THE BLURRY LIMITS OF THE EQUAL PAY ACT'S "FACTOR OTHER THAN SEX": AN ARGUMENT FOR LIMITING THE USE OF SALARY HISTORY AND THE BENEFIT TO EMPLOYERS

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I. INTRODUCTION

President John F. Kennedy signed the Equal Pay Act into law on June 10, 1963, remarking that such legislation constituted a "significant leap forward."[1] Advocates of the bill heralded the legislation as "a matter of simple justice" ensuring that "there is no longer any excuse for paying women less than men for performing the same work, if there ever was any."[2] Today, more than fifty years after Congress enacted the legislation, the pay gap persists. In 1963, when the law was enacted, women earned $0.59 to a dollar earned by men.[3] In 2018, fifty-five years later, women earned only $0.81 to a dollar earned by men—evidencing only meager progress towards closing the gender pay gap.[4] The persistence of the gap is, in part, created by the sustained use of prior salary information in setting employee compensation rates for new employees.[5] Currently, federal courts are split in their interpretation of a critical catch-all phrase in the Equal Pay Act ("EPA")—an exception that permits an employer to pay individuals of different sexes disparate salaries for substantially

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1. Beth Pearsall, *50 Years After the Equal Pay Act, Parity Eludes Us*, AM. ASS'N UNIV. WOMEN (Mar. 18, 2013), https://ww3.aauw.org/article/50-years-after-the-equal-pay-act-parity-eludes-us/.

2. 109 CONG. REC. 9213 (1963) (statement of Rep. Matsunaga).

3. Abby Lane & Katharine Gallagher Robbins, *The Wage Gap Over Time*, NAT'L WOMEN'S L. CTR. (May 3, 2012), https://nwlc.org/blog/wage-gap-over-time/.

4. *See* Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. AM. PROGRESS (Mar. 24, 2020), https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/ (calculating the gender wage gap using 2018 data from U.S. Census Bureau); *see also* KEVIN MILLER & DEBORAH J. VAGINS, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 5, 7 (2018), https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf.

5. *See* MILLER & VAGINS, *supra* note 4, at 21.

equal work so long as the differential is based on a "factor other than sex."[6] Employers have used this exception as justification for relying on prior salary history. Use of salary history inquiries, however, serves to perpetuate the wage gap, locking women into cycles of lower pay and "piling on" wage disparity from job to job.[7]

Prior to the Ninth Circuit's 2018 en banc decision in *Rizo v. Yovino*,[8] federal courts had articulated three general approaches to the catch-all exception to the EPA. The Seventh Circuit's pro-employer approach unequivocally permits the use of prior salary as either a standalone factor or in conjunction with other factors, creating a broad interpretation of the exception.[9] The Eighth Circuit has taken a slightly more restrictive approach, allowing the use of prior salary as the sole determinant of new salary but implementing a case-by-case reasonableness inquiry.[10] In contrast, the Tenth and Eleventh Circuits greatly limit the use of prior salary history, holding that the use of such information as the sole factor in setting an employee's compensation violates the EPA.[11] The Ninth Circuit's 2018 en banc decision created a fourth category—the most restrictive interpretation of the EPA—prohibiting the use of salary history entirely.[12] Although many hoped the Supreme Court would resolve the split, after granting certiorari, the Court vacated and remanded *Rizo* on purely procedural grounds.[13] In early 2020, the Ninth Circuit reheard the case en banc, and issued a majority opinion that echoed the previous decision: Prior salary may not be considered in salary determinations. The Supreme Court has since declined to resolve the issue, leaving the circuit split unresolved and employers in an uncertain position, particularly those who may be subject to conflicting circuit interpretations and a dizzying array of local and state laws prohibiting or limiting the use of salary history inquiries.[14]

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6. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1)(iv).

7. Rizo v. Yovino, 887 F.3d 453, 469 (9th Cir. 2018) (McKeown, J., concurring); *see also* MILLER & VAGINS, *supra* note 4, at 21.

8. 887 F.3d 453 (9th Cir. 2018).

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

10. Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2004); *see also* Drum v. Leeson Elec. Corp., 565 F.3d 1071, 1073 (8th Cir. 2009) (applying *Taylor*).

11. Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015); Angove v. Williams-Sonoma, Inc., 70 F. App'x 500, 508 (10th Cir. 2003); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995).

12. *Rizo*, 887 F.3d at 460–61.

13. Yovino v. Rizo, 139 S. Ct. 706, 710 (2019). In its *per curiam* decision, the Court addressed the issue of whether a judge who died prior to the issuance of the opinion can be counted as a member of the majority, failing to resolve the uncertainty surrounding the EPA exception. *Id.* at 707–08.

14. Joanne Sammer, *Employers Adjust to Salary-History Bans*, SHRM (June 5, 2019), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/employers-adjust-to-salary-history-bans.aspx; *see also 9th Circuit: Employers May Not Use Pay History as Defense to Equal Pay Act Claims*, MCGUIREWOODS (Apr. 12, 2018), https://www.mcguirewoods.com/client-

This Comment will first provide an overview of the history and text of the EPA, including the Supreme Court's interpretation of the claim structure and available defenses for employers. Next, this Comment will detail the current status of the circuit split on this issue. This Comment will argue that the majority reasoning articulated in the Ninth Circuit's 2020 en banc decision in *Rizo* is the best approach to resolving the ambiguity surrounding the "factor other than sex" exception to the EPA. Finally, this Comment will analyze the impact the split has on employers as well as the benefits created by broad prohibitions on the use of salary history.

II. GENDER WAGE GAP AND THE EPA

The origins of the EPA can be traced to the influx of female workers into the economy during World War II in response to severe labor shortages.[15] Following the war, men returning home displaced women from their wartime roles, sending the number of women in the workplace back to pre-World War II levels.[16] Women who managed to remain in the workforce were often reclassified into new roles and suffered decreased wages.[17] By 1963, women made an average of $21,959 per year, compared to an average annual male salary of $37,253—a 41.1 percent wage gap.[18]

Although several bills were introduced throughout the 1950s advocating for equal pay,[19] equal pay legislation did not gain significant traction until the Kennedy administration. President Kennedy signed the EPA into law as an amendment to the Fair Labor Standards Act on June 10, 1963, characterizing it as merely a "first step" towards economic equality.[20]

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resources/Alerts/2018/4/9th-Circuit-Employers-Pay-History-Defense-Equal-Pay-Act-Claims.

