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Leaving Unequal Pay in the Past: Why Reliance on Prior Pay Must Be Restricted Under the Equal Pay Act

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Part I. Introduction

In 2017, Emma Stone won an Oscar and became the highest paid actress in Hollywood when she earned $26 million that year.[1] While Stone has reached the top of her field, her success is undermined by the fact that at least fourteen other male actors, including her former co-star Ryan Gosling, were paid significantly higher salaries.[2] When asked about the pay disparity by a magazine, Stone explained: "if a male co-star, who has a higher quote than me but believes we are equal, takes a pay cut so that I can match him, that changes my quote in the future and changes my life."[3] Stone's life and future earnings are affected by her prior pay.[4] The fact that even the highest-paid actress could not attain equal pay to her male co-stars demonstrates how reliance on prior pay has extensively hindered wage equality. Given that historically women continue to receive lower salaries than men for reasons other than relevant skill and experience, the average woman's salary history likely reflects this disparity and the implicit effects of gender bias.[5]

In a Ninth Circuit case, *Rizo v. Yovino*, a female mathematics consultant learned at lunch with her new male colleague that his salary was significantly higher despite their similar resumes.[6] Soon after, Rizo filed an Equal Pay Act ("EPA") claim against her employer.[7] The employer asserted in its defense that the prior salary of both Rizo and her coworker determined

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[1] Rachel Lewis, *Emma Stone is the Highest-Paid Actress, but Makes Less Than Top 14 Actors*, FORTUNE (Aug. 23, 2017), http://fortune.com/2017/08/23/emma-stone-highest-paid-actors/.
[2] *Id.*
[3] Lisa Respers France, *Emma Stone Says Male Co-Stars Have Taken Pay Cuts for Her*, CNN (July 8, 2017, 12:26 PM), http://www.cnn.com/2017/07/07/entertainment/emma-stone-equal-pay/index.html.
[4] *See id.*
[5] *See* SUZANA CROSS, THE EQUAL PAY ACT, FIFTY YEARS ON 4 (2015).
[6] Rizo v. Yovino, 854 F.3d 1161, 1164 (9th Cir. 2017).
[7] *Id.*

their salaries, rather than any bias against women; it further claimed that reliance on prior compensation was a reasonable business practice.[8] Although the Court of Appeals panel originally sided with decades old precedent in accepting this defense based on prior pay, [9] the Ninth Circuit subsequently vacated this decision and granted an en banc review of the issue.[10]

The controversy surrounding the *Rizo* case reflects a persisting divergence among the circuit courts on how to construe an employer's reliance on prior pay as an EPA affirmative defense. An underlying tension between accommodating business hiring needs yet recognizing the suppressive effect prior pay has on women's salaries continues to drive this conflict.[11] Several circuits have deferred to business hiring policies and allow employers to assert sole reliance on prior pay without requiring any justifications.[12] In contrast, other circuits reject reliance on prior salary as a single factor by viewing it as undermining the purpose of the EPA in a more rigorous approach.[13] Additionally, courts following the "business justification" standard, a third, middle-ground approach, accept reliance as long as there are reasonable business justifications supporting it.[14]

This comment will explore the broad, antidiscriminatory purpose and structure of the EPA in Part II. Part III will discuss the three different approaches taken by circuit courts on whether prior pay should be construed as a "factor other than sex." In Part IV, this comment will argue that the circuit courts should not accept an employer's sole reliance on prior salary as

[8] *Id.* at 1165.
[9] *Id.* at 1166-67.
[10] Rizo v. Yovino, 869 F.3d 1004 (9th Cir. 2017) (order vacating the prior decision and granting en banc rehearing).
[11] *See* Nicole Porter and Jessica Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 169 (2011).
[12] *See* Taylor v. White, 321 F.3d 710 (8th Cir. 2003); Wernsing v. Dep't of Human Servs., 47 F.3d 466 (7th Cir. 2005).
[13] *See* Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995); Angove v. Williams-Sonoma, Inc. 70 Fed. Appx. 500 (10 Cir. 2003). Balmer v. HCA, Inc., 423 F.3d 606 (6th Cir. 2005).
[14] *See* Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982).

satisfying the EPA's fourth affirmative defense. In order to resolve the circuit split and support the EPA's purpose to mitigate this pervasive cycle of wage inequality, the Supreme Court should rule that an employer cannot assert reliance on prior pay alone as a "factor other than sex" defense. To support this argument, this comment will reason that an employer's use of prior salary as a determinative factor in setting wages perpetuates the consistently lower salaries paid on average to female employees. Furthermore, the Ninth Circuit's business justification approach is flawed because, while it claims to accommodate both employees and employers, its adverse effect on pay equality is no different from the even broader approach of the Eighth and Seventh Circuits.

This comment will also argue that, while employers have a valid interest in relying on prior pay to incentivize desirable candidates, this does not excuse the need to place restrictions on prior salary reliance in order to promote wage equality. As the Eleventh and Tenth Circuits have held, prior salary may be properly used to accommodate both employee and employer interests if considered along with other factors, such as experience. If circuits courts across the board refuse to accept an affirmative EPA defense relying solely on prior pay, employers will be forced to rely on more legitimate factors that facilitate progress in wage equality.

