Saint Louis University Law Journal

Volume 64
Number 1 *Internationalism and Sovereignty (Fall 2019)*

Article 7

4-23-2020

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Recommended Citation
Jessica Gottsacker, *Waging War Against Prior Pay: The Pay Structure That Reenforces the Systemic Gender Discrimination in the Workplace*, 64 St. Louis U. L.J. (2020).
Available at: https://scholarship.law.slu.edu/lj/vol64/iss1/7

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WAGING WAR AGAINST PRIOR PAY: THE PAY STRUCTURE THAT REENFORCES THE SYSTEMIC GENDER DISCRIMINATION IN THE WORKPLACE

> "I ask no favors for my sex . . . . All I ask of our brethren, is that they will take their feet from off our necks, and permit us to stand upright."[1]

This quote from Sarah Grimke first circulated in 1837.[2] At the time, Ms. Grimke aspired to pursue a legal career but was denied the opportunity because her father did not believe she was capable of attaining the requisite level of intellect;[3] nor would any law school have accepted her at that time regardless of her aptitude.[4] She became a minister instead while she was forced to watch her brothers pursue and achieve what was once her own dream.[5] Since 1837, women's rights have improved substantially. The Married Women's Property Acts, enacted in the middle of the nineteenth century, opened the door to a measure of economic independence for married women.[6] In 1920, women achieved the right to vote with the passage of the Nineteenth Amendment.[7] In 1963, in a second wave of feminism, the Equal Pay Act was first enacted, seen by many as the key for providing women equal access to the workplace.[8]

At the time of enactment, women were earning fifty-nine cents to the dollar.[9] Today, fifty-five years later, women still only earn eighty cents to the dollar.[10] This issue is especially relevant since a 2018 Equal Pay Survey found one in three

1. Sarah Grimké, *Letters on the Equality of the Sexes and the Condition of Woman*, *Letter 2* (July 17, 1837), http://www.worldculture.org/articles/12-Grimke%20Letters,%201-3.pdf [https://perma.cc/UEB4-9LFN].

2. *Id.*

3. Pamela R. Durso, *Sarah Grimiké: A Useful Member of Society*, MUTUALITY (2007), https://www.cbeinternational.org/sites/default/files/sarah-grimke.pdf [https://perma.cc/7EJ6-5RC8].

4. Barbara Joan Zeitz, *CountHerHistory*, AAUW-ILLINOIS (2009), https://aauw-il.aauw.net/files/2013/04/Oct2009.pdf [https://perma.cc/3RFC-DFWZ].

5. *See supra* note 3.

6. *See* Leo Kanowitz, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 40–41 (1969).

7. U. S. CONST. amend. XIX.

8. Sally Ann Drucker, Betty Friedan: The Three Waves of Feminism, OHIO HUMANITIES, http://www.ohiohumanities.org/betty-friedan-the-three-waves-of-feminism/ [https://perma.cc/Y4QG-3LLS].

9. *Equal Pay Act of 1963,* NAT'L PARK SERV. (April 1, 2016), https://www.nps.gov/articles/equal-pay-act.htm [https://perma.cc/D63E-9U4U].

10. AAUW, *The Simple Truth About the Gender Pay Gap*, https://aauw-il.aauw.net/files/2013/04/Oct2009.pdf [https://perma.cc/6BDM-B2AC].

Americans is not aware that a gender pay gap even exists—and men were found almost twice as likely as women to believe it does not exist.[11] The study further implicated that the gender pay gap begins as young as sixteen and continues to develop and expand from there.[12] This indicates that women suffer wage discrimination their entire working lives. By starting their careers at lower salaries than their male equals, women face an uphill battle trying to level the field. This is because when companies set a new starting salary, they frequently rely on salary history inquiries, emboldening the differential pay disguised as market place statistics. Factoring in this lower pay to establish a starting salary simply perpetuates this intrinsic sex-based discrimination.

The fight for workplace equality for women has been long. In writing her brief to the U.S. Supreme Court in *Reed v. Reed*, the first case that recognized sex-based discrimination, Justice Ruth Bader Ginsburg poignantly articulated:

> In very recent years, a new appreciation of women's place has been generated in the United States. Activated by feminists of both sexes, courts and legislatures have begun to recognize the claim of women to full membership in the class "persons" entitled to due process guarantees of life and liberty and the equal protection of the laws. But the distance to equal opportunity for women—in the face of the pervasive social, cultural and legal roots of sex-based discrimination—remains considerable. In the absence of a firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.[13]

Almost fifty years since *Reed v. Reed*, the courts once again are confronted with this realization under eerily similar circumstances. Yes, women can vote. Yes, women can attend law school and pursue a legal career. Yes, women can run a household without a man. But even with the passage of the Equal Pay Act, can women truly have access to equal salaries when they face an uphill battle in not only proving their capabilities and securing their spot at the table, but when they are also regarded with implicit biases and an endemic history of earning less than their male equal?[14] The answer, as the law is currently interpreted by some circuit courts, is no.[15] Thus, it is essential for the U.S. Supreme Court to

11. Kerri Anne Renzulli, *46% of American men think the gender pay gap is 'made up to serve a political purpose,'* CNBC (April 4, 2019), https://www.cnbc.com/2019/04/04/46percent-of-american-men-think-the-gender-pay-gap-is-made-up.html [https://perma.cc/VB6A-B9RH].

12. *Supra* note 9.

13. Brief for Appellant at 10, Reed v. Reed, 401 U.S. 934 (1971) (No. 70-4), 1971 WL 133596.

14. Yaron Nilli, *Better, but not good enough: Women still are few and far between on corporate boards*; JOURNAL SENTINEL (March 28, 2018), https://www.jsonline.com/story/opinion/contributors/2018/03/28/diversity-lags-few-women-corporate-boards/430165002/ [https://perma.cc/HLK2-444W].

15. Aubrey Menarndt, *The Compounding Damage of Gender-Based Wage Inequality*, PAC. STANDARD (April 26, 2018), https://psmag.com/economics/the-compounding-danger-of-wage-

step in to ensure this intrinsic and unintentionally unconstitutional practice ceases to be perpetuated by employers.

With the recent Ninth Circuit decision, *Rizo v. Yovino*, courts have started to make the direly needed progress to close this gap. The case addressed the issue of whether an employer may rely on salary history when setting salaries, when, as in Aileen Rizo's specific case, the practice consistently results in lower starting salaries for women even when factoring in education and experience.[16] The court sided with Ms. Rizo and determined employers cannot use prior pay when setting salaries.[17] The Ninth Circuit's decision to eliminate the use of prior pay as a determination of starting salary can effectively narrow the gap by removing a source of the income disparity, as women have historically received less compensation in virtually all sectors of work.[18] Due in part to lower starting salaries for women and lower raises over time, considering a woman's salary history is inherently discriminatory, and thus is substantially responsible for the current gender pay gap.[19] While salary history inquiries may not directly cause the current gender pay gap, these inquiries help perpetuate it.[20] By utilizing a salary history inquiry, employers rely on female workers' lower past salaries as a factor they consider as "other than sex" to base new, future salaries, but in doing so continue to preserve the long-lasting pay inequity that exists between male and female workers.[21] The U.S. Supreme Court has yet to take an official stance on whether prior pay can be used to determine salary. The Supreme Court did, however, recently have the opportunity to address the circuit split regarding the consideration of prior pay when they elected to grant certiorari on *Rizo v. Yovino*. However, their decision failed to even broach the issue. Instead, the court recklessly remanded the decision for reasons unrelated to the central issue.

This Note addresses the inconsistent interpretations on whether prior pay can in fact be considered a "factor other than sex" when analyzing the Equal Pay Act. Based on the Equal Pay Act's language, legislative history, and the persistent gender pay gap seen today in the workplace, the Ninth Circuit was correct to exclude prior pay as a "factor other than sex" due to the unintended but consequential perpetuation of salary discrimination that is, in fact, on the

inequality [https://perma.cc/W8GD-49P9]. ("Experiencing early wage discrimination can set women back again and again, as small-percentage raises prevent them from ever truly breaking the cycle.").

16. Rizo v. Yovino, 887 F.3d 453, 457–58 (9th Cir. 2018).

17. *Id.* at 458.

18. H. R. Rep. No. 2095, at 6 (2017).

19. *See* Motion of Amici Curiae Equal Rights Advocates et al. to File an Amici Curiae Brief in Support of Plaintiff-Appellee's Petition for Rehearing and Rehearing En Banc at 13, Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018) (No. 16-15372), 2017 U.S. 9th Cir. Briefs LEXIS 189, at *23.

20. *Id.*

21. *Id.*

basis of sex. Prior pay is in fact a violation of the Equal Pay Act. Part I of this Note will discuss the history and legislative intent of the Equal Pay Act. Part II will discuss the Ninth Circuit case, *Rizo v. Yovino,* which addressed the issue of considering prior pay under the Equal Pay Act. Part III will discuss the current circuit split surrounding whether prior pay can be considered as a "factor other than sex" when determining salaries. Part IV will address the need for the U.S. Supreme Court to officially take a stance on the issue and the potential results now that the Supreme Court has remanded the Ninth Circuit case. Part V will provide insight to the legislative action that could occur, successfully solving the Equal Pay Act's violation before the Court gets another chance.

