Closing the Gap: Resolving the Circuit Split on Prior Pay in Equal Pay Act Claims

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ABSTRACT

Despite decades of legislative efforts to achieve pay equity, women in the United States earn less on average than men. The Equal Pay Act ("EPA") prohibits sex-based wage discrimination. But the EPA allows for pay differentials based on a "factor other than sex." Competing interpretations of this provision have led to a deep circuit split. Some courts permit the use of prior salary alone as a justification, but others prohibit it entirely, and a third group takes a "middle ground" approach, allowing courts to consider prior pay only in conjunction with other legitimate business factors.

This Comment examines the historical context of the EPA, the emergence of the circuit split regarding prior salary, and the legal and policy implications of each approach. This Comment argues that the middle ground approach strikes the best balance between employer flexibility and employee protections, ensuring that employers do not use prior pay to perpetuate historical discrimination while allowing organizations to legally use prior pay as a relevant factor in wage-setting. This Comment urges the Supreme Court to resolve the split by adopting the middle ground approach. The middle ground approach improves clarity for employers, employees, and lower courts, reinforcing the EPA's mission of pay equity.

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I. INTRODUCTION

In 2023, women in the United States earned an average of 84 cents for every dollar earned by men, a disparity that persists despite decades of legislative efforts to achieve pay equality.[1] Modern hiring and compensation strategies, including the reliance on prior salary histories, perpetuate the wage gap.[2] Employers use prior pay as a benchmark to set wages, which can inadvertently entrench historical inequities and compound the very discrimination that the Equal Pay Act ("EPA") aims to eliminate.[3]

Congress enacted the EPA to combat gender-based wage disparities by mandating that men and women receive equal pay for equal work.[4] Under the EPA, employers cannot pay employees differently based on sex unless they justify the disparity with seniority, merit, production quality or quantity, or another factor other than sex.[5] The "factor other than sex" defense has become a focal point of litigation. In particular, many cases

1. *See* Erin George & Gretchen Livingston, *What You Need to Know About the Gender Wage Gap*, U.S. DEPT. OF LABOR BLOG (Mar. 12, 2024), https://perma.cc/M2F7-47MU.

2. *See Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, NAT'L WOMEN'S L. CTR. (Mar. 10, 2022), https://perma.cc/AL6G-HRBD.

3. *See id.*

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

5. *See id.*

have litigated the issue of whether an employee's prior salary can justify pay differences as a factor other than sex.[6]

Courts throughout the United States deeply disagree on this issue.[7] The Seventh and Fourth Circuits have permitted using prior pay alone as a legitimate factor, arguing that prior pay reflects market conditions rather than gender bias.[8] In contrast, the Ninth Circuit has categorically rejected prior pay as a valid justification, viewing it as a practice perpetuating historical discrimination.[9] The Eleventh, Tenth, Sixth, and Federal Circuits have adopted a middle ground approach, considering prior pay only when coupled with additional legitimate business reasons.[10] This circuit split has created legal uncertainty, leaving employees and employers without clear guidance on lawful wage-setting practices under the EPA.[11]

Part II of this Comment outlines the EPA's history and purpose, the process of bringing a claim under the EPA, and the emergence of the circuit split regarding the use of prior pay in wage-setting.[12] Part III analyzes the implications of each approach to prior pay: allowing it as a sole factor, prohibiting it entirely, and the approach that requires additional justifications.[13] Part III then argues that the middle ground approach appropriately balances employer flexibility and employee protections.[14] Finally, this Comment concludes by urging the Supreme Court to resolve the circuit split and adopt the middle ground approach, which would provide much-needed clarity and reinforce the EPA's mission to promote pay equality.[15]

6. *See* Nicole Tronolone, *The Blurry Limits of the Equal Pay Act's "Factor Other Than Sex": An Argument for Limiting the Use of Salary History and the Benefit to Employers*, 11 WAKE FOREST L. REV. 21, 22 (2021).