Part II. The Purpose and Structure of the Equal Pay Act

In 1963, women, many working at the same jobs as men, earned fifty-nine cents for every dollar paid to a man.[15] In the same year, Congress enacted a sweeping remedy to level the egregious injustice in discriminatory pay through the Equal Pay Act.[16] More recently, women outnumber men in attaining both bachelor's and master's degrees and represent an almost equal

[15] CROSS, *supra* note 5.
[16] *See id.*

percentage of the work force.[17] Yet, after great progress, a substantial pay gap still exists. As of 2017, women were paid eighty cents for every dollar paid to a man.[18] Considering the comparable experience and education both genders now achieve, this disparity in average pay remains an unsolved and pervasive problem that society attempts to repair pursuant to the EPA's purpose.[19]

A. The Foundation of the Equal Pay Act

The Equal Pay Act of 1963 is an amendment to the Fair Labor Standards Act that prohibits an employer from paying an employee less than it pays an employee of the opposite sex to perform "equal work," unless the employer can justify the disparity through one of four statutory defenses.[20] The statute states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[21]

The EPA's language and legislative history demonstrate Congress's "broadly remedial" purpose.[22] Congress intended to create a statute which would eradicate the "serious and endemic

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[17] *Id.*
[18] Jessica L. Semega & Kayla R. Fontenot, *Income and Poverty in the United States: 2016*, UNITED STATES CENSUS BUREAU, (September 2016), https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf.
[19] *See* CROSS, *supra* note 5.
[20] 29 U.S.C § 206(d).
[21] 29 U.S.C § 206(d)(1).
[22] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (citing legislative history).

problem" of discriminatory pay practices based on gender.[23] In one congressional hearing, a representative emphasized that enacting the statute was a "matter of simple justice to pay a woman the same rate as a man when she is performing the same duties."[24] Furthermore, the congressional hearings show that the bill arose out of women's integral role in the work force and the undeniable injustice in perpetuating pay disparity when women were paying the same taxes, shouldering the same financial responsibilities, and performing the same work as men.[25]

B. The Structure of an EPA claim

To establish a prima facie case of sex discrimination under the EPA, a plaintiff, who is usually female, must show: that her employer has paid higher wages to an employee of the opposite sex and that the employees perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[26] Under this standard, the EPA functions as a strict liability statute because the plaintiff is not required to show that it was her employer's intent to create a wage disparity on the basis of sex.[27] In determining if a plaintiff has satisfied a required showing of equal work, courts have interpreted the "equal pay" standard to be "substantially equal" and have looked to job tasks rather than classifications or titles to make that determination.[28] However, as one scholar has criticized, the EPA has increasingly acted as a glass ceiling to women working in non-

[23] *Id.*
[24] 109 CONG. REC. 9193 (1963) (statement of Rep. Bolton).
[25] *See* 109 CONG. REC. 9201 (1963) (statement of Rep. Kelly).
[26] 29 U.S.C § 206(d)(1).
[27] *See* Porter, *supra* note 11.
[28] *See id.*; *see, e.g.*, Horner v. Mary Inst., 613 F.2d 706, 713 (8th Cir. 1980); EEOC v. Maricopa Cnty. Cmty. Coll. Distr., 736 F.2d 510, 513 (9th Cir. 1984).

standardized or upper-level positions who have faced difficulty in passing the equal work threshold.[29]

If a plaintiff establishes a prima facie case, the burden then shifts to the defendant to prove one of four statutory affirmative defenses or exceptions.[30] Those defenses require an employer to prove that any wage differential is explained by "(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."[31]

C. The Ambiguous Affirmative Defense of "Factors Other than Sex"

The fourth affirmative defense, a pay differential based on any "factor other than sex," is susceptible to multiple interpretations. The Supreme Court's reluctance to provide a clear definition of this catch-all phrase has led to a wide variety of interpretations in lower courts.[32] One danger of interpreting the defense broadly is that allowing employers to assert pretextual reasons for pay disparity and possible biased objectives would contradict the purpose of the statute.[33] However, the bigger issue is that, regardless of intent, employers' reliance on factors which continuously set women's salaries lower than men puts a ceiling on women's compensation, and therefore, perpetuates the existing wage gap.[34]

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[29] Deborah Eisenberg*, Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 46 (2010) (stating that women who achieve leadership positions in their companies are not adequately protected by the EPA because "courts are more likely to accept that upper-level jobs are not comparable based on employers' blanket claims that work in different departments simply cannot be compared.").
[30] Corning Glass Works, 417 U.S. at 196.
[31] *Id.*; *see* 29 U.S.C § 206(d)(1).
[32] *See* Corning Glass Works, 417 U.S. at 205; Peter Avery, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed*, 56 RUTGERS L. REV. 849, 854 (2016).
[33] *Id.*
[34] *See* CROSS, *supra* note 5, at 4-5.

Despite over five decades since the EPA's enactment, the Supreme Court has squarely addressed an EPA claim only in *Corning Glass Works v. Brennan*.[35] The case arose when men, who worked as inspectors during a night shift, demanded to be paid more than the women who performed the same tasks while working as inspectors during the day shift.[36] Women were prohibited from working at night by both New York and Pennsylvania law at the time.[37] The women sued, asking for the same rate paid to the males.[38] Since the work itself was equivalent, the only "equal work" issue was whether different shifts rendered the job unequal.[39] The Court held that the female workers met the "equal work" standard required for the prima facie case.[40] At that point, the employer defended the wage disparity under the fourth affirmative defense.[41] However, the Court held that a wage differential arising "simply because men would not work at the low rates paid [to] women" did not qualify as a "factor other than sex" and was a violation of the EPA because the women were being paid less based on their sex.[42]

The Court further discussed the "factors other than sex" defense only four years after *Corning Glass Works* in *City of Los Angeles Department of Water & Power v. Manhart*.[43] This case concerned a Title VII challenge to a company's practice of charging female employees higher pension premiums based on the reasoning that women tended to live longer than men and, therefore, could anticipate more months of retirement benefits.[44] In response to the employer's argument that Title VII excused any pay differential that satisfied the EPA's "factors other than

[35] *See* 417 U.S. at 196.
[36] *Id*. at 191-92.
[37] *Id*. at 191.
[38] *Id*. at 194-95.
[39] *Id*. at 190.
[40] *Id*. at 203.
[41] Corning Glass Works, 417 U.S. at 204-05.
[42] *Id*. at 205; 207-8.
[43] 435 U.S 702 (1978).
[44] *Id*.

sex" defense, the Court explained that the "other than sex" factor could not be based on sex itself.[45] The court also implied that not every business-related factor qualifies under this defense by stating that while "[s]ome amici suggest that the Department's discrimination is justified by business necessity…. there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan." [46] Therefore, the Court rejected the employer's argument under the reasoning that the differential could not be excused because it was based on sex in the context of longevity.[47]

Part III. The Circuit Split on Reliance of Prior Pay

While the Supreme Court addressed elements of the EPA in *Corning Glass Works,*[48] it has not yet addressed if use of prior pay to set compensation constitutes a "factor other than sex" within the EPA's fourth affirmative defense. As a result, the circuit courts remain sharply divided on the issue of whether an employer may rely on prior pay alone as a justification for wage disparity in an EPA claim.