I. THE NEED FOR THE EQUAL PAY ACT

A. The History Preceding the Equal Pay Act

The Equal Pay Act requires that employers pay women and men the same salary for "equal work on jobs the performance of which requires equal skill, effort, and responsibility."[22] Following World War II, a serious and endemic problem saturated the United States. Women had previously flooded the workforce to essentially replace the men sent overseas to serve.[23] When the men returned home following the war, many women found that they still wanted to work and earn extra income for their families.[24] However, when the war ended, an economic problem emerged. This problem consisted of a wage structure in which men were paid more than women although their duties were the same.[25] Congress noted this disparity was unacceptable on the basis of economic as well as on the basis of justice and fairness.[26] As a result, women turned down jobs where they were most needed even when they had the requisite education, training, and experience.[27] Additionally, women's suppressed wages limited their ability to "earn a living" and "support [their] families."[28] Efforts began shortly after the war to correct this inequity. The first legislative attempt to require equal pay for women began in 1944 with H.R. Bill 5056 authored by

22. 29 U.S.C. § 206(d)(1).

23. *See Women and Work After World War II*, PBS AM. EXPERIENCE, www.pbs.org/wgbh/americanexperience/features/tupperware-work [https://perma.cc/T69E-E4WB] (last visited Feb. 11, 2019) ("[W]omen proved that they could do 'men's' work, and do it well.").

24. *Id.*

25. Corning Glass Works v. Brenner, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)) "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.'"

26. *Equal Pay Act of 1963*, 88th Cong. 9213 (1963) (statement of Rep. Spark Matsunaga).

27. *Id.*

28. *United States Must Play New Role at Worldwide Trade Talks*, 88th Cong. Rec. 8916–17 (1963) (statement of Sen. Philip Hart).

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Congresswoman Winifred Stanley.[29] The Bill was sent to the Committee on Labor for discussion; however, it failed to make any progress from there and eventually languished.[30] Many attempts were made by Congresswoman Winifred, but none were successful in amending the National Labor Relations Act.

Congress finally passed the Equal Pay Act in 1963 in an effort to correct this persistent pay disparity between men and women workers.[31] This twenty-year gap was a direct result of the inability to draw up enough congressional support before then, as the gender pay gap was not seen as a pressing matter until then. This may have been a result of the lack of female advocates for women in Congress, or potentially due to the previously conservative political agendas before John F. Kennedy took office. Women in the workplace were still not seen as common practice, and there was a misconception that the wages were serving as supplemental income that was not necessarily needed by families. It was important not to make drastic legal changes as "the Court should never be influenced by the weather of the day but inevitably they will be influenced by the climate of the era."[32] Thus, it could be deduced that women's rights, when it came to salary, required a far greater social outcry before the matter received the legislation it deserved.

The 1963 Equal Pay Act's objective is "simple in principle: to require that 'equal work will be rewarded by equal wages.'"[33] When John F. Kennedy signed the Equal Pay Act into law, he stated, "Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force," thus setting the stage for enforcement of this Act.[34] Since more and more women entered the workplace each year, the need for the Equal Pay Act became apparent. In addition, Congress was led by who was seen as a drastically more liberal president than previously, John F. Kennedy.

29. *Equal Pay for Equal Work Bill,* HIST., ART & ARCHIVES https://history.house.gov/House Record/Detail/15032448840 [https://perma.cc/3UEJ-23QX] (Last visited on Feb. 11, 2019) ("Her bill amended the National Labor Relations Act to make wage discrimination illegal on the basis of the employee's sex. Stanley's remarks when introducing the bill were prescient: 'It has often been remarked that this is a 'man's world.' The war and its far-reaching effects have provided the answer. It's 'our world,' and this battered old universe needs and will need the best brains and ability of both men and women.'").

30. *Id.*

31. Equal Pay Act, § 2(b), Pub. L. No. 88–38, 77 Stat. 56 (1963).

32. *Transcript: Interview with Supreme Court Justice Ruth Bader Ginsburg*, PRI INT'L (Sept. 16, 2013) https://www.pri.org/stories/2013-09-16/transcript-interview-supreme-court-justice-ruth-bader-ginsburg [https://perma.cc/5MGA-TZZD].

33. *Corning Glass*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)).

34. *See supra* note 29.

B. The Statute

The Equal Pay Act states, "No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex . . . ."[35] In accordance with the Act, a plaintiff may recover damages if she demonstrates she was paid less than a colleague of the opposite sex who performed equal work.[36] To constitute equal work, a job requires equal skill, effort, and responsibility.[37]

The Equal Pay Act does not require plaintiffs to provide proof of intentional discrimination.[38] Rather, an employer becomes presumptively liable once the plaintiff has established the existence of a pay gap in which he or she is paid less than workers of the opposite sex.[39] The Equal Pay Act also establishes potential affirmative defenses for employers who can prove that an otherwise illegal pay gap is due to: (i) a seniority system;[40] (ii) a merit system;[41] (iii) a system which measures earnings by quantity or quality of production;[42] or (iv) a differential based on any other factor other than sex.[43]

C. Any Other Factor Other Than Sex

The first three exceptions are relatively unambiguous, limited, objective exceptions. The Act's fourth exception—"a differential based on any other factor other than sex"—is more general and, thus, open for interpretation and exploitation.[44] Consequentially, this last exception has resulted in controversy and various interpretations by the courts in the past decades. A woman charging her employer with compensation discrimination under the Equal Pay Act would have drastically different results depending on which circuit she resides. The first three affirmative defenses call for a far simpler analysis due to the

35. 29 U.S.C. § 206(d) (2016).

36. 29 U.S.C. § 206(d)(1), (3).

37. *Id.*

38. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 640 (2007).

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

40. Aaron Hotfelder, *What Are the Exceptions to the Equal Pay Act?*, LABOR & EMP'T, https://www.lawyers.com/legal-info/labor-employment-law/employment-discrimination/equal-pay-act-exceptions-for-unequal-pay.html [https://perma.cc/L2PZ-DQTZ] ("One of the EPA exceptions allows employers to use a seniority system that compensates employees based on years of service. An employer may use a seniority system to pay longer-tenured employees more than newer hires, even if this approach results in a wage disparity between the sexes.").

41. *Id.* ("In a merit system, supervisors evaluate employees on a regular basis according to predetermined objective measures, with exceptional performers receiving raises or bonuses.").

42. *Id.* ("These systems reward employees based on the quality or quantity of work produced.").

43. 29 U.S.C. § 206(d)(1).

44. *Id.*

established requirements that "employers must prove the existence of a system with objective standards and must show that the system was applied in a non-discriminatory manner."[45]

The "any factor other than sex" affirmative defense, however, is routinely seen as a "catchall defense," or, as Eisenberg phrased it, the "Any Reason Under the Sun" defense.[46] By adding this fourth defense, Congress inserted a "broad general exception" and "did not limit the exception to job-evaluation systems."[47] Due to the vagueness and generalness of the fourth exception, employers favor it and resultantly cite to the any other "factor other than sex" affirmative defense more than the other three exceptions combined.[48]

The expansive approach of the catchall defense can be seen in *Dey v. Colt Construction & Development Co.*, where the court described the "factor-other-than-sex" defense as "a broad 'catch-all' exception [which] embraces an almost limitless number of factors, so long as they do not involve sex."[49] The factor does not even need to "be 'related to the requirements of the particular position in question,' nor must it even be business-related."[50] The Seventh and Eighth Circuits have proceeded to embrace *Dey's* approach of giving deference to the employer for their interpretation of the any other "factor other than sex" defense and to their interpretation's reasonableness or relation to the job and business at issue.[51] For these courts, "the wisdom or reasonableness of the asserted defense" is not relevant.[52] The Seventh Circuit expanded this when finding that the Equal Pay Act "does not authorize federal courts to set their own standards of 'acceptable' business practices. The statute asks whether the employer has a reason other than sex—not whether it has a 'good' reason. Congress has not authorized federal judges to serve as personnel managers for America's employers."[53]

Employers argue that prior pay inquiries are permitted under the "any other factor other than sex" exception because the question itself only focuses on prior salary rather than sex.[54] They conclude the inquisition is gender neutral on its face. In practice, however, employers' reliance on salary history results in

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45. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 57 (2010) ("Courts have recognized that permitting a defense to pay disparities based on assertions of 'merit' and 'performance,' 'if not strictly construed against the employer, could easily swallow the rule.'").

46. *Id.*

47. Kouba v. Allstate Ins. Co., 691 F.2d 873, 877 (9th Cir. 1982).

48. Ellen M. Bowden, *Closing the Pay Gap: Redefining the Equal Pay Act's Fourth Affirmative Defense*, 27 COLUM. J.L. & SOC. PROBS., 225, 233 (1994).

49. Dey v. Colt Construction & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994).

50. *Id.*

51. *See* Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2003).

