

# Salary History and Pay Parity: Assessing Prior Salary History as a “Factor Other Than Sex” in Equal Pay Act Litigation

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**ABSTRACT:** Inquiries about a prospective applicant’s salary history are controversial because of the role such inequities play in the broader gender pay equity debate. The use of prior salary to determine compensation can perpetuate pay discrimination for women, especially women of color, and lock them into cycles of underpayment when these inequities are carried over from job to job. Reliance on salary history perpetuates historical discrimination and is antithetical to the language and purpose of Title VII and the Equal Pay Act. The purpose of this paper is to critically analyze the legal reasoning relied upon to interpret these laws, especially in light of the new cases emerging in this field, and to assess the potential impacts of these differing interpretations across the circuit courts. This paper offers a nuanced analysis of the courts’ reasoning, including an analysis of the text and context of the legislation and how this influences appellate courts’ divergent interpretation and reasoning. Given that this circuit split primes the issue for Supreme Court consideration, this Article considers the implications of the various interpretations.

I. INTRODUCTION TO THE EQUAL PAY ACT AND THE CIRCUIT SPLIT ON THE USE OF SALARY HISTORY .....	136
II. THE CIRCUIT SPLIT: IS PRIOR SALARY A “FACTOR OTHER THAN SEX”?..	141
A. Summarizing the Approaches Adopted by the Circuits .....	141
B. Analyzing the Textual Arguments Presented in the Circuit Split .....	143

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C.	Summarizing the Circuit Courts’ Legislative History Arguments.....	147
D.	Examining the Equal Pay Act’s Purpose in the Circuits’ Rationales.....	149
III.	THE STATUS OF FEDERAL, STATE, AND LOCAL LEGISLATION.....	151
IV.	POLICY AND POLITICAL CONSIDERATIONS IN DETERMINING THE NEXT STEPS OF THE SALARY HISTORY DEBATE .....	153
A.	Assessing the Implementation and Efficacy of Salary History Bans.....	155
B.	Evaluating the Most Effective Actor: Courts vs. Legislatures....	156
C.	Accounting for the Impact of Salary History in Negotiations.....	159
D.	Understanding the Implications for Women of Color Using the Lens of Intersectionality.....	161
V.	CONCLUSION.....	165

#### I. INTRODUCTION TO THE EQUAL PAY ACT AND THE CIRCUIT SPLIT ON THE USE OF SALARY HISTORY

The Equal Pay Act (“EPA” or “Act”) was originally passed in 1963 to eliminate disparities in pay based on sex.<sup>1</sup> However, more than fifty years after its passage, the wage gap persists.<sup>2</sup> Women confront a pervasive “gender-based wage gap across industries, occupations, and education levels.”<sup>3</sup> This Article assesses the differing interpretations of the EPA in the current circuit split, analyzing whether prior salary history is a factor other than sex that can be considered by employers when making salary determinations, as well as the legal and social impacts of these different approaches.

Currently, there is a robust national debate about the extent to which employers can rely on prior salary history in the context of the EPA. The debate in the courts has significant consequences for countless workers: if prior salary history is a factor other than sex, employers may permissibly consider a female employee’s previous wages to make salary determinations, despite the fact that women’s wages are often impacted by sex and that such a policy would perpetuate existing cycles of under-payment. Against the backdrop of a broad

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1. Although gender and sex have distinct meanings, the terms are used interchangeably in this paper to describe the pay gap, which is based on both an individual’s biological or physiological traits as well as a person’s gender identity in the context of society’s perception and treatment of the individual (biases, expectations, tropes, roles, etc.). This understanding is meant to be inclusive of transgender, gender-queer, gender-fluid, and gender non-conforming individuals.

2. Yuki Noguchi, *50 Years After The Equal Pay Act, Gender Wage Gap Endures*, NPR (June 10, 2013), <https://www.npr.org/2013/06/10/189280329/50-years-after-the-equal-pay-act-gender-wage-gap-endures> [https://perma.cc/6TQB-BH7H].

3. JEANNE H. BALLANTINE, KEITH A. ROBERTS & KATHLEEN ODELL KORGEN, *OUR SOCIAL WORLD: INTRODUCTION TO SOCIOLOGY* 276 (7th ed. 2016).

national debate on the issue of gender pay equity, much of the recent emphasis on salary history stemmed from a Ninth Circuit opinion that deepened an existing split between the federal courts of appeal on the question of whether prior salary is a “factor other than sex” under the EPA.<sup>4</sup>

Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in 2009. Pursuant to the office’s established policy, Rizo’s salary as a new employee was “based exclusively on [her] most recent prior pay, regardless of qualifications, education, or even the kind of work the individual had been doing”; thus, Rizo began on step one of the salary scale.<sup>5</sup> But in 2012, she discovered that a newly hired male math consultant had started on step nine of the salary scale, with an initial salary \$13,000 more than Rizo’s fourth year salary, despite being less educated and less experienced than Rizo.<sup>6</sup> The County conceded Rizo’s prima facie case: “Rizo is paid less than her male colleagues for performing the exact same job.”<sup>7</sup> However, despite acknowledging that Rizo was paid less than her male counterpart for the same work, the County asserted that the discrepancy was permissible because it was based on Rizo’s prior salary—a “factor other than sex.”<sup>8</sup>

The district court sided with Rizo, determining that her prior salary history was not a valid factor under the EPA.<sup>9</sup> On an interlocutory appeal, the Ninth Circuit reversed the district court based on the circuit’s prevailing precedent in *Kouba v. Allstate Insurance Company*, before ordering rehearing of the case en banc.<sup>10</sup> A six-judge majority of the Ninth Circuit held that “[p]rior 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.”<sup>11</sup> In overruling *Kouba*, the majority “conclude[s], 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.”<sup>12</sup>

The majority opinion received attention not only because it overturned *Kouba* to set new precedent in the Ninth Circuit and deepened the existing circuit

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4. Danielle Paquette, *Court: Employers Can't Pay Women Less Because of Their Salary History*, WASH. POST (Apr. 9, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/04/09/court-employers-cant-pay-women-less-because-of-their-salary-history/?utm\\_term=.3c4569fa4a29](https://www.washingtonpost.com/news/wonk/wp/2018/04/09/court-employers-cant-pay-women-less-because-of-their-salary-history/?utm_term=.3c4569fa4a29) [<https://perma.cc/3EK4-2HLSJ>].

5. Brief for Equal Employment Opportunity Commission as Amicus Curiae Supporting Appellee, *Rizo v. Yovino*, 2016 WL 5869872 (9th Cir. Oct. 5, 2016) (No. 14-cv-4932) at 4.

6. *Id.* at 4.

7. Brief for Appellee at 21, *Rizo v. Yovino*, 2016 WL 5846093 (9th Cir. Sept. 28, 2016).

8. *Id.*

9. *Rizo v. Yovino*, 2015 WL 9260587, at 9 (E.D. Cal. 2015).

10. *Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017), *and on reh'g en banc*, 887 F.3d 453 (9th Cir. 2018); *see also Kouba v. Allstate Ins. Co.*, 691 F.3d 873 (9th Cir. 1982).

11. *Rizo v. Yovino*, 887 F.3d at 460 (9th Cir. 2018).

12. *Id.*

split by determining that salary history could never be used, but also because it was one of the final opinions authored by the late Judge Stephen Reinhardt.<sup>13</sup> The Ninth Circuit's opinion noted that "[p]rior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death."<sup>14</sup>

Counsel for the Fresno County School District appealed the Ninth Circuit's en banc decision to the United States Supreme Court, providing the Court an immediate opportunity to serve as a final arbiter to this question on the use of salary history.<sup>15</sup> However, the Supreme Court vacated and remanded the Ninth Circuit's decision on other grounds, which may ultimately permit employers to consider workers' prior salaries. The Court instead addressed the issue of whether the circuit court erred when it counted Judge Reinhardt as a member of the majority since he died before the court's opinion in this case was issued on April 9, 2018, eleven days after he passed away on March 29.<sup>16</sup> The Court determined that "the Ninth Circuit erred in counting [Judge Reinhardt] as a member of the majority" by allowing "a deceased judge to exercise the judicial power . . . after his death," noting that "federal judges are appointed for life, not for eternity."<sup>17</sup>

The Supreme Court's decision, though it did not directly address the question of salary history, vacated the Ninth Circuit's precedent on this question. With Judge Reinhardt's vote, the majority of six of eleven judges would have "constitute[d] a precedent that all future Ninth Circuit panels must follow."<sup>18</sup> As the Supreme Court observed, "[w]ithout Judge Reinhardt's vote, the opinion attributed to him would have been approved by only five of the ten members of the en banc panel who were still living when the decision was filed. Although the other five living judges concurred in the judgment, they did so for different reasons."<sup>19</sup>

Thus, the Supreme Court's decision has the potential to revive case law that allows employers to consider workers' prior salaries, at least in certain circumstances, in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands. In the wake of the Supreme Court's per curiam decision in *Rizo v. Yovino*, the debate over the

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13. Sam Roberts, *Stephen Reinhardt, Liberal Lion of Federal Court, Dies at 87*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/obituaries/stephen-reinhardt-liberal-lion-of-federal-court-dies-at-87.html> [<https://perma.cc/985J-W94L>].

14. *Rizo v. Yovino*, 887 F.3d 453, 455 (9th Cir. 2018).

15. McGuire Woods, *9th Circuit: Employers May Not Use Pay History as Defense to Equal Pay Act Claims* (Apr. 12, 2018), <https://www.mcguirewoods.com/Client-Resources/Alerts/2018/4/9th-Circuit-Employers-Pay-History-Defense-Equal-Pay-Act-Claims.aspx> [<https://perma.cc/VM9R-JM2S>].