15. *Equal Pay Act of 1963*, NAT'L PARK SERV., https://www.nps.gov/articles/equal-pay-act.htm (last updated Apr. 1, 2016). The number of women in the civilian workforce grew rapidly during this time, increasing from roughly 24 percent at the beginning of the twentieth century to 37 percent by 1945. *See id.* An early push for equal compensation came from union leaders as they attempted to ensure that men's wages after the war would not be undercut by the "cheaper" women's labor. *See id.*

16. *See id.*

17. *See id.*

18. Lane & Robbins, *supra* note 3.

19. Pearsall, *supra* note 1. Additionally, in his 1956 State of the Union Address, President Dwight D. Eisenhower urged Congress to move forward with such legislation, remarking: "Legislation to apply the principle of equal pay for equal work without discrimination because of sex is a matter of simple justice." *Annual Message to the Congress on the State of the Union. Jan 5, 1956*, EISENHOWER LIBR. (Jan. 5, 1956), https://www.eisenhowerlibrary.gov/sites/default/files/file/1956_state_of_the_union.pdf.

20. *Equal Pay Act of 1963*, *supra* note 15.

Despite the EPA's egalitarian promise of equal pay for equal work, the wage gap persists today, more than fifty years after the legislation's enactment. The wage gap has moderately narrowed since 1963,[21] but the rate of change has slowed significantly since 2001.[22] At the current rate women are not expected to receive pay parity until 2106.[23] Women of color experience an even greater disparity, with African-American and Latina women making $0.63 and $0.55 to the dollar, respectively, when compared with non-Hispanic white men.[24] Over the course of a forty-seven year career, a female college graduate will earn roughly $1.2 million less than a white male college graduate.[25] These figures highlight the importance of a consistent and transparent approach to the EPA's protections.[26]

In *Corning Glass Works v. Brennan*,[27] the Supreme Court stressed that the EPA was not meant to be a passive prohibition on discrimination, but rather Congress's remedy to the "endemic problem"[28] of different wage structures "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."[29] The solution to such a problem is to require that "equal work . . . be rewarded by equal wages."[30] The Court has characterized congressional intent for the EPA to be "more than a token gesture to end discrimination"[31] and advised that the broad remedial nature of

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21. In 2018, women's earnings constituted 82 percent of men's earnings. Bleiweis, *supra* note 4.

22. *Id.* From 1960 to 2001 the rate of change was 0.38 percent per year; from 2001 to 2017 the rate was 0.26 percent per year. MILLER & VAGINS, *supra* note 4, at 5.

23. MILLER & VAGINS, *supra* note 4, at 5.

24. NAT'L P'SHIP WOMEN & FAMILIES, AMERICA'S WOMEN AND THE WAGE GAP 1 (2020), https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf.

25. AM. ASS'N UNIV. WOMEN, QUICK FACTS 1 (2019), https://www.aauw.org/app/uploads/2020/03/quick-facts-Equal-Pay-nsa.pdf.

26. In 2018, the Ninth Circuit criticized the current status of the promise of equal pay, noting that "[a]lthough the Act has prohibited sex-based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy." Rizo v. Yovino, 887 F.3d 453, 456 (9th Cir. 2018), *vacated*, 139 S. Ct. 706 (2019).

27. 417 U.S. 188 (1974).

28. *Id.* at 195.

29. S. REP. NO. 88-176, at 1 (1963).

30. *Id.*

31. *Corning Glass Works*, 417 U.S. at 205, 208 ("To permit the company to escape [the] obligation [of paying male and female workers equally for the same work] by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress's ends.").

the statute be "construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."[32]

Under the EPA, employers are prohibited from discriminating between employees on the basis of sex in the wage rate for equal work unless the wage differential 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."[33] Through this language, the EPA provides for four exceptions to the equal pay for equal work mandate of the legislation.[34] The fourth exception, a catch-all category providing for "any other factor other than sex," is the subject of the current circuit split, with courts differing in their interpretations of whether salary history falls within the exception.

To establish his or her prima facie case under the EPA, a plaintiff must demonstrate "that an employer paid different wages to employees of opposite sexes 'for equal work on jobs the performance of which are performed under similar working conditions.'"[35] Once the plaintiff has established his or her prima facie case, the burden shifts to the employer to prove the differential was made pursuant to one of the statutory exceptions.[36] Although the Supreme Court has characterized the proof structure of the EPA as "straightforward,"[37] deciphering the implications of a "factor other than sex" has proved otherwise.

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32. *Id.* at 208.

33. Equal Pay Act, 29 U.S.C. § 206(d)(1).

34. *Id.*

35. *Corning Glass Works*, 417 U.S. at 195 (citing Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1)). Although the EPA has similar objectives to Title VII in prohibiting discrimination in employment, the two statutes have distinct proof structures. In contrast to Title VII's *McDonnell Douglas* burden-shifting framework, the EPA "creates a type of strict liability" for those employers who pay sexes differently for the same work. *Compare* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."), *with* Maxwell v. City of Tucson, 803 F.2d 444, 446 (9th Cir. 1986). Unlike Title VII, a plaintiff who demonstrates a wage disparity is *not* required to prove discriminatory intent under the EPA. *See Maxwell*, 803 F.2d at 446.

36. *Corning Glass Works*, 417 U.S. at 196. The statutory exceptions are affirmative defenses that must be both pled and proved by the employer. Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982); *see also Corning Glass Works*, 417 U.S. at 196–97.

37. *Corning Glass Works*, 417 U.S. at 195 (referring to the EPA's "basic structure and operation" as "straightforward").

III. CIRCUIT SPLIT: IS SALARY HISTORY A "FACTOR OTHER THAN SEX" UNDER THE EPA'S AFFIRMATIVE DEFENSES?

A. Seventh Circuit: Salary History Is Unequivocally a "Factor Other Than Sex"

In addressing the scope of the catch-all exception the Seventh Circuit has adopted the broadest construction of "factor other than sex," holding that "wages at one's prior employer are a 'factor other than sex' and . . . an employer may use them to set pay consistently with the Act."[38] Disapproving of any approach that requires a court to second-guess the motivations of an employer's use of a "factor other than sex," the Seventh Circuit emphasizes "Section 206(d) does not authorize 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."[39] Under this approach salary history *always* constitutes a "factor other than sex," enabling an employer to assert an affirmative defense under the EPA to liability for sex-based wage differentials.[40]

B. Eighth Circuit: Case-by-Case Analysis of the Use of Prior Salary History

Similarly, the Eighth Circuit does not recognize a blanket prohibition against the use of prior salary.[41] In contrast to the Seventh Circuit's approach, the Eighth Circuit acknowledges the potential for employers to use prior salary history in a discriminatory manner.[42] Despite this concern, the Eighth Circuit has held that such opportunity for misuse does not warrant a per se prohibition against the use of salary history policies.[43] Rather, courts must undertake careful examination of the record to ensure the employer is not relying on the "market forces" theory "to justify lower wages for female employees simply because the market might bear such

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

39. *Id.* at 468. In defense of its broad interpretation, the Seventh Circuit criticizes other circuits that have adopted a narrower construction and argues that those circuits have violated the text and explicit exceptions of EPA. *See id.* at 470.