52. *Id.*

53. Wernsing v. Dep't of Human Servs., 427 F.3d 466, 468 (7th Cir. 2005).

54. Rizo v. Yovino, 887 F.3d 453, 457 (9th Cir. 2018).

female workers taking home a smaller paycheck than male workers doing equal work.[55] Further, as female employees transition from one job to another, reliance on prior salary to calculate a new salary means women continue to be subjected to decades-old pay inequality undermining the "equal pay for equal work" concept.[56] As much change as the Equal Pay Act allowed, its effect has been significantly dampened by its malleable "any other factor other than sex" exception.[57] Relying on the "any other factor other than sex" exception, employers have defended the use of prior salary in making employment and compensation decisions under the guise of a factor other than sex.[58] In turn, female employees are subjected to a perpetual cycle of compounding gender pay inequality.[59]

D. The Equal Pay Act's Legislative History and the Resulting Congressional Intent

As a result of these diverging interpretations of the Equal Pay Act and its affirmative defenses, it is imperative to analyze the legislative history in order to glean the legislative intent for the Equal Pay Act as a whole. When a congressional Special Subcommittee on Labor of the Committee of Education and Labor of the House of Representatives was assigned to the important topic of wage equality in 1963, several statistical studies were analyzed for providing support for the Equal Pay Act.[60] In 1963, women were not provided the same resources to protect their right to equal pay, and "[o]f the 24 ½ million women in the labor force [at that time], 21 million [did] not belong to a union, and consequently [were] less able to establish the principle of equal pay for equal work."[61] Further, by 1963, twenty-two states had already enacted legislation to

55. Megan Leonhardt, *Refusing to Answer this One Job Interview Question Helps Men - but Hurts Women*, MONEY (June 27, 2017), http://money.com/money/4834777/job-interview-question-past-salary [https://perma.cc/HBD2-2NMH] ("Advocates argue that when past salary is used to shape compensation at each new job, one discriminatory pay decision leads inevitably to another one").

56. *Id.*

57. Torie Abbott Watkins, *The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap and Should Be Ousted As A Factor Other Than Sex*, 103 MINN. L. REV. 1041, 1057 (2018).

58. *Id.*

59. *Id.*

60. *To Prohibit Discrimination, on Account of Sex, In the Payment of Wages by Employers Engaged in Commerce or in the Production of Goods for Commerce and to Provide for the Restitution of Wages Lost by Employees by Reason of Any Such Discrimination: Hearing on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the H. Comm. on Educ. and Labor,* 88th Cong. 12 (1963) (statement of Hon. Esther Peterson, Assistant Sec'y, U.S. Dept. of Labor).

61. *To Prohibit Discrimination, on Account of Sex, In the Payment of Wages by Employers Engaged in Commerce or in the Production of Goods for Commerce and to Provide for the*

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protect women in response to this disparity, with a majority of the female workers being located in those states.[62] However, while some argued that this was in fact a state issue, proponents of the Equal Pay Act found that after "examination of State laws and State enforcement activities" it was "clear that action by the States is simply not sufficient."[63] This is because of many finding the states not going far enough to ensure adequate protections for women in the workplace, as well as the drastic variations in these protections across the nation. During the March 15th subcommittee hearings, a large focus surrounded the economic purpose and benefits that rendered the Equal Pay Act necessary. In the opening remarks introducing the Bills, the Secretary of Labor, William Willard Wirtz stated, "This matter is too often cast in terms of prejudice, propriety, or politics and gallantry, or something of the sort. It isn't. It is a matter of exploitation. It is a matter of preserving the competition. It is a matter of good business."[64] In 1963, one-third of the work force in America were women.[65] This proportion was seeing an exponential increase with each passing year.[66] Studies found that "[a] great many of the women are in the work force because they are the heads of families, or because they are members of families where the man in the family is unable to support the family."[67] These findings contradicted the misperceived stereotype that commonly circulated that women were just working to provide their "pin cushion money" or, in other words, extra side cash.[68] It was not commonly thought of that women were working for their livelihood. The Secretary of Labor concluded, "It is a matter of preserving a fair opportunity for someone to exercise a choice which ought to be hers to discharge what is often a basic, key financial responsibility."[69] The Senate subcommittee found the wage disparity to be rooted in a social construct which established a wage structure across "many segments of American industry . . . based on an ancient but outmodeled belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[70]

Restitution of Wages Lost by Employees by Reason of Any Such Discrimination: Hearing on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the H. Comm. on Educ. and Labor, 88th Cong. 9 (1963) (statement of Hon. W. Willard Wirtz, Sec'y).

62. *Id*.

63. *Id.*

64. *Id.*

65. *Id.* at 10.

66. *To Prohibit Discrimination, on Account of Sex, In the Payment of Wages by Employers Engaged in Commerce or in the Production of Goods for Commerce and to Provide for the Restitution of Wages Lost by Employees by Reason of Any Such Discrimination: Hearing on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the H. Comm. on Educ. and Labor,* 88th Cong. 10 (1963) (statement of Hon. W. Willard Wirtz, Sec'y).

67. *Id.*

68. *Id.*

69. *Id.*

70. 109 Cong. Rec. S8914 (daily ed. May 17, 1963).

The Equal Pay Act of 1963, however, was not intended to entirely eliminate differential pay. In fact, the head of the Women's Bureau of the Department of Labor, Esther Peterson, pointed out the specific "justifiable differentials stemming from length of service or merit systems [that] would be allowed to remain."[71] It is important to note that during the discussions brought about in the subcommittee, length of service and differing merit were the *only* two factors explicitly denoted as exceptions to differing pay among men and women doing the same labor. [72]It was seen that some concessions had to be recognized where a man's qualifications might provide for more substantial pay than a female peer's pay.[73] The committee never addressed prior pay and whether its use in setting a pay rate could constitute a justifiable exception to differential pay. The lack of commentary on the issue is most likely a result of women making up only thirty-seven percent of the workforce, of which were earning only fifty-nine cents to the dollar compared to men.[74] Specifically, in 1963, the average male employee made $28,684.36 while the average female employee made $16,908—$11,776 less annually.[75] The intent of the Equal Pay Act was to eliminate this disparity; however, the committee did not and could not have foreseen this extrinsic factor perpetuating the wage gap as the Act itself was to solve any remaining residue of inequality. Since the wage gap was so significant at the time, it would have been nonsensical to even consider prior pay to set women's salaries in accordance to the Equal Pay Act because doing so would accomplish little to nothing in closing the existing gap.

This congressional analysis is supported by two nongovernmental sample surveys which were introduced to the subcommittee, one authored by the Wall Street Journal and the other authored by a university. They found that

> significant proportions of employers acknowledge the existence of some wage or salary inequality. About one-third of the employers in one survey admitted they had a double standard pay scale for male and female office workers. In the other, about one-fifth of the employers questioned about salary practices

71. *To Prohibit Discrimination, on Account of Sex, In the Payment of Wages by Employers Engaged in Commerce or in the Production of Goods for Commerce and to Provide for the Restitution of Wages Lost by Employees by Reason of Any Such Discrimination: Hearing on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the H. Comm. on Educ. and Labor,* 88th Cong. 10 (1963) (statement of Hon. Esther Peterson, Assistant Sec'y, U.S. Dept. of Labor).

72. *Id.*

73. *Id.*

74. *Equal Pay Act of 1963,* NAT'L PARK SERV., April 1, 2016, at https://www.nps.gov/articles/equal-pay-act.htm [https://perma.cc/7A53-2PDB].

75. *See, e.g.*, *The Wage Gap Over Time: In Real Dollars, Women See a Continuing Gap*, NAT'L COMM. ON PAY EQUITY, https://www.pay-equity.org/info-time.html [https://perma.cc/BC46-VXF3] (last visited on Feb. 11, 2019).

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> affecting men and women in high-level positions said they did not follow a uniform practice of paying the same salaries.[76]

At the March 15th, 1963 subcommittee hearing, Peterson proceeded to find that "[t]hese differences in earned income result, though, . . . from a variety of factors, one of the major ones of which is lack of opportunity for women, particularly in the better paying jobs."[77] Thus, it may be argued that once access to employment opportunities gave way, the wage gap would too diminish. "By removing this major barrier to women's economic advancement, it would diminish the possibilities of using women to force wages down and of taking advantage of sharp competition for jobs in times of substantial unemployment."[78] The gender pay gap would perceivably be corrected as long as there would be access to higher paying jobs. Yet this is not entirely true, since the problem persists. This is because Congress could not have predicted for the gap to linger as a result of employers' use of a facially neutral application question. The barrier at the time was the wide-spread facially discriminatory belief that women's work was worth less. That was the issue Congress initially intended to correct; it was not yet foreseen that hiring processes could perpetuate an intrinsically rooted gender discrimination.

When drafting the Equal Pay Act, Congress also included a Declaration of Purpose listing various negative consequences associated with lower wages for women:

> The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—(1) depresses wages and living standards for employees necessary for their health and efficiency; (2) prevents the maximum utilization of the available labor resources; (3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burdens commerce and the free flow of goods in commerce; and (5) constitutes an unfair method of competition.[79]

This Declaration of Purpose provides insight to Congress's intent surrounding the Equal Pay Act of 1963. It is clear that the Act focused on the pay gap's effects on the economy. Essentially, by paying women less for work, companies were depressing America's economy and impeding commerce. The purpose, while transactional in nature, sheds light to the general impact equal wages would have on the economy. This was to appeal to corporations as well

76. *To Prohibit Discrimination, on Account of Sex, In the Payment of Wages by Employers Engaged in Commerce or in the Production of Goods for Commerce and to Provide for the Restitution of Wages Lost by Employees by Reason of Any Such Discrimination: Hearing on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the H. Comm. on Educ. and Labor,* 88th Cong. 12 (1963) (statement of Hon. W. Willard Wirtz, Sec'y).

77. *Id*. at 31 (statement of Hon. Esther Peterson, Assistant Sec'y, U.S. Dept. of Labor).

78. *Id.* at 36.