16. *Yovino v. Rizo*, 139 S. Ct. 706, 708 (2019).

17. *Id.* at 710.

18. *Id.* at 708.

19. *Id.*

use of salary history in the courts is ongoing. Importantly, this deliberation in the courts is occurring against a backdrop of legislative action by several state and localities, many of which have banned employers from inquiring about an employee's prior salary.<sup>20</sup>

The question of prior salary history has generated sharp division because of the ongoing role it plays in broader gender pay equity debate. Many advocates argue against an employer's use of prior salary history because "reliance on that information to determine compensation, forces women and, especially women of color, to carry lower earnings and pay discrimination with them from job to job."<sup>21</sup> As such, reliance on salary history perpetuates historical discrimination and is antithetical to the language and purpose of the EPA. However, others see salary history as an essential, non-discriminatory inquiry. There are many employers that "use salary history to evaluate and compare applicants' job responsibilities and achievements," "to determine the market value of an applicant or the position," even though "salary is not a neutral, objective factor" for decision making.<sup>22</sup>

Although estimates of the wage gap vary, on average, women earn seventy-seven cents for every dollar that men earn.<sup>23</sup> Ongoing research demonstrates that pay disparities are worse for women of color<sup>24</sup> and can be exacerbated by geographic differences.<sup>25</sup> According to one estimate, "women employed full time in the United States lose a combined total of more than \$900 billion every year due to the wage gap."<sup>26</sup>

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20. Ryan Golden & Valerie Bolden-Barrett, *Women Who Refuse to Disclose Salary History More Likely to Be Paid Less*, HR DIVE (June 29, 2017), <https://www.hrdiver.com/news/women-who-refuse-to-disclose-salary-history-more-likely-to-be-paid-less/445993/> [<https://perma.cc/A85F-5V9M>].

21. *Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, NAT'L WOMEN'S LAW CTR. 1 (Dec. 2018), [https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=L4k1CnSW08yrWJX3kf5jG0uXmA\\_Zn1dtVVFiBELGORvF7TQ0b3UUI1qYPr1C8nl05VJ9PgPk0ejgBEjWLh1nk9lqmPDyBPL0xskJC1-Eu-Q](https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=L4k1CnSW08yrWJX3kf5jG0uXmA_Zn1dtVVFiBELGORvF7TQ0b3UUI1qYPr1C8nl05VJ9PgPk0ejgBEjWLh1nk9lqmPDyBPL0xskJC1-Eu-Q) [<https://perma.cc/FYY3-MKS4>].

22. *Id.* at 1-2.

23. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 5 <http://www.census.gov/prod/2013pubs/p60-245.pdf> [<https://perma.cc/8G2X-6EKE>].

24. National Partnership for Women & Families, QUANTIFYING AMERICA'S GENDER WAGE GAP BY RACE (Sept. 2017), <http://www.nationalpartnership.org/our-work/resources/workplace/fair-pay/quantifying-americas-gender-wage-gap-by-race-2017.pdf> [<https://perma.cc/TXJ4-6LDF>].

25. National Women's Law Center, THE LIFETIME WAGE GAP, STATE BY STATE (Apr. 4, 2018), <https://nwlc.org/resources/the-lifetime-wage-gap-state-by-state/> [<https://perma.cc/39P3-9GBZ>].

26. National Partnership for Women & Families, AMERICA'S WOMEN AND THE WAGE GAP 2 (Apr. 2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf> [<https://perma.cc/U28W-6LA8>].

To address issue of pay inequity, the EPA requires:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions[.]<sup>27</sup>

This language adopts an equal pay for equal work standard, in which two similarly situated employees who are performing the same work must be paid the same, regardless of their sex. The EPA creates four exceptions to this general rule, where salary differentials between the sexes can be permissible “pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”<sup>28</sup>

To establish a *prima facie* case under the EPA, the plaintiff must show: “(i) the employer pays different wages to employees of the opposite sex; (ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (iii) the jobs are performed under similar working conditions.”<sup>29</sup> Because the EPA does not have an intent requirement,<sup>30</sup> once the plaintiff has demonstrated that workers of one sex are paid more for equal work than are employees of the opposite sex, the burden of proof shifts to the employer; the employer defendant must show the pay differential is justified, such as under one of the Equal Pay Act’s four exceptions, which constitute an affirmative defense to the claim.<sup>31</sup> If the defendant satisfies their burden, the plaintiff may still rebut with evidence that the employer’s proffered reason was a pretext for discrimination on the basis of sex.<sup>32</sup>

The purpose of this Article is to critically analyze the legal reasoning relied upon to interpret the EPA in the context of prior salary history cases, as well as to assess the potential impacts of these differing interpretations across the circuit courts. Part II will analyze the circuit split on the question of salary history as a “factor other than sex” under the EPA, including the arguments related to the statute’s text, legislative history, and purpose. Part III will provide a summary of legislative action that has been taken with regard to salary history. Part IV will evaluate some of the current and potential policy consequences resulting from

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27. 29 U.S.C. § 206(d)(1).

28. *Id.*

29. *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999).

30. *MEEKS v. Comput. Assocs. Int’l*, 15 F.3d 1013, 1019 (11th Cir. 1994) (noting that “[i]n contrast to Title VII, the EPA establishes a form of ‘strict liability’”).

31. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974).

32. *Belfi*, 191 F.3d at 136.

the ongoing salary history debate. Finally, Part V will provide a summary of the main conclusions and recommendations of this Article.

## II. THE CIRCUIT SPLIT: IS PRIOR SALARY A “FACTOR OTHER THAN SEX”?

The federal courts of appeal are split on the question of whether prior salary is a “factor other than sex” under the EPA. These different methods of interpreting the EPA in turn influence the role that prior salary history can play in making employment compensation decisions. This Section summarizes the circuits’ varying perspectives.

The courts’ divergent interpretations arise from the different textual interpretations, legislative history, and purpose-based arguments they consider. The textual interpretation of the EPA is informed by each court’s understanding of legitimate business reasons that could permissibly constitute a “factor other than sex.” A court’s skepticism of a company’s business decision making and its inclination to override employers’ exercise of that judgment influence the textual analysis. Additionally, although not every circuit considers legislative history, the understanding of the legislative history and comparisons with other exceptions to the EPA also inform the approach that the courts have taken. Finally, the courts have also relied on the EPA’s remedial purpose in assessing whether prior wages are a “factor other than sex.”

### A. Summarizing the Approaches Adopted by the Circuits

One perspective is that the Equal Pay Act does not permit the consideration of prior salary history. The Ninth Circuit explained this interpretation in its recent en banc decision in *Rizo v. Yovino*, in which the court held that “prior salary alone or in combination with other factors cannot justify a wage differential.”<sup>33</sup> The court reasoned that there was an attenuated relationship between prior salary and legitimate factors other than sex that relate to qualification, skill, or experience; as such, salary history “does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality.”<sup>34</sup> Accordingly, employers in the Ninth Circuit’s jurisdiction may not rely on salary history in their employment decisions. Although this decision has been vacated by the Supreme Court on the grounds that Judge Reinhardt’s vote was impermissibly counted in the six-judge majority and does not carry precedential weight, the majority’s reasoning nonetheless presents a unique analysis of the salary history inquiry. The term “majority” is still used in this Article to distinguish this analysis from the three concurring

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33. 887 F.3d 453, 456 (9th Cir. 2018).

34. *Id.* at 467.

opinions adopted by the remaining five judges of the court; the remaining judges concurred in the judgment, but declined to adopt the full breadth of the reasoning set forth in Judge Reinhardt's opinion.

The second mode of analysis, proffered by the Seventh Circuit, directly opposes the Ninth Circuit's position. Under the Seventh Circuit's approach, salary history is always a "factor other than sex." The court has acknowledged that "many empirical studies show that women's wages are less than men's on average," but it ultimately determined that discriminatory wage patterns are "something to be proved rather than assumed."<sup>35</sup> Since all market wages cannot be assumed to be discriminatory, unless the plaintiff can prove that "sex discrimination led to lower wages in the 'feeder' jobs" or that the employer's wage scale directly violated the Equal Pay Act, there is no actionable claim.<sup>36</sup> As such, employers may freely consider salary history, with only narrow exceptions.

The third approach, adopted by several circuits, stakes out a middle ground between the positions of the Ninth and Seventh Circuits and allows employers to assess prior salary history under specific circumstances. Circuit courts have articulated this position in different ways. The Eighth Circuit permits employers to use prior salary as an affirmative defense, but the "court carefully examines the record to ensure that an employer does not rely on the prohibited 'market force theory' to justify lower wages for female employees."<sup>37</sup> Similarly, the Second Circuit allows salary history to be used as an affirmative defense if the employer can prove "that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense."<sup>38</sup> The Eleventh Circuit has held that prior salary history, on its own, "cannot solely carry the affirmative defense,"<sup>39</sup> as has the Tenth Circuit by prohibiting "an employer from relying solely upon a prior salary to justify pay disparity."<sup>40</sup>

The Ninth Circuit's concurring opinions in *Rizo v. Yovino* echo this perspective. Judge McKeown's concurrence, joined by Judge Murguia, eschews the majority's bright-line test categorically banning the consideration of prior salary history in favor of an approach that uses "prior salary along with valid job-related factors such as education, past performance and training . . . [to] provide a lawful benchmark for starting salary in appropriate cases."<sup>41</sup> Judge Callahan, joined by Judge Tallman, expressed that while it was impermissible to use "prior pay" as the exclusive determinant of pay under the EPA, "prior pay is not inherently a reflection of gender discrimination" because those differences could

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35. *Wernsing v. Dep't of Human Services*, 427 F.3d 466, 470 (7th Cir. 2005).