In a broad interpretation of the statute, the Eighth and Seventh Circuits have determined that prior pay alone can stand as a "factor other than sex" defense without requiring an evaluation of reasonableness or a business justification for the employer's reliance on it.[49] The business justification standard, a middle-ground approach adopted by the Ninth Circuit, permits reliance on prior salary alone as a "factor other than sex," but only if it the employer can assert reasonable business justifications for utilizing it.[50] In the strictest approach to the EPA defense,

[45] *Id.* at 712.
[46] *Id.* at 716. n.30.
[47] *Id.* at 712-15.
[48] 417 U.S. at 208.
[49] *See* Taylor, 321 F.3d at 710; Wernsing, 47 F.3d at 466.
[50] *See* Kouba, 691 F.2d at 873.

the Eleventh, Tenth, and Sixth Circuits have recognized that multiple factors including prior pay may be relied on together, but prior pay alone cannot be used as a justification.[51] The three different approaches taken by the circuit courts reflect the tension between deferring to an employer's need to control hiring practices and safeguarding women's wages from the problematic influence of prior pay.[52]

A. The Broad Acceptance Standard – The Seventh and Eighth Circuits

In *Dey v. Colt Const. & Development Co,* the Seventh Circuit encapsulated its enduring view of prior pay by interpreting the EPA's fourth affirmative defense as a "broad catch-all exception that embraces an almost limitless number of factors, as long as they don't involve sex."[53] This reasoning was later referenced in *Wernsing v. Department of Human Services,* where the Seventh Circuit explicitly held that "prior wages are a 'factor other than sex.'"[54]

The plaintiff in *Wernsing* alleged that her male co-worker received a disparate starting monthly salary for substantially similar work and claimed that the defendant's policy was discriminatory against women.[55] The defendant's company policy was to "give lateral entrants a salary at least equal to what they had been earning previously."[56] Granting summary judgment to the employer, who argued that prior salary was a defense under the "any other factor" prong, the court reasoned that a plaintiff must "establis[h] by evidence rather that assum[e]" that prior

[51] *See* Irby, 44 F.3d at 949; Angove, 70 F. App'x. at 500; Balmer, 423 F.3d at 606.
[52] *Id.*
[53] 28 F.3d 1446, 1462 (7th Cir. 1994).
[54] 47 F.3d at 468; *see* Lauderdale v. Ill. Dep't of Human Servs., 210 F. Supp. 3d 1012, 1019 (C.D. Ill. 2016) (finding prior pay a sufficient affirmative defense when it is bona fide and not discriminatorily applied, regardless of whether business-related).
[55] Wernsing, 47 F.3d at 467.
[56] *Id.*

wages were discriminatory.[57] Here, plaintiff did not offer evidence.[58] While the court acknowledged that "wage patterns in some lines of work can be discriminatory," the court suggested that such claims require support, such as expert evidence or references to economic literature.[59]

The Seventh Circuit also voiced criticism of courts, such as those of the Ninth Circuit, that impose a business-related requirement for injecting an employer's own set of acceptable business practices, which the Court interpreted as not authorized by the text of the Equal Pay Act.[60] The Court explained, "[t]he statute asks whether the employer has a reason other than sex – not whether it has a 'good' reason."[61] A direct target for the Seventh Circuit's criticism is the Ninth Circuit's *Kouba* decision, a case that was the origin for the "acceptable business reason" requirement.[62] The Seventh Circuit claimed that the business justification approach was flawed because it treated an EPA claim like a disparate impact theory under Title VII.[63] In its reasoning, the court noted that a disparate-impact theory under Title VII requires an employer to provide a strong reason, such as a business necessity, to defend an allegedly adverse, employment practice.[64] The court found that the Ninth Circuit's requirement of a business justification under the EPA was inconsistent because the EPA does not have a disparate-impact component and,

[57] *Id.* at 470-71.
[58] *Id.*
[59] *Id.* at 470.
[60] *See id.* at 468-70.
[61] Wernsing, 47 F.3d at 468; *accord* Taylor, 321 F.3d at 719 (8th Cir. 2003) (finding the wisdom or reasonableness of the defense to be irrelevant).
[62] *See* Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982).
[63] Wernsing, 47 F.3d at 469. ("The Ninth Circuit proceeded as if the Equal Pay Act worked like the disparate-impact theory under Title VII: if the plaintiff shows that an employment practice adversely affects protected workers as a group, then the employer must provide a strong reason ("business necessity") for the practice.")
[64] *Id.*

thus, does not require the employer to provide such a defense for an exclusively disparate-treatment clam."[65]

The Eighth Circuit similarly emphasized that prior pay can be sufficient by itself as a sex-neutral factor in an employer's EPA defense, which the circuit justified in terms of the employer's interest in preserving business autonomy.[66] In *Taylor v. White,* the Eighth Circuit upheld a subjective salary retention policy that allowed some higher-paid employees to retain their pay when assigned lower pay-grade jobs.[67] The court refused to conduct a reasonableness inquiry or require the employers to provide a business-related justification for using prior pay, while stating that the court is not part of a "super personnel department" and "do[es] not review the wisdom of an employer's chosen means to accomplish its goals."[68]

Although the court noted the importance of a careful review of the record for intentional discrimination, the court limited review of prior pay to only evidence that would contradict the employer's assertions of gender-neutrality.[69] Moreover, the Eighth Circuit highlighted its deference to employer practices by noting that refraining from further evaluation of an employer's salary policy "preserves the business freedoms Congress intended to protect when it adopted the catch-all 'factor other than sex' affirmative defense."[70]

B. A Tougher Scrutiny Standard – The Eleventh, Tenth, and Sixth Circuits

In contrast, the Eleventh, Tenth, and Sixth Circuits have shared the view of the Equal Employment Opportunity Commission ("EEOC") in finding unequivocally that prior salary