79. Equal Pay Act, § 2(a), Pub. L. No. 88–38, 77 Stat. 56 (1963).

because of their tendencies to make hiring decisions on a seemingly transactional basis. While Congress enacted this legislation with the best intentions to close the pay inequities between men and women, there are remaining shortcomings that fail to live up to the Equal Pay Act's stated purpose.

The Equal Pay Act was enacted fifty-six years ago, and while the wage gap has significantly narrowed, it still exists and the closing has stagnated over the years.[80] Currently, for every dollar men earn, women, on average, earn eighty cents.[81] The pay gap can no longer be blamed on the lack of education or employment opportunities.[82] This is supported by the evidence that "female surgeons earn seventy-one percent of what male surgeons earn, and five of the ten major occupational groups where women lagged the most [in pay] were in finance."[83] This trend is not unusual. According to a Wall Street Journal poll, it found women face even larger pay gaps for what is seen as white-collar occupations than women with blue-collar occupations.[84]

One explanation for the persistent wage gap is that employers have transitioned from overt gender discrimination to implicit, subconscious generalizing of the gender.[85] Employers, while not discriminating intentionally, use an array of factors when considering salary, some of which are intrinsically disadvantageous for women.[86] Further, while it is reported about forty percent of companies request for prior pay information, there is a catch-22 that occurs for women.[87] This is because "women who refuse to disclose what they make

80. *The Wage Gap is Stagnant for a Decade*, NAT'L WOMEN'S LAW CTR. (2016), at https://nwlc.org/wp-content/uploads/2016/09/Wage-Gap-Stagnant-2016-3.pdf [https://perma.cc/J6ZD-G2G3].

81. Terry M. Dworkin et al., *Assessing the Progress of Women in Corporate America: The More Things Change, the More They Stay the Same*, 55 AM.BUS. L.J. 721, 722 (2018).

82. Abigail Hess, *For the First Time In History, Women are Better Educated Than Their Husbands—But Men Still Earn More*, CNBC (Nov 21, 2017), at https://www.cnbc.com/2017/11/21/women-are-better-educated-than-their-husbands-but-men-still-earn-more.html [https://perma.cc/4RAH-DWPQ].

83. Dworkin et al., *supra* note 81, at 731.

84. Janet Adamy & Paul Overberg, *Women in Elite Jobs Face Stubborn Pay Gap*, WALL ST. J., (May 17, 2016), https://www.wsj.com/articles/women-in-elite-jobs-face-stubborn-pay-gap-1463502938 [https://perma.cc/NR3V-C2CP].

85. Dworkin et al., *supra* note 81, at 758 ("Although overt gender discrimination in the workplace is now less frequent since the passage of the Civil Rights Act, subconscious biases and their effects remain. These subtle biases continue to contribute to gender inequality in the employment context, hindering women's ability to reach the top ranks of corporate leadership and their ability to achieve pay equity.").

86. *See id.* at 731. These factors can include expectation for production and growth within company, worth brought to company, expectations for leave i.e. pregnancies—all of which factors are typically held against women.

87. Megan Leonhardt, *Refusing to Answer this One Job Interview Question Helps Men - but Hurts Women*, MONEY (June 27, 2017), http://time.com/money/4834777/job-interview-question-past-salary [https://perma.cc/W58L-TACF].

generally earn 1.8% less than women who do give up the details. If a man refuses to disclose his current salary, however, he gets paid 1.2% more."[88]

A 2018 survey, conducted by WorldatWork, calculated eighty-four percent of employers rely on prior pay inquiries "a great deal" or "a moderate amount" when assessing a potential candidate's salary expectations.[89] Furthermore, eighty percent of employers that were surveyed reported hiring managers and recruiters rely on prior pay "a great deal" or "a moderate amount" when determining an offer that would be acceptable to a potential candidate.[90] These numbers remain fairly consistent across organizations regardless of the organization's size.[91] On the other hand, only ten percent of employers reported that prior pay is "not at all" used when determining a potential candidate's offer.[92] Thus, while prior pay on the surface seems inconsequential, when women face a persistent history of underpayment, reliance on the same foundation that causes wage inequality will only perpetuate the problem. Women are more likely to accept a salary, oblivious that the process used to reach that number may have been inherently discriminatory. After all, she is not given a spreadsheet of her peers and their qualifications when being hired. This issue of the use of prior pay is specifically what the Ninth Circuit addressed in *Rizo v. Yovino*.

II. THE NINTH CIRCUIT CASE

Aileen Rizo was a math teacher who received both a bachelor's degree and master's degree in math and education.[93] Fresno County, California hires individuals to act as math consultants and train the area high school teachers on curricular standards.[94] Ms. Rizo applied for and accepted the County's official position as a Math Consultant.[95] The County considers math consultants managerial employees because, contrary to classroom teachers, they coordinate the curricular standards across multiple school districts in the County.[96]

From 2004 to 2015, when applicants accepted the position of math consultant, the County set their salaries using an internal policy known as Standard Operation Procedure #1440 (SOP 1440).[97] This practice eliminated the

88. *Id.*
89. WORLD AT WORK, QUICK SURVEY ON SALARY HISTORY BANS (U.S.) 9 (2018), https://www.worldatwork.org/dA/9abc8ad414/salary-history-bans.PDF [https://perma.cc/ZC4T-RGCK].
90. *Id*.
91. *Id*.
92. *Id*.
93. Rizo v. Yovino, No. 1:14-CV-0423-MJS, 2015 WL 9260587, at *3.
94. *Id.*
95. Rizo v. Yovino, 887 F.3d 453, 457 (9th Cir. 2018).
96. *Rizo,* 2015 WL 9260587, at *2.
97. *Rizo,* 887 F.3d. at 457.

County's previous practice of considering prospective hires' experience and qualifications in setting salaries.[98] Under SOP 1440, new salaries were set by taking their most recent salaries, adding five percent, and then placing them on the nearest step in a ten-step salary scheme.[99] The only adjustment to that salary was either a $600 stipend for a master's degree or a $1,200 stipend for a doctorate degree.[100] Under SOP 1440, the average female employee hired as a math consultant was placed more than two steps below the average male employee, since most female hires transitioned from lowerpaying jobs.[101] When Ms. Rizo accepted the County's job as a math consultant, she was place on the lowest prong, step one, which constituted a starting salary of $62,133.[102] In comparison, an individual starting on step ten would receive a salary of $81,461.[103] Ms. Rizo's pay was established based solely on her previous pay as a classroom teacher.[104] She became aware of three other male colleagues starting salaries being at least $10,000 more than her salary.[105] Further, they were performing the same job, but she had higher qualifications than these colleagues had.[106] Ms. Rizo filed a formal internal challenge to the pay disparity.[107] The County concluded there was no pay disparity in the salary-setting process after reviewing a compilation of the pay and demographics of employees who held similar positions.[108] This report indicated that more women had higher paying salaries than men, however, this was because there were significantly more female employees in that job, thus the analysis failed to account beyond the absolute number at each step.[109] Instead, the proper analysis would have looked at the number of women in relation to the number of men in each pay step.[110]

Upon realization of the inherently discriminatory nature of Fresno County's salary structure, Ms. Rizo filed suit, believing the pay structure under SOP 1440 was impermissible because of the inherent discriminatory nature that resulted

98. *Id.* at 457–58. The County has since reverted back to this practice following the initial filing of this suit.

99. *Id.* at 457.

100. *Id.*

101. *Rizo,* 2015 WL 9260587, at *6. The County's own data show that the average female management employee was placed at step 6.3 on the salary scale while the average male employee was placed at step 8.8. In 2009, the year Rizo was hired, this gap corresponded to at least a $5,000 salary difference on the County's salary scale.

102. *Rizo,* 887 F.3d at 458.

103. *Rizo,* 2015 WL 9260587, at *2.

104. *Rizo,* 887 F.3d at 458.

105. *Id.*

106. *Rizo,* 2015 WL 9260587, at *2.

107. *Rizo,* 887 F.3d at 458.

108. *Id.*

109. *Id.*

110. *Id.*

from such use since women have been consistently paid less than men.[111] The County responded that its exclusive reliance on her prior salary to set pay for her current job produced a permissible wage gap based on "any other factor other than sex" under Section 206(d)(1)(iv).[112] The County supported its policy of basing employee pay on prior salary by presenting non-discriminatory business reasons for using such process. These reasons include that the use of prior pay to set starting salary (i) is objective; (ii) encourages candidates to leave other jobs because candidates will always receive a five percent pay increase over their prior salary; (iii) prevents favoritism; and (iv) is a judicious use of taxpayer dollars.[113]

The district court reasoned that "a pay structure based exclusively on prior wages," such as SOP 1440, "is so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand."[114] In light of the "across-the-board pay disparity between male and female educators," the district court explained that salary systems based exclusively upon prior pay "will perpetrate that disparity" and subvert the remedial objectives of the Equal Pay Act.[115]

On appeal, a three-judge panel of the Ninth Circuit found that under circuit precedent, past pay could constitute an affirmative defense for an otherwise illegal pay disparity under certain circumstances. An employer could "base a pay differential on prior salary so long as it showed" that it had "used the factor reasonably in light of its stated purpose and its other practices," and that it "effectuate[d] some business policy."[116] As a result, the panel directed the district court to consider petitioner's rationales for its exclusive reliance on Ms. Rizo's prior salary and determine whether they justify the evident pay disparity.[117] The decision was instead appealed to the Ninth Circuit sitting en banc.