36. *Id.*

37. *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009).

38. *Aldrich v. Randolph Ctr. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992).

39. *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

40. *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).

41. *Rizo v. Yovino*, 887 F.3d 453, 470 (9th Cir. 2018).

be based on other, legitimate factors “such as the cost of living in different parts of our country.”<sup>42</sup> The final concurrence, by Judge Watford, reasoned that an employer may rely on prior salary but “bears the burden of proving that its female employees’ past pay is not tainted by sex discrimination, including discriminatory pay differentials attributable to prevailing market forces . . . [which] in most instances that will be exceedingly difficult to do.”<sup>43</sup>

Under this third approach, courts allow employers to consider salary history, but not as the sole justification for gender pay disparities. This perspective aligns most closely with that of the Equal Employment Opportunity Commission (“EEOC” or “Commission”), which takes the position that “prior pay alone cannot justify a compensation disparity under the EPA because the practice perpetuates the gender pay gap that continues to exist.”<sup>44</sup> Given this range of possible interpretations, it is important to understand the reasoning upon which the EEOC and circuit courts have based their analysis, in order to fully appreciate how these differing statutory readings directly impact female workers.

### *B. Analyzing the Textual Arguments Presented in the Circuit Split*

The EPA requires that:

[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . . [that] requires equal skill, effort, and responsibility . . . performed under similar working conditions[.]<sup>45</sup>

The EPA also permits employers to assert an affirmative defense to justify an identified pay gap based on “any other factor other than sex.”<sup>46</sup>

Relying on this language, the circuits have differed in their understanding of what should fall within the scope of a permissible “factor other than sex.” In characterizing what constitutes an “acceptable business reason” for salary differences under this catchall exception, courts’ interpretations have been influenced by two factors. The first factor is the closeness with which courts scrutinize the pretext behind an employer’s decisions. A court’s interpretation is strongly influenced by its willingness to critically assess the legitimacy of an

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42. *Id.* at 477.

43. *Id.* at 478-79.

44. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellee and in Favor of Affirmance, *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (No. 16-15372), 2016 WL 5869872 (explaining the EEOC “is the agency charged with interpreting, administering, and enforcing the Equal Pay Act along with other federal employment discrimination statutes”) (internal citations omitted).

45. 29 U.S.C. § 206(d)(1).

46. *Id.*

employer's reliance on salary history and the purported connection to experience, ability, or other job-related performance metrics. The second is the court's willingness to defer to the employer's business judgment. A court's understanding of the statutory provision is influenced by its willingness not merely to insert itself as an economic agent in the market, but possibly to contradict an employer's business judgment.

The Ninth Circuit majority interpreted "factor other than sex" as "limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance."<sup>47</sup> In reaching this conclusion, the Ninth Circuit relied on two canons of construction: *noscitur a sociis* and *ejusdem generis*.

The canon *noscitur a sociis* gives related meaning to words grouped together in a list. Applied to the text of the EPA, "factor other than sex" appears as a catchall exception along with three specific exemptions to the pay parity requirement: seniority, merit, and productivity systems. The court reasoned that these three exclusions "share more in common than mere gender neutrality [as] all three relate to job qualifications, performance, and/or experience."<sup>48</sup> This supports the Ninth Circuit's reasoning that "the more general exception ['factor other than sex'] should be limited to legitimate, job-related reasons as well."<sup>49</sup>

The Ninth Circuit's application of the canon of *ejusdem generis* also supports this reading. The canon requires that a general term, when appearing at the end of a list of more specific terms, be "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."<sup>50</sup> In reading the other exceptions as related to qualifications, performance, or experience, the court concluded that "[a] similar factor would have to be one similar to the other legitimate, job-related reasons" provided in the EPA.<sup>51</sup> Because the court found that salary history bore an attenuated relationship from these valid metrics, it determined that prior salary "does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality."<sup>52</sup>

Alternatively, the exception could be interpreted as any factor besides sex, including any business-related factor other than sex, encompassing salary history. Prior to its most recent ruling, the Ninth Circuit had "relied upon the express language of the EPA which says a pay differential is nonactionable if the differential is pursuant to 'a differential based on *any* other factor other

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

48. *Id.* at 461-62 (internal citations omitted).

49. *Id.*

50. *Id.* at 462.

51. *Id.*

52. *Id.* at 467.

than sex.”<sup>53</sup> Although not explicitly relying on the canons of construction, this argument identifies a more general unifying characteristic between the exceptions: they are all business-related.<sup>54</sup> Given “virtually every dictionary defines the word ‘any’ as ‘regardless of kind,’” then the appropriate reading of “any other factor other than sex” is *any* factor.<sup>55</sup> The use of the word “any” also supports a broad reading of the fourth exception of the EPA. A broad reading of the exception “expressly permit[s] an employer to assert prior salary history as a legitimate, nondiscriminatory reason for a pay differential.”<sup>56</sup>

The Seventh Circuit takes this conclusion one step further. Based on the court’s prior decisions in *Dey* and *Covington*, the court held that a “factor [other than sex] need not be ‘related to the requirements of the particular position in question,’ nor must it even be business-related.”<sup>57</sup> The Ninth Circuit’s earlier precedent in *Kouba*, characterizing the fourth exception as business-related factors other than sex, is directly criticized by the Seventh Circuit. Writing for a unanimous panel, Judge Easterbrook chastises the Ninth Circuit for originating the acceptable business requirement without explaining its genesis, in a move that “was [as] advanced as ukase.”<sup>58</sup> The rebuke extends to all circuits that have followed the same reasoning because the acceptable business reason requirement is not grounded in the statutory text.<sup>59</sup> Under this expansively interpreted exception to the EPA, salary history is a legitimate business consideration, on par with seniority and merit pay systems.

### *Pretext & Business Judgment*

In its decision in *Corning*, the Supreme Court concluded that the company’s ongoing disparity in base wages between night and day workers was pretext and “operated to perpetuate the effects of the company’s prior illegal practice of paying women less than men for equal work.”<sup>60</sup> Accordingly, the Court found the wage differential discriminatory, despite being “phrased in terms of a neutral factor other than sex.”<sup>61</sup> This decision supports scrutiny by courts to ensure that when an employer asserts an affirmative defense, it is not a pretext or post-hoc

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53. Brief of Appellants at 26, *Rizo v. Yovino*, 2016 WL 3901069 (9th Cir. 2016) (No. 16-15372) (emphasis added) (citing *Kouba*, 691 F.2d at 875).

54. Some courts have noted that a “factor other than sex” does not include literally any other factor, but any factor that was adopted for a legitimate business reason. See *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029-31 (6th Cir. 1983).

55. Jeffrey K. Brown, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits’ Misapplication of the Equal Pay Act’s “Any Other Factor Other Than Sex” Defense*, 13 HOFSTRA LAB. & EMP. L.J. 181, 191 (1995).

56. Brief of Appellants, *supra* note 53, at 26 (citing *Kouba*, 691 F.2d at 877).

57. *Wernsing*, 427 F.3d 466 at 470.

58. *Id.* at 469.

59. *Id.*

60. *Corning Glass Works v. Brennan*, 417 U.S. 188, 209-10 (1974).

61. *Id.* at 209-10.

rationalization for discrimination.<sup>62</sup> However, it is unclear if this decision would permit courts to assume bias in the underlying salary history because the EPA “permit[s] employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of ‘other factors other than sex.’”<sup>63</sup>

Courts vary greatly in how closely they review these determinations, particularly with regard to pretext. The Second Circuit frames the pretext inquiry as “whether the employer has use[d] the factor reasonably in light of the employer’s stated purpose as well as its other practices.”<sup>64</sup> The Second Circuit has also held that “an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential.”<sup>65</sup> In determining whether an employer’s use of a civil service exam and job classification system were permissible, the court held that these systems could constitute an affirmative defense as a factor other than sex “if defendants prove that the system is bona fide,” meaning the employer “must prove that the exam for custodians and the practice of filling the custodian’s position only from among the top three scorers on the exam are related to performance of the custodian’s job.”<sup>66</sup>

In comparison, the Sixth Circuit reviewed an employer’s “head of household” provision, which permitted employees to extend medical and dental coverage to a spouse, but only if the spouse earned less than the employee. The court found the policy justified by business interests, as an employer could legitimately conclude that “choosing a comprehensive fringe benefit package faces the challenge of maximizing employee satisfaction while minimizing or controlling cost.”<sup>67</sup> In Judge Hillman’s dissent, he notes several reasons why he is critical of the relationship between the head of household policy and the company’s purported justifications. These reasons include: (1) the comparatively low percentage of female employees eligible for spousal benefits, (2) that “nearly three-fourths of the affected employees . . . were female,” (3) that benefits extended “to so few employees is not reasonably related to . . . [the company’s] asserted justification of maximizing employee satisfaction,” and (4) that there was no evidence of employee satisfaction increases.<sup>68</sup>

In the context of prior salary history, the analysis of pretext is related to the court’s assessment of an employer’s business judgment. In *Gunther*, the Supreme Court acknowledged that “courts and administrative agencies are not permitted to substitute their judgment for the judgment of the employer . . . who

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62. Some courts have used clear language to hold there is no valid affirmative defense for “illusory” and “post-event” justification for unequal pay. *See e.g.*, *Odomes v. Nucare, Inc.*, 653 F.2d 246, 251-52 (6th Cir. 1981).

63. *Washington Cty. v. Gunther*, 452 U.S. 161, 170 (1981).

64. *Aldrich v. Randolph Ctr. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992) (citation omitted).