40. *See id.*; *see also* Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (citing Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989)) ("We explained in *Fallon* that the EPA's fourth affirmative defense 'is a broad "catch-all" exception [that] embraces an almost limitless number of factors, so long as they do not involve sex.'"); Covington v. S. Ill. Univ., 816 F.2d 317, 322 (7th Cir. 1987).

41. *See* Taylor v. White, 321 F.3d 710, 717–20 (8th Cir. 2003).

42. *See id.* at 718 ("While we recognize that salary retention policies might lead to wage decisions based on factors unrelated to an individual's qualifications for a particular job, such policies are not necessarily gender biased.").

43. *See id.*

wages."[44] By requiring a case-by-case reasonableness assessment of an employer's use of the "factor other than sex" defense, the Eighth Circuit adopts a slightly narrower interpretation of the EPA exception, though one largely supportive of the use of salary history policies.

C. Tenth and Eleventh Circuits: The Use of Salary History Alone in Setting Compensation Does Not Constitute a "Factor Other Than Sex"

Before the Ninth Circuit's en banc decision completely prohibiting the use of salary history, the Tenth and Eleventh Circuits had adopted the most restrictive interpretations of a "factor other than sex."[45] The approach shared by these circuits permits the use of salary history only when used in conjunction with additional factors.[46] Although an employer may consider an applicant's prior salary, a pay disparity may not be premised on this factor alone.[47]

D. Ninth Circuit: En Banc *Decision Prohibits Any Use of Salary History*

In its 2018 en banc decision in *Rizo v. Yovino*, the Ninth Circuit overturned existing circuit precedent and adopted an approach even more restrictive than that of the Tenth and Eleventh Circuits.[48] A few months later the Supreme Court granted certiorari for *Yovino v. Rizo*, and it appeared as though the circuit split regarding the

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44. Drum v. Leeson Elec. Corp., 565 F.3d 1071, 1073 (8th Cir. 2009); *see also* Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) (rejecting employer's "market forces" argument that the gender-based wage differential arose due to a job market that allowed women to be paid less than men for the same work).

45. *See* Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015); Angove v. Williams-Sonoma, Inc., 70 F. App'x 500, 508 (10th Cir. 2003); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995).

46. *See Riser*, 776 F.3d at 1199; *Angove*, 70 F. App'x at 508. In *Riser v. QEP Energy*, the Tenth Circuit reiterated existing circuit precedent holding that "the EPA 'precludes an employer from relying solely upon a prior salary to justify pay disparity.'" 776 F.3d at 1199 (quoting *Angove*, 70 F. App'x at 508).

47. *See Riser*, 776 F.3d at 1199. Similarly, the Eleventh Circuit has also rejected employers' sole reliance on prior salary as a valid "factor other than sex" exception to the EPA's pay equity mandate, but has permitted "mixed-motive" salary determinations. *See Irby*, 44 F.3d at 955. In *Irby v. Bittick*, the Eleventh Circuit held that "[w]hile an employer may not . . . rest[] on prior pay alone, . . . there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay *and* more experience." *Id.*

48. *See* Rizo v. Yovino, 887 F.3d 453, 456 (9th Cir. 2018) ("We took this case *en banc* in order to clarify the law, and we now hold that prior salary alone or in combination with other factors cannot justify a wage differential."), *vacated*, 139 S. Ct. 706 (2019); *see also id.* at 468 ("Because *Kouba*, however construed, is inconsistent with the rule that we have announced in this opinion, it must be overruled.").

interpretation of "factor other than sex" would finally be resolved.[49] The Supreme Court, however, vacated the case on a distinct procedural posture issue and avoided the EPA question entirely.[50] Following the remand, the Ninth Circuit reheard the case en banc, and issued an opinion reaffirming its restrictive approach: employers may not use salary history when determining pay levels.[51]

In February 2014, Plaintiff Aileen Rizo filed suit against Defendant Jim Yovino in his official capacity as Superintendent of Fresno County Office of Education ("FCOE").[52] Rizo filed four causes of action including violation of the EPA and sex discrimination under Title VII.[53] In 2009, Rizo applied for, and was offered, a position as a math consultant in FCOE's Science, Technology, Engineering, and Mathematics program.[54] In accordance with FCOE's Standard Operating Procedure 1440, Rizo's initial salary was determined by adding 5 percent to her most recent salary and placing her on Step 1 of the county's salary schedule.[55] Three years later, Rizo learned of a male colleague who had just been hired by FCOE as a math consultant but placed on Step 9 of the salary schedule.[56] Rizo argued she established her prima facie case for an EPA claim by showing that she, a woman, was placed on a lower salary schedule step than a male employee hired to perform substantially the same work.[57] The County did not dispute that Rizo had satisfied her prima facie case, thereby shifting the burden to the County to prove the wage disparity resulted from one of the EPA's four available exceptions.[58] The County argued that since it had used her salary history in application of its standard operating procedure, the differential fell within the catch-all exception of a "factor other than sex" and thus was permissible.[59]

The district court acknowledged it was placed in the unique position of interpreting whether the use of prior salary *alone* properly fell within the catch-all exception.[60] The court distinguished *Rizo*

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49. Yovino v. Rizo, 139 S. Ct. 706, 710 (2019).

50. *Id.* at 707 ("The petition in this case presents the following question: May a federal court count the vote of a judge who dies before the decision is issued?").

51. *See* Rizo v. Yovino, 950 F.3d 1217, 1231 (9th Cir. 2020) ("[I]f called upon to defend against a prima facie showing of sex-based wage discrimination, the employer must demonstrate that any wage differential was in fact justified by job-related factors other than sex. Prior pay, alone or in combination with other factors, cannot serve as a defense.").

52. *See* Rizo v. Yovino, No. 14-cv-0423, 2015 WL 13236875, at *1 (E.D. Cal. Dec. 4, 2015).

53. *See id.*

54. *See id.* at *3.