There, a majority of the judges agreed with Rizo that petitioner's sole reliance on Ms. Rizo's former pay to set her salary did not constitute an affirmative defense within the meaning of Section 206(d)(1)(iv).[118] In addressing the issue, the Ninth Circuit looked to the language of the statute. The Oxford English Dictionary provides a definition of the phrase "any other" that conveys its reference to a thing "specified or understood contextually."[119]

111. *Id.*

112. *Rizo,* 887 F.3d at 458.

113. Rizo v. Yovino, 854 F.3d 1161, 1165 (9th Cir. 2017), reh'g en banc granted, 869 F.3d 1004 (9th Cir. 2017), and on reh'g en banc, 887 F.3d 453 (9th Cir. 2018).

114. *Rizo*, 887 F.3d at 458.

115. Rizo v. Yovino, No 1:14-cv-0423-MJS, 2015 WL 13236875, at *8 (E.D. Cal. Dec. 18, 2015).

116. *Rizo*, 854 F.3d at 1166.

117. *Id.* at 1167.

118. *Rizo,* 887 F.3d at 460, 467.

119. *Other*, OXFORD ENGLISH DICTIONARY (3d ed. 2004).

Congress's use of this phrase becomes important when looking at the statute as a whole, namely, the phrase appears in a list of affirmative defenses. The defenses all carry the similarity of directly pertaining to work performance, such as experience and quality of work production. The court addressed *Noscitur a sociis*, which "stands for the principle that words are to be understood by the company they keep."[120] *Ejusdem generis* further exercised this principle to general provisions following specific lists.[121] The Supreme Court follows this logic as "[w]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[122] It is essential to look at the statute's overarching theme and mission to understand what the factors are trying to admit or protect against.[123] The first three listed affirmative defenses provide for an employer to pay more to an employee who has greater experience to offer, whether that be greater skill-set or years on the job.[124] As a result, the fourth affirmative defense should likewise also be limited to specific job-related factors.[125]

In looking at the legislative intent, the majority believed that Section 206(d)(1)(iv) can only excuse a pay differential when that differential is based on "legitimate" factors. Such factors "must be job related," which means they must be "measure[s] of work experience, ability, performance, or any other job-related quality."[126] Thus, prior salary, standing alone, is not a "legitimate" factor.[127] The court further explained that while prior salary might bear a "rough relationship" to legitimate factors like education or ability, the relationship is attenuated and the use of prior salary "may well operate to perpetuate the wage disparities prohibited under the Act."[128] The majority directed that "[r]ather than use a second-rate surrogate that likely masks continuing inequities," the employer must "point directly to the underlying factors for which prior salary is a rough proxy" in order to "prove its wage differential is justified."[129] The court reasoned that the purpose of the Act was to "eliminate long-existing 'endemic' sex-based wage disparities."[130] The Ninth Circuit Court of Appeals therefore found it "inconceivable" that Congress "would create an exception for basing

120. Brief in Opposition at 24, Yovino v. Rizo, 139 S. Ct. 706 (2019) (No. 18-272).
121. *Id.*
122. Yates v. United States, 135 S. Ct. 1074, 1086 (2015).
123. *See* Brief in Opposition, *supra* note 120, at 24.
124. *Id.* at 25–26.
125. *Id.*
126. Rizo v. Yovino, 887 F.3d 461, 467 (9th Cir. 2018).
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 460.

new hires' salaries on those very disparities."[131] To permit consideration of salary history as a factor alone or in combination with other factors would allow employers to "capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands."[132] The Ninth Circuit thus concluded that prior pay could not be considered a "factor other than sex" and is impermissible to use by employers because of the discriminatory nature of the factor.

In the concurrences, the judges felt that relying solely on prior pay as a factor was a violation of the Equal Pay Act; however, it could conceivably be used as a single factor that is considered with other appropriate factors.[133]

III. THE EXISITING CIRCUIT SPLIT SURROUNDING THE PERMISSIBILITY OF PRIOR PAY USAGE

Currently, circuit courts have taken various stances in interpreting the fourth exception enumerated in the Equal Pay Act: "any factor other than sex." As a result, there have been inconsistencies in court decisions when women bring claims regarding the discriminating nature of salaries set in reliance on their prior pay. In general, there are three different responses to employers' use of prior pay as a factor other than sex: The Ninth Circuit previously found that employers should never consider prior pay under any circumstance,[134] the Seventh and Eighth Circuits view prior pay as a factor other than sex,[135] and the Tenth and Eleventh Circuits believe that prior pay should not be the sole factor when considering a starting salary.[136]

Prior to the *Rizo v. Yovino* decision, the Ninth Circuit had previously held that prior pay constituted a "factor other than sex" upon which a wage differential may be based under the Equal Pay Act's "catchall" exception[137] set forth in 29 U.S.C. § 206(d)(1).[138] *Rizo* overturned this understanding and as a result overturned the precedent on the matter, *Kouba v. Allstate Insurance Co.* In Kouba, a class of women sued Allstate for sex discrimination due to their

131. *Rizo*, 887 F.3d at 460.

132. *Id.* at 456–67.

133. *Id.* at 469 (McKeown, C.J., concurring).

134. *Id.*

135. *See* Wernsing v. Ill. Dep't of Human Servs., 427 F.3d 466, 468 (7th Cir. 2005).

136. Angove v. Williams-Sonoma, Inc., 70 F.App'x 500, 508 (10th Cir. 2003); Irby v. Bittick, 44 F.3d 949, 959 (11th Cir. 1995) (finding reliance on salary history alone was an Equal Pay Act violation).

137. There is a broad construction of this final exception that some have seen as permitting courts to expand the exceptions to suit the employers when not being facially discriminatory. *See supra* note 45.

138. Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982).

practice of setting their starting minimum pay using prior salary as a factor.[139] As a result of this, women were disproportionately paid a lower rates than their male equals.[140] Allstate responded that prior salary is a "factor other than sex" within the meaning of the statutory exception.[141] The district court entered summary judgment against Allstate, reasoning that (1) because so many employers paid discriminatory salaries in the past, the court would presume that a female agent's prior salary was based on her gender unless Allstate presented evidence to rebut that presumption, and (2) absent such a showing (which Allstate did not attempt to make), prior salary is not a factor other than sex.[142] The Ninth Circuit reversed this decision, finding that:

> The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason. Conversely, a factor used to effectuate some business policy is not prohibited simply because a wage differential results.[143]

The 1982 decision reversed the district court's progressive finding and reverted back to the conservative holding that the Equal Pay Act entrusts employers, not judges, with making the decisions that will accomplish their business objectives.[144] The court does not and should not have any referee role and thus does not have any authority to give guidance on the proper judicial inquiry when there is a lack of direct evidence of discriminatory intent.[145] The court found this to be a "pragmatic standard, which protects against abuse yet accommodates employer discretion,"[146] and thus permits employers to base compensation on salary history alone, provided the employer can show that use of salary history "effectuates some business policy," and it is used "reasonably."[147] This conservative position was a result of the generation's belief that the government should play a minimal role in corporations. After all, judges do not typically have the same business savvy as a CEO, let alone the fundamental knowledge of running a business.

Rizo v. Yovino abrogated this decision and in doing so, took an approach that offered the most narrow interpretation of the "any other factor other than sex" defense than any other circuit had before. In *Rizo*, the Ninth Circuit determined that prior pay could not be considered a factor for setting starting salaries, *alone*

139. *Id.* at 875.
140. *Id*. at 876.
141. *Id*. at 875.
142. *Id*.
143. *Kouba*, 691 F.2d at 876.
144. *Id*.; *see* Cty. of Wash. v. Gunther, 452 U.S. 161, 170–71, 101 S. Ct. 2242, 2248–49 (1981).
145. *Kouba*, 691 F.2d at 876.
146. *Id*.
147. *Id*.

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or in conjunction with other employment factors.[148] This decision effectively eliminated the trend of asking for salary history during employment procedures in the Ninth Circuit and is being recognized by companies across America.[149]

A. The Tenth and Eleventh Circuits

There are circuits whose decisions similarly align with the Ninth Circuit following the *Rizo* decision. The circuits include the Tenth and Eleventh Circuits. In *Angove v. Williams-Sonoma*, *Inc.*,, the Tenth Circuit found that the employer's consideration of prior pay alone does not qualify as an exception of "a factor other than sex" as required by the Equal Pay Act.[150] In *Angove*, the plaintiff worked at Williams-Sonoma from 1991 until being fired in 2000.[151] While employed at Williams-Sonoma, Angove worked as a sales associate and proceeded to be promoted to store manager at two different store locations.[152] Following his termination, Angove filed this lawsuit against Williams-Sonoma contending that his previous employer's pay scale infringed against the Equal Pay Act.[153] Angove argued that because another store manager, MacKenna, made $12,000 more annually than Angove, he was being discriminated against on the basis of sex.[154] Williams-Sonoma based Mackenna's starting salary on a number of factors, as they did with all of their employees.[155] Williams-Sonoma's decision to match MacKenna's prior salary was based on her extensive retail experience, "substantial connection to the community, the respect she commanded within the Tulsa shopping center, and the recommendation of the owner of the shopping center."[156] Thus, the Tenth Circuit concluded that under the Equal Pay Act, "[e]xperience is an acceptable factor other than sex if not used as a pretext for differentiation because of gender," and that prior pay may only be considered as a factor in setting a salary when considered alongside these other factors.[157] Since Williams-Sonoma relied on various job-performance

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148. *Rizo*, 887 F.3d at 460.