65. *Id.*

66. *Id.* at 527.

67. *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988).

68. *Id.* at 255 (Hillman, J., dissenting).

[has] established and applied a bona fide job rating system so long as it does not discriminate on the basis of sex.”<sup>69</sup> The interpretation of the catchall exception can vary based on a court’s perspective of its role in reviewing business decisions that result in pay disparities.

For instance, the Seventh Circuit explained that “Congress has not authorized federal judges to serve as personnel managers for America’s employers,” which is why a broad reading of the catchall exception supports deference to employers in exercising business judgment.<sup>70</sup> This interpretation underpins the court’s general reasoning, that while “[i]t remains possible that pay differences between men and women reflect discrimination,” such discrepancies can also be attributed to individual “choices made about allocating time between family and market endeavors.”<sup>71</sup>

By contrast, the Ninth Circuit’s holding is infused with far less deference to an employer’s business judgment because “[n]ot every reason that makes economic sense—in other words, that is business related—constitutes an acceptable factor other than sex.”<sup>72</sup> In an effort to sidestep “too many improper justifications for avoiding the strictures of the Act,” the court relies on intent and precedent to support its interpretation, which prohibits actions by employers that aim “to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*.”<sup>73</sup>

These interpretive differences are explored further in the context of legislative history and precedent. These comparisons underscore how the court’s perspective of its role in resolving these issues, as well as a court’s willingness to be critical of business judgments, impact the contours of how “any other factor other than sex” is interpreted across the various circuits.

### C. Summarizing the Circuit Courts’ Legislative History Arguments

The Supreme Court analyzed the legislative history of the EPA in its decision in *Corning*. In a later decision that discusses the *Corning* Court’s analysis, the Supreme Court found that the “language and legislative history of

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69. *Washington Cty. v. Gunther*, 452 U.S. 161, 171 (1981) (internal citation omitted).

70. *Wernsing v. Dep’t of Human Services*, 427 F.3d 466, 468 (7th Cir. 2005).

71. *Id.* at 471.

72. *Rizo v. Yovino*, 887 F.3d at 466 (9th Cir. 2018) (citing the Supreme Court’s decision in *Corning*, which “readily dismissed the notion that an employer may pay women less under the catchall exception because women cost less to employ, thus saving the employer money. The Court explained that the market forces theory—that women will be willing to accept lower salaries because they will not find higher salaries elsewhere—did not constitute a factor other than sex even though such a method of setting salaries could have saved the company a considerable amount and so would have constituted a good business reason.”) (internal quotations omitted).

73. *Id.* at 456-57, 466.

the provision are not unambiguous,” adding to the complexity of the salary history debate.<sup>74</sup>

The Court begins its analysis of the legislative history by noting that the original version of the EPA created only two exceptions, for seniority or merit systems; this was met by pushback from witnesses during the House and Senate committee hearings.<sup>75</sup> Those exceptions were insufficient to account for the “formal, systematic job evaluation plans” used by many employers “to establish equitable wage structures in their plants” by taking into account “four separate factors in determining job value—skill, effort, responsibility and working conditions.”<sup>76</sup> In addition, critics of the bill expressed concerns that the EPA’s language was “unduly vague and incomplete” and that the “Secretary of Labor would be cast in the position of second-guessing the validity of a company’s job evaluation system.”<sup>77</sup> The Court observes that “Congress acted in direct response to these pleas” by amending the EPA to reflect that equal pay also required “equal effort, responsibility, and similar working conditions,” which were at the heart of job classifications, formed a “legitimate basis for differentials in pay.”<sup>78</sup> In sum, the Court concludes this demonstrates Congress’ intent to keep “well-defined and well-accepted principles of job evaluation . . . [so] that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act.”<sup>79</sup>

The Court relied upon this analysis of legislative history in *Corning* to conclude that the fourth affirmative defense was added to the EPA “because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted.”<sup>80</sup> Circuit courts have relied upon this legislative history analysis in interpreting the EPA, but have also added to this interpretative context.

References to written reports provide additional insight for interpreting the EPA. The Ninth Circuit references the House Committee’s report, which characterizes “a bona fide job classification program” as one “that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.”<sup>81</sup> The court also relied upon the committee’s “illustrative list of other factors in addition to job classification programs which would be covered under the fourth exception” which included “shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy

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74. *Gunther*, 452 U.S. at 168.

75. *Corning Glass Works v. Brennan*, 417 U.S. 188, 199 (1974).

76. *Id.*

77. *Id.* at 200.

78. *Id.* at 200-01 (internal citations omitted).

79. *Id.* at 201.

80. *Rizo*, 887 F.3d at 464 (citing H.R. REP. NO. 88-309, at 3 (1963), as reprinted in 1963 U.S.C.C.A.N. 687, 689).

81. *Id.* (citing H.R. REP. NO. 88-309, at 3 (1963), as reprinted in 1963 U.S.C.C.A.N. 687, 689).

objects, differences based on experience, training, or ability.”<sup>82</sup> The Ninth Circuit also notes the “Senate Committee Report likewise confirms that Congress intended the catchall exception to cover factors other than sex only insofar as they were job related.”<sup>83</sup> This analysis is largely echoed by the Second Circuit, which also refers to the report, in noting that while “there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay . . . a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense.”<sup>84</sup>

*Gunther* and *Rizo* both make reference to Representative Robert Griffin, but rely on different statements by the congressman to support their analysis. In *Gunther*, the Court noted that Representative Griffin’s explanation “that the fourth affirmative defense is a ‘broad principle,’ which ‘makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation.’”<sup>85</sup> The Ninth Circuit quotes Representative Griffin’s description of the catchall exception: “Roman numeral iv is a broad principle, and those preceding it are really examples.”<sup>86</sup> Both statements may be reconciled when read in unison; however, when read independently from one another, it is possible these two statements, though made by the same person, could be construed in multiple ways to support various conclusions.

By contrast, the Seventh Circuit dismisses reliance on legislative history by posing this question: “But what relevance can this have now that anti-discrimination statutes have been in force for more than two generations?”<sup>87</sup>

#### D. Examining the EPA’s Purpose in the Circuits’ Rationales

Courts have also evaluated the purpose of the EPA in assessing the scope of a “factor other than sex.” The Supreme Court, in its decision in *Corning*, stated, “Congress’ purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination” to eliminate wage structures that reflected “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.”<sup>88</sup> Additionally, in interpreting the EPA as a broadly remedial statute, the Supreme Court held the Act “should be construed

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82. *Id.* (internal quotations omitted).

83. *Id.*

84. *Aldrich*, 963 F.2d at 525.

85. *Gunther*, 452 U.S. at 171 (citing 109 CONG. REC. 9203 (1963)) (also noting the statements of several other legislators that aligned with Representative Griffin’s statements, citing remarks made by Reps. Frelinghuysen, Thompson, Goodell, Kelly, Pucinski, and Thompson).

86. *Rizo*, 887 F.3d at 464.

87. *Wernsing*, 427 F.3d at 471.

88. *Corning*, 417 U.S. at 195 (citing S. REP. NO. 88-176, at 1 (1963)).

and applied so as to fulfill the underlying purposes which Congress sought to achieve.”<sup>89</sup>

In its most recent decision in *Rizo*, the Ninth Circuit has determined that “it is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing endemic sex-based wage disparities, would create an exception for basing new hires’ salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex.”<sup>90</sup> Relying on the broad remedial purpose of the statute, the Ninth Circuit concludes “Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials.”<sup>91</sup> This is particularly evident when recognizing that at the time of the EPA was passed, “an employee’s prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other.”<sup>92</sup>

Although the Second Circuit ultimately reaches a different conclusion than the Ninth Circuit, the court in *Aldrich* concludes that “job classification systems may qualify under the factor-other-than-sex defense only when they are based on legitimate business-related considerations also comports with the general policy goals Congress sought to effectuate by enacting equal pay legislation.”<sup>93</sup> The court notes that in the absence of “a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned.”<sup>94</sup>

These perspectives of the EPA’s purpose stand in contrast to the Seventh Circuit’s analysis. The court prioritizes the “benefit of making the job more attractive to the best candidates—because the state’s civil service criteria call for more attention to employees’ background and skills than to the market.”<sup>95</sup> Judge Easterbrook’s opinion suggests the opposition’s analysis is “manufactured by the judges rather than discovered by digging through legislative debates” and “lacks any footing in enacted texts.”<sup>96</sup> Rather than elevating the EPA’s purpose, the Seventh Circuit opinion eschews purpose in arriving at its decision to always permit the use of salary history as a “factor other than sex.”

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89. *Id.* at 208.

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

91. *Id.* at 461.

92. *Id.*

93. *Aldrich*, 963 F.2d at 525.

94. *Id.*

95. *Wernsing*, 427 F.3d at 468.

96. *Id.* at 470.

## III. THE STATUS OF FEDERAL, STATE, AND LOCAL LEGISLATION

Ongoing litigation on the federal level has deepened the circuit split regarding whether prior salary history is a permissible affirmative defense based on “a factor other than sex.” However, the debate regarding prior salary history is not cabined to the judicial arena. This Section briefly describes how legislative action on the state level provides a rich backdrop against which to analyze the circuit split, especially in the wake of federal inaction on this question.