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[65] *Id.*
[66] *See* Taylor, 321 F.3d at 723.
[67] *Id.*
[68] *Id.* at 719.
[69] *See id.; see also* Price v. N. States Power Co., 664 F.3d 1186, 1193 (8th Cir. 2011) (finding that the affirmative defense of a "factor other than sex" is facially broad and may include red circling policies).
[70] Taylor, 321 F.3d at 720.

alone cannot constitute a "factor other than sex" due to the pervasive risk of prior salaries reflecting sex-based compensation discrimination.[71]

In *Irby v. Bittick*, the Eleventh Circuit held that an employer cannot use "prior salary alone to justify pay disparity," but it acknowledged that prior pay when coupled with other legitimate factors, such as experience, can form a valid EPA defense.[72] The Eleventh Circuit has recognized an individual's experience, training, and ability to constitute adequate justifications for pay disparity that can be considered together with prior pay.[73] Applying this principle, *Irby* affirmed summary judgement in favor of the defendant because the employer showed that prior pay was considered in conjunction with the unique, longer experience of the male employees hired as investigators.[74] The Eleventh Circuit reasoned that this limitation on use of prior pay was necessary to prevent the central purpose of the EPA from being "swallowed up."[75] In an earlier case, *Price v. Lockheed*, the Eleventh Circuit's exacting view was made explicit from the beginning: to accept that "prior salary alone is a per se factor other than sex would require this court to contravene Congress' intent and perpetuate the traditionally unequal salaries paid to women for equal work."[76]

The Tenth Circuit joined the Eleventh in taking a firm position that restricts the use of prior salary as a justification for pay disparity, while similarly qualifying the limitation to be only

[71] *See* Ida Castro, *EEOC New Compliance Manual § 10-Iv.E.1,* U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2000), http://www.eeoc.gov/policy/docs/compensation.html.
[72] 44 F.3d at 955-56. *See* Glenn v. Gen Motors Corp. 841 F.2d 1567 (11th Cir. 1988) (rejecting a facially gender-neutral standard and finding a retention policy alone to be an insufficient defense); *see also* Lima v. Fla. Dep't of Children & Families, 627 Fed. Appx 782 (11th Cir. 2015).
[73] *See* Irby, 44 F.3d. at 955; Glenn, 841 F.2d at 1571.
[74] Irby, 44 F.3d at 957.
[75] *Id.* (citing Irby v. Bittick, 830 F. Supp. 632, 636 (M.D.Ga. 1993)) (stating that "[i]f prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated").
[76] Price v. Lockheed Space Operations Co., 856 F.2d 1503, 1506 (11th Cir. 1988).

that of *sole* use of prior pay.[77] In *Angove v. Williams-Sonoma, Inc.*, the court allowed a defendant to successfully raise an affirmative defense under the EPA where the justification asserted for pay disparity was that one employee had significantly more retail experience than the other.[78] The Eleventh Circuit explained that it would accept an EPA defense "where an employer sets a new employee's salary based upon that employee's previous salary and qualifications and experience the employee brings."[79] Therefore, the Tenth Circuit, like the Eleventh Circuit allows prior pay to be used only along with other factors that are grounded in the employee's actual experience and skills in order to prevent reliance on a distorted and possibly biased number.[80]

In accord with the Eleventh and Tenth Circuits, the Sixth Circuit also allows consideration of an employee's prior salary as long as the employer is not depending only on this number as a justification for pay disparity.[81] The Sixth Circuit has further expounded on what it will accept as legitimate factors allowed under the "factor other than sex" defense.[82] In *Balmer v. HCA, Inc.*, the court held that a pay disparity between a woman and her male colleague was justified because the higher-paid male had negotiated a higher salary and, "most importantly, the ultimate decision maker [used by the employer] determined that [the male employee] had greater relevant industry experience than [the] Plaintiff."[83] The Sixth Circuit has also accepted union membership as a legitimate "factor other than sex."[84] *In Perkins v. Rock-Tenn Services, Inc.*, the court accepted a justification for a pay differential that was based on a combination of the male

[77] Angove, 70 Fed. Appx. at 500; *see* Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015) (finding that a 31% disparity between a male and female employees' salaries could not be justified simply by prior salary).
[78] 70 Fed. Appx. at 508.
[79] *Id*. at 612.
[80] *See id.*
[81] Balmer v. HCA, Inc., 423 F.3d 606 (6th Cir. 2005).
[82] *Id*. at 612-13.
[83] *Id*. at 613.
[84] *See* Perkins v. Rock-Tenn Servs., Inc., No. 6-1798, 2017 U.S. App. LEXIS 1172 at *11-12 (6th Cir. June 30, 2017).

employee's prior salary, length of experience, and union membership, which helped facilitate negotiations for a higher salary than the plaintiff-colleague.[85]

While the employees tended to lose even under this test, the Eleventh, Tenth, and Sixth Circuits at least represent a more critical evaluation of what an employer may assert as a justification for pay disparity.[86] In doing so, these circuits highlight the underlying risk of discrimination behind a seemingly neutral factor like prior pay, which may go overlooked by courts enacting broader, more lenient standards on the "factor other than sex" defense.