7. *See* Wernsing v. Dep't of Human Servs., State of Ill., 427 F.3d 466, 467 (7th Cir. 2005); Spencer v. Va. State Univ., 919 F.3d 199, 207 (4th Cir. 2019); Rizo v. Yovino, 950 F.3d 1217, 1219 (9th Cir. 2020); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Riser v. QEP Energy, 776 F.3d 1191, 1196–97 (10th Cir. 2015); Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005); Boyer v. U.S., 97 F.4th 834, 838 (Fed. Cir. 2024).

8. *See Wernsing*, 427 F.3d at 467; *Spencer*, 919 F.3d at 207.

9. *See Rizo*, 950 F.3d at 1219.

10. *See Irby*, 44 F.3d at 955; *Riser*, 776 F.3d at 1191; *Balmer*, 423 F.3d at 612; *Boyer*, 97 F.4th at 838.

11. *See* Tronolone, *supra* note 6.

12. *See* discussion *infra* Part II.

13. *See* discussion *infra* Part III.

14. *See* discussion *infra* Sections III.A–III.B.

15. *See* discussion *infra* Section III.C.

II. BACKGROUND

The EPA emerged as a legislative response to widespread wage disparity between men and women.[16] The Act's passage marked a significant milestone in the women's liberation movement and the fight for workplace equality.[17] However, the EPA has not fully lived up to its purpose, as persistent wage disparities and the ambiguous scope of the "factor other than sex" defense continue to undermine the Act's ability to achieve wage parity.[18]

A. The History of the Equal Pay Act

Congress signed the EPA into law in 1963.[19] The EPA mandates employers to pay employees of the opposite sex equally "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[20] In *Corning Glass Works v. Brennan*, a landmark case addressing the Equal Pay Act, the Supreme Court noted,

> Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry – the fact that the wage structure of "many segments of American industry has been based on an ancient and 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."[21]

The need for the EPA originated several decades before its passage, when the demands of World War II called for women to work outside of the home.[22] Following the war, the need for women's labor remained steady; by 1960, women made up 37% of the workforce.[23] During this period, employers commonly paid female employees less than male employees for completing comparable work.[24] In response to the gender pay gap, Esther Peterson proposed the EPA to amend the Fair Labor Standards Act.[25] The Fair Labor Standards Act regulates minimum wage

16. *See* Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1); *see also* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

17. *See Equal Pay Act of 1963*, NAT'L PARK SERV., https://perma.cc/N5EV-YNXY (last updated Apr. 1, 2016).

18. *See* Tronolone, *supra* note 6.

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

20. *See id.*

21. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting S. REP. NO. 176 (1963)).

22. *See Equal Pay Act of 1963*, NAT'L PARK SERV., https://perma.cc/N5EV-YNXY (last updated Apr. 1, 2016).

23. *See id.*

24. *See id.*

25. *See id.*

and child labor laws.[26] The EPA amendment proposed equal pay for "comparable work."[27] EPA advocates repeatedly failed throughout the 1950s to pass legislation demanding equal pay for women.[28] Lawmakers revived the EPA in 1961, and two years later, President Kennedy signed it into law with new language requiring "equal pay for equal work."[29]

The gender pay gap persists today despite the great intentions of the EPA.[30] In 2023, employers paid women working full-time 84% of the money paid to men.[31] While the gender pay gap continues to close, progress throughout the past two decades has slowed.[32] Several factors contribute to the persisting wage gap, including the demands of motherhood.[33] On average, fathers tend to have higher wages than men without children.[34] Fathers also tend to work more hours compared to men without children.[35] However, women aged 25 to 34, who are just entering the workforce experience a less daunting wage gap, which has remained stagnant since 2007 at around 90 cents to a man's dollar.[36] As women age and tend to start families, women's average pay relative to men's drops sharply.[37]

The Global Gender Gap Index tracks the current gender parity yearly to close gender pay gaps over time.[38] Regionally, the 2024 Global Gender Gap Index ranked North America second only to Europe in gender parity,

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26. *See id.*

27. *See id.* (noting that legislators perceived the language as "problematic" because they believed it suggested that the Act would protect work they considered not equal but "comparable").

28. *See Equal Pay Act of 1963*, NAT'L PARK SERV., https://perma.cc/N5EV-YNXY (last updated Apr. 1, 2016) (explaining that the bill failed primarily due to the "comparable work" language).