Although the Equal Pay Act does not permit wage discrimination, it was not understood to afford protection on the federal level to safeguard against disclosure of past salary information—until the Ninth Circuit’s decision in *Rizo* prohibited reliance on salary history under the EPA. State legislation regarding prior salary history, on the other hand, has multiplied in recent years. At least five states, including Massachusetts, Delaware, New York, California, and Oregon, in addition to several cities, have also passed measures that ban employers from inquiring about salary history.<sup>97</sup> New Jersey’s governor signed an executive order to address this issue.<sup>98</sup>

The scope and protections of these laws vary. The Massachusetts law, for instance, includes an anti-retaliation provision.<sup>99</sup> Delaware’s provision includes strong punitive measures, including “penalties from \$1,000 to \$5,000 for a first offense, and up to \$10,000 for a subsequent offense.”<sup>100</sup> New York City’s provision includes even more severe fines. While “unknowing” violations can result in penalties as high as \$125,000, “knowing and continuing” violations can be fined up to \$250,000.<sup>101</sup>

The proliferation of state legislation to ban prior salary history is ongoing. In addition to Florida and New Hampshire, which “already have pay equity bills drafted for consideration in their respective 2018 legislative sessions,” another eleven states are considering “passing similar salary history ban laws” this year.<sup>102</sup> Although growing in popularity, not all legislative efforts to ban prior salary history have been successful.

For example, last August, Illinois Governor Bruce Rauner vetoed a bill that would prohibit employers from inquiring about an applicant’s salary history,

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97. Ryan Golden & Valerie Bolden-Barrett, *Women Who Refuse to Disclose Salary History More Likely to Be Paid Less*, HR DRIVE (June 29, 2017), <https://www.hrdrive.com/news/women-who-refuse-to-disclose-salary-history-more-likely-to-be-paid-less/445993/> [<https://perma.cc/T62W-524D>].

98. N.J. Exec. Order 2018-01 (Feb. 1, 2018), [http://nj.gov/governor/news/news/562018/approved/20180116a\\_eo.shtml](http://nj.gov/governor/news/news/562018/approved/20180116a_eo.shtml) [<https://perma.cc/KTG4-WWE7>].

99. Levi Perkins, *Salary History Bans Gain Momentum*, CORP. SCREENING BLOG (Oct. 26, 2017), <https://www.corporatescreening.com/2017/08/03/salary-history-bans-gain-momentum> [<https://perma.cc/Z5AY-WHSZ>].

100. *Id.*

101. Joseph Maddaloni Jr. & Cynthia L. Flanagan, *Salary History Ban Laws Aim to Close Gender Pay Gaps*, N.J. L. J. (Mar. 20, 2018), <https://www.law.com/njljournal/2018/03/20/salary-history-ban-laws-aim-to-close-gender-pay-gaps> [<https://perma.cc/8BL7-SRLM>].

102. *Id.*

although the bill passed in a bipartisan manner and by a wide margin in both the state House (91-24) and Senate (35-18).<sup>103</sup> In his veto message, Governor Rauner favorably acknowledged the Massachusetts salary history law as a best-in-the-country approach because of its benefits—for *employers*.<sup>104</sup> Governor Rauner encouraged the Illinois legislature to adopt Massachusetts’ legislative language, underscoring a provision that permits employers to seek pay history once they have offered a candidate the job and salary. The exclusion of this provision from the Illinois bill was viewed positively, as some advocates have expressed concern that post-offer salary disclosures “could reduce an employee’s raise or bonus down the road if it is revealed he or she was earning much less before,” effectively undermining the purpose of the legislation.<sup>105</sup> Despite the bill’s popularity, and the fact that a “veto override [would] require 71 votes in the House and 36 in the Senate,” the state legislature has failed to override the veto—twice—effectively rendering the legislation dead.<sup>106</sup>

The activity on the state and local level reflects a willingness to act in the face of federal stagnation on wage parity efforts, as Congress has not been able to pass legislation to address pay disparities resulting from salary history. Perhaps most notable is Congress’ failure in prior sessions to pass the Paycheck Fairness Act, which was most recently re-introduced in 2019.<sup>107</sup> The proposed Paycheck Fairness Act includes a provision banning the use of wage, salary, and benefit history in “considering the prospective employee for employment” or in “determining the wages for such employment . . . [unless] voluntarily provided by a prospective employee . . . to support a wage higher than the wage offered by the employer.”<sup>108</sup> The legislation would also prohibit employers from requesting prior salary directly from a prospective employee’s past employers and protect employees from retaliation.<sup>109</sup> In addition to creating a limit to the “any other factor other than sex” catchall exception currently in the EPA, the Act

103. *Illinois Governor Vetoes Ban on Salary History Inquiries*, GARTNER INC. (Aug. 31, 2017), <https://www.cebglobal.com/talentedaily/illinois-governor-vetoes-ban-on-salary-history-inquiries/> [<https://perma.cc/BV5J-G8Z2>].

104. Memorandum from Bruce Rauner, Governor of Illinois, to Ill. House of Representatives, 100th General Assembly (Aug. 25, 2017), <http://www.ilga.gov/legislation/fulltext.asp?DocName=10000HB2462gms&GA=100&SessionId=91&DocTypeId=HB&LegID=103476&DocNum=2462&GAID=14&Session> [<https://perma.cc/FJ2V-YR9Z>]; see also Alexia Elejalde-Ruiz, *Rauner Vetoes Bill That Would Bar Employers From Asking About Salary History*, CHI. TRIB. (Aug. 28, 2017), <http://www.chicagotribune.com/business/ct-illinois-no-salary-history-bill-veto-0829-biz-20170828-story.html> [<https://perma.cc/2NLE-9XQL>].

105. Monique Garcia, *Dems push Gov. Rauner to sign bill advocates say could bring women more equal pay*, CHI. TRIB. (Aug. 8, 2018), <https://www.chicagotribune.com/news/local/politics/ct-met-rauner-wage-bill-democrats-20180808-story.html> [<https://perma.cc/KD8H-N9Y6>].

106. Elejalde-Ruiz, *supra* note 104; see also Kate Tornone, *Second Attempt at Illinois Salary History Ban Fails*, HR DIVE (Nov. 9, 2017), <https://www.hrdiver.com/news/second-attempt-at-illinois-salary-history-ban-fails/510534> [<https://perma.cc/S5BP-6P5G>].

107. Paycheck Fairness Act, H.R. 7, 116th Cong. § 10 (2019); Paycheck Fairness Act, S. 270, 116th Cong. § 8 (2019)

108. H.R. 7; S. 270.

109. H.R. 7; S. 270.

would provide a specific penalty: employers would be “liable to each employee or prospective employee who was the subject of the violation for special damages not to exceed \$10,000 plus attorneys’ fees, and shall be subject to such injunctive relief as may be appropriate.”<sup>110</sup>

Especially since the start of the Trump Administration, many advocates have grown increasingly concerned about pay parity efforts on the federal level. Most significantly, Trump suspended an Obama-era policy that would have required “private employers with over 100 workers [to] have had to disclose pay data to the Equal Employment Opportunity Commission on top of information on gender, race, and ethnicity already provided to the agency,” which advocates are concerned will decrease transparency and allow the pay gap to grow.<sup>111</sup> The Trump Administration also rolled back other pay equity efforts, including the White House Equal Pay Pledge, just days after taking office. The pledge “encouraged companies to take action to advance equal pay” and included notable companies such “Patagonia, Estée Lauder, InterContinental Hotels, Mastercard, Yahoo, Square and Zillow.”<sup>112</sup>

In the absence of federal legislation and in the wake of these executive acts, there is increasing pressure on the courts to resolve the circuit split on this question. This would make clear whether additional federal legislation is necessary to add protections for employees nationwide, or if existing protections under the EPA are sufficient to ensure true pay equality for women. The current state of affairs, with federal legislation unlikely to be forthcoming and the question still hotly contested among the circuits, also heightens the importance of developing state-level policies designed to combat barriers to wage parity, including prior salary history, in order to create affirmative protections not otherwise guaranteed through litigation or legislation.

#### IV. POLICY AND POLITICAL CONSIDERATIONS IN DETERMINING THE NEXT STEPS OF THE SALARY HISTORY DEBATE

This Section identifies central issues that are likely to influence the national debate regarding the role of salary history in employment decisions. Situated within the larger salary history discussion, these issues concern the efficacy of

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110. H.R. 7; S. 270.

111. Clare O’Connor, *Trump Halting Equal Pay Measure “A Blatant Attack On Women,”* *Activists Say*, FORBES (Aug. 30, 2017), <https://www.forbes.com/sites/clareoconnor/2017/08/30/trump-halting-equal-pay-measure-a-blatant-attack-on-women-activists-say/#a39aa2a395b1> [https://perma.cc/T7K7-J9Q3].

112. Mandana Massoumi, *INSIGHT: A Wave of Statewide Equal Pay Legislation Continues Despite the Trump Administration’s Move in the Opposite Direction*, BLOOMBERG L. (July 12, 2018), <https://news.bloomberglaw.com/daily-labor-report/insight-a-wave-of-statewide-equal-pay-legislation-continues-despite-the-trump-administrations-move-in-the-opposite-direction> [https://perma.cc/A5ME-6RAH].

salary history bans, the role of courts and legislatures, the use of prior salary in negotiations, and the unique impact on women of color.

Prior to analyzing these considerations, consider an illustrative example to demonstrate the significance of the wage gap: assume that a man's starting salary is \$5,000 more than a woman's. In addition to the immediate differential in their earning, over time this gap is exacerbated. First, even if raises are given at the same percent each year, because the base amount the man receives is higher, so too is the dollar value that is represented by an equal percentage raise. What started as a \$5,000 gap per year grows into a differential that is more than \$15,000 per year over four decades; in this example, the gap has grown more than three times.<sup>113</sup> In addition to an annual differential, there is a huge gap in the cumulative earnings between these employees. By the time the two workers are 60, extra earnings for the male total over \$360,000.<sup>114</sup> Finally, the wage differential is made more acute by added value of savings, which augment this differential. Putting the salary differential into a savings account with 3 percent interest would put the man's total earnings at nearly \$570,000 more than the woman's total earnings.<sup>115</sup>

This example demonstrates the impact of the wage gap, not only in direct earnings and day-to-day expenditures for women, but in the compounding nature of this differential. An initial disparity creates a wealth gap that increasingly impacts the economic security and wealth-building opportunities for women over the long-term.