55. *See id.* at *2–3.

56. *See id.* at *4.

57. *See id.* at *6.

58. *See id.*

59. *See id.*

60. *See id.* at *7.

from Ninth Circuit precedent[61] in *Kouba v. Allstate*.[62] In *Kouba*, the Ninth Circuit held, "the Equal Pay Act does not impose a strict prohibition against the use of prior salary."[63] Noting that the employer in *Kouba* relied on multiple factors in setting an employee's salary, the district court differentiated *Rizo* as the County determined her new salary *solely* through the use of her prior salary.[64] Thus, the district court found that the standard operating procedure violated the EPA and denied FCOE's motion for summary judgement.[65]

FCOE petitioned for, and was granted, interlocutory appeal from the district court's order denying summary judgment.[66] The three-judge panel of the Ninth Circuit found that the case was controlled by *Kouba*, rejecting any strict prohibition on salary history, and vacated and remanded the district court's order.[67]

In late 2017, the Ninth Circuit granted Rizo's petition for a rehearing en banc to determine the continued applicability of *Kouba*.[68] All eleven circuit court judges agreed that an employer's use of prior salary *alone* to set an employee's new salary violates the EPA, and thus Fresno County's standard operating procedure was impermissible.[69] Beyond this however, the circuit was severely split in its reasoning regarding the limits of the catch-all exception, a "factor other than sex."[70] Authoring the six-judge majority opinion,

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61. *See id.* ("The Ninth Circuit in Kouba was not called upon to, and did not, rule on the question of whether a salary differential based solely on prior earnings would violate the EPA, even if motivated by legitimate, non-discriminatory business reasons.").

62. 691 F.2d 873 (9th Cir. 1982).

63. *Id.* at 878.

64. *See Rizo*, 2015 WL 13236975, at *6–7.

65. *See id.* at *8–9 ("[N]othwithstanding its non-discriminatory purpose, SOP [Standard Operating Procedure] 1440 necessarily and unavoidably conflicts with the EPA.").

66. *See* Rizo v. Yovino, 854 F.3d 1161, 1165 (9th Cir. 2017).

67. *See id.* at 1163. The panel emphasized that the Circuit continued to adhere to the interpretation articulated in *Kouba*: That the EPA does not impose a per se prohibition on the use of prior salary, and, further, the use of prior salary as the sole factor of consideration does not change this reasoning. *See id.* at 1166 ("We do not agree with the district court that *Kouba* left open the question of whether a salary differential based solely on prior earnings violates the Equal Pay Act. To the contrary, that was exactly the question presented and answered in *Kouba*.").

68. *See* Rizo v. Yovino, 887 F.3d 453, 459 (9th Cir. 2018).

69. *See id.* at 456; *id.* at 469 (McKeown, J., concurring); *id.* at 477 (Callahan, J., concurring); *id.* at 478 (Watford, J., concurring).

70. *See id.* at 460 ("We conclude, unhesitatingly, that 'any other factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. . . . Prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages."); *id.* at 469 (McKeown, J., concurring) ("In my view, prior salary alone is not a defense to unequal pay for equal work. . . .

Judge Stephen Reinhardt held that the EPA prohibits an employer from relying on prior salary as a justification, either alone or in conjunction with other factors, for a wage differential between male and female employees.[71] Relying on the text, history, and purpose of the EPA, Judge Reinhardt explicitly overruled *Kouba*, refuting the Ninth Circuit's prior contention that reliance on prior salary is job related and therefore permissible under the catch-all exception.[72] The United States Supreme Court granted certiorari to review the en banc decision.[73] Although many employers hoped for a resolution of the uncertainty surrounding the exception,[74] the Supreme Court's *per curiam* opinion was entirely focused on the resolution of a different question.[75] Because the Ninth Circuit's decision was issued eleven days after the death of Judge Stephen Reinhardt, the Supreme Court held the use of his vote rendered the decision void and vacated the en banc judgment, remanding for further proceedings.[76]

Upon remand, the Ninth Circuit reconsidered FCOE's appeal en banc in early 2020.[77] Similar to the decision issued in 2018, all eleven judges agreed that FCOE's use of prior salary as the sole factor in setting Rizzo's salary violated the EPA. However, the judges remained split over the consideration of prior salary in conjunction with other factors.

However, employers do not necessarily violate the Equal Pay Act when they consider prior salary among other factors when setting initial wages."); *id.* at 477 (Callahan, J., concurring) ("[N]either Congress's intent, nor the language of the Equal Pay Act, nor logic, requires, or justifies, the conclusion that a pay system that includes prior pay as one of several ingredients can never be a 'factor other than sex . . .'"); *id.* at 478 (Watford, J., concurring) ("[P]ast pay can constitute a 'factor other than sex,' but only if an employee's past pay is not itself a reflection of sex discrimination.").

71. *Id.* at 456. "To hold otherwise—to 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." *Id.* at 456–57.

72. *Id.* at 468. "Reliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, . . . past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors." *Id.*

73. Yovino v. Rizo, 139 S. Ct. 706, 710 (2019).

74. *See* Christopher Wilkinson & Alex Guerra, *Business Groups Urge U.S. Supreme Court to Review Ninth Circuit Decision Rejecting Use of Prior Salary to Set Pay*, ORRICK: EQUAL PAY PULSE (Oct. 12, 2018), https://blogs.orrick.com/equalpaypulse/2018/10/12/business-groups-urge-u-s-supreme-court-to-review-ninth-circuit-decision-rejecting-use-of-prior-salary-to-set-pay/.

75. *Yovino*, 139 S. Ct. at 707.

76. *Id.* at 707–10. The Court noted that the Ninth Circuit's use of Judge Reinhardt's vote "effectively allowed a deceased judge to exercise the judicial power of the United States after his death" while "federal judges are appointed for life, not for eternity." *Id.* at 710.

77. Rizo v. Yovino, 950 F.3d 1217, 1221 (9th Cir. 2020).

The majority opinion, authored by Judge Christen, incorporated the arguments advanced by Judge Reinhardt. Starting with the text of the EPA, the majority argues each word of the statute—"any *other* factor other than sex"[78]—should be given effect and concludes that the catch-all defense is limited to job-related factors.[79] Employing two canons of construction, *noscitur a sociis* and *ejusdem generis*, the majority held that the text of the EPA requires the catch-all to be job-related.[80]

The majority also looked to the legislative history and purpose of the EPA for additional support for its interpretation of the catch-all exception. As emphasized in *Corning Glass*, Congress intended the EPA to remedy the "serious and endemic problem" of wage discrimination in private employment.[81] After determining that the fourth exception includes only job-related factors, the majority concluded that prior pay is not such a job-related factor.[82] This en banc decision ratifies the narrow scope of the catch-all provision previously articulated by the late Judge Reinhardt. Under the

78. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (emphasis added); *see also Rizo*, 950 F.3d at 1224 ("The fourth exception is often shortened to 'any factor other than sex,' but here we are called upon to define its precise contours and we examine every word: 'any *other* factor other than sex.'") (internal citations omitted) (emphasis in original).