C. The Business Justification Standard – The Ninth Circuit

As a middle ground approach, the business justification approach permits reliance on prior salary alone as a "factor other than sex," but only if the employer can assert reasonable business justifications for utilizing it.[87] In *Kouba v. Allstate Insurance Company*, the Ninth Circuit originated the "acceptable business reason" requirement.[88] The court held that reliance on prior salary should not be rejected as a "factor other than sex" per se; rather, the employer is required to demonstrate that the reliance on past salary is used to "effectuate some business policy" and the "employer must use the factor reasonably in light of the employer's stated purpose as well as its other practices."[89] Applying its new standard, the court reversed and remanded the district court's grant of summary judgement against the defendant, Allstate, in

[85] *Id.*
[86] *See* Brake, Deborah L., *Reviving Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889, 898 (2016).
[87] *See* Kouba, 691 F.2d at 873.
[88] *Id.*
[89] *Id*. at 876-77. ("R]elevant considerations in evaluating reasonableness [of considering prior salary in setting wages] include (1) whether employer also uses other available predictors of the new employee's performance, (2) whether the employer attributes less significance to prior salary once the employee has proven himself or herself on the job, and (3) whether the employer relies more heavily on salary when the prior job resembles [the new job].").

order to determine if it could provide a reasonable business justification for its reliance on prior pay for a female sales agent's salary.[90]

In sharp contrast with the Seventh and Eighth Circuits' approach, the Ninth Circuit has asserted that applying only a facially neutral test to a "factor other than sex" would be "manifestly incompatible with the [Equal Pay] Act's purpose" because "an employer could easily manipulate factors having a close correlation to gender as a guise to pay female employees discriminatorily low salaries."[91] However, in *Kouba*, the Ninth Circuit admitted the limits of its own approach by recognizing that even with a business-related requirement, an employer might easily assert a business justification as a pretext for a discriminatory purpose.[92] Furthermore, the court recognized that the likelihood of a business justification being used for discriminatory objectives is especially significant with "a factor like prior salary which can easily be used to capitalize on the unfairly low salaries historically paid to women."[93] To rationalize the use of the business justification approach, the Ninth Circuit explained that "the ability of courts to protect against such abuse is somewhat limited," and, therefore, the court deemed this to be the best, most "pragmatic" approach to protect against abuse yet accommodate employer discretion.[94]

After the business justification standard in *Kouba* was established in 1982, the approach has been integrated into a number of other courts in decades since.[95] While the Sixth Circuit rejects the notion that prior pay can be relied on alone,[96] it takes a similar view to the Ninth

[90] *Id*. at 878.
[91] *Id*. at 876. *See also* Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 524-25 (2d Cir. 1992) (holding that congressional intent supports the approach that a "factor other than sex" must be business-related and not solely based on gender-neutrality).
[92] Kouba, 691 F.2d at 876.
[93] *Id*.
[94] *Id*.
[95] *See* Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2017); Aldrich, 963 F.2d at 524.
[96] *See* Balmer, 423 F.3d at 612.

Circuit on the concept that the fourth affirmative defense does "not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."[97]

Within the Ninth Circuit, the *Rizo v. Yovino* decision has reignited the debate as to the appropriate rule.[98] A panel of the court originally reaffirmed the *Kouba* precedent, but the en banc court vacated that decision and is posed to address the question afresh. [99] Therefore, the Circuit's business-related standard appears to be in doubt.

In *Rizo*, the plaintiff was a math teacher who found out after being hired that she was making a lower salary than men who were in comparable positions with similar experience at her school.[100] The defendant, the County School District, gave business justifications for its defense of a prior pay policy that created the wage differential: the policy (1) is objective, (2) encourages candidates to leave other jobs because candidates will always receive a five percent pay increase over their prior salary, (3) prevents favoritism, and (4) is a judicious use of taxpayer dollars.[101]

The Ninth Circuit Court of Appeals panel viewed itself as bound by its long-standing *Kouba* precedent in holding that the County's justifications effectuated a business policy that was reasonable.[102] In response to the approach that prior pay cannot be a sole factor, the court reasoned that it "could not understand how the employer's consideration of other factors would prevent the perpetuation of existing pay disparities if…prior salary is the only factor that causes

[97] EEOC v. J.C. Penney Co., Inc., 843 F.2d 249, 253 (6th Cir. 1988); *see* Balmer, 423 F.3 at 612.
[98] *See* Terry Carter, *Employers Can Pay Women Less Than Men Based on Salary Histories, 9th Circuit Rules*, ABA JOURNAL (April 27. 2017, 2:15PM), http://www.abajournal.com/news/article/woman_employee_pay_past_salary_9th_circuiit.
[99] *See* Rizo, 869 F.3d 1004 (9th Cir. 2017) (order vacating judgment and granting en banc review).
[100] Rizo, 854 F.3d at 1163-64.
[101] *Id*. at 1165.
[102] *Id.* at 1167.

the current disparity."[103] En banc review,[104] however, signals a possible shift against precedent and toward a potentially stricter standard.

Part IV. The Supreme Court Should Ban Employers from Relying on Prior Pay Alone Under the EPA's "Factor Other Than Sex" Defense

As signified by the Ninth Circuit's reconsideration of its long-standing precedent, the time has come to recognize how the acceptance of an employer's sole reliance on prior pay as an EPA defense helps to sustain a cap on women's salaries which must be shattered to achieve equal pay for the two sexes. Considering how a single prior salary number can perpetuate discriminatory pay for a lifetime, the division among the circuits is best solved by restricting reliance on prior pay as much as possible. The Ninth's Circuit's business justification approach, which allows sole reliance on prior pay as long as there are legitimate business reasons to support it,[105] is nearly as problematic and deferential as the Seventh and Eighth Circuits, which freely accept business practices relying only on prior salary.[106]

The Supreme Court should weigh in on what constitutes "factors other than sex" and, in accordance with the Tenth and Eleventh Circuits, allow prior pay only to be used with other legitimate factors, but never alone.[107] While businesses have a legitimate interest in using prior pay to determine salaries and compete for ideal candidates, employers are not without alternative means to satisfy these needs through methods, such as pay targets, which do not sanction unequal pay for equal work. If it is still important to the courts to help close the gender gap as it

[103] *Id*. at 1166.
[104] Rizo, 869 F.3d at 1004.
[105] *See* Rizo, 854 F.3d at 1161; Kouba, 691 F.2d at 876.
[106] *See* Taylor, 321 F.3d at 710; Wernsing., 47 F.3d at 466.
[107] *See* Irby, 44 F.3d at 949; Angove, 70 Fed. Appx. at 500.

once was to Congress in 1963 when the EPA was enacted,[108] then the Supreme Court should provide a firm restriction against sole reliance on this factor.