149. Yuki Noguchi, *More Employers Avoid Legal Minefield By Not Asking About Pay History*, NPR (May 3, 2018), https://www.npr.org/2018/05/03/608126494/more-employers-avoid-legal-minefield-by-not-asking-about-pay-history [https://perma.cc/F3TU-X435], ("Some companies aren't waiting for the legal questions to settle: Amazon, Wells Fargo, American Express, Cisco, Google and Bank of America all recently changed hiring policies to eliminate questions about pay history.").

150. Angove v. Williams-Sonoma, Inc., 70 F.App'x 500, 508 (10th Cir. 2003) ("The EPA only precludes an employer from relying solely upon a prior salary to justify paydisparity").

151. *Id*. at 503.

152. *Id*. at 502.

153. *Id*. at 504.

154. *Id*. at 507.

155. *Angove*, 70 F. App'x at 508.

156. *Id.*

157. *Id.*

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related factors, their employment hiring criteria was not in violation of the Equal Pay Act.[158]

Similarly, in *Irby v. Bittick*, the Eleventh Circuit articulated that "an employer may not overcome the burden of proof on the affirmative defense of relying on 'any other factor other than sex' by resting on prior pay alone."[159] In *Irby*, Barbara Irby filed suit against Monroe County, Georgia and John Bittick, the Sheriff of Monroe County, in his official capacity as sheriff.[160] While working as a county criminal investigator, two city appointed investigators, Robert Jones and Ronald Evans, began also working as investigators in the county as a result of a job transfer.[161] Even though their job descriptions remained the same as before—and they had the same job description as Irby—Jones and Evans were actually paid more by the county than they had been by the city.[162] This is because in switching over from city positions to county positions, the two male employees were given an initial base salary equal to the sum of their city base salary plus overtime.[163] This equated to $23,987.50 in 1989 and $27,868.10 in 1993—a significantly higher compensation than what Irby received, which was $15,757.00 in 1989 and $18,519.80 in 1993.[164]

In considering Irby's suit, the court addressed the Equal Pay Act's "any other factor other than sex" exception, finding that "such factors include unique characteristics of the same job; . . . an individual's experience, training or ability; or . . . special exigent circumstances connected with the business."[165] The Eleventh Circuit held that the county "cannot defend paying Jones and Evans more than Irby simply because of the pay schedule of Jones and Evans's previous employer."[166] Ultimately, the court found that "an Equal Pay Act 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 . . ." as seen in this case because the prior pay would be used as a mixed-motive.[167] However, the court proceeded to explain that salary history alone, in this case, would not be sufficient to warrant a pay differential because "[i]f prior salary alone were a justification, the exception

158. *Id.*
159. Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995).
160. *Id.* at 949.
161. *Id.* at 953.
162. *Id.*
163. *Id.*
164. *Irby,* 44 F.3d at 953 n.3.
165. *Id.* at 955.
166. *Id.*
167. *Id.*

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would swallow up the rule and inequality in pay among genders would be perpetuated."[168]

Thus, the Tenth and Eleventh Circuits have found that prior pay alone cannot determine a salary but may be considered in collaboration with other legitimate business considerations such as experience.

B. The Seventh and Eighth Circuits

The Seventh and Eighth Circuits disagree with the Ninth, Tenth, and Eleventh Circuits' findings and have instead concluded prior pay may be considered a "factor other than sex." In *Wernsing v. Ill. Dep't of Human Services*, the Seventh Circuit held that so long as sex is not a factor in determining salaries, there is no Equal Pay Act violation when considering the employee's wage history.[169] Jenny Wernsing sought for the Seventh Circuit to reverse their previous decisions and to invalidate the Department of Human Services of Illinois's reliance on prior pay to set lateral employees' new salaries.[170] Following Wernsing's acceptance of an Internal Security Investigator II position in the department's Office of the Inspector General, her starting monthly salary was $2,478.118, which was calculated using Wernsing's prior monthly salary of $1,935 while employed as a Special Agent with the Southern Illinois Enforcement Group.[171] As a result of the various prior salaries received by lateral employees, there was no uniform pay system used.[172] Subsequently, Charles Bingaman, who was hired contemporaneously with Wernsing, received a substantially higher starting monthly salary of $3,739 as a result of his higher prior salary.[173] The Seventh Circuit even noted that "Wernsing and Bingaman do the same work but at substantially different pay as a result of this process for determining initial salaries. Annual raises preserve the relative gap until employees reach the maximum of the pay scale. Bingaman will top out years before Wernsing does."[174] Although Wernsing started at a salary less than Bingaman, her percentage pay increase was higher at thirty

168. *Id.* (citing Price v. Lockheed Space Operations Co., 856 F.2d 1503, 1506 (11th Cir. 1988); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570–71 (11th Cir. 1988)) ("Appellees cannot defend paying Jones and Evans more than Irby simply because of the pay schedule of Jones and Evans's previous employer. Therefore, we reject appellees' reliance on prior salary as a separate justification for the pay differential.").

169. Wernsing v. Ill. Dep't of Human Servs., , 427 F.3d 466, 471 (7th Cir. 2005).

170. *Id*. at 468 (recognizing that the Seventh Circuit has already decided similar cases that found prior pay to be acceptable under the EPA).

171. *Id.* at 467.

172. *Id.*

173. *Id.*

174. *Wersing*, 427 F.3d at 467.

percent compared to Bingaman's ten percent.[175] The court failed to examine the validity of the employer's stated reason for the practice.[176]

According to the Seventh Circuit, Congress intended the "any other factor other than sex" exception to be read broadly, as the hiring criteria "need not be 'related to the requirements of the particular position in question,' nor must it even be business-related."[177] The court proceeded to analyze other Circuits' approach to looking at Congressional intent when reading the Equal Pay Act and concluded that Congress has the power and duty to explicitly bar or permit actions. Thus, the statutes should be read literally and unspoken "intent" should not be inferred from statements in committee reports or on the floor.[178] Congress made the decision not to restrict that fourth affirmative defense; therefore, the defense should not be limited by the courts without explicit direction to do so. The Seventh Circuit deduced that the Equal Pay Act "forbids sex discrimination, an intentional wrong, while markets are impersonal and have no intent."[179] The Seventh Circuit essentially mocked and discredited the Ninth, Tenth and Eleventh Circuit's divergent holdings by finding that their reasoning "rests on an 'intent' that, if not manufactured by the judges rather than discovered by digging through legislative debates, lacks any footing in enacted texts."[180] The Equal Pay Act itself only "asks whether the employer has a reason other than sex—not whether it has a 'good' reason."[181] Sticking with their strict interpretation of the Equal Pay Act, the Seventh Circuit found that "Congress has not authorized federal judges to serve as personnel managers for America's employers."[182] According to the court, like Title VII and other anti-discrimination laws, the Equal Pay Act does not permit a court to assess the reasonableness of the employer's stated business purpose.[183] Thus, the Equal Pay Act does not prevent employers from basing starting salaries on prior pay.[184] Similarly, the Eighth Circuit found in *Taylor v. White* that unequal pay for identical work under identical conditions is not unlawful when the pay is based on a "salary retention policy."[185] Esther S. Taylor worked as a civilian employee

175. *Id.*

176. *See generally* Wernsing v. Ill. Dep't of Human Servs., 427 F.3d 466 (7th Cir. 2005).

177. *Id*. at 470 (quoting Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994)).

178. *Id*. at 469. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 566–68 (1988); Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005).

179. *Wersing*, 427 F.3d at 469.

180. *Id.* at 470 ("That many women spend more years in child-rearing than do men thus implies that women's market wages will be lower on average, but such a difference does not show discrimination.").

181. *Id.* at 468.

182. *Id.*

183. *Id*. at 470.

184. *Wersing*, 427 F.3d at 470.

185. Taylor v. White, 321 F.3d 710, 717, 718–19 (8th Cir. 2003).

at the Army's Pine Bluff, Arkansas Arsenal.[186] While working at the Army's Arsenal in Pine Bluff, Taylor worked together with two male employees, Theodis Thornton and Willie Early, and a female employee, Linda Jones.[187] Thorton, Early, Jones, and Taylor "performed identical work under identical conditions."[188] However, the male employees were still set at a higher pay scale than the female employees and, as a result, made more money for performing the identical work.[189]

The Army claimed the rationale for such a salary retention policy was to retain skilled employees during periods of time when their services are not required by preventing job loss and allowing employees to perform less demanding, lower grade work without suffering a reduction in grade or salary, and thus had no correlation to sex.[190] Taylor argued that the policy was loose and subjective, and it was not properly asserted as there was a "sloppiness and informality" to the Army's implementation.[191] The Eighth Circuit found that"if it is permissible to rely upon a salary retention policy, the unwritten nature of the policy or the presence of subjectivity or informality in the structure or administration of the policy cannot, standing alone, support an inference of discrimination."[192] While salary inquiries may result in wage decisions based on factors unrelated to an individual's qualifications for a particular job, the court reasoned such policies are not necessarily gender biased.[193] The court thus concluded that while

> an employer might apply a salary retention policy in a discriminatory fashion or use such a policy as a vehicle to perpetuate historically unequal wages caused by past discrimination, these potential abuses do not provide valid bases to adopt a per se rule that declares all salary retention practices inherently discriminatory.[194]

Thus, the Eighth Circuit found that the catchall exception applies to any business decisions that are not facially discriminatory. It would be impossible to account for all the potential underlying discriminatory factors affecting women, thus the Equal Pay Act should be read literally as "*any* factor other than sex."