79. *Rizo*, 950 F.3d at 1224 ("Because the three enumerated exceptions are all job-related, and the elements of the 'equal work' principle are job-related, Congress' use of the phrase 'any *other* factor than sex' . . . signals that the fourth exception is also limited to job-related factors.").

80. *Id.* at 1224–25. *Noscitur a sociis* advises courts to interpret words that are grouped together as carrying similar meanings. *See* Yates v. United States, 574 U.S. 528, 543 (2015) (citing Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)) ("[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'"). When applied to the ambiguous "factor other than sex" exception, this canon requires the general exception to be interpreted similarly to the specific job-related exceptions of seniority, merit, and productivity delineated by the EPA. *Rizo*, 950 F.3d at 1224 ("Because the enumerated exceptions are job-related, the more general exception that follows them refers to job-related factors too."). Similarly, *ejusdem generis* requires general words at the end of a list to be understood as related and similar to the preceding, specific words. *See* Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991) ("Under the principle of *ejusdem generis*, where a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."). Through this lens, the catch-all exception "any other factor than sex" must be limited to job-related reasons. *Rizo*, 950 F.3d at 1225 ("Because all of the enumerated exceptions are job-related, the general exception that follows—'any factor other than sex'—is limited to job-related factors.").

81. Corning Glass Works v. Brennan, 417 U.S. 190, 195 (1963); *see also* S. REP. NO. 88-176, at 1 (1963).

82. *Rizo*, 950 F.3d at 1228 ("But prior pay itself is not a factor related to the work an employee is currently performing, nor is it probative of whether sex played any role in establishing any employee's pay.").

majority's approach, prior salary may not be used in determining an employee's salary as it serves no job-related purpose.[83] This limiting construction, however, was not adopted by the entire circuit; the two concurrences criticize the extent of the majority's ban on the use of prior salary, arguing it should be permitted in conjunction with other factors.[84]

In July 2020, the Supreme Court denied certiorari for the case, declining to resolve the circuit split. As a result, circuits remain deeply divided on the legal question of whether prior salary constitutes a "factor other than sex" either alone or in combination with other factors and employers continue to face conflicting requirements.

IV. THE IMPACT OF THE CIRCUIT SPLIT ON EMPLOYERS

In response to the lack of clarity regarding the use of salary history on the federal level, and growing concerns regarding the role of salary history in perpetuating gender inequality, many states and localities have enacted legislation limiting the use of salary history in setting new employees' salaries.[85] The specifics of the legislation differ among jurisdictions, creating nuances that frustrate the development of a "one-size fits all approach to compliance."[86] Beyond

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83. *See id.* at 1229 ("[W]e conclude that the wage associated with an employee's prior job does not qualify as a factor other than sex that can defeat a prima facie EPA claim."). *See also* Rizo v. Yovino, 887 F.3d 453, 468 (9th Cir. 2018) ("Reliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reach the conclusion that past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors.") *vacated*, 139 S. Ct. 706 (2019).

84. *See Rizo*, 950 F.3d at 1232 (McKeown, J., concurring) ("But the majority goes too far in holding that any consideration of prior pay is 'inconsistent' with the Equal Pay Act, even when it is assessed alongside other job-related factors . . ."); *id.* at 1242 (Callahan, J., concurring) ("Nonetheless, the majority goes beyond what is necessary to resolve this appeal and mistakenly proclaims that prior salary can never be considered as coming within the fourth exception to the Equal Pay Act."). Judges McKeown and Callahan also authored concurrences to the 2018 en banc decision authored by Judge Reinhardt, similarly criticizing the bright-line rule barring employers from ever considering prior pay. *See Rizo,* 887 F.3d at 469 (McKeown, J., concurring) ("[T]he majority goes too far in holding that any consideration of prior pay is 'impermissible' under the Equal Pay Act."); *id.* at 472–73 (Callahan, J., concurring) ("I write separately because in holding that prior salary can never be considered the majority fails to follow Supreme Court precedent."). Judge Watford authored a separate concurrence in 2018 but joined the majority in 2020. *See id.* at 478. *But see Rizo*, 950 F.3d at 1219.

85. *Salary History Bans*, ALLIANCE 2020, https://www.alliance2020.com/resources/salary-history-bans/ (last visited Feb. 20, 2021). As of February 2021, eighteen states and fifteen localities have legislation banning the use of salary history. *See id.*

86. ARTHUR H. MAZOR ET AL., EQUAL PAY LEGISLATION BANNING SALARY HISTORY QUESTIONS 1 (2018),

the uncertainty created by the circuit split, employers are faced with a patchwork of state and local laws that further complicates a standard approach to recruiting.

For many employers, questions regarding salary history have long been a standard aspect of the hiring process.[87] This type of inquiry quickly provides employers with information about a potential applicant early in the interview process.[88] Salary history inquiries allow employers to remove from consideration those candidates with higher previous salaries than the amount budgeted for the job in question, while allowing candidates who previously earned less to be "snapped up at a bargain."[89] This early screening is considered to be the greatest advantage of using salary history to set new employees' compensation.[90] Salary history bans and interpretations of the EPA that exclude salary history as an available affirmative defense force employers to reconfigure hiring practices and compensation policies.[91]

To ensure compliance with the dynamic legal landscape regarding the use of salary history, many employers have proactively begun to eliminate these inquiries from their hiring procedures.[92] For companies with national footprints and workforces, the necessity of a uniform hiring approach is critical.[93] Rather than create a set of

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https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-equal-pay-legislation-banning-salary-history-questions.pdf.

87. Susan Milligan, *Salary History Bans Could Reshape Pay Negotiations*, SHRM (Feb. 16, 2018), https://www.shrm.org/hr-today/news/hr-magazine/0318/pages/salary-history-bans-could-reshape-pay-negotiations.aspx (describing salary history questions as "asked and answered almost reflexively during initial hiring discussions").