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

30. *See* George & Livingston, *supra* note 1.

31. *See id.*

32. *See* Rakesh Kochar, *The Enduring Grip of the Gender Pay Gap*, PEW RSCH. CTR. (March 1, 2023), https://perma.cc/5RFZ-KQ7Q (highlighting that from 2002 to 2022, the wage gap closed by two cents; in contrast, from 1982 to 2002 the wage gap closed by fifteen cents).

33. *See id.* (noting that women between the ages of 25 and 44 who are mothers are less likely to be active in the labor force than women of the same age who are childless).

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.* Data shows that women's pay relative to men's drops sharply around ages 35 to 44. *See id.* While women ages 25–34 made around 92% of what men made, women ages 34–44 made about 83% of what men made. *See id.* This gap coincides with the age at which women are more likely to have children in the home. *See id.*

38. *See* WORLD ECONOMIC FORUM, GLOBAL GENDER GAP REPORT 2024 5 (Kusum Kali Pal et al.) (June 2024), https://www3.weforum.org/docs/WEF_GGGR_2024.pdf. The index evaluates gender parity across four subindexes: Economic Participation and Opportunity, Educational Attainment, Health and Survival, and Political Empowerment. *See id.* at 9. Each subindex bases its evaluation on several indicators. *See id.* at 65.

boasting 100% parity in "Educational Attainment" and 96.9% parity in "Health and Survival."[39] However, the United States ranked 43rd globally based on overall score.[40] The World Economic Forum estimates that reaching global parity will take 134 years.[41]

Equal pay proponents suggest that state and federal governments must take action to achieve parity in the United States.[42] These proponents further suggest that reforming the EPA may improve the wage gap in the United States.[43] However, despite these arguments, lawmakers have struggled to amend the EPA.[44] While legislators may be unlikely to reform the EPA, federal judges have continued debating its interpretation over the last several decades.[45] Because Congress has not substantially reformed the EPA recently, courts have decided its future.[46]

B. Claims and Remedies Under the EPA

Under the EPA, employers cannot "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."[47] The EPA also requires that the work be equal in skill, effort, and responsibility for the law's prohibition on wage discrimination to apply.[48] The EPA grants employees a private right of action, allowing them to bring claims against their employer for alleged violations of the law.[49] To establish a prima facie case of discrimination, courts require plaintiff-employees to prove: (1) the employer pays employees of the opposite sex unequally, (2) the employees of the opposite sex perform substantially equal work, and (3) the employees have similar working conditions.[50]

Once a plaintiff establishes a prima facie case, the burden of proof shifts to the employer to show that the difference is justified under one of

39. *See id.* at 19–20. The "Educational Attainment" subindex uses four indicators to measure gender parity: literacy rate, enrollment in primary education, enrollment in secondary education, and enrollment in tertiary education. *Id.* at 65. The "Health and Survival" subindex uses two indicators to measure gender parity: sex ratio at birth and health life expectancy. *Id.*

40. *See id.* at 12.

41. *See id.* at 5.

42. *See* Abigail Coleman et al., *In Pursuit of Pay Equity: Examining Barriers to Equal Pay, Intersectional Discrimination Theory, and Recent Pay Equity Initiatives*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Nov. 2021), https://perma.cc/WLZ9-55KR.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

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

48. *See id.*

49. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 190 (1974).

50. *See* Stopka v. All. of Amer. Insurers, 141 F.3d 681, 685 (7th Cir. 1998); s*ee also* Lindsley v. TRT Holdings, Inc., 984 F.3d 460, 466 (5th Cir. 2021).

the EPA's four affirmative defenses.[51] The EPA's four affirmative defenses include: (1) pay based on seniority, (2) pay based on merit, (3) pay measured by quantity or quality of production, and (4) pay based on a "factor other than sex."[52] Establishing an affirmative defense under the EPA is a heavy burden.[53]

An employee who successfully proves an EPA violation has several forms of relief available.[54] The most common relief is "backpay equivalent to the difference between what the aggrieved employee actually received and what the aggrieved employee should have received but for the illegal pay disparity."[55] This backpay calculation can include all allowances and fringe benefits.[56]

