women earn lower wages than men across industries, occupations, and education levels. Brief of Equal Rights Advocates and 21 Other Organizations in Support of Plaintiff-Appellee's Supplemental Brief During Pendency of Rehearing as Amici Curiae, Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018) (No. 16-15372).

84. *Rizo*, 887 F.3d at 468.

85. *Id.* at 460, 468.

86. *Id.* The court affirmed the district court's denial of the County's motion for summary judgment and remanded the case to be considered under the new law set forth in the majority opinion.

terpretation.[87] Although every judge agreed that the majority correctly decided Rizo's case as a violation of the Act, the extent to which the judges supported the majority's rationale differed significantly.[88]

The first concurrence, written by Judge McKeown,[89] re-emphasized the majority's observation that prior salary can reflect historical sex discrimination and that the Act "prohibits this kind of 'piling on' where women can never overcome the historical inequality."[90] However, Judge McKeown wrote separately to assert the majority went too far in holding that any consideration of prior pay—even consideration of prior salary *with* other job-related factors—is impermissible under the Act.[91] The concurring opinion explained that the majority came to a "puzzling outcome" by distinguishing legitimate, job-related factors and then rendering those factors futile when an employer also considers prior salary.[92] Instead, Judge McKeown wrote that prior salary may be considered when setting a new salary, not as a standalone defense, but with other factors.[93] Additionally, she clarified that employ-

87. *Id.* at 453. Of the eleven judges who heard the case, five joined Judge Reinhardt's majority opinion and two joined concurring opinions. The judges agreed that Rizo's case presented a clear violation of the Act because prior salary was the only difference between Rizo's pay and her male counterparts' pay. *Id.* at 469 (McKeown, J., concurring) (explaining Rizo's situation as "a textbook violation of the 'equal pay for equal work' mantra" and stating "Rizo's case is an easy one."). However, the judges' opinions differed with respect to the permissibility of prior pay as a defense, either alone or considered with other factors. *Id.* at 470–71; *Id.* at 472–73 (Callahan, J., concurring).

88. *Id.* at 468–79; *see also Employment Litigation*, 30 No. 8 BUS. TORTS REP. 183, 185 (2018) (summarizing the differences between each concurring opinion).

89. *See infra* section IV.B for an in-depth analysis of Judge McKeown's concurring opinion.

90. *Rizo*, 887 F.3d at 469 (McKeown, J., concurring). Judge McKeown wrote the concurring opinion in which Judge Murguia joined.

91. *Id.* at 469–70. Judge McKeown clarified, "prior salary alone is not a defense to unequal pay for equal work . . . [h]owever, employers do not necessarily violate the Equal Pay Act when they consider prior salary among other factors when setting initial wages." *Id.* at 469.

    For simplicity, this Note presents this issue in terms of whether an employer may "consider" prior salary under a particular approach. However, the rule is more nuanced than this characterization suggests. Specifically, the rule is that when an employer uses prior salary and that use results in a pay disparity between men and women doing the same work, the employer increases its risk of violating the Act because, depending on the circumstances, the employer may not have a defense under the "factor other than sex" exception.

92. *Id.* at 472.

93. *Id.* at 470. Judge McKeown cautioned that the majority's holding that prior salary may never be considered as a benchmark for an employee's starting salary may disadvantage women in practice. This is because employers often consider salary to lure talent from competitors and voluntary discussions of prior salary can help women negotiate higher pay. *Id.* at 471–72. She added, "it may well be that salary accurately gauges a prospective employee's 'skill, effort, and responsibility,' as the Equal Pay Act envisions . . . and a new employer wants to exceed that benchmark." *Id.* at 471. Thus, chilling all discussions of prior pay may keep

ers still have the burden of showing that a "pay differential is based on a valid job-related factor other than sex."[94]

Similarly, Judge Callahan argued that although Rizo's case was properly decided, the majority's rationale "unnecessarily ignores the realities of business and, in doing so, may hinder rather than promote equal pay for equal work."[95] The concurrence noted that the Supreme Court had never specifically limited the Act's fourth exception to job-related factors. Therefore, he concluded the exception should be read broadly.[96] Like Judge McKeown, Judge Callahan reasoned that prior pay cannot be an employer's *only* justification for a pay differential under the Act's fourth exception.[97] He focused on business implications of the decision and explained that employers find prior salary important to their abilities to exercise flexibility and recruit competitive employees.[98] Unlike the majority and first concurring opinion, however, he questioned whether prior pay is a reflection of gender discrimination and, directly contradicting the majority opinion, held prior salary "is not inherently a reflection of gender discrimination."[99]

Finally, Judge Watford concurred with the majority's judgment but argued prior pay can be a factor other than sex only if the employee's prior salary does not reflect sex discrimination.[100] His concurrence tracked the Supreme Court's reasoning in *Corning*, acknowledging the purpose of the Act but leaving uncertainty as to what an employer must show to prove prior salary does not reflect sex discrimination.[101] Even more than the preceding concurrences, this opinion demon-

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women from attaining higher salaries when they begin new positions. *See* discussion *infra* notes 144–145 and accompanying text.