Although these figures help quantify the impact and escalation of wage differentials, even when differences are initially minor, these numbers fail to capture how this impacts the lived experiences of women. Betty Dukes was the named plaintiff in a claim against Wal-Mart for gender discrimination in pay and promotion policies and practices.<sup>116</sup> She described the direct and personal impact of her lower salary by explaining: "When you subtract my living [expenses], I'm not living — I'm existing. I have an 88-year-old mother. Economically, there's nothing I can do for my mom to make her life more golden in her golden years, because I have no resources to do that."<sup>117</sup>

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113. *Id.*

114. *Id.*

115. See JEANNE H. BALLANTINE, KEITH A. ROBERTS, KATHLEEN ODELL KORGEN, *OUR SOCIAL WORLD: INTRODUCTION TO SOCIOLOGY* (2016).

116. *Wal-Mart v. Dukes*, 564 U.S. 338 (2011).

117. Dave Jamieson, *Betty Dukes, Renowned Dukes v. Walmart Plaintiff, Takes Her Fight Back to Capitol Hill*, HUFFINGTON POST (Jun. 20, 2012), [http://www.huffingtonpost.com/2012/06/20/betty-dukes-walmart-supreme-court\\_n\\_1613305.html](http://www.huffingtonpost.com/2012/06/20/betty-dukes-walmart-supreme-court_n_1613305.html) [<https://perma.cc/FBX9-PC8F>] (discussing plaintiff in *Dukes v. Walmart* after the Supreme Court failed to certify what would have been the largest class action lawsuit in U.S. history, representing a proposed class of more than a million women alleging gender discrimination in pay and promotion policies and practices).

*A. Assessing the Implementation and Efficacy of Salary History Bans*

An ongoing point of contention, even among advocates who all favor pay equity, is whether banning the use of prior salary history is an effective remedy to resolve the pay gap. Although salary history prohibitions are meant to close the gender wage gap, they may also have adverse consequences. Employers may assume that women who refuse to disclose their pay have earned less or that they are more determined to negotiate their salary aggressively, making them a less appealing candidate. Women may also be perceived adversely for initiating salary negotiations, even if men are not similarly penalized.<sup>118</sup>

Other concerns have been expressed about existing legislative measures banning the use of prior salary history. For instance, even though the Massachusetts law provided other employment protections, some have been critical of the bill's salary history provision as superfluous. A main critique is that employers have a work-around: asking prospective employees about their salary expectations. *HR Professionals Magazine* provides several suggestions of questions that employers should ask in lieu of salary history, including: "What are your salary expectations?" This gives the candidate the ability to share what they seek to make for the role. It lets you decide if you should keep talking with them. It also tells you whether they've done their homework or not."<sup>119</sup>

There is an additional concern that adopting a particular policy or standard will have the effect of backing courts and legislatures into a corner, especially if the adopted rule is not effective. The process of undoing precedent or rescinding legislation may be even more difficult. Those persuaded by this argument might support the adoption of the middle-ground approach taken by most circuits, which permits the consideration of salary history in limited circumstances and under close scrutiny by the courts. As expressed in *Taylor*, the Eighth Circuit was "reluctant to establish a per se rule that might chill the legitimate use of gender-neutral policies and practices."<sup>120</sup> This moderate approach may help build judicial consensus, while also balancing the concerns of employers and employees.

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118. Lydia Frank, *Why Banning Questions About Salary History May Not Improve Pay Equity*, HARV. BUS. REV. (Sept. 2017), <https://hbr.org/2017/09/why-banning-questions-about-salary-history-may-not-improve-pay-equity> [<https://perma.cc/6C7D-94EX>].

119. *The Salary History Question: Alternatives for Recruiters and Hiring Managers*, HR PROF'LS MAG. (2017), <http://hrprofessionalsmagazine.com/the-salary-history-question-alternatives-for-recruiters-and-hiring-managers> [<https://perma.cc/NT38-RZQD>].

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

*B. Evaluating the Most Effective Actor: Courts vs. Legislatures*

With both active federal litigation over the EPA's application to prior salary history and a marked increase in state and local legislation on the issue, many equal pay advocates may question which approach to favor.

While it might be quicker for the Supreme Court to resolve the circuit split, there are potential shortcomings to judicial interventions for equal pay. Judge Nancy Gertner assesses employment discrimination law's skewed evolution in her essay entitled *Losers' Rules*. She contends that judicial remedies are inadequate to address gender-based employment discrimination, including the gender pay gap, despite long-standing legislation that makes it illegal for employers to discriminate on the basis of sex. As such, while litigation efforts should continue, state legislation should be an ongoing focus for equal pay advocates.

First, Judge Gertner asserts, judges do not see the strongest cases of discrimination because they are settled rather than litigated.<sup>121</sup> Second, defendants prevail more frequently at the summary judgment stage, likely in part because the plaintiff bears the burden of proof in employment discrimination cases.<sup>122</sup> Additionally, when a court grants defendants summary judgment, it authors an opinion in opposition to the plaintiff; however, when courts deny summary judgment, the case proceeds to trial and no pro-plaintiff record is established.<sup>123</sup> Finally, interpretive bias resolves ambiguity in favor of defendants, creating another advantage for employers.<sup>124</sup>

Such asymmetrical decision making has created a one-sided body of law that undermines the plaintiffs who challenge gender-based employment discrimination. As a result, judges follow distorted precedent that reifies and affirms the biased judicial decision-making process. Moreover, courts are more likely to presumptively view gender-based employment discrimination claims as trivial, particularly in factually complex or ambiguous cases, giving defendants the benefit of the doubt.<sup>125</sup> Inconsistent pay for plaintiffs' attorneys, protracted lawsuits, and high litigation costs complicate litigation and often create

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121. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. F. 109, 115 (2012).

122. *Id.* (basing claim on Federal Judicial Center report, summary judgment motions, which are overwhelmingly brought by defendants, were granted more often in employment discrimination cases than in the aggregate).

123. *Id.*

124. *Id.* at 118 (ignoring explicitly discriminatory statements, such as in the "stray remarks" doctrine, fundamentally distorts the outcome of discrimination cases by dismissing direct evidence of bias upon which plaintiffs could rely).

125. *Id.* at 117 (noting that "one-sided heuristics—rules of thumb that oversimplify, dismiss, and often demean proof of discrimination" not only favor the efficient dismissal of cases, but elevate the concern of creating false positives over the concern for "false negatives that leave meritorious claims of discrimination unredressed").

additional incentives to settle.<sup>126</sup> These aspects of the judicial system reinforce a strong pro-defendant narrative that, when juxtaposed with an anti-plaintiff judicial decision-making framework, makes it more difficult for claims to succeed.

These biases in the litigation process have substantial implications for the power dynamics between the parties and make it is easy to see why a legislative resolution may be preferable. However, state policymaking is not without its own challenges. For instance, preemption laws have been used to usurp local legislation on a range of issues—from preventing gun regulation<sup>127</sup> to curtailing environmental regulation.<sup>128</sup>

Most recently, preemption laws have been a dominant instrument in state regulation to squelch local experimentation and curtail the expansion of employment protections. Such efforts have been successfully used to preempt localities from setting minimum wage laws. For example, cities and counties have been extremely effective in passing legislation to increase the minimum wage, demonstrated by the fact that “more than 40 cities or counties in states such as California, New Mexico, and Arizona have adopted local minimum wage laws.”<sup>129</sup> As a result, at least twenty-five states currently have “laws that preempt cities from passing their own local minimum wage laws.”<sup>130</sup> Efforts in some states, like Missouri, have been in direct opposition to city expansions. Missouri’s preemption law will effectively roll back “St. Louis’ \$10-an-hour minimum wage ordinance passed earlier this year . . . [meaning] thousands of minimum-wage earners in the city could go back to earning the state rate of \$7.70 an hour.”<sup>131</sup>

Advancement of local and state policies has the impact of substantively expanding employment protections within those geographic areas. While state policymaking would require a piecemeal approach, achieve less consistent nationwide practices, and face potential preemption challenges, these policies can help ensure that pay gaps, particularly for women, are not compounded over time. These laws can complement the protections of the EPA or potentially

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126. Greg Ryan, *What Defense Attys Should Know Before Going Plaintiff*, LAW360 (Aug. 20, 2013), <http://www.law360.com/articles/466366/what-defense-attys-should-know-before-going-plaintiff> [https://perma.cc/V9YZ-YL7W].

127. See *Preemption of Local Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (2017), <http://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/#state> [https://perma.cc/4SAS-6YYH].

128. Matthew Porter, *State Preemption Law: The Battle for Local Control of Democracy*, BEYOND PESTICIDES (2017), <https://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf> [https://perma.cc/F5FT-P384].

129. *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NAT’L EMP. L. PROJECT 1 (July 2017), <http://www.nelp.org/content/uploads/Fighting-Preemption-Local-Minimum-Wage-Laws.pdf> [https://perma.cc/7QWH-3DGR].

130. *Id.* at 2.

131. Yuki Noguchi, *As Cities Raise Minimum Wages, Many States Are Rolling Them Back*, NPR (July 18, 2017, 4:39 PM), <https://www.npr.org/2017/07/18/537901833/as-cities-raise-minimum-wages-many-states-are-rolling-them-back> [https://perma.cc/MR4C-FSKT].

provide additional coverage, depending on the ultimate interpretation adopted by the Supreme Court. Moreover, the laboratories of democracy theory suggests that experimentation with various policies can also help bring to light unintended consequences of such laws and help advocates move closer to the goal of pay parity.