C. "Factor Other Than Sex" Circuit Split

When using the "factor other than sex" defense, the employer-defendant must prove that sex discrimination did not create the pay differential between a male and female employee.[57] The employer must present a reason other than sex to explain the pay disparity.[58] Courts have held that factors such as prior experience, educational attainment, and market forces adequately prove the affirmative defense under the EPA.[59] While circuit courts somewhat agree on the meaning of the factor other than sex defense, some courts disagree on whether the factor must be job-

51. *Corning Glass Works*, 417 U.S. at 197.

52. *See* The Equal Pay Act, 29 U.S.C. § 206(d)(1).

53. Timmer v. Mich. Dept. of Com., 104 F.3d 833, 843 (6th Cir. 1997)(holding that an employer may rely on a mistake that resulted in a wage disparity as long as the employer can show that sex provided no basis for the discrimination); *see also* Ryduchowski v. Port Auth. of N.Y. and N.J., 203 F.3d 135, 143 (2nd Cir. 2000) (holding that an employer failed to meet its heavy burden because it did not prove that the employer systemically evaluated employees under its merit system).

54. *See* 26 AM. JUR. 3D *Proof of Facts* § 18, Westlaw (database updated Sept. 2024).

55. *Id.*

56. *See id.* (explaining that the calculation of backpay can include deferred income, profit-sharing, guarantees, bonuses, company cars, gas and travel allowances, expense accounts, and medical or life insurance).

57. *See* Drum v. Leeson Elec. Corp., 565 F.3d 1071, 1072 (8th Cir. 2009) (quoting Simpson v. Merchs. & Planters Bank, 441 F.3d 572, 579 (8th Cir. 2006)) (holding that a genuine issue of material fact existed concerning whether the pay disparity was due to a factor other than sex).

58. *See id.*

59. *See* Merillat v. Metal Spinners, Inc., 470 F.3d 685, 697 (7th Cir. 2006) (granting summary judgment to an employer because it showed that a male employee had more education and experience than the plaintiff and that the disparity was rooted in market forces); *see also* Weidenbach v. Casper-Natrona Cnty. Health Dep't, 563 F. Supp. 3d 1170, 1183 (D. Wyo. 2012) (holding that a genuine issue of material fact existed regarding whether pay disparity resulted from the plaintiff's lack of managerial experience).

related.[60] Requiring a factor to be job-related can alter the outcome of an EPA action.[61]

The factor other than sex affirmative defense has been the subject of much litigation surrounding the EPA.[62] The term "factor other than sex" is ambiguous.[63] Lower courts have struggled to define the term while respecting the EPA's original intent.[64] Apart from the Supreme Court's decision in *Corning Glass Works*, the Court has provided little guidance to lower courts on interpreting the "factor other than sex" defense.[65] In *Corning Glass Works,* employees filed an EPA challenge against their employer for paying male workers significantly more than female workers.[66] The employer claimed that even though male and female employees performed substantially similar work, the male workers worked at night while the female workers worked during the day.[67] The Court reasoned that the time of day worked is not an adequate factor other than sex under the EPA.[68] The Court explained,

> The differential arose simply because men would not work at the low rates paid to women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.[69]

The Court further reasoned that the employer still violated the EPA when it tried to remedy the pay discrimination by allowing women to bid for jobs on the night shift.[70] *Corning Glass Works* also established that an employer must increase the women's pay rate to the men's pay rate rather than lowering the men's pay rate to the women's pay rate.[71] The Court held that the employer did not meet its burden of proof and, thus, violated

60. *Compare* Eisenhauer v. Culinary Inst. of Amer., 84 F.4th 507, 520 (2d Cir. 2023) (reasoning that "nothing in the legislative history suggests that a 'factor other than sex' must be job related"), *with* Rizo v. Yovino, 950 F.3d 1217, 1219 (9th Cir. 2020) (en banc) (holding that only job-related factors may serve as affirmative defenses).