88. *See id.*

89. *See id.*

90. *See* John Feldman, *Banning the Salary History Ban: The Pros and Cons for Employer and Applicant*, FORBES (Aug. 21, 2018, 9:00 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/08/21/banning-the-salary-history-ban-the-pros-and-cons-for-employer-and-applicant/#52061fc84fc0. Through salary history an employer can alert a candidate to a potential wage incompatibility between the employer's expected salary range and the applicant's previous compensation levels early in the process, "increasing their interview-to-hire ratio and shortening their time to hire." *Id.*

91. Milligan, *supra* note 87.

92. For example, Amazon, Wells Fargo, American Express, Cisco, Google, and Bank of America have changed their recruiting policies, removing any questions regarding salary history. Yuki Noguchi, *More Employers Avoid Legal Minefield by Not Asking About Pay History*, NPR (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.

93. To illustrate this complexity, consider the structure of two household names. In 2018, Apple had over 2.4 million employees in the United States across all fifty states, four times greater than the number of U.S. employees it had in 2010. *See, e.g., Apple's US Jobs Footprint Grows to 2.4 Million*, APPLE:

disparate hiring policies, each tailored to the unique requirements of the jurisdiction, these companies have sought to preempt any future changes.[94] Nearly half of the executives surveyed in a 2017 study concerning the implications of salary history bans indicated that they would change their policies to comply with the most restrictive legislation rather than creating policies that vary by location.[95] As a result, human resources experts forecast the elimination of salary history policies to emerge as a recruiting best practice.[96] The need for a consistent interpretation of the EPA's "factor other than sex" exception is important in providing employers with a clear mandate, one on which they can craft legal and enforceable policies.

NEWSROOM (Aug. 15, 2019), https://www.apple.com/newsroom/2019/08/apples-us-job-footprint-grows-to-two-point-four-million/ (expanding workforce to include employees in all fifty states). Projecting similar growth, Amazon announced the creation of 3,000 jobs for "remote workers" in March 2019. Abigail Hess, *Amazon is Hiring 3,000 Remote Workers in 18 States*, CNBC (Mar. 11, 2019), https://www.cnbc.com/2019/03/11/amazon-is-hiring-3000-remote-workers-in-18-states.html. The job listings for these customer service positions indicated the roles were distributed across eighteen states. *See id.* With these workforce expansions, both of these companies would now be subject to each of the varying interpretations of "factor other than sex." Considering the impact of the circuit split alone, without the effects of state and local laws, Apple and Amazon may set the salaries of new employees in Wisconsin, located in the Seventh Circuit, on the sole basis of prior salary. However, for employees one state away in Iowa, located in the Eighth Circuit, the companies would have to show the use of prior salary for employees did not improperly rely on the prohibited market forces theory. The same companies could only rely on prior salary history for employees in New Mexico and Alabama, located in the Tenth and Eleventh Circuits respectively, if they also used other factors, such as experience and education, to justify the wage disparity. Add to this confusion the restrictions of various state and local laws, and the landscape becomes bewildering.

94. *See* Noguchi, *supra* note 92. This is a sharp transformation from the long-standing practices of many employers, with some even going so far as to obtaining applicants' W-2s to confirm previous salaries. Milligan, *supra* note 87; *see also* John Feldman, *What Should Employers Be Aware of When Requesting W-2 Forms from Job Applicants?*, FORBES (June 6, 2017, 9:00 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2017/06/06/what-should-employers-be-aware-of-when-requesting-w-2-forms-from-job-applicants/#4523a83064a8.

95. *Korn Ferry Executive Survey: New Laws Forbidding Questions on Salary History Likely Changes the Game for Most Employers*, KORN FERRY (Nov. 14, 2017), https://www.kornferry.com/press/korn-ferry-executive-survey-new-laws-forbidding-questions-on-salary-history-likely-changes-the-game-for-most-employers ("choosing to comply with the most stringent legislation is the likely mode of adapting to the new legislation, as opposed to complying to each local legislation").

96. Milligan, *supra* note 87.

A. The Most Effective Interpretation of "Factor Other Than Sex"

The deepening circuit split and proliferation of state and local legislation on the topic beg the question: Which circuit approach should be adopted as the national standard, and to what extent, if at all, does salary history constitute a "factor other than sex" as an affirmative defense to gender wage disparities under the EPA? The Ninth Circuit's 2020 en banc decision provides a bright-line rule for employers; consideration of salary history is not permitted under the EPA, either alone or in combination with other factors, in justifying a gender-based wage disparity.[97] This approach, although by far the most narrow interpretation of the EPA's "factor other than sex," best reflects legislative history and conforms with the legislative text. Furthermore, prohibiting the use of salary history in setting employee salary rates benefits employers and employees alike by shifting the basis of compensation to the skills, experience, and responsibilities of the candidate, a notable step in the right direction to eliminating gender pay inequity.

B. Advantages of Ninth Circuit's Approach

The complete prohibition on the use of salary history, adopted by the Ninth Circuit initially in 2018 and again in 2020, provides clear guidance to employers and reflects the original intent of the EPA. A salary history inquiry "forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job."[98] The EPA was designed to force employers to address explicit gender discrimination and justify any wage differentials. Broad constructions of "factor other than sex" that permit reliance on salary history simply enable employers to perpetuate such discrimination without articulating a non-discriminatory reason for the disparity.

The text of the EPA's catch-all affirmative defense allows employers to justify wage-based pay differentials if the disparity is due to any "factor other than sex."[99] At the time of the legislation's

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97. Rizo v. Yovino, 950 F.3d 1217, 1231 (9th Cir. 2020).

98. NAT'L WOMEN'S L. CTR., ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB 1 (2018), https://nwlc.org/wp-content/uploads/2018/12/Asking-for-Salary-History-Perpetuates-Discrimination-1.pdf. This cycle of discrimination is precisely what the EPA was designed to remedy. The legislation was introduced in response to a report issued by President Kennedy's Commission on the Status of Women recommending equal pay statutes for comparable work. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN 37 (1963); *see also* Audio tape: John F. Kennedy, Statement by the President on the Establishment of the President's Commission on the Status of Women (Dec. 14, 1962) (transcript available in the John F. Kennedy Presidential Library and Museum) ("It is my hope that the Commission's Report will indicate what remains to be done to demolish prejudices and outmoded customs which act as barriers to the full partnership of women in our democracy.").

99. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1).

enactment salary history was directly related to sex. The extreme wage disparity of the mid-1960s, with women earning roughly $0.59 to a man's $1.00 for substantially the same work, reflects this reality.[100] The text of the EPA, as originally enacted, understood women's salaries to be inherently gendered and the product of long-standing discrimination. Because legislators at the time of the EPA's passage considered women's salaries to be a product of their sex, any interpretation of the catch-all exception that permits salary history as a "factor other than sex" is contrary to the original interpretation of the affirmative defenses available to employers.

In comparison to the approaches adopted by other circuits, the Ninth Circuit's bright-line rule provides a decisive and reasoned interpretation of the catch-all exception. The Seventh Circuit's approach allows employers to perpetuate gender discrimination by locking women into a cycle of lower wages than their male colleagues, in direct contrast to the stated purposes of the EPA. The Eighth Circuit's case-by-case analysis leaves employers with a limited understanding as to how a court will evaluate a claimed affirmative defense. Finally, the Tenth and Eleventh Circuits' limited use of salary history, in conjunction with other factors, is redundant. If an employer has an alternative criterion to justify a wage disparity, such as an applicant's education or prior experience, then salary history should be rendered unnecessary. In contrast, drawing from the text and purpose of the EPA, the Ninth Circuit's approach provides clear direction for employers, prohibiting the use of salary history.

C. Benefits to Employers from Eliminating Salary History Inquiry

Given the extent of changes to recruiting policies that are required to ensure compliance with judicial and legislative changes to the use of salary history, it is unsurprising that employers have been reluctant to adapt. Without doubt, the adoption of the Ninth Circuit's interpretation of "factor other than sex," prohibiting any sort of reliance on salary history, will require significant alterations to recruiting processes.[101] Lost in the current discourse concerning salary history bans, however, is a discussion of their potential advantages to employers. Employers can incur both economic and non-monetary benefits from ending inquiries into applicants' prior salaries. Embracing salary history bans and reimagining human resources policies to ensure employees are compensated based on their experience and skills rather than their previous salaries can help employers recruit and retain top talent while limiting the expenses associated with a changing workforce.

100. Lane & Robbins, *supra* note 3.
101. *See* MAZOR ET AL., *supra* note 86.

1. Monetary Benefits

Ending the use of salary history in compensation determinations can result in direct economic benefits for employers, including better valuation of skills, fewer wage discrimination lawsuits, and reduced employee turnover.

Although helpful in initial application reviews, salary history is largely unrelated to a candidate's ability to do the job.[102] Instead, employers should seek to "price the job, not the person."[103] Removing salary history questions from employment applications forces employers to identify the core knowledge and skill requirements of the job and measure the job's value to the organization rather than simply relying on a previous employer's perception of the position's value. Because past salary "often reflects the historical market forces which value the equal work of one sex over the other," prior salary is an imperfect proxy for the market value of an applicant or a position.[104] Through approaches intended to address the wage gap, such as pay audits and increased reliance on market data regarding compensation levels, employers will not only have a better sense of any wage gaps within their organization, but also a clearer understanding of the true "going-rate" of certain positions.

Furthermore, eliminating salary history inquiries protects employers from potential wage discrimination lawsuits.[105] Beyond ensuring compliance with the complex legal landscape of salary history bans, removing this information from applications ensures employers have additional, defensible reasons for a wage differential such as an employee's experience or education.[106]

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102. Bob Corlett, *Why Employers Need to Stop Asking for Salary History, Right Now*, STAFFING ADVISORS: BLOG (Apr. 24, 2017), https://blog.staffingadvisors.com/why-employers-need-to-stop-asking-for-salary-history-right-now.

103. Lydia Frank, *Employers Should Stop Asking for Salary History, But Not for the Reason You Think*, PAYSCALE (June 27, 2017), https://www.payscale.com/compensation-today/2017/06/employers-should-stop-asking-salary-history-but-not-for-the-reason-you-think.

104. NAT'L WOMEN'S L. CTR., *supra* note 98, at 2.

105. Jon Heuvel, *Should Salary History Questions be Outlawed?*, PERSONNEL TODAY (Sept. 3, 2019), https://www.personneltoday.com/hr/should-salary-histories-be-consigned-to-history/.

106. The taboo associated with sharing salary information with colleagues and peers is eroding as millennials are more willing to discuss this information with their peers. Joe Pinsker, *The Extreme Discomfort of Sharing Salary Information*, THE ATL. (Oct. 16, 2018), https://www.theatlantic.com/family/archive/2018/10/talking-about-salaries-coworkers/573172/; *see also* Jessica Lutz, *Millennials Are Slowly Killing Salary Secrecy—And That's a Good Thing,* FORBES (Nov. 30, 2017, 8:30 AM), https://www.forbes.com/sites/jessicalutz/2017/11/30/millennials-are-slowly-killing-salary-secrecy-and-thats-a-good-thing/#5d6792826015. This culture of pay transparency is beneficial to employers because "when people don't know how their pay compares to their peers they're actually more likely to feel underpaid—

Finally, employers benefit economically from the increased efficiency created by an engaged workforce with minimal employee turnover. Shifting to more transparent pay structures, including eliminating the use of salary history data, improves employee engagement while decreasing the likelihood of turnover.[107] Employees feel valued for their contributions and are more likely to perceive a sense of fairness and collaboration within an organization.[108] The costs associated with employee turnover are substantial, with the costs to replace the employee approximating 20 percent of the employee's salary.[109] While changing recruiting approaches and human resources policies to eliminate the use of salary history create upfront expenses, employers stand to benefit economically from such changes long-term.

2. Non-Monetary Benefits

Ending reliance on salary history also fosters non-monetary benefits for employers. In addition to the advantages of a more engaged workforce, employers that do not rely on salary history are able to draw from a larger and more talented candidate pool and are perceived as better places to work.[110] Recent research indicates that employers without access to prior salary data actually interview more applicants than those provided with such data.[111] Instead of relying on prior salary as an indicator of productivity, employers ask more substantive questions regarding the applicant's role at previous jobs, inquiring into the skills and responsibilities involved in former positions.[112] By using prior salary as a screening mechanism,

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and even discriminated against." David Burkus, *Why You Should Know How Much Your Coworkers Get Paid*, TED: IDEAS (Apr. 4, 2017), https://ideas.ted.com/why-you-should-know-how-much-your-coworkers-get-paid/. By providing employees with a transparent, reasoned understanding of "what fair pay is for their position and skill set at their company" employers reduce the chance of an expensive lawsuit. GLASSDOOR, GLOBAL SALARY TRANSPARENCY SURVEY, EMPLOYEE PERCEPTIONS OF TALKING PAY 3 (2015), https://media.glassdoor.com/pr/press/pdf/GD_Survey_GlobalSalaryTransparency-FINAL.pdf.