These state and local policies may also catalyze broader change. For instance, national companies seeking to adopt a consistent practice within their organization may change organization-wide salary-setting practices if they operate in at least one state with a salary history ban. Several industry-leading employers “like Amazon, Bank of America, Wells Fargo, and Progressive have eliminated salary history questions from the hiring process, and other employers are following suit.”<sup>132</sup> One recent survey found that nearly 40% of surveyed employers “had implemented a policy to stop asking about a candidate’s salary history” and that 40% of employers without an existing policy were likely to adopt a salary history ban in the next 12 months. Thus, even in the absence of a consistent national policy or uniform interpretation of existing legislation, widespread discourse on the issue, or even a single state’s policy, could have national consequences.<sup>133</sup>

Although there are benefits to a federal approach, “the policymaking benefits associated with devolution, including mutual learning, iterative regulation, helpful redundancy, and healthy competition” suggest that state and local policymaking should be more than a secondary alternative.<sup>134</sup> As Heather Gerken explains in *Federalism 3.0*, “the fact that states are embedded in a federal regime also allows them to play a crucial role in defending congressional prerogatives, checking executive overreach, and safeguarding the separation of powers.”<sup>135</sup> States should be viewed as robust democratic actors. Accordingly, the development of state and local legislation is an affirmative strategy to pursue, not in lieu of federal legislation, but as a complement to national policymaking efforts. Ultimately, our policies benefit from the refinement that results from the interaction between federal and state actors; this iterative process is a function of the structure of our democracy itself, where “[c]ooperative federalism is paired with uncooperative federalism,” to create a feedback loop within the system of checks and balances.<sup>136</sup>

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132. Genevieve Douglas, *States Begin to Block Bans on Pay History Inquiries; Will Others Follow?*, BLOOMBERG L. (Apr. 9, 2018), <https://www.bna.com/states-begin-block-b57982090883> [<https://perma.cc/ABS6-D9MK>].

133. *Id.* at 1721.

134. Heather K. Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1720 (2017).

135. *Id.*

136. *Id.*

### C. Accounting for the Impact of Salary History in Negotiations

While experts have posited many reasons for pay discrepancies—ranging from occupational segregation, to the impacts of maternity leave and motherhood, to overt discrimination—gender pay inequity persists.<sup>137</sup> These major and systemic workplace issues impact working women daily, as does “the lack of adequate lactation rooms in most office buildings, antiquated office dress codes that require women to wear high heels to work and the size of safety gear available[, such as those used by] female astronauts [and soldiers].”<sup>138</sup>

Salary negotiations are another possible cause of pay disparities, and negotiations often prompt questions related to salary history. As illustrated in the earlier example, salary differentials can result in both short-term and long-term inequities.<sup>139</sup> Even an initially small pay disparity can eventually lead to disparities of several hundred thousand dollars. Lower salaries constrain spending, whereas a worker’s ability to save generates additional earnings. In this way, seemingly small differences in pay result in substantial long-term inequities.

There are other concerns about the use of salary history in the pay negotiation and wage-setting process. The National Women’s Law Center (“NWLC”) identifies several additional complications. First, NWLC cites recent research that proves that women, particularly women of color, face bias in the salary-setting process. In an experiment, researchers found that employers offered the male applicant, John, a salary nearly \$4,000 higher than the female applicant, Jennifer, despite the fact that both candidates had identical resumés, expect for the name.<sup>140</sup> Intentional or not, conscious or otherwise, this bias increases the likelihood that women will face disparities that are magnified, not

137. See Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/> [<https://perma.cc/PQ3N-SHYL>]; Miriam Valverde, *Hillary Clinton Says Donald Trump Doesn’t Believe in Equal Pay*, POLITIFACT (Nov. 2, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/nov/02/hillary-clinton/hillary-clinton-says-donald-trump-doesnt-believe-e> [<https://perma.cc/AGZ2-R3L2>].

138. These institutional barriers are as embedded and routine as “temperature setting, [which] in most workplaces is calibrated to men’s metabolic rates, so women are often uncomfortably cold,” which chills strides towards full inclusion of women in all careers. Marisa Porges, *What the Failed All-Female Spacewalks Tells Us About Office Temperature: In a For-Men, By-Men World, the Little Things Still Really Do Matter*, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/opinion/nasa-female-spacewalk.html> [<https://perma.cc/4U8D-TDDU>].

139. CARRIE J. MENKEL-MEADOW, ANDREA KUPFER SCHNEIDER & LELA PORTER LOVE, *NEGOTIATION: APPROPRIATE PROCESS AND PROBLEM SOLVING* (2006).

140. National Women’s Law Center, *Asking for Salary History Perpetuates Pay Discrimination from Job to Job* (June 2017), [https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocyqZp4\\_mv06F7CjAivNg3wj3gjp5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTINeEztBdEIP1kvbus](https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocyqZp4_mv06F7CjAivNg3wj3gjp5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTINeEztBdEIP1kvbus) [<https://perma.cc/E5H2-QG3V>] (referencing Corrine A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, PROC. NAT’L ACAD. SCI. (Aug. 2012), <http://www.pnas.org/content/109/41/16474.abstract#aff-1> [<https://perma.cc/FCL5-6X6H>]).

neutralized, by the salary negotiation process. In addition, “women are more likely to have worked in lower paid, female-dominated professions that pay low wages simply because women are the majority of workers in the occupation.”<sup>141</sup> Moreover, because women carry “the majority of caregiving responsibilities,” they are more likely “to reduce their hours or leave the workforce to care for children and other family members.”<sup>142</sup> These dynamics also impact educated women. Even though this group is “the least likely to stop working after having children,” it is important to recognize the social and economic dynamics “that push couples who have equal career potential to take on unequal roles,” as women often move to less demanding jobs or reduce their hours in order to accommodate their partner’s career and earning potential.<sup>143</sup> Recognizing that “[w]omen don’t step back from work because they have rich husbands ... [but that] [t]hey have rich husbands because they step back from work” is the first step to understanding how this phenomenon intersects with the compounding effects of the pay gap.<sup>144</sup> Overrepresentation in low-wage industries, accumulation of unpaid caregiving responsibilities, and practical limitations on earning capacity present additional hurdles for women to overcome in salary negotiation.

In addition to these obstacles in negotiation, other challenges that result from the use of prior salary history information include salaries that may not reflect current market conditions or a candidate’s current qualifications; preemptive screening of candidates because of salaries that are too high or too low, without an assessment of skill, knowledge, or experience; and salary disclosures that artificially deflate wages because employers are less likely to pay an applicant significantly more than their previous role.<sup>145</sup>

Courts have also recognized the difficulty of overcoming sexism in pay negotiations. The Ninth Circuit’s opinion in *Rizo* notes the limits of its holding, particularly with regard to salary negotiations:

Today we express a general rule and do not attempt to resolve its applications under all circumstances. We do not decide, for example, whether or under what circumstances past salary may play a role in the course of an individualized salary negotiation. We prefer to reserve all questions relating to individualized negotiations for decision in subsequent cases.<sup>146</sup>

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141. *Id.*

142. *Id.*

143. Claire Cain Miller, *Women Did Everything Right. Then Work Got ‘Greedy’: How America’s Obsession with Long Hours has Widened the Gender Gap*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html> [<https://perma.cc/3WBJ-2282>].

144. *Id.*

145. *Id.*

146. *Rizo*, 887 F.3d at 461.

Although specifically noting that the majority's opinion "should in no way be taken as barring or posing any obstacle to whatever resolution future panels may reach regarding questions relating to such negotiations," the concurrences by Judges McKeown and Callahan express concern that this holding could upset settled precedent.<sup>147</sup>

While the Ninth Circuit's ruling prohibits the reliance on salary history generally, it is unclear if or how this holding can break a cycle that often occurs in employment: prior salary is used to determine one's new salary. When employers are banned from inquiring about applicants' previous wages, applicants are relieved from having to disclose information that could be used against them to artificially deflate their salary. This ban breaks the cycle of underpayment. This rationale, which has prompted states like Massachusetts to take action to remedy the pay gap, will likely have a continuing influence on ongoing jurisprudence in about the use of prior salary history, particularly in the context of negotiations.<sup>148</sup>

#### *D. Understanding the Implications for Women of Color Using the Lens of Intersectionality*

There are many employment challenges faced by women of all races, including underrepresentation in high level, high-paying positions, and overrepresentation in low-paying jobs.<sup>149</sup> Only 5 percent of CEOs at Fortune 500 companies are women.<sup>150</sup> Women comprise less than 30 percent of earners at the top 10 percent and less than 20 percent of earners at the top 1 percent.<sup>151</sup> By contrast, "[w]omen make up 63 percent of workers earning the federal minimum wage, a wage rate stuck at \$7.25 since 2009."<sup>152</sup> Additionally, "[f]emale-dominated occupations — such as childcare and restaurant service — continue to occupy the lower rungs of the U.S. wage ladder."<sup>153</sup>

It should come as no surprise that the rates of female poverty are also higher—with 13.4 million women (13.4%) aged 18-64 living in poverty, as compared with 9.4 million (9.7%) of adult men.<sup>154</sup> This gap grows further when comparing poverty rates for single-parent households with children, where

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147. *Id.* at 468-78.

148. Frank, *supra* note 118.

149. *Economic Inequality Across Gender Diversity*, INST. FOR POL'Y STUD. (2019), <https://inequality.org/gender-inequality> [<https://perma.cc/3WBJ-2282>].