94. *Rizo*, 887 F.3d at 469 (McKeown, J., concurring).

95. *Id.* at 473 (Callahan, J., concurring). Judge Callahan wrote the concurring opinion in which Judge Tallman joined.

96. *Id.* at 474.

97. *Id.* at 475.

98. *Id.*

99. *Id.* at 477. Judge Callahan noted that differences in pay may be based on other factors, including, for example, cost of living if the employee is coming from a different part of the country. He also expressed trust that private employers have already adjusted their pay systems to be gender neutral. *Id.*

100. *Id.* at 478–79 (Watford, J., concurring).

101. Judge Watford acknowledged that it would be extremely difficult for an employer who pays female employees less than male employees by relying on prior salary to prove "that its female employees' past pay is not tainted by sex discrimination, including discriminatory pay differentials attributable to prevailing market forces." *Id. Cf.* Gordon v. United States, 903 F.3d 1248, 1254–57 (Fed. Cir. 2018) (Reyna, J., concurring) (discussing the difficulty in overcoming the burden of proof of historical discrimination against women as a plaintiff and citing *Rizo* when recommending the Federal Circuit fall in line with other circuit courts that assume pay differentials between men and women are based on sex), *vacated*, 754 F. App'x 1007 (Fed. Cir. 2019).

strates the judges' variety in reasoning and the uncertainty underlying the interpretation of the Act's ambiguous fourth exception.

### D. Certiorari and Supreme Court Opinion

On February 25, 2019, the Supreme Court issued an opinion per curiam on the County's petition for certiorari.[102] However, the Court refused to discuss substantive issues in the case, dodging the issue of whether prior salary is a factor other than sex and whether the Ninth Circuit correctly decided the case. Instead, the Court focused on Judge Reinhardt, who penned the *Rizo* majority opinion and died eleven days before it was issued.[103] Had the judge's vote not been counted, the majority opinion would have been approved by only five of the ten still-living panelists.[104] Thus, although Judge Reinhardt fully participated in the case while alive, the Court determined it was unlawful to count his vote because one cannot exercise judicial power after death.[105] The Court declared that "federal judges are appointed for life, not for eternity."[106]

By deciding the case solely on these unique procedural grounds and ignoring the substantive issue of prior salary altogether, the Court missed a momentous opportunity to clarify the law. *Rizo* was the perfect case for the Court to consider, as the County determined Ms. Rizo's pay solely based upon prior salary. There were no other factors to complicate a substantive analysis, yet the Court declined to consider this narrow issue. By once again dodging the issue of equal pay, the Court has perpetuated the ongoing debate about the role of prior salary. Perhaps merely granting the petition for certiorari was a warning shot that the Court is gearing up to consider an equal pay case. However, refusing to acknowledge the substantive issue appears to indicate that the Court is not yet ready. Regardless, the issue remains and *Rizo* illustrates the ongoing debate that employees and employers are struggling to reconcile without clear guidance.

### E. Circuit Split

The Ninth Circuit's landmark decision in *Rizo* deepened an existing split among the federal circuit courts of appeals. Circuits had already adopted varied interpretations of the "factor other than sex" exception, including a rule that the justification must be job-related or a legitimate business reason.[107] Additionally, *Rizo* created a direct

102. Yovino v. Rizo, 139 S. Ct. 706 (2019) (per curiam).
103. *Id.* at 707–08.
104. *Id.*
105. *Id.* at 707.
106. *Id.* at 710.
107. *See* Christine Elzer, *Wheeling, Dealing, and the Glass Ceiling: Why the Gender Difference in Salary Negotiation Is Not a "Factor Other Than Sex" Under the*

split with the Seventh Circuit as to whether employers may consider prior salary and use it as an affirmative defense. Circuits disagree as to whether prior pay may justify a wage disparity under the Act, either alone or in conjunction with other factors.[108]

Unlike the Ninth Circuit in *Rizo*, the Tenth and Eleventh Circuits have held that, although prior pay cannot justify a wage differential alone, it may be considered with other factors to establish the factor other than sex affirmative defense.[109] These courts have explained that although the Act "precludes an employer from relying solely upon a prior salary to justify pay disparity,"[110] it is prudent and permissible for employers to consider prior salary with other factors other than sex.[111] These circuits allow employers to assert prior salary as a defense when they can point to additional factors that meet the court's threshold for the Act's fourth exception.[112] The Second and Eighth Circuits have applied a more lenient version of this approach, allowing prior salary as a factor other than sex when an employer also takes some other precaution.[113]

On the other hand, *Rizo* directly contradicts the Seventh Circuit's decision in *Wernsing v. Dep't of Human Servs.*,[114] which held prior salary is *always* a factor other than sex.[115] In *Wernsing*, the plaintiff

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*Equal Pay Act*, 10 GEO. J. GENDER & L. 1, 25–30 (2009); Bowden, *supra* note 19, at 234–44. Courts and legal scholars have differed as to whether a factor other than sex differential requires employers to prove a bona fide factor, business relation, acceptable business reason, or legitimate business reason, among other classifications. *Id. Rizo* added to this more general discussion of the Act's exception, arguing the standard for any factor other than sex should be a job-related factor other than sex. *See supra* notes 69–71 and accompanying text.