61. *See id.*

62. *See* Peter Avery, *The Diluted Equal Pay Act: How Was it Broken? How Can it Be Fixed?*, 56 RUTGERS L. REV. 849, 863–64 (2004).

63. *See id.*

64. *See id.*

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

66. *See id.* at 192.

67. *See id.*

68. *See id.* at 205.

69. *Id.*

70. *See id.* (explaining that employers must pay their employees "equal pay for equal work" regardless of the time of day they worked).

71. *See Corning Glass Works*, 417 U.S. at 207.

the EPA.[72] While the Court demonstrated that the EPA has significant enforcement power,[73] it stopped short of addressing whether employers may use other factors, such as prior pay, in a "factor other than sex" defense.

The minimal guidance offered by the Supreme Court in *Corning Glass Works* in interpreting the "factor other than sex" affirmative defense has led to disagreement between the circuit courts.[74] The ambiguity has caused a circuit split on the issue of whether employers may use prior pay as a factor other than sex under the EPA.[75] Courts have adopted three main approaches to resolve the ambiguous "factor other than sex" defense: (1) prior pay alone can be a factor other than sex; (2) prior pay can never be a factor other than sex; and (3) prior pay can be a permissible factor other than sex when considered with another factor (the middle ground approach).[76] The Federal Circuit added to the circuit split in 2024 when it joined the middle ground circuits in *Boyer v. United States*.[77]

1. The Seventh and Fourth Circuits: Prior Pay Alone as a Factor

The Seventh and Fourth Circuit Courts have held that employers may use prior pay as a factor other than sex.[78] These circuits have prioritized allowing employers to use wage-setting policies as they see fit, so long as no concrete evidence shows that they base the wages on overt sex discrimination.[79]

a. The Seventh Circuit: *Wernsing v. Dep't of Human Servs.*

In *Wernsing v. Dep't of Human Servs.*, a female employee claimed that her employer violated the EPA.[80] The employer paid lateral transferees a salary equal to what they earned in their prior role, plus a raise if possible.[81] The employer's hiring practice caused the employer to

72. *See id.* at 204.
73. *See id.* at 207–08.
74. *See* Wernsing v. Dep't of Human Servs., State of Ill., 427 F.3d 466, 467 (7th Cir. 2005); Spencer v. Va. State Univ., 919 F.3d 199, 207 (4th Cir. 2019); Rizo v. Yovino, 950 F.3d 1217, 1219 (9th Cir. 2020); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015); Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005).
75. *See id.*
76. *See* Jennifer Cacchioli, *Leaving Unequal Pay in the Past: Why Reliance on Prior Pay Must Be Restricted Under the Equal Pay Act*, 43 SETON HALL LEGIS. J. 463, 470–71 (2019).
77. *See* Boyer v. U.S., 97 F.4th 834, 843–44 (Fed. Cir. 2024).
78. *See Wernsing*, 427 F.3d at 468; *Spencer*, 919 F.3d at 206.
79. *See id.*
80. *See Wernsing*, 427 F.3d at 467.
81. *See id.*

pay the female plaintiff substantially less than a male employee performing the same job.[82] In three previous decisions, the Seventh Circuit established prior pay as a factor other than sex.[83] The employee still argued that the employer's hiring practice violated the EPA for two reasons: (1) the employer lacked an "acceptable business reason," and (2) the use of prior pay is discriminatory "because all pay systems discriminate on account of sex."[84]

The Seventh Circuit maintained that prior pay is an acceptable factor other than sex under the EPA.[85] The court reasoned, "[t]he statute asks whether the employer has a reason other than sex – not whether it has a 'good' reason."[86] The Seventh Circuit recognized that some courts have mandated the factor be based on an "acceptable business reason," but the Seventh Circuit rejected this requirement.[87] The court noted, "[t]he Equal Pay Act forbids sex discrimination, an intentional wrong, while markets are impersonal and have no intent."[88] While the court conceded that a gender wage gap exists, it reasoned that sex discrimination does not necessarily cause this gap.[89] Instead, the court credited factors such as women spending less time in the workforce than men due to child-rearing responsibilities.[90]

b. The Fourth Circuit: *Spencer v. Va. State Univ.*

More recently, the Fourth Circuit joined the Seventh Circuit, holding that prior pay is an adequate factor other than sex under the EPA.[91] In *Spencer v. Virginia State Univ.*, the plaintiff failed to meet her burden of establishing that similarly situated employees performed "substantially equal work."[92] Although the plaintiff's claim failed because she did not establish a prima facie case, the court went a step further and addressed the "factor other than sex" defense.[93] In *Spencer*, the employer used the employees' prior salaries as university administrators to set their new salaries as professors.[94] This practice caused male professors to receive