A. Sole Reliance on a Woman's Prior Pay History Perpetuates the Cycle of Discriminatory Wages

In *Irby v. Bittick*, the Eleventh Circuit stated that "if prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated."[109] As this statement suggests, the circuit courts rejecting reliance solely on prior pay recognize the adverse effect that this factor inflicts on pay equality.[110] The effect of perpetuating an engrained wage disparity between genders directly conflicts with the broadly remedial purpose of the EPA to ensure women are paid equal to men for similar work.[111]

1. Statistics on the Adverse Effect of Prior Pay Reliance

Although there may be various reasons why pay inequality still exists between men and women, there is significant weight to the Eleventh Circuit's notion that reliance on a female employee's prior salary can play a crucial role in prolonging the pay gap among similarly-situated men and women.[112] Recent statistics suggest that if employers base starting pay on the wages of employees' past jobs, women on average will continue to receive lower salaries than men for substantially equal work.[113] In a Glassdoor study reported in 2016, researchers found that men earn 5.4 percent more in base pay and 7.4 percent in overall compensation than their

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[108] See Corning Glass, 417 U.S. at 195.
[109] 830 F. Supp. 632, 636 (M.D.Ga. 1993).
[110] *See* Irby, 44 F.3d at 949; Angove, 70 Fed. Appx. at 500; Price, 856 F.2d at 1506.
[111] *See* Corning Glass Works, 417 U.S. at 195; 109 CONG. REC. 9193 (1963) (statement of Rep. Bolton).
[112] *See* Irby, 44 F.3d at 946.
[113] *See* Dr. Andrew Chamberlain, *Demystifying the Gender Pay Gap: Evidence from Glassdoor Salary Data*, GLASSDOOR (2016), https://www.glassdoor.com/research/app/uploads/sites/2/2016/03/Glassdoor-Gender-Pay-Gap-Study.pdf.

female colleagues with the same titles at the same companies.[114] The study noted that while some of that gap was attributed to variables such as experience and education, a third of the gap remained unexplained, but was likely the result of an undervaluation of women's work and institutionalized bias on how they should be rewarded.[115]

In another study regarding teachers similar to the plaintiff in *Rizo*, the Department for Professional Employees demonstrated that "[f]emale elementary and middle school teachers earned over 14% less than similarly situated men, despite compromising almost 82% of the field."[116] Therefore, statistics suggest that employers that rely solely on a woman's prior salary are most likely in effect facilitating the average lower salary rates that persist for women.

While studies show that the pay disparity between similarly-situated men and women is a continuing problem, employers often rely on an employee's past salary without evaluating whether the figure itself is the product of previous gender discrimination and, therefore, may unknowingly perpetuate a history of discriminatory pay rates.[117] Courts have also recognized the critical difficulty in determining whether an employee's previous salary violated the EPA.[118] A court deciding an EPA claim or an employer looking into an employee's prior pay may find that previous employers are not easily accessible and disaggregating the components that form a prior pay disparity can be impossible to determine.[119] In *Wersing*, the Seventh Circuit held that an employer could rely on prior salary as long as there was no evidence of discrimination.[120] If a

[114] *Id.* at 2, 19.
[115] *Id*. at 3.
[116] AFL-CIO, *Dep't for Professional Employees, Fact Sheet 2010, Professional Women: Vital Statistics*, at 3 (2010), https://www.payequity.org/PDFs/ProfWomen.pdf.
[117] *See* Robert Brody & Lindsay Rinehart, *The Equal Pay Act*, 22 L.J. NEWSLETTERS 3 (2017).
[118] *See* Covington v. Southern Ill. Univ., 816 F.2d 317,322-23 (7th Cir. 1987).
[119] *See* Jeanne M. Hamburg, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1103-04 n.117 (1989).
[120] Wernsing, 47 F.3d at 471.

court has adopted this rule, a finding of nondiscrimination will hold little weight due to the difficulties that hinder the proper discovery of such information.

2. Problematic Market Forces

Another problematic element of prior salary that perpetuates wage disparity is its foundation in the widely discredited market forces theory. A market force involves the value assigned by the market to men's and women's work or the greater bargaining power that men have historically commanded.[121] Under this theory, an employer may use a practice of paying male employees more than their female counterparts in the same position simply because of the male employee's higher market value.[122] While the Supreme Court ruled that market forces do not constitute "factors other than sex,"[123] the Seventh Circuit has suggested that market wage patterns could be relied on despite the implications of unequal pay.[124] In *Wernsing*, the court noted that "markets are impersonal and have no intent," while arguing that discrimination cannot necessarily be assumed from women's lower market wages.[125]

The same implicit acceptance of market forces as a "factor other than sex" appears to be supported by the Ninth Circuit panel. In *Rizo*, the County's business justifications for relying on prior salary to determine the plaintiff's earnings involved factors which had little to do with the employee's qualifications for a math teacher position.[126] By asserting conservation of taxpayer money as one of the rationales for the prior pay policy, the County assumed it could cut costs by paying employees less based on candidates' lower prior salary rates.[127] As stated in their petition

[121] National Women's Law Center, *Paycheck Fairness: Closing the "Factor other than Sex" Gap in the Equal Pay Act*, (2009), https://www.nwlc.org/sites/default/files/pdfs/FactorOtherThanSex.pdf.
[122] *See* Castro, *supra* note 71.
[123] *See* Corning Glass Works, 417 U.S. at 205.
[124] *See* Wernsing, 47 F.3d at 469-70.
[125] *Id.*
[126] Rizo, 854 F.3d at 1165.
[127] *See* Brief of the EEOC as Amicus Curiae in Support of Rehearing En Banc at 8, Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2017) (No. 16-15372).

for a rehearing of the Court of Appeals decision, the plaintiff's attorneys contended that this justification is an "overt statement of the 'market forces theory'' and "is inconsistent with the EPA."[128] While this justification may be economically advantageous, the County essentially accepted as a legitimate factor that women may on average be paid less than men, which is contrary to the gender-neutral purpose of the "factor other than sex" defense.