108. *See* Laura Palk & Shelly Grunsted, *Born Free: Toward an Expansive Definition of Sex*, 25 MICH. J. GENDER & L. 1, 16 (2018) (noting generally a split on the issue of "whether pay history alone can support a wage disparity claim.").

109. *See* Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570–71 (11th Cir. 1988).

110. *Riser*, 776 F.3d at 1199 (quoting Angove v. Williams-Sonoma, Inc., 2003 WL 21529409, at *508 (10th Cir. July 8, 2003)).

111. *Id.*; *see also Irby*, 44 F.3d at 955 ("This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense.").

112. *See, e.g.*, Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525–26 (2d Cir. 1992) (holding prior salary is a permissible defense when the employer meets a "bona fide business-related reason" standard).

113. *Id.* at 526 (concluding that requiring a factor other than sex to be job-related serves as a limitation on an employer's ability to justify a wage differential); Drum v. Leeson Elec. Corp., 565 F.3d 1071, 1073 (8th Cir. 2009) (allowing the use of prior salary as a defense for a wage differential but cautioned the court "carefully examines the record to ensure that an employer does not rely on the prohibited 'market force theory' to justify lower wages for female employees . . . .").

114. 427 F.3d 466, 468–70 (7th Cir. 2005).

115. *Id.*

alleged that her employer discriminated against women through its standard compensation program, which provided employees with a ten percent raise from their prior salary.[116] She argued (1) her employer lacked an acceptable business reason for considering prior pay when setting her salary and (2) the use of prior pay to set salary was discriminatory because pay systems historically discriminate on account of sex.[117]

The court rejected the plaintiff's first argument, holding courts do not set standards for the exception and classifying a factor as an acceptable business reason is not required.[118] It then acknowledged the premise of the plaintiff's second argument that an employer's reliance on prior salary cannot support the exception because market wages are discriminatory, but held her conclusion did not logically follow.[119] The court explained that although women's wages are less than men's on average, pay changes with experience and "other aspects of human capital."[120] The court held prior salary is a permissible justification for a wage differential unless the plaintiff can prove that using prior wages as base pay was discriminatory because sex discrimination led to lower wages in the prior jobs.[121] In that situation, the court reasoned, there would be adequate evidence to show prior salary perpetuated sex discrimination and violated the Act.[122]

Although the court acknowledged that wages could be discriminatory, it placed greater value on the plaintiff's ability to prove her prior salary was discriminatory on the basis of sex.[123] Ms. Wernsing did not meet this burden because she presented no specific evidence that her

116. *Id.* at 467. Wernsing alleged her coworkers were given higher salaries due to discriminatory prior pay. Specifically, she pointed to a male coworker hired at the same time she was who had been earning $3,399 monthly at his past job and received a ten percent raise when he joined the Department. Wernsing, on the other hand, had been earning $1,925 monthly and started at the Department with an almost thirty percent raise, but still earned less than her male coworker at $2,478 per month. Moreover, Wernsing provided evidence that the Department's pay scale has a maximum for annual raises, which her male coworker will "top out" years before she does. *Id.*

117. *Id.* at 468.

118. *Id.* at 468–70. Writing for the majority, Judge Easterbrook explained that an employer can act for any reason and specified "[t]he [Equal Pay Act] asks whether the employer has a reason other than sex—not whether it has a 'good' reason." *Id.* at 468.

119. The court described Wernsing's conclusion that all considerations of prior salary are discriminatory as a "non-sequitur." *Id* at 470.

120. *Id.* In explaining how wages may differ between the genders, Judge Easterbrook gave only one (arguably unconvincing) example: "many women spend more years in child-rearing than do men [which] implies that women's market wages will be lower on average, but such a difference does not show discrimination . . . ." *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 470–71.

pay was based on discriminatory principles.[124] However, the court did not specify what evidence is sufficient for proving discrimination in prior pay, and this would likely be an extremely high burden for a plaintiff to reach. The *Rizo* majority directly split with the *Wernsing* rationale when it held that prior salary perpetuates wage discrimination and, therefore, may never be considered in setting an employee's starting salary.

## IV. ANALYSIS

The majority opinion in *Rizo* captures Congress's intent in enacting the Equal Pay Act and the importance of its history as applied to the gender wage gap issues that persist today. The Ninth Circuit correctly held, based upon the purpose of the Act, that Rizo's employer could not justify setting her salary by using her prior pay within the Act's "factor other than sex" affirmative defense.[125] Although this decision would have significantly clarified the law within the Ninth Circuit by declaring that employers simply may not rely upon prior salary, it deepened the circuit split on the issue and raised questions about whether employers should ever be able to consider prior salary when setting employees' new salaries.[126]

This analysis first discusses the challenges employers face in light of *Rizo* and ongoing uncertainty.[127] Next, it proposes a middle-ground approach to resolve the prior salary debate. It argues Judge McKeown's concurrence in *Rizo* and the majority opinions in the Tenth and Eleventh Circuits assert the best approach by holding that employers may consider prior salary only in conjunction with other job-related factors other than sex.[128] The proposed approach uniquely advocates for equal pay and remedies gender pay inequity without disregarding employers' interests.[129]

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124. *Id.*

125. *See* Rizo v. Yovino, 887 F.3d 453, 468 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019).