186. *Id.* at 712.
187. *Id.*
188. *Id*. at 713.
189. *Id*.
190. *Taylor*, 321 F.3d at 716.
191. *Id*. at 717.
192. *Id*.
193. *Id*. at 718.
194. *Id*.

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IV. THE SUPREME COURT FAILED TO PROPERLY AFFIRM THE NINTH CIRCUIT'S HOLDING IN *RIZO V. YOVINO*

It took until 1971 and Justice Ruth Bader Ginsburg's advocacy to certify women as a recognized class of people, deserving of equal protections and equal rights as those that previously only belonged to men. *Rizo* had that same potential to be beacon of hope in the long journey of women's rights when the petitioner filed an appeal from the Ninth Circuit's en banc decision. The Supreme Court did grant certiorari but did not hear arguments. Instead, they vacated and remanded the decision on unrelated procedural grounds. This was a mistake. The wage gap will not close until this issue is decided once and for all. *Rizo v. Yovino* will be back. There will be a Ninth Circuit rehearing and likely an appeal from that decision. The Supreme Court will then be faced with the question: Does prior pay discriminate on the basis of sex? The Court would then determine if there is in fact a limit to what has been previously seen by some circuits as the catchall exception, to which any business-related decision can apply.

A. The Supreme Court's Reasoning to Vacate and Remand Rizo v. Yovino

The U.S. Supreme Court was poised to tackle the use of salary history inquires and settle the circuit split once and for all following its grant of certiorari of *Rizo v. Yovino*. However, the Court failed to rule on the fundamental dispute at hand. Instead, the Court vacated and remanded the Ninth Circuit decision because Judge Reinhardt, the author of the majority opinion, passed away eleven days before the decision was officially published.[195] The Ninth Circuit previously addressed Judge Reinhardt's passing in the published decision, noting: "Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death."[196]

The Supreme Court concluded it was procedurally improper to include Justice Reinhardt's vote in the count because judges are permitted to change their votes up until the time the decision is released to the public.[197] According to the Court, authorizing Judge Reinhardt's decision to stand violates judicial policy because it effectively permitted a deceased judge to still exercise the judicial power of the United States even after his death.[198] The Court resounded that federal judges are "appointed for life, not for eternity."[199]

Further, without Judge Reinhardt's vote, there was not a majority to support the Ninth Circuit's en banc decision due to only five judges supporting the

195. Yovino v. Rizo, 139 S. Ct. 706, 710 (2019).
196. Rizo v. Yovino, 887 F.3d 453, 456 n.* (9th Cir. 2018).
197. Yovino v. Rizo, 139 S. Ct. 706, 709 (2019).
198. *Id.* at 710.
199. *Id.*

decision out of the remaining ten judges still living. Additionally, the Court resonated concern that Reinhardt's decision was deemed the majority decision, thereby establishing the mandatory precedent in the Ninth Circuit.[200] Because the other five judges wrote only as concurrences for various reasons, the Court found it impossible to determine what outcome would have resulted without Judge Reinhardt authoring the majority opinion.[201] Thus, the Court found the only feasible solution to vacate and remand the Ninth Circuit decision. In doing so, the Court failed to provide any dicta or direction regarding the core issue of prior pay under the Equal Pay Act, which continues to divide the country's courts.[202]

It is likely the Ninth Circuit will readdress and author a new decision in *Rizo*. The decision can be expected to uphold at least some level of rejection of reliance on prior pay under the Equal Pay Act. There is no time estimate for how long it will be before the Ninth Circuit once again addresses these issues; however, as it currently stands, employers' use of salary history inquiries is once again permissible unless there is a state or local legislation to the contrary. Since some of the concurrences expressed concern with how far the majority went with its complete ban on considering prior pay, the new decision may show more restraint in interpreting the Equal Pay Act.[203] Another potential outcome is the decision remains the same in the Ninth Circuit's respect for Judge Reinhardt's majority opinion on the matter. At this stage, it will most likely be some time before the Supreme Court addresses the employers' use of salary history, so the current circuit split is likely to remain unless there is action from Congress.

B. The Future of Prior Pay in the Supreme Court

Regardless of the outcome on the Ninth Circuit's rehearing of *Rizo v. Yovino,* there are a couple of outcomes that may occur if the Supreme Court eventually rehears an appeal on this issue. First, the Supreme Court may affirm the previous Ninth Circuit decision in *Rizo v. Yovino.* This would drastically change the landscape of the Equal Pay Act as that decision would reject the consideration of prior pay under any circumstance, including in compilation with other work-related factors. No other circuit besides the Ninth Circuit has yet interpreted the use of prior pay to this restrictive of a manner. Another stance the Supreme Court could take is that prior pay cannot be used exclusively to determine a starting salary. This would align more with the Tenth and Eleventh Circuits.[204] This would force companies to use other business-related factors

200. *Id.*

201. *Id.*

202. Yovino, 139 S. Ct. at 710.

203. *See* Rizo v. Yovino, 857 F.3d 453 (9th Cir. 2018).

204. *See* Angove v. Williams-Sonoma, Inc., 70 F.App'x 500 (10th Cir. 2003); Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995).

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such as work experience when applying prior pay as a factor to base starting salary. The Supreme Court could also choose to reject this argument, and find for an expansive view of the "*any* factor other than sex" exception. This would revert the courts back to the understanding that only overt sexism can constitute compensation discrimination.

The petitioners, Yovino and the employer, in the appeal to the Supreme Court in *Rizo,* implore salary history could be considered a legitimate factor other than sex.[205] Based on the circuit split, the Supreme Court has an interest in settling the law to ensure consistency for men and women advocating for equal pay as well for employers, so that they have guidelines to follow.[206] While some states have embraced the Ninth Circuit's ruling, others have gone in the opposite direction and have passed legislation that strictly forbids local governments from enacting their own rules banning the use of prior pay.[207] As a result, there is even more turmoil in interpreting the ability to rely on prior pay when setting a salary. This reinforces the Court's grave mistake to not address the use of prior pay in relation to the Equal Pay Act.

There is also support for why prior pay can be considered a gender-neutral practice. In a competitive market such as the trucking industry, employers might simply want to ensure their wages are competitive in the ever-changing markets.[208] Further, prior pay could be used to ensure an efficient hiring process in that employers ask about prior salary "not in order to discriminate," but because "[t]hey don't want to waste the time of a candidate who's seeking a higher salary than they can offer."[209] This would permit an employer not to waste valuable time and resources on a candidate they simply cannot afford. Further, the ban on salary history questions might actually have negative effects on closing the wage gap. This is because employers who are no longer able to ask about prior salary might conclude a female candidate would accept less

205. Brief for The Chamber of Commerce of the United States of America, et al. at 9, 10–11, as Amici Curiae Supporting Petitioner, Yovino v. Rizo, 139 S. Ct. 706 (2019) (No. 18-272).

206. *Id.* at 10, 17.

207. *See* MICH. COMP. LAWS § 123.1384(4) (2019) ("A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must request, require, or exclude on an application for employment or during the interview process from an employee or a potential employee."); WIS. STAT. § 103.36(3)(a) (2019) ("No city, village, town, or county may enact or enforce an ordinance prohibiting an employer from soliciting information regarding the salary history of prospective employees.").

208. Brief for The Chamber of Commerce, *supra* note 205 at 11.

209. Yuki Noguchi, *Proposals Aim To Combat Discrimination Based On Salary History*, NPR (May 30, 2017), https://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history [https://perma.cc/QK23-BR3M].

money than a male, since females make less on average.[210] As University of Virginia economist, Jennifer Doleac, asserted:

> It seems like the general social impulse is, "We don't like employers using particular information, so we'll tell them they can't use it anymore and assume that's the end of the conversation, . . . [b]ut if they cared enough about it to ask it to begin with, they probably care about it enough to try to guess."[211]

As a result, by asking about prior pay, it could be in fact the employer doing its best to avoid gender discrimination.

In analyzing the Ninth Court decision of *Rizo*, the petitioner, Yovino as the employer, argued that the court completely rejected the plain text meaning of the statute. The exception clearly lays out that "*any* other factor other than sex" may be permitted by companies to use when establishing a starting salary. Congress intended to end pay inequality based on sex. This fourth affirmative defense reinforces that. The Equal Pay Act bars any employer to discriminate on the basis of sex, but Congress has not in any way limited the business reasoning that may be asserted when hiring so long as it is not reliant on gender. The business reasoning, when put in objective light, needs to be permitted to ensure that company practice is not infringed upon. Objective reasoning does not implicate gender discrimination within the Equal Pay Act as sex was not the controlling factor. Thus, the petitioner argued that the Ninth Circuit sitting en banc was incorrect to conclude that prior pay is impermissible.

The respondents, Rizo in this case, previously argued that certiorari should not be granted. However, this was because Rizo had already won at the time. She did not want to risk the potential overruling of her victory, which became the ultimate result due to the remand of the case. This should not stop Rizo from continuing to pursue justice, both at the regional level and at the national level. Women should be granted the right to a non-discriminatory pay structure that relies solely on her skill and merit instead of outside factors outside of her control.