82. *See id.*
83. *See id.* (citing Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446 (7th Cir. 1994); Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987); Covington v. Southern Ill. Univ., 816 F.2d 317 (7th Cir. 1987)).
84. *Wernsing*, 427 F.3d at 468.
85. *See id.* at 470.
86. *Id.* at 468.
87. *Id.* at 469.
88. *Id.*
89. *See id.* at 470.
90. *See id.*
91. *See* Spencer v. Va. State Univ., 919 F.3d 199, 207 (4th Cir. 2019).
92. *Id.* at 206.
93. *See id.*
94. *See id.*

higher salaries than female professors because the male professors had earned more in their previous positions.[95] The Fourth Circuit upheld the employer's method to determine salaries, reasoning that prior pay is a factor other than sex within the meaning of the EPA.[96] The court clarified that while the employer may have "erroneously applied" its practice of relying on prior pay, the employer still relied on a "non-sex-based explanation."[97]

The Seventh and Fourth Circuits held that prior pay may be used alone as a factor other than sex.[98] In doing so, the two Circuits placed far more emphasis on an employer's interests than the Ninth Circuit did in *Rizo v. Yovino*.[99] The Seventh and Fourth Circuits' holdings can also be distinguished from the middle ground circuits' holdings, which focus on adequately considering both the employer's interests and the interests of EPA plaintiffs.[100]

2. The Ninth Circuit: Prior Pay Never a Factor

In *Rizo v. Yovino*, the Ninth Circuit considered whether Aileen Rizo's previous salary was a factor other than sex justifying Fresno County's Office of Education paying Rizo less than her male colleagues for the same work.[101] The Ninth Circuit held that employers could not use prior pay as a factor other than sex to defeat EPA claims.[102] The court reasoned that allowing prior pay as a factor other than sex would undermine the purpose of the EPA.[103] The court interpreted the "factor other than sex" defense to be limited to job-related factors, which do not include prior pay.[104] The court defended its position, emphasizing that the history of wage discrimination prevents an employer from using prior pay as a factor.[105]

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95. *See id.*

96. *See id.*

97. *Spencer*, 919 F.3d at 207.

98. *See* Wernsing v. Dep't of Human Servs., State of Ill., 427 F.3d 466, 468 (7th Cir. 2005); *Spencer*, 919 F.3d at 206.

99. *Compare Wernsing*, 427 F.3d at 468 (reasoning that the EPA "does not authorize federal courts to set their own standards of 'acceptable' business practices"), *and Spencer*, 919 F.3d at 206, *with* Rizo v. Yovino, 950 F.3d 1217, 1228 (9th Cir. 2020) (en banc) (reasoning that "the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex.").

100. *Compare Wernsing*, 427 F.3d at 468, *and Spencer*, 919 F.3d at 206, *with* Irby v. Bittick, 44 F.3d 949, 954–55 (11th Cir. 1995), Riser v. QEP Energy, 776 F.3d 1191, 1197 (10th Cir. 2015), Balmer v. HCA, Inc., 423 F.3d 606, 613 (6th Cir. 2005), *and* Boyer v. U.S., 97 F.4th 834, 843–44 (Fed. Cir. 2024).

101. *See Rizo*, 950 F.3d at 1219.

102. *See id.* at 1231.

103. *See id.* at 1227.

104. *See id.* (noting that "education, skills, or experience related to an employee's prior job" are acceptable job-related factors).

105. *See id.* at 1228.