126. *See, e.g.*, Hamburg, *supra* note 30, at 1089 (explaining "the judicial debate concerning the circumstances under which prior salary qualifies as a sex-neutral factor illustrates lower courts' conflicting positions on the scope of the factor other than sex defense."); *Employers Violate Equal Pay Act When They Consider New Employees' Prior Salaries in Establishing Salary Structures, Concurrences Argue That Prior Salaries May Be Considered as One of Several Factors* Rizo v. Yovino*, 887 F.3d 453 (9th Cir. April 9, 2018)*, 39 NO. 5 CAL. TORT REP. 135 (2018) (explaining the differences between the *Rizo* majority and concurring opinions to the extent the judges disagreed about when employers may consider prior salary, if ever).

127. *See infra* section IV.A.

128. *See infra* section IV.B.

129. Few scholars have looked beyond the procedural posture of *Rizo* after its time before the Supreme Court and addressed the majority or concurring opinions and their impact on equal pay. Within the greater discussion of prior salary as a fac-

### A. Employers Face Uncertainty in Light of *Rizo*

The *Rizo* majority's holding that an employer may not justify a wage differential when men and women perform substantially the same work by relying upon prior salary drew attention from employers nationwide. This holding starkly contrasts with other circuit courts taking more moderate approaches.[130] Thus, it has concerned employers who do not understand what a prior salary ban means for their day-to-day business practices.[131] Although *Rizo* correctly observed that prior salary can and often does reflect historical sex discrimination, its categorical rule fails to account for economic realities and leaves employers—and even many employees—to face uncertainty and practical challenges.[132]

In light of *Rizo* and several states and municipalities passing inconsistent legislation to ban prior salary inquiries, employers have grown increasingly concerned about compliance with the Act.[133] Best practices suggest that employers remove all inquiries about prior salary from employment applications and general recruitment documents to avoid liability.[134] Because judicial interpretation of the Act varies and local laws banning consideration of prior salary have been enacted in different jurisdictions, some employers operating throughout the country have eliminated questions about pay history altogether to avoid a "legal minefield."[135] Still, questions remain as to whether an employee may voluntarily start a discussion regarding

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tor other than sex, even fewer commentators have taken an employer-friendly perspective that sets forth an alternative to a complete ban on prior salary information. This Note, on the other hand, suggests that promulgating the Act's purpose to end discrimination and giving employers greater flexibility need not be mutually exclusive. It does so by recommending a middle-ground approach that promotes effective business practices for employers who act in good faith but limits employers from simply perpetuating the wage gap. This approach encourages employers to examine potential employees' value, curbs the damage that employers who try to circumvent a ban may cause, and gives female employees greater latitude to negotiate for higher pay than a categorical anti-employer rule can provide.

130. *See supra* section III.E.

131. Perhaps even more confused are employers in circuits that have not addressed whether prior salary is a factor other than sex but fear liability all the same.

132. *See supra* notes 18–28 and accompanying text.

133. *See* Sheryl J. Willert, *A Little Advance Notice on Employment Issues That Will Be Faced by General Counsel in 2018*, 2018 IN-HOUSE DEF. Q., 46, 49 (inquiring "Why should [a ban on prior salary inquiries] keep corporate counsel and management up at night?").

134. *See* Robert Nichols & Lauren West, *End of an Era? Growing List of Laws Is Ending the Use of Comp History in Hiring*, 30 WESTLAW J. EMP. 1, 3 (2018).

135. *See* Yuki Noguchi, *More Employers Avoid Legal Minefield By Not Asking About Pay History*, NPR: ALL THINGS CONSIDERED (May 3, 2018, 5:34 PM), https://www.npr.org/2018/05/03/608126494/more-employers-avoid-legal-minefield-by-not-asking-about-pay-history [https://perma.unl.edu/3LB4-DD4U] ("Some companies aren't waiting for the legal questions to settle: Amazon, Wells Fargo, American

prior salary; what happens with first-time job applicants who do not have a salary history; whether a ban extends to salary negotiations; and whether employers can consider prior salary for lateral hires, promotions, or job transfers within the same organization. The *Rizo* majority does not adequately address these uncertainties and admittedly leaves further questions "for decision in subsequent cases" unlike the clearer middle-ground approach Judge McKeown articulated.[136]

To the extent prior salary information is helpful, eliminating all means of inquiring about a potential employee's prior pay can be difficult for employers. For many employers, asking candidates about salary history has been a long-standing interview process.[137] This information provides recruiters with a benchmark for the potential employee's expectations and can be particularly useful where the employer seeks to lure talented employees from competitors by offering higher pay.[138] Of course, although salary history is helpful, employers can get by without asking or can limit their consideration of prior salary through the use of other job-related factors. The purpose of the Act, as the *Rizo* majority explained, supersedes the convenience of relying solely upon salary history to set an employee's pay. However, the burdens of compliance in this state of uncertainty become a concern for employers if prior salary may never be considered.