Employers using a market defense may also rely on a salary negotiation involving prior pay to justify paying a male employer more than a woman performing equal work.[129] In *Horner v. Mary Institute*, the Eighth Circuit held that a salary negotiation could constitute a "factor other than sex," where a school established a valid pay disparity primarily due to the fact that the male employee asked for more money than his female counterpart.[130] However, research has shown that women on average negotiate less than men,[131] and scholars have asserted that this differential may be grounded in a woman's fear of repercussions by her employer for violating social norms.[132] One scholar, who conducted an experiment on why women negotiate less, found that "male evaluators penalized women more than men for attempting to negotiate for higher compensation," while many female candidates who initiated negotiation were generally deemed "not nice and overly demanding."[133] Although negotiation based on prior salary might be

[128] Petition for Panel Rehearing and Rehearing En Banc at 10, Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2017) (No. 16-15372).
[129] *See* Horner, 613 F. 2d at 710-14.
[130] *Id*.; *see* McNierney v. McGraw-Hill, Inc., 919 F. Supp. 853, 860 (D. Md. 1995) (accepting an employer's defense that the male employee refused to work for less as a gender-neutral factor).
[131] Glassdoor Team, *3 in 5 Employees Did Not Negotiate Salary*, GLASSDOOR (2016), https://www.glassdoor.com/blog/3-5-u-s-employees-negotiate-salary/.
[132] *See* Hannah Riley Bowles, Linda Babcock & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORG. BEHAV. & HUM. DECISION PROCESSES 84 (2007)).
[133] Bowles, *supra* note 132, at 99.

essential for business reasons, the employer is accepting a risk that gender-based inequality underlies such a market defense.[134]

Comparatively, the Eleventh Circuit has rejected reliance on market forces and explained that "the argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [EPA] was designed to eliminate, and has been rejected."[135] In *Glenn,* the Eleventh Circuit emphasized how the legislative history of the EPA indicates that the "factor other than sex exception applies when the disparity results from unique characteristics of the same job," such as experience, skills, or training.[136] Therefore, when a court accepts prior pay as a sole basis for salary determination, it places more value on market forces than on the "unique characteristics" of employees and, in effect, undermines the purpose of the "factor other than sex" defense.[137]

B. The Seventh, Eighth, and Ninth Circuits Emphasize a Valid Employer Interest

The circuits that allow sole reliance on prior pay emphasize a need to accommodate business interests as a reason for maintaining their broader view of the "factor other than sex" defense.[138] While the Eighth and Seventh Circuits do not agree with the business justification approach, all three circuits underscore an acceptance of employer discretion in hiring practices.[139] Though deferring to employers' interests does not excuse the pervasive issue of

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[134] *See* Deborah Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 994-95 (2011).
[135]Glenn, 841 F.2d at 1570 (citing Brock v. Georgia Southwestern College, 765 F.2d 1026, 1034 (11th Cir. 1985)); *see* Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974) (finding that a market force theory that a woman will work for less than a man is not a valid consideration under the Equal Pay Act).
[136] Glenn, 841 F.2d at 1571.
[137] *See* Glenn, 841 F.2d at 1570 (rejecting the Seventh Circuit's holding in *Covington v. Southern Illinois University* for implicitly using the market force theory to justify the pay disparity resulting from maintaining an employee's salary upon a change of assignment within the university).
[138] *See* Taylor, 321 F.3d at 710; Wernsing, 47 F.3d at 466; Kouba, 691 F.2d at 873.
[139] *Id.*

gender pay inequality, these circuits suggest that there is a legitimate countervailing need for employers to use prior salary in order to satisfy necessary business objectives and minimize costs.

Scholars on the prior pay issue have noted that employers prevented from relying on prior pay may experience more difficulty in attracting talented applicants and determining competitive salaries.[140] Employers commonly depend on a prior salary number to determine what competitors are paying in order to establish the salary necessary to incentivize a desirable candidate to take an offered position.[141] Furthermore, employers may require prior salary as an initial means to assess the value of a job candidate's skills.[142]

State jurisdictions further demonstrate the tension between legitimate business interests that depend on prior salary and the need to eradicate gender-based pay differentials. While many states have enacted bans on prior salary inquiry, the Chamber of Commerce for Greater Philadelphia has challenged the city's pay ordinance against consideration of prior salary by highlighting its unintended adverse consequences on businesses.[143] To support an argument against laws banning prior salary inquiry, the Chamber cited business burdens that would likely reduce an employer's ability to hire.[144] Thus, the Chamber's argument suggests that without an ability to rely on prior pay, employers may be hindered by a diminished capacity to fill necessary positions attached to salaries that are both within budget and attractive to the right candidates.[145]

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[140] *See* Micala Robinson, *A Woman's Worth: Closing the Gender Pay Gap*, 223 NEW JERSEY L.J. 47 (2017); Hamburg, *supra* note 119, at 1102.
[141] Hamburg, *supra* note 119, at 1102; *see* Sparrock v. NYP Holdings, 2008 U.S. Dist. LEXIS 125889, at *40 (S.D.N.Y. Mar. 4, 2008) (holding that matching a prior salary is permitted under the EPA because it allows an employer to award for experience and to attract talented people from other backgrounds); *see also* Osborn v. Home Depot U.S.A., Inc., 518 F. Supp. 2d 377, 385 (D. Conn. 2007) (finding that "market forces… and inducement to hire the best person for the job have been held to be legitimate factors justifying pay differentials" under the Act).
[142] Hamburg, *supra* note 119, at 1102.
[143] Robinson, *supra* note 140.
[144] *Id.*
[145] *See id.*

C. Consideration of Prior Pay Along with Other Factors Demonstrating Experience and Skill Is an Effective Bar to Discriminatory Pay and Accommodates Business Interests

The rigorous approach of the Tenth, Eleventh, and Sixth Circuits is superior to that of the approach followed by the Seventh, Eighth, and Ninth Circuits because the courts not only recognize prior pay's effect on perpetuating pay inequality, but also promote a way to properly regulate its use without banning it completely. These circuits allow the employer to prove that sex was not a factor in salary determination by accepting evaluation of prior pay as long as it is considered among other legitimate factors.[146] By considering prior pay in conjunction with other factors such as experience, the employer can more effectively determine that prior salary accurately reflects the employee's abilities or qualifications related to the job or it can show simply that that there are other adequate justifications for setting the employee's salary.[147]