The Ninth Circuit also overruled precedent holding that employers may use prior pay in combination with other factors.[106] The court reasoned that allowing prior pay as a consideration with other factors is "inconsistent with the EPA's text, purpose, and burden-shifting framework for the same reasons the use of prior pay alone is inconsistent . . . ."[107] The court also criticized *Kouba v. Allstate Ins. Co.'s* "business reasons" language,[108] asserting that the language contradicts the Supreme Court's express rejection of the market force theory.[109] The Ninth Circuit narrowed the scope of the fourth affirmative defense to "job-related factors other than sex."[110] The circuit court added that its decision does not forbid discussing prior pay in the negotiation process.[111] However, the court did not further explain how its decision may affect future litigation.[112]

Two judges wrote separate concurring opinions in *Rizo*.[113] The first, Judge McKeown, criticized the majority's holding that employers may never use prior salary as a defense under the EPA.[114] McKeown noted, "[t]he majority fails to account for the realities of today's dynamic workforce, choosing instead to view the workplace in a vacuum. In doing so, the majority betrays the promise of equal pay for equal work and disadvantages workers regardless of gender identity."[115] Judge McKeown agreed that prior pay should not be a factor other than sex, as there is a significant likelihood that sex constitutes the primary factor causing pay disparity.[116] However, Judge McKeown reasoned that it is "wholly consistent to forbid employers from baldly asserting prior pay as a defense . . . but to permit consideration of prior salary along with those valid factors."[117] Judge McKeown further reasoned that the hybrid approach is best because it still places the burden on the employer to prove that a factor other than sex is present.[118] The hybrid approach also considers that many reasons may account for the pay disparity between

106. *See id.* at 1229 (overruling Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982)).

107. *See Rizo*, 950 F.3d at 1229–30.

108. *See id.* at 1230; *see also Kouba*, 691 F.2d at 876 (explaining that "[i]t would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to the business").

109. *See Rizo*, 950 F.3d at 1230 (citing *Corning Glass*, 417 U.S. 188, 205 (1974)) (explaining that Corning Glass Works relied on the "market force theory" when they paid women less than men because women were willing to work for less).

110. *See id.*

111. *See id.* at 1231.

112. *See id.*

113. *See id.* at 1232–42.

114. *See id.* at 1232 (McKeown, M., concurring).

115. *Id.*

116. *See id.* at 1233.

117. *Id.* at 1234.

118. *See id.*

male and female employees.[119] Furthermore, Judge McKeown suggested that never allowing prior pay as a factor may be harmful because it prevents women from using prior pay to their advantage.[120]

The second concurring judge, Judge Callahan, also criticized the majority's holding that employers may never use prior pay as a factor other than sex.[121] Judge Callahan criticized the "job-related" requirement proffered by the majority, arguing that the Supreme Court intended the "factor other than sex" defense to be a broad catch-all exception.[122] Like Judge McKeown, Judge Callahan agreed with the case's narrow holding but reasoned that the majority went beyond what was necessary to decide the case.[123]

Judge McKeown's and Judge Callhan's concurrences echo many of the critical ideas supported by the middle ground circuits.[124] The concurrences in the Ninth Circuit's *Rizo* decision and the middle ground circuits' approach emphasize flexibility in interpreting the "factor other than sex" defense, rejecting a rigid reading of the EPA.[125]

3. The Middle Ground Approach

Most of the circuits that have addressed the issue of whether employers may use prior pay as a factor other than sex, including the Eleventh, Sixth, Tenth, and Federal Circuits, have taken a middle ground approach.[126] These courts have held that employers cannot use prior salary alone as a factor other than sex to prove an affirmative defense.[127]

a. The Eleventh Circuit: *Irby v. Bittick*

In *Irby v. Bittick*, an employee claimed her employer discriminated against her under the EPA.[128] The defendant, Monroe County Sheriff's