Employers who seek to maintain compliance with the Act and uphold its underlying purpose to end wage discrimination face practical challenges.[139] Complying with changing requirements may necessitate an overhaul of hiring documents, training for hiring professionals, and ongoing internal audits.[140] Business leaders who are concerned with compliance must move resources from profit centers to make changes in hopes of preventing litigation on uncertain grounds and defending their hiring practices.[141] These tasks are exacerbated for employers operating in states with different laws. Compliance is achievable, but unnecessarily frustrated by the current uncertainty of

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Express, Cisco, Google and Bank of America all recently changed hiring policies to eliminate questions about pay history.").

136. *See* Rizo v. Yovino, 887 F.3d 453, 461, 472 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019) (McKeown, J., concurring).

137. *See* Charles H. Kaplan & Theresa M. Levine, *Salary Inquiries Are History in NYC: Employers Banned from Asking About Applicants' Pay*, 24 NO. 5 N.Y. EMP. L. LETTER 3 (2017).

138. *See supra* note 93 and accompanying text.

139. *See* Kaplan & Levine, *supra* note 137, at 3.

140. *See* Willert, *supra* note 133, at 49 (explaining that changing business practices to comply with different regulatory requirements "may well be difficult for local management who are accustomed to making decisions in a different way—including making inquiries about compensation in an effort to hire the best talent, while at the same time saving significant money for the company.").

141. *Id.* ("[M]any general counsel have seen firsthand the nightmare that can occur because there are different regulatory requirements in different locations.").

the law. Both employers and employees need a clear rule that reconciles the purpose of the Act with the practicalities of conducting business, as Judge McKeown, the Tenth Circuit, and the Eleventh Circuit properly observe.[142]

### B. Courts Should Adopt the Middle-Ground Approach

A middle-ground approach is best suited to end gender wage discrimination while addressing uncertainty and acknowledging employers' practical demands.[143] Like the Tenth and Eleventh Circuits, Judge McKeown opined that prior salary may not be considered as a standalone defense, but is permissible when considered with other job-related factors.[144] This concurring opinion struck a practical balance between policy and application that the majority opinion lacked. It agreed with and reemphasized the majority's policy considerations and fervor for the purpose of the Act—arguably, the strongest part of the opinion—adding information about the persistence of the wage gap today.[145]

This middle-ground approach rejects the majority's view that prior salary may never be used to set employees' salaries. Judge McKeown concluded that it is lawful and consistent with the purpose of the Act to "forbid employers from baldly asserting prior salary as a defense—without determining whether it accurately measures experience, education, training or other lawful factors—and to permit consideration of prior salary along with those valid factors."[146] She properly observed that the majority made a categorical error, similar in kind but opposite in character to the Seventh Circuit's outlier holding in *Wernsing*, in announcing prior salary is never a factor other than sex.[147] The

142. *See infra* section IV.B; s*ee also* Tony Puckett, *Should You Ask Job Applicants How Much They Made at Their Last Job?*, 25 NO. 6. OKLA. EMP. L. LETTER 2 (2017) (explaining that employers within the Tenth Circuit may not rely solely upon prior salary to justify a pay differential and suggesting a compensation plan based on other factors).

143. *See* Rizo v. Yovino, 887 F.3d 453, 461, 472 (9th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 706 (2019) (McKeown, J., concurring).

144. *Id.*

145. This discussion was similar to that of the majority opinion, citing legislative history and President John F. Kennedy's remarks at the Act's signing ceremony to glean its purpose, which the concurrence summarized as "eras[ing] the gender wage gap." *Id.* Additionally, Judge McKeown noted the median salary for a female employee was only eighty percent of the salary for a male employee as of 2017. *Id.* at 468–70.

146. *Id.* at n.1. Judge McKeown also cited a congressional report that explained "there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay" and, to this extent, only explained, "wage differentials based *solely* on the sex of the employee are an unfair labor standard." H.R. REP. NO. 88-309, at 2 (1963) (emphasis added).

147. *See Rizo*, 887 F.3d at 471 (McKeown, J., concurring). Judge McKeown explained that the Seventh Circuit's decision that prior salary is always a factor other than

holding in *Rizo* forbidding employers from considering prior salary at all is drastic because organizations often use prior salary to recruit employees with specific skills. Salary may be an accurate representation of an employee's talent and what the organization needs to offer.[148] The majority stressed the importance of considering those very skills when stating that factors must be job-related, but irrationally rendered them useless if prior salary was also involved.[149] New employers are willing to exceed a talented employee's prior salary and a bar on any consideration of prior salary stifles this good policy. Moreover, the majority's rule burdens employers acting in good faith with a risk of liability under the Act. The majority failed to fully consider its impact on businesses and employee mobility between employers upon which the first two concurring opinions turn.