Factors such as relevant, experience, education, skills, and training are not based on gender and are crucial for an employer's evaluation of which candidates have suitable qualifications.[148] In contrast, the Office of Personnel Management has noted that an employee's "existing rate of pay is not reflective of the candidate's current qualifications or existing labor market conditions."[149] For example, a woman who is returning to the workplace after taking time off to raise her child will have a prior salary rate that may not properly indicate what her skills and experience would be worth in the present market, which may limit her earnings at a company that allows pay differentials based on prior pay alone.[150] Therefore, if an employer

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[146] *See* Irby, 44 F.3d at 949; Angove, 70 Fed. Appx. at 500; Balmer, 423 F.3d at 606.
[147] Castro, *supra* note 71.
[148] *See* Irby, 44 F.3d at 949; Angove, 70 Fed. Appx. at 500; Balmer, 423 F.3d at 606.
[149] Bourree Lam, *The Government Thinks That Interview Questions About Salary History Are Holding Women Back*, THE ATLANTIC (August 10, 2015), https://www.theatlantic.com/business/archive/2015/08/hiring-interview-gender-gap-pay-salary-history-opm/400835/ (citing a memorandum by Beth Cobert, Acting Director of the Office of Personnel Management).
[150] *See id.*

must rely on factors in relation to an employee's actual qualifications along with the prior salary figure, then the likelihood of perpetuating pay inequality for women is diminished.

D. The Business Justification Approach is Flawed Because There Are More Effective Alternative Means to Accommodate Employer Interests

While the *Kouba* court may have intended to accommodate both employers and employees' interests by imposing a business justification requirement,[151] the Ninth Circuit ultimately perpetuates gender-based pay inequality by refusing to implement the necessary restrictions needed to limit employer reliance on prior pay. The Ninth Circuit has admitted the risks involved with relying on prior salary, yet reasoned that the court was limited in its protection against misuse of prior salary and was compelled to accommodate employer discretion.[152] However, the Ninth Circuit's business justification test undermines the broad, anti-discriminatory purpose of the EPA, and the Circuit mistakenly views the business justification test as the only practical way to accommodate business interests.

The District Court in *Rizo*, highlights the essential problem of the business justification approach: "[A] pay structure based exclusively on prior wages 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, even if motivated by a legitimate non-discriminatory business purpose."[153] Therefore, the court suggests that business justifications for relying on prior salary, while reasonable ways of effectuating business policies, can extend discriminatory, gender-based pay whether intentional or not.[154] A scholar also asserts that by failing to consider qualifications, skills, or experience necessary for the position, the Ninth

[151] Kouba, 691 F.2d at 876.
[152] *See id.*
[153] Rizo v. Yovino, 2015 U.S. Dist. LEXIS 163849, at *26 (E.D. Cal. 2015).
[154] *See id.*

Circuit's approach does nothing to weed out gender-based pay as courts are likely to accept any rationale from employers.[155]

While the Eleventh and Tenth Circuits offer the better method of accommodating both employer and employee interests through a consideration of prior pay among other legitimate factors involving job qualifications, businesses are able to utilize an alternative to prior pay that would effectuate similar hiring purposes without undermining the EPA.[156] Employers have successfully used pay targets as a means of setting salaries within the range of what a job is actually worth and what the employer is able to afford, while leaving some room for negotiation.[157] To calculate pay targets, a company may take into account the average of what its current employees in the position make or other general estimates, which in effect allows employees to "start with a clean slate and mitigate any bias embedded within [the employee's] prior compensation."[158] Furthermore, employers may also use pay rates to determine the wage practices of competition, which employers have similarly used prior pay for determining.[159]

Part V. Conclusion

When Congress enacted the EPA in 1963, it engrained in the law the simple principle that "equal work will be rewarded by equal wages."[160] In order to effect wage equality, the act was intended as a broad, remedial solution for women to be paid the same as their male colleagues in

[155] *See* Robinson, *supra* note 140.
[156] *See* Hamburg, *supra* note 119, at 1102; Laszio Bock, *How the "What's Your Current Salary?" Question Hurts the Gender Pay Gap*, THE WASHINGTON POST (April 29, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/04/29/how-the-whats-your-current-salary-question-hurts-the-gender-pay-gap/?utm_term=.965b1313c3db.
[157] *Id*.
[158] *See* Hamburg, *supra* note 119, at 1102 ("Where prior salary is not used to ascertain the competition's pay practices, "wage survey" data is used and "job rates" are established.")
[159] *Id*.
[160] Corning Glass Works, 417 U.S. at 195. *See* 109 CONG. REC. 9193 (1963) (statement of Rep. Bolton).

substantially similar positions.[161] Under the EPA, an employer may assert one of four affirmative defenses, including a "factor other than sex," although the Supreme Court has yet to fully address the scope of what factors exactly qualify under this defense.[162]

The circuit courts remain divided on whether prior salary may alone qualify as a "factor other than sex." Some circuits have limited acceptance of prior pay as a defense to protect against possible past discrimination, while others defer more to the needs and freedoms of business hiring practices. Due to the pervading wage gap between genders, it is evident that women on average have been and continue to be paid less than men for equal work despite the remedial nature of the EPA. Therefore, when an employer relies on prior pay itself to determine a woman's salary, the risk is great that this practice is perpetuating pay inequality. In order to mitigate this pernicious cycle of wage inequality that continues to affect women, the Supreme Court should solve the circuit split by holding that an employer's reliance on prior salary alone cannot constitute a "factor other than sex."

While courts cannot ignore that employers have a valid interest in relying on prior pay to further necessary business policies and attract candidates, the circuit courts can better integrate those concerns with that of wage equality by allowing prior salary to be considered within a mix of other legitimate factors implicating the employee's actual qualifications and skills. In order to affect change and fulfill the goal of the EPA, the court system should be willing to place stricter barriers on employer practices, such as prior pay, which are impeding the long overdue closing of the wage gap.

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[161] *Id.*
[162] *See* Corning Glass Works, 417 U.S. at 195.