The Ninth Circuit sitting en banc was correct in its decision for multiple reasons. The Ninth Circuit correctly found that an employer cannot pay a female employee less than her male equal solely because of her prior salary at a different job with a different employer. Such a policy cannot constitute "a differential based on any other factor other than sex" in alignment with the context of 29 U.S.C. Section 206(d)(1)(iv). The Ninth Circuit's holding correctly interprets the text, history, and logic of the Equal Pay Act.[212] It is proper statutory canon

210. Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. TIMES (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/business/economy/salary-history-laws.html [https://perma.cc/22XC-UK69].

211. *Id.*

212. Brief of Respondent at 23, Yovino v. Rizo, 139 S. Ct. 706 (2019) (No. 18-272).

to read a statute as a whole in order to understand the objectives of the Act.[213] In reading the affirmative defense together, it is clear that all four must be construed as job-related factors; anything beyond that would be outside the intended scope of Congress.[214] Further, prior pay cannot be considered a job-related factor because it exposes nothing about performance and can be completely unrelated if transitioning to a new line of work.[215] The Supreme Court was wrong to remand this case instead of upholding its findings.

The respondent at the time had argued that if the Equal Pay Act would be read as broadly as the petitioner requested, then the statute would essentially have no purpose.[216] This is because the fourth affirmative defense could be construed to accept any decision by the company so long as a reason for that decision is provided. This creates an impossible hurdle for victims of discriminatory pay to overcome. Under no circumstances, albeit accepted reasoning such as seniority, should a woman who has greater experience and education receive pay that is less than her equals. Reliance on prior pay can cause this result, as it did in Ms. Rizo's case. Even the Equal Employment Opportunity Commission (EEOC) appeared on behalf of Ms. Rizo and presented its Compliance Manual, which "constitute[s] a 'body of experience and informed judgment' to which [courts] may resort for guidance."[217] In its brief to the Ninth Circuit, the EEOC articulated that "because exclusive reliance on prior salary institutionalizes the disparity between what men and women earn on average, the practice undermines the purpose of the EPA."[218] Based on this understanding that women historically are paid lower salaries, it is inadmissible to rely on prior pay when it potentially constitutes an implicit bias in the first place. This is regardless of the intentions of the employer in using this prior pay. Thus, the Ninth Circuit's interpretation should have been upheld based on the language, legislative history, and the endemic underpayment of women in the workplace.

V. LEGISLATIVE ACTIVITY

As the Supreme Court continues to await the time they may decide the use of salary history inquiries, there is a chance that the legislature may definitively act before then. In the Paycheck Fairness Act, sponsored by Rep. Rosa DeLauro (D-CT) and her colleagues, Congress hopes to further limit the pay disparities by banning the use of salary history inquiries during job-screenings, interviews,

213. *Id.* at 25.
214. *Id.* at 26.
215. *Id.* at 27.
216. *Id.* at 26.
217. Brief of Respondent, *supra* note 212, at 7–8.
218. *Id.* at 8.

and at any point of the hiring process.[219] The Paycheck Fairness Act also proposes to protect women against retaliation from their employers for discussing their salaries with others as well as requires employers to prove that pay disparities exist for legitimate, job-related reasons instead of the current standard of giving employers leeway in determining pay for unclear "business reasons."[220]

This is not the first time the Paycheck Fairness Act has graced Congress's floors. In fact, it is the eleventh time being introduced.[221] Each time in the past two decades, the Paycheck Fairness Act, while well received by the public, fades from the attention of Congress after introduction.[222] The potential reason? While there is high public approval for the Paycheck Fairness Act, it is not well received by corporations.[223] In March 2017, about two dozen businesses wrote President Trump to revoke similarly structured regulations requiring greater transparency for workplace pay that were enacted in 2016 by President Obama.[224] A few months later, President Trump complied.[225] This new Paycheck Fairness Act that was introduced in January 2019 aims to reverse President Trump's actions and reinstate this previous rule.[226]

According to an American Association of University Women study in 2013, women are compensated 6.6 percent less than their male counterparts at their first jobs, "even after considering factors such as job location, occupation, college major, and number of hours worked."[227] The Paycheck Fairness Act would address the problem in three key ways.[228] It would mandate employers to publicize pay data to the EEOC, permitting the agency to ascertain any potential discrimination. For example, the EEOC would be able to pinpoint when "women at a certain company consistently earn less and get promoted less than men in similar positions."[229] The Paycheck Fairness Act would also prohibit employers from requiring employees to keep their salaries confidential, so women would be able to inquire how much their colleagues earn without fear of retaliation.[230]

219. *The Paycheck Fairness Act*, NAT'L P'SHIP FOR WOMEN & FAMILIES, (Jan. 2019) http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/the-paycheck-fairness-act.pdf [https://perma.cc/5WXN-YYR7].

220. *Id.*

221. Alexia Fernández Campbell, *How Democrats Plan to Shrink the Gender Pay Gap*, VOX, (Feb. 12, 2019, 5:30 PM), https://www.vox.com/2019/2/12/18205182/paycheck-fairness-act-gender-pay-gap [https://perma.cc/LW8U-B933].

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Campbell, *supra* note 221.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

Finally, it would ban the use of salary history when determining pay.[231]

There are a couple potential outcomes regarding the Paycheck Fairness Act. First, the Act could pass both the House and Senate and become law with the president's signature, in which case businesses have direct orders never to rely on prior pay. Second, the Bill once more becomes lost among countless other bills waiting to garner support. The later would result in still more discrepancies in how to incorporate prior pay into the hiring process.

VI. CONCLUSION

The Equal Pay Act has left many courts in disagreement over how to handle salary history inquisitions. As a result, employers remain without direction at the cost of explicit equality for female employees. While women's rights in the workplace have improved significantly, and the pay gap has essentially been cut in half since the Equal Pay Act's enactment, it is predicted that the pay gap will not completely close until 2059.[232] Clearly there is still a long way to go for women's equality.

Based on the Equal Pay Act's history, it is clear that the intent was to provide women access to the same salaries as their male counterparts. There is a long history of undervaluing a woman's work. This is, and has been, unjustifiable. Since being enacted in 1963, the Equal Pay Act has contributed to the narrowing of the wage discrepancies; however, a twenty-cent gap still remains. This can most likely be attributed to the expansive nature of the fourth affirmative defense, "any factor other than sex." This exception permits employers to base pay on any business reason it deems appropriate. However, because of the intrinsically discriminatory nature of the use of prior pay, salary history inquiries should be prohibited. This is because of the long-lasting history of women being underpaid. By relying on prior salary, there is simply a perpetuation of this issue, contrary to the intent of Congress when enacting the Equal Pay Act. Several circuits have reached different conclusions on the reliance of prior pay, however.

The Supreme Court had the opportunity to step in and hear *Rizo v. Yovino*. They refused to address the pressing matter, and women will remain trapped by the prior pay stranglehold until the laws enacted to protect them are read with that same intent. When the Supreme Court finally responds to the circuit split, there are a few potential outcomes. The Court could decide to narrowly decide the issue, in that prior pay should not be the sole factor used when determining pay. This would not be such a drastic decision as there are several circuits mentioned above that have interpreted the Equal Pay Act to mean the same thing.

231. Campbell, *supra* note 221.

232. *Women's Median Earnings as a Percent of Men's Median Earnings, 1960-2017 (Full-time, Year-round Workers) with Projection for Pay Equity in 2059*, INST. FOR WOMEN'S POLICY RESEARCH, (Sept. 2018), https://iwpr.org/publications/pay-equity-projection-1960-2017/ [https://perma.cc/944S-2VBP].

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The Court could instead take a narrow interpretation of the law and find that "any other factor other than sex" should be only read as business-related qualities such as experience and merit. That decision would align itself with the previous Ninth Circuit stance as well and the legislation that is continuously trying to be passed. This would be seen as accepting the climate of the era, in the sense that the public is the main advocate behind such a proposal. The climate of the era has in fact been known for permitting monumental decisions that have ended discrimination previously.[233] The time has come for the courts to take a more definite stance on gender inequality in the workplace. The gap remains visible even fifty-five years after the Equal Pay Act's enactment. Thus, there needs to be even greater progression if women will ever have the same footing as their male equals in the workplace. This will not be the end of *Rizo v. Yovino*, and if it is, there will be another case just like it to come out of the framework. With twenty cents still remaining to close the wage gap, equality is still a long way away. Another woman, in no time at all, will be told a familiar tale: her work is still not worth that of her male peers. That case deserves to be heard. Women deserve to be heard.

JESSICA GOTTSACKER*

233. Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 493 (1954), supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955); Moritz v. Comm'r, 469 F.2d 466 (10th Cir. 1972); Reed v. Reed, 404 U.S. 71 (1971).

* JD Candidate, 2020, Saint Louis University School of Law. I would like to thank my advisor, Professor Constance Z. Wagner, who guided me immensely in research as well as writing; her mentorship and expertise were invaluable. I would also like to thank the all-amazing Editor-In-Chief, Kenny Bohannan, whose patience and support got me through the year. This guy does not get the recognition he deserves. Of course, a huge thank you goes to Ginny Hogan, who not only served as an incredible Managing Editor but also as a friend. I cannot imagine going through this process or law school without her. My family deserves a shout-out for their never-ending support and encouragement throughout life. To come from such a loving family is a true blessing. Thank you to all the strong women in my life, who have shown me how to be a leader in life and advocate for change. An apology goes out to my roommates, who have had to listen to me talk about gender inequality just as much as I talk about Ed Sheeran.

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