The middle-ground approach that Judge McKeown presented balances employees' and employers' salary negotiation needs. It aptly observes that a ban on all consideration of prior salary in fact disadvantages women by chilling voluntary salary discussions.[150] Under the ban, women seeking new employment may not be able to negotiate themselves to higher salaries than a simple benchmark would provide.[151] For example, a recent study showed that women

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sex and does not need to be related to job requirements violates the Act's purpose. She explained, "inherent in the Act is an understanding that compensation should mirror one's 'skill, effort, and responsibility.'" *Id.* (quoting Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974)). Because it is well-established that historical sex discrimination persists today, she reasoned, "it cannot be that prior salary always reflects a factor other than sex." *Id.*

148. *Id.* Judge McKeown added the Act "should not be an impediment for employees seeking a brighter future and a higher salary at a new job" and pointed to studies showing that employers are willing to pay high salaries to lure talented employees away from competitors, particularly in engineering and technology positions. *Id.* at 471–72. Judge Callahan echoed this value for practicality in business, stating the majority's rule ignores the economic incentives of enticing potential employees to a new job. *Id.* at 473 (Callahan, J., concurring). He explained, "In the private sector, basing initial salary upon previous salary, plus other factors such as experience and education, encourages hard work and rewards applicants who have stellar credentials. The majority opinion stifles these economic incentives with a flat prohibition on ever considering prior salary . . . ." *Id.*

149. *Id.* at 472 (McKeown, J., concurring) ("[T]he majority nonetheless renders those valid, job-related factors nugatory when an employer also considers prior salary. That is a puzzling outcome.").

150. *Id.* ("[I]n the real world, an employer 'rel[ies] on prior salary to set initial wages' when it takes the prior salary offered voluntarily by an employee in negotiations and sets a starting salary above those past wages, even if there is an established pay scale.").

151. *See Employment Law—Equal Pay Legislation—Oregon Bans Employers from Asking Job Applicants About Prior Salary.—Oregon Equal Pay Act of 2017, 2017 Or. Laws Ch. 197, H.B. 2005 (To Be Codified in Scattered Sections of Or. Rev. Stat.)*, 131 HARV. L. REV. 1513, 1519–20 (2018). The article compared salary history bans to "ban the box" laws that prohibit employers from asking job applicants about criminal history. Although there are differences between ban the box

who refused to disclose their prior salaries received lower wage offers than women who did disclose, suggesting that leaving the employer to make a wage determination without prior pay information and prohibiting a female applicant from voluntarily disclosing her pay may disadvantage her.[152] Not only does this result frustrate the purpose of the Act and hinder many women from achieving higher pay, but it is also impractical for employers trying to recruit talented employees and offer reasonably competitive pay.

The middle-ground approach also limits employers' abilities to circumvent a simple ban on all prior salary inquiries. Due to the business difficulties in eliminating prior salary inquiries altogether, employers will find other ways to approximate an employee's prior salary.[153] For example, recruiters can ask employees about their pay expectations or perceptions of an acceptable salary rate.[154] Although these questions are not the same as asking for prior salary, they provide employers with anchoring points that may give insight into the

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laws and salary history bans, the article notes that ban the box laws that were enacted to improve employment outcomes for individuals with criminal records in fact exacerbated racial discrimination based on stereotypes about black criminality. The article predicts a similar impact for a ban on salary history discussions, suggesting employers may offer women lower salaries by virtue of not being able to discuss prior pay.

152. *See* Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, HARV. BUS. REV. (Sept. 5, 2017), https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity [https://perma.unl.edu/3M6Y-5T6R]. The author hypothesized this result occurs because employers assume women who refuse to disclose pay earn less. This assumption may not exist for men who refuse to discuss prior pay. The article argues that a ban on asking for pay history does not achieve the Act's purpose of eliminating the wage gap if employers actually set salaries based on gender assumptions when candidates do not or cannot share what they have previously earned. *Cf.* Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* 17–25 (Nat'l Bureau of Econ. Research, Working Paper No. 22469, 2016) (explaining a similar phenomenon with ban the box policies preventing employers from conducting criminal background checks early in the job application process. This study found that ban the box policies decreased the probability of employment for young, low-skilled, black men by 5.1% and concluded that these policies have "unintentionally done more harm than good when it comes to helping disadvantaged job-seekers find jobs.").

153. Roy Maurer, *How to Comply with Bans on Queries About a Candidate's Salary History*, SOC'Y FOR HUMAN RES. MGMT. (Sept. 7, 2017), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/how-to-comply-with-bans-on-queries-about-candidate-salary-history-.aspx [https://perma.unl.edu/P287-N7SW].

154. *Id. See also* Jennifer Roeslmeier, *3 Alternatives to Asking a Job Applicant About Their Salary History*, AUTOMATED BUS. DESIGNS (Nov. 5, 2019), https://www.abd.net/3-alternatives-to-asking-a-job-applicant-about-their-salary-history/ [https://perma.unl.edu/G4KZ-TGLP] (suggesting useful alternatives to asking about salary history in light of a state law ban).

employee's previous pay. Unlike the middle-ground approach, an outright ban would allow employers to frame questions slightly differently to ascertain prior salary without being required to look at additional job-related factors. The middle-ground approach, on the other hand, (1) does not incentivize employers to find ways around the rules to consider salary history and (2) provides a safety net of other job-related factors to legitimize the employee's salary. Although this approach may at first seem less stringent than an outright ban, it takes important realities into account to better guide employers and protect employees from gender pay inequity.