107. Burkus, *supra* note 106.

108. *See id.*

109. Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, CTR. FOR AM. PROGRESS (Nov. 16, 2012, 3:44 AM), https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/.

110. NAT'L WOMEN'S L. CTR., *supra* note 98, at 3.

111. Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History:? Evidence from a Field Experiment* 3 (CESifo Working Paper No. 6559, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014719.

112. *See id.* In response to the lack of data regarding an applicant's salary history, "employers responded to their information deficit primarily by acquiring more of their own information." *Id.* Although more effort is required to

employers have effectively used this data as a proxy of an applicant's interest in a position.[113] This, however, limits an employer's prospective applicant pool, shutting out potentially talented employees from even initial interviews.[114] Those reentering the workforce, particularly female workers who have taken time off for familial reasons, are penalized if they choose to apply for lower-paying, less demanding roles.[115] Non-monetary compensation, including greater benefits, flexibility, and paid time off, can be major selling points for certain applicants.[116] The use of salary history, however, would exclude those same applicants from consideration despite their potential experience and value if their prior salaries are above the employer's perceived cut-off.

Lastly, employers benefit from the positive public perception associated with eliminating the use of prior salary information. As salary history bans become more widespread, applicants may view salary history inquiries negatively, perceiving them as a violation of privacy and assuming that disclosure of their salary would put them at a disadvantage.[117] Although employees are open to discussing their salaries among friends and colleagues,[118] this type of inquiry from a prospective employer may come across as "intrusive and heavy-handed."[119] Changing the conversation from prior salary

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thoroughly screen applicants without salary history information, by getting a sense of prior job attributes through questioning rather than the use of a salary proxy, employers cast a wider net and hired a broader pool of applicants than those that would have been hired based on prior salary alone. *See id.*

113. *See* NAT'L WOMEN'S L. CTR., *supra* note 98, at 3.

114. *See id.* at 3. Using salary history as an indicator for interest in a position can remove more experienced workers with higher salaries from consideration even if they are interested into pursuing positions with less responsibilities or lower time commitments. Employers relying on the prior salaries of these applicants would deem them too expensive for the position and they would be screened out of the application process. *See id.* at 1.

115. *See id.* at 2.

116. *See* Kerry Jones, *The Most Desirable Employee Benefits*, HARV. BUS. REV. (Feb. 15, 2017), https://hbr.org/2017/02/the-most-desirable-employee-benefits. Furthermore, the unprecedented impact of COVID-19 on the workplace has increased the desire for flexibility and remote working. *See* Mary Baker, *Future of Work Tops HR Priorities for 2020–21*, GARTNER (July 6, 2020), https://www.gartner.com/smarterwithgartner/future-of-work-tops-hr-priorities-for-2020-21/; Rainer Strack et al., *People Priorities for the New Now*, BCG (Apr. 30, 2020), https://www.bcg.com/publications/2020/seven-people-priorities-in-reponse-to-covid.

117. Susan M. Heathfield, *Pros and Cons of Asking for the Salary History of a Candidate*, THE BALANCE CAREERS, https://www.thebalancecareers.com/what-is-a-salary-history-1919067 (last updated Jan. 17, 2020).

118. *See supra* note 106 and accompanying text.

119. Liz Ryan, *When Someone Demands Your Salary History, Give Your Salary Requirement Instead*, FORBES (Jan. 16, 2017, 6:38AM), https://www.forbes.com/sites/lizryan/2017/01/16/when-they-demand-your-salary-history-give-your-salary-requirement-instead/#10296db5a8bb.

history to a discussion of an applicant's target or expected salary can benefit an employer's brand and help to recruit talent.[120]

Proponents of the use of salary history argue that salary history bans limit an employer's ability to quickly and efficiently screen candidates.[121] Prior salary information is seen as a fast, low-cost method of assessing an applicant's candidacy for a job, evaluating whether the employer can afford the applicant and identifying a starting point for salary negotiations.[122] This initial screen, however, can be achieved through other means that do not have the discriminatory impact of prior salary inquiries. Employers can avoid spending time on candidates outside of their target ranges by providing candidates with a salary range or pay band expectations at the outset of the application process.[123] This can help to set the expectations of both the applicant and the employer, leading those applicants seeking higher salaries to pursue other opportunities while also ensuring employers do not rely on the market forces theory, dropping compensation below the internally anticipated range simply because an applicant's prior salary is lower.

V. CONCLUSION

While signing the EPA, President Kennedy observed that "much remains to be done to achieve full equality of economic opportunity."[124] Over fifty years later, this statement continues to ring true today.[125] The fourth exception delineated in the EPA, permitting wage differentials between sexes so long as the disparity is based on a "factor other than sex," remains an area where further change is required.

Currently, federal circuits are deeply split on the issue of whether the use of an employee's salary history is a permissible basis for a wage disparity under the EPA's catch-all exception.[126] Although it briefly appeared as though the Supreme Court would resolve the uncertainty surrounding this exception, the Court's decision in *Yovino v. Rizo* failed to settle the issue.[127] As a result, employers are faced with vastly different judicial interpretations of the exception in addition to an increasingly complex landscape of local and state laws on the issue.[128]

The approach first articulated by Judge Reinhardt in his 2018 decision, and later affirmed by the Ninth Circuit's 2020 en banc

120. *See id.*
121. Heathfield, *supra* note 117.
122. *Id.*
123. Milligan, *supra* note 87.
124. Audio tape: John F. Kennedy, *supra* note 98.
125. *See* Lane & Robbins, *supra* note 3 and accompanying text.
126. *See supra* Part III for a discussion of the circuit split on the interpretation of the EPA's "factor other than sex" exception.
127. Yovino v. Rizo, 139 S. Ct. 706, 710 (2019).
128. *See* Milligan, *supra* note 87.

decision in *Rizo v. Yovino*, provides the most effective interpretation—prohibiting the use of prior salary from consideration as either the sole factor or one of multiple criteria. Eliminating the use of salary history information helps to disrupt the cycle of wage discrimination suffered by minority employees and can provide both economic and non-monetary benefits to employers. As the late Judge Reinhardt noted, "Allowing prior salary to justify a wage differential perpetuates this message, entrenching in salary systems an obvious means of discrimination—the very discrimination that the Act was designed to prohibit and rectify."[129]

129. Rizo v. Yovino, 887 F.3d 453, 468 (9th Cir. 2018).