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

female-headed households “had a poverty rate of 35.6 percent, more than twice the 17.3 percent rate for households led by single men with children.”<sup>155</sup>

The gender wage gap also perpetuates the gender wealth gap, where earnings over time result in an even wider schism between the sexes, both directly and indirectly. Wage disparities impact pension plan payments and Social Security payouts, both of which are partly based past earnings.<sup>156</sup> More tangentially, women have smaller retirement savings but longer life expectancies than men, which are impacted by their earnings.<sup>157</sup> Women “hold nearly two-thirds of outstanding student loan debt” even though they only make up about half of college students.<sup>158</sup> These are just some of the ways women’s debt and savings are uniquely impacted by the gender wage gap.

Ongoing research shows that pay disparities are often worse for women of color.<sup>159</sup> According to research compiled by the American Association of University Women (“AAUW”), most women of color face an even greater wage gap than white non-Hispanic women, whose earnings were 77 percent that of white men.<sup>160</sup> In comparison, native Hawaiian and other Pacific Islander women earn 65 percent, black women earn 61 percent, native women earn 58 percent, and Latina women earn 53 percent as much as white men.<sup>161</sup> Only Asian women outpace white non-Hispanic women, but still only earn 85 percent as much as white men.<sup>162</sup> Accordingly, women of color are typically at an even greater disadvantage and disproportionately bear the impact of the wage gap. As the wage gap grows, so does the impact on the poverty and wealth gaps for women of color.

Sociologists have investigated “how racial and gender discrimination play important roles in creating and reinforcing this particular wage gap,” including research demonstrating that “office rules are applied more harshly to women of color than to others, and that some predominantly white workplaces have racially inhospitable environments that serve to push women of color out.”<sup>163</sup> Researchers have also investigated “how black women working in male-

155. *Id.*

156. *Id.* (“In 2017, the \$15,000 average annual Social Security benefit for women lagged the benefit for men by \$4,000.”).

157. *Id.*

158. *Id.*

159. NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, QUANTIFYING AMERICA’S GENDER WAGE GAP BY RACE (Mar. 2019), [https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocYqZp4\\_mv06F7CjAivNg3wj3gjp5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTINeEztBdEIP1kvbus](https://www.cwlc.org/download/fact-sheet-asking-for-salary-history-perpetuates-pay-discrimination-from-job-to-job/?wpdmdl=4689&ind=18BbgOnmocYqZp4_mv06F7CjAivNg3wj3gjp5CXH4qf-zNYNZRnH8IT0pAsVDTcnZ-L6CITL7w3seubhA7Ca3J-0CTINeEztBdEIP1kvbus) [<https://perma.cc/2X6D-89VW>].

160. KEVIN MILLER & DEBORAH J. VAGINS, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP, AAUW 9 (2018), [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=The\\_Simple\\_Truth](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth) [<https://perma.cc/QP2L-ECZL>].

161. *Id.*

162. *Id.*

163. Adia Harvey Wingfield, *About Those 79 Cents*, THE ATLANTIC (Oct. 17, 2016), <https://www.theatlantic.com/business/archive/2016/10/79-cents/504386> [<https://perma.cc/QP2L-ECZL>].

dominated executive ranks encounter both racial and gender stereotypes as well as disparities in mentorship that limit their career trajectories.”<sup>164</sup> These studies complement the findings of New York University researcher Deirdre Royster, whose work shows “that social networks help white men more than black men when it comes to looking for skilled jobs,” underscoring the importance of access to insider networks.<sup>165</sup>

This research is similar to the resumé study showing gender bias in salary-setting, in which employers on average offered John a starting salary nearly \$4,000 more than Jennifer, although their resumé were otherwise identical.<sup>166</sup> Similar research has demonstrated that the same phenomenon occurs with respect to race. One study of employers in Boston and Chicago found that white-sounding names—Greg Baker and Emily Walsh—generated a callback rate 50% higher than that of equally qualified applicants with African-American-sounding names—Lakisha Washington and Jamal Jones.<sup>167</sup> Another recent study showed racial discrimination in the evaluation of identical writing samples. Half of the reviewers were told the candidate was white and the other half were told the candidate was African-American.<sup>168</sup> Even though the memos were identical, “reviewers rated the memo thought to be written by a white man an average score of 4.1 out of 5, while they rated the memo thought to be written by an African-American man a score of 3.2 out of 5.”<sup>169</sup> These statistics illuminate a difficult reality: “contemporary bias is often subtle, unconscious, and institutionally based.”<sup>170</sup>

Broad statistics like these contain useful insights for advocates of pay equity, but they don’t tell the whole story. First, there is additional complexity within the subgroups in the statistics cited. For instance, although Asian women are paid more than women from other minority groups, the general group statistics do not fully reflect the experiences of all Asian women, as there is also diversity within this group. In the United States, Asian women “of Indian and Chinese descent are on average paid better . . . but Burmese, Hmong, and Laotian women on average are paid significantly less—60 percent or less of what white men are paid.”<sup>171</sup> A simple comparison between ethnic groups glosses over the different experiences of Asian women based on their country of origin.

Second, there are additional impacts on women who hold more than one minority identity. As seen with the intersection of gender and race in

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164. *Id.*

165. *Id.*

166. National Women’s Law Center, *supra* note 140.

167. Jamillah Bowman Williams, *Accountability as a Debiasing Strategy: Testing the Effect of Racial Diversity in Employment Committees*, 103 IOWA L. REV. 1593, 1597 (2018).

168. *Id.* at 1598.

169. *Id.*

170. *Id.*

171. MILLER, *supra* note 160, at 10.

employment, “[w]omen of color . . . experience particularly high levels of poverty, unemployment, and other economic hardships.”<sup>172</sup>

This is further compounded for women of color who are also members of other minority or historically disadvantaged groups due to their age,<sup>173</sup> disability,<sup>174</sup> sexual orientation, or gender identity.<sup>175</sup> Adopting an intersectional lens in which “categories like gender, race, and class are best understood as overlapping and mutually constitutive rather than isolated and distinct” can inform solutions that account for the experiences of all women.<sup>176</sup> The importance of intersectionality is that it “deliberately focus[es] on those on the fringes” to ensure that a “focus on women” includes all women.<sup>177</sup>

The concept of intersectionality, first introduced by legal scholar Kimberlé Crenshaw, recognizes that race and gender are interconnected and interrelated, rather than discrete categories of analysis.<sup>178</sup> Because a person “does not experience oppressions or privileges discretely, but simultaneously . . . women of color often have unique intersectional experiences that neither men of color nor white women can relate to.”<sup>179</sup>

Intersectional problems require intersectional solutions. It is critical to address bias in salary history, as well as other gender-based forms of discrimination, ranging from stereotyping to the motherhood penalty, that afflict all women. However, it is not sufficient to advocate for salary parity, pregnancy or caregiver protections, or other policies that benefit women as a monolith. A comprehensive and multi-faceted solution that is also intersectional will better address the broad impacts of the gender wage gap, including its implications for women’s access to housing, education, and credit. Implementing policies that “improve the quality of jobs held mainly by women, tackle occupational segregation, enforce equal pay and employment opportunities, and improve work family benefits for all workers, will help the incomes of women and their families grow and strengthen the economy.”<sup>180</sup> Accordingly, “any efforts to close the gender-pay gap should address not just the processes that perpetuate gender discrimination . . . but also the mechanisms that reproduce racial inequalities” so

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 11.

176. Wingfield, *supra* note 163.

177. Jennifer Kim, *Intersectionality 101: Why “We’re Focusing on Women” Doesn’t Work for Diversity & Inclusion*, MEDIUM (Apr. 10, 2018), <https://medium.com/awaken-blog/intersectionality-101-why-were-focusing-on-women-doesn-t-work-for-diversity-inclusion-8f591d196789> [<https://perma.cc/WZN7-DKQP>].

178. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

179. Kim, *supra* note 177; see also Wingfield, *supra* note 163.

180. Erica Williams, *On Equal Pay Day, a Look at How EITCs Help Women in Every State*, CTR. ON BUDGET & POL’Y PRIORITIES (Apr. 10, 2018), <https://www.cbpp.org/blog/on-equal-pay-day-a-look-at-how-eitcs-help-women-in-every-state> [<https://perma.cc/5FD3-HZRE>].

that the pay gaps that remain are “driven only by differences in skill, education, and experience—not by race or gender.”<sup>181</sup>

## V. CONCLUSION

The question of whether prior salary history is a “factor other than sex” under the EPA will likely be determined by the Supreme Court, as the circuit split on this question was not answered in the Court’s review of Ninth Circuit’s en banc decision in *Rizo*. This Article summarizes the existing circuit divide on this question, assessing arguments related to the statute’s text, legislative history, and purpose. Additionally, state legislative efforts to address problems that arise from the use of prior salary history provide important context for the evolution of a national dialogue on this issue. Finally, while the policy consequences of the ongoing salary history debate are uncertain, special attention should be paid to the efficacy of salary history bans, the role of courts and legislatures in setting the scope of use of salary history information, the impact of prior salary in employment negotiations, and the unique barriers faced by women of color. In addition to achieving the goal of pay equity through the elimination of prior salary history, advocates should promote intersectional solutions that improve the outcomes for all women. Such solutions include enhancing union protections, mandating paid leave and flexible scheduling, and designing tax and economic policies that help all workers. Ultimately, these court decisions, legislative choices, and national discussions will help ensure that the fundamental goal of the Equal Pay Act is realized: offering truly equal employment opportunities to all workers, regardless of sex or salary history.

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181. Wingfield, *supra* note 163.