Additionally, an analysis of the more sensible middle-ground approach reveals an anomaly in the *Rizo* majority's approach to salary negotiations. Although the court stated it was expressing a general rule about prior salary and noted salary negotiations as a separate, unresolved issue,[155] the impact of the opinion's categorical rule suggests otherwise. The court explained it did not wish to pose an obstacle to future panels deciding whether prior salary may be used in negotiations,[156] and there is good reason for this. Like prior pay, there is merit to the argument that the salary negotiation process is not truly a gender-neutral factor other than sex because these negotiations have different outcomes for men and women.[157] Studies have shown that men are generally more aggressive in negotiating salaries than women and that women may be disadvantaged by sex stereotypes during negotiations.[158] Still, for women who want to negotiate pay and confront these biases head-on, an obstacle to negotiations that the majority hinted at could frustrate those objectives.

Despite proclaiming that use of prior salary in negotiations is a separate issue that should be considered independently, the practical effect of the majority's categorical rule is to chill salary negotiations. Even with the majority's caveat for negotiations, the rule goes too far and leaves "little daylight for arguing that negotiated starting salaries

155. *See Rizo*, 887 F.3d at 461.

156. *Id.*

157. *See* Sabrina L. Brown, Note, *Negotiating Around the Equal Pay Act: Use of the "Factor Other Than Sex" Defense to Escape Liability*, 78 OHIO ST. L.J. 471, 492, 497 (2017) (discussing social science research that demonstrates a gender disparity in salary negotiations and proposing legislation to ban consideration of negotiation as a factor other than sex within the Act's fourth exception); *see also* Elzer, *supra* note 107, at 3 (arguing "employers' reliance on salary negotiation should not be considered a valid factor other than sex.").

158. *See, e.g.*, Emily T. Amanatullah & Michael W. Morris, *Negotiating Gender Roles: Gender Differences in Assertive Negotiating Are Mediated by Women's Fear of Backlash and Attenuated When Negotiating on Behalf of Others*, 98 J. PERSONALITY & SOC. PSYCHOL. 256 (2010); Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 632 (2018); Laura J. Kray et al., *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY & SOC. PSYCHOL. 942 (2001).

should be treated differently than established pay scales."[159] Although the majority considered the policy behind its decision, it appears to have underestimated how far a ban could reach. A general rule that employers may not consider prior salary perpetuates uncertainty and does not promote the equal-pay-for-equal-work mantra to its purported extent. Instead, the middle-ground approach promotes a clear judicial rule that prior salary may be considered with other job-related factors. Not only does this squash the perpetuation of pay discrimination by requiring employers to consider legitimate factors, but it also limits the chilling results of the paternalistic ban approach. In other words, the middle-ground approach works to limit an employer's ability to justify a wage disparity based on prior salary without stifling good business practices or taking away women's power to negotiate themselves to higher pay.[160]

The Tenth and Eleventh Circuits have adopted this prudent approach, holding prior salary alone cannot justify a wage disparity but can be considered in conjunction with other factors. In *Irby v. Bittick*,[161] the Eleventh Circuit held that male employees' prior salaries did not justify a wage disparity, but the employer could justify the disparity as a factor other than sex with male employees' past experience.[162] This decision did not bar discussion of prior salary altogether but, as the middle-ground approach would suggest, merely prohibited employers from relying solely on prior salary to justify the wage differ-

159. *See Rizo*, 887 F.3d at 472 (McKeown, J., concurring).

160. Additionally, the procedure of the Act serves as a backstop for ensuring an employer is not using prior salary to wrongfully justify a wage differential between employees of different sexes, as the burden still falls on employers to show that a pay differential is based on a job-related factor other than sex. *See* Equal Pay Act of 1963, 29 U.S.C. § 206. Under *Rizo*, the employer is required to prove that the differential is based on an additional job-related factor other than prior salary.

161. 44 F.3d 949 (11th Cir. 1995).

162. *Id.* at 950. Plaintiff Barbara Irby was hired to work as an investigator in the Monroe County Sheriff's Department in Georgia, where she learned two male investigators were paid substantially more than her. Irby performed work identical to the work of the two male investigators. She filed suit against the County Sheriff alleging a violation of the Equal Pay Act. The Sheriff responded that the use of the male investigators' prior salaries in setting the current salary was a legitimate factor other than sex and the pay disparity existed because the male investigators worked at the Monroe County Sheriff's Department longer than Irby and had greater experience. The court explained that the Eleventh Circuit has "consistently held that 'prior salary alone cannot justify pay disparity' under the [Act]," but noted a defendant "may successfully raise the affirmative defense of 'any other factor other than sex' if he proves that he relied on prior salary *and* experience in setting a 'new' employee's salary." *Id.* at 955 (quoting Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988)). Because the male investigators' experience with the Department presented a business reason that justified the use of prior salary, the Department prevailed on its affirmative defense. *Id.* at 955–56.

ential. Similarly, in *Riser v. QEP Energy*,[163] the Tenth Circuit held the Act "precludes an employer from relying solely upon a prior salary to justify a pay disparity."[164] There, the court rejected the employer's defense because it could not meet its burden of proving a factor other than the female employee's former salary justified a wage disparity.[165] Together, these cases illustrate how a middle-ground approach would allow courts to draw lines,[166] define rules for employers, protect employees' interests in obtaining equal pay, and uphold the purpose of the Act.

In addition to judicial support for this approach, the Equal Employment Opportunity Commission (EEOC)—the agency charged with enforcing the Act—would allow for consideration of prior salary with other factors.[167] The EEOC directly addressed the issue of prior salary as a factor other than sex and observed it cannot justify a compensation disparity on its own because it can reflect sex-based discrimination. Consistent with the middle-ground approach, the EEOC states that an employer's consideration of prior salary is permissible "as part of a mix of factors—as, for example, where the employer also considers education and experience and concludes that the employee's prior salary accurately reflects ability, based on job-related

163. 776 F.3d 1191 (10th Cir. 2015).

164. *Id.* at 1199.

165. *Id.* Kathy Riser worked at an energy company, QEP, which developed a fifteen-grade pay scale based on compensation data. Although she performed substantially equal work to two of her male counterparts, they each earned over thirty percent more than she did. QEP argued the wage differential was based upon its gender-neutral pay classification system and the court held the classification system would only serve as a defense where a difference in pay resulting from the system is rooted in "legitimate business-related difference in work responsibilities and qualifications for the particular positions at issue." *Id.* at 1198–99. Without other business reasons, QEP's affirmative defense failed.

166. This approach requires additional consideration of where the best place to draw a line between permissible and impermissible use of prior salary lies. This Note proposes the middle-ground approach for resolving the ongoing debate about prior salary as a factor other than sex but acknowledges that there are still nuances for courts to address within the "other factors" allowed. For example, there is room to clarify precisely whether and when a salary negotiation would be a permissible other factor. If a potential employee volunteers her prior salary in the midst of a salary negotiation to demand higher pay and the employer uses that to provide a defense to the Act, that could require one analysis. Courts might need a different analysis if that employee volunteers her prior salary in a negotiation and the employer uses that to measure value, but the prior salary perpetuates lower pay for women compared to men. Both of these analyses could be different than in a situation where a potential employee reveals her prior salary in a negotiation and that causes the employer to independently evaluate her experience and skills. In the latter case, the employer would clearly have a defense to the Act under a middle-ground approach.

167. *See Rizo*, 887 F.3d at 470–71 (McKeown, J., concurring) (citing *Compensation Discrimination in Violation of the Equal Pay Act*, EEOC Compl. Man. (CCH) No. 915.003 at 10-IV (Dec. 5, 2000)).

qualifications."[168] The EEOC interpretation of the Act as it relates to prior salary aims to clarify the law and provide employers, courts, and agencies with guidance for analyzing claims of compensation discrimination. The consistency between the EEOC and Tenth and Eleventh Circuits further suggests that Judge McKeown's middle-ground opinion properly applied the Act to permit prior salary to be considered only with other job-related factors. This approach clearly states the law, addresses employers' business needs, and furthers the Act's purpose of eliminating wage discrimination to a greater extent than the majority's categorical rule.

## V. CONCLUSION

The *Rizo* majority's interpretation of the "factor other than sex" exception to never include prior salary has contributed to the ongoing debate over the Equal Pay Act's ambiguous affirmative defense. The gender wage gap has persisted since Congress passed the Act and, without specific guidance from the Supreme Court, employers do not know whether they may consider an employee's prior salary in the hiring process. Although the *Rizo* majority correctly analyzes the purpose of the Act and the need to close the gender wage gap, its holding goes too far. Rather, a middle-ground approach—such as the approach Judge McKeown and the Tenth and Eleventh Circuits have taken—would eliminate confusion, forbid discriminatory use of prior salary information, and empower women to negotiate higher salaries. In doing so, this approach more successfully effectuates the Act's purpose to end wage discrimination. If uniformly adopted, it would clarify the law and give employers flexibility to conduct business while executing the Act's mission of achieving equal pay for equal work. Notwithstanding the Supreme Court's procedural decision to vacate and remand *Rizo*, the substantive issue of whether prior salary is a factor other than sex is ready for review and of critical importance to employers and their female employees across the country.

168. *Id.*; *see also* Steven C. Kahn & Barbara Berish Brown, *Equal Pay Act—Employer's Defenses to Equal Pay Act Suit*, LEGAL GUIDE TO HUM. RESOURCES § 16:82 (2018) (citing the EEOC Compliance Manual and explaining the EEOC argues employers can offer higher pay to employees with more job-related factors that would benefit its business, such as superior experience, training, and ability).