119. *See Rizo*, 950 F.3d at 1234.
120. *Id.* at 1236.
121. *See id.* at 1237 (Callahan, C., concurring).
122. *See id.* at 1240.
123. *See id.* at 1242 (arguing that it was unnecessary for the court to hold that prior pay can never be considered in a "factor other than sex" analysis).
124. *Compare Rizo*, 950 F.3d at 1232–37 (McKeown, M., concurring), *and Rizo*, 950 F.3d at 1237–42 (Callahan, C., concurring), *with* Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995), Riser v. QEP Energy, 776 F.3d 1191, 1200 (10th Cir. 2015), Balmer v. HCA, Inc., 423 F.3d 606, 613 (6th Cir. 2005), *and* Boyer v. U.S., 97 F.4th 834, 843–44 (Fed. Cir. 2024).
125. *See id.*
126. *See Irby*, 44 F.3d at 955; *Riser*, 776 F.3d at 1200; *Balmer*, 423 F.3d at 613; *Boyer*, 97 F.4th at 843.
127. *See id.*
128. *See Irby*, 44 F.3d at 953.

Department, hired the plaintiff, Ms. Irby, as an investigator.[129] After a few years of working with Monroe County, two male investigators transferred from the City of Forsyth to Monroe County.[130] The plaintiff and the male employees held the same job title.[131] The county inadvertently included the male employees' previous year's overtime hours in determining their base salary.[132] Including previous overtime hours caused the employer to pay male employees substantially more than the plaintiff.[133] The plaintiff sought injunctive relief, damages, and declaratory judgment under the EPA.[134] The district court granted summary judgment for the defendants, and the plaintiff appealed.[135]

In the Eleventh Circuit, the plaintiff successfully established a prima facie case under the EPA because she proved she "perform[ed] the same work involving identical skill, effort, responsibility, and working conditions" as the male employees.[136] The defendants argued that the employers based the pay disparity on a factor other than sex.[137] The circuit court held that the employer could not rely on prior salary alone to justify the disparity.[138] However, the court noted that the employer could succeed on a claim under the EPA if it could prove it relied on prior salary in combination with the employees' experience in setting salaries.[139] The male employees spent five more years in the investigations division and four more years with the Sheriff's Department than the plaintiff.[140] Therefore, the court concluded that the employer justified the pay disparity on the "factor other than sex" defense.[141]

Judge Carnes, concurring in part and dissenting in part, argued that the Ninth Circuit should not have affirmed the grant of summary judgment to the employer.[142] Judge Carnes contended that the employer failed to show that the male employees were "worth more" to the department than

129. *See id.* (noting that the Monroe County Sheriff's Department had six investigators on staff in the criminal investigations division and the plaintiff was the only female investigator).

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *Id*. at 954.

137. *See id.*

138. *See Irby*, 44 F.3d at 955.

139. *See id.* ("While an employer may not overcome the burden of proof on the affirmative defense of relying on 'any other factor other than sex' by resting on prior pay alone, . . . there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay *and* more experience.").

140. *See id.* at 956.

141. See *id.* at 957 (explaining that experience is an adequate "factor other than sex" when used in combination with prior pay).

142. *See id.* at 957 (Carnes, E., concurring in part and dissenting in part).

the plaintiff based on their experience.[143] Furthermore, Judge Carnes reasoned that the employer based the pay disparity solely on prior salary continuation, which does not qualify as a factor other than sex under the statute.[144] Judge Carnes concluded that a genuine issue of material fact existed and that the court should not have granted summary judgment.[145]

b. The Sixth Circuit: *Balmer v. HCA*

The Sixth Circuit joined the middle ground circuits in *Balmer v. HCA.*[146] In *Balmer,* an employee filed an action under the EPA because her employer paid her less than a male employee holding the same position.[147] Under the "factor other than sex" defense, the defendants justified the pay differential on experience, prior pay history, and negotiated salaries.[148] The district court granted the defendants' motion for summary judgment.[149]

The Sixth Circuit held that pay disparity based on prior education or work experience is a factor other than sex under the EPA.[150] The circuit court considered the evidence together, including that the male employees asked for a higher salary, had a higher salary history, and had more industry experience than the plaintiff.[151] After the employer met its burden of proving the affirmative defense, the burden shifted back to the plaintiff to show that the reasons presented by the employer were pretextual.[152] Because the plaintiff failed to meet her burden, the Ninth Circuit affirmed the district court's grant of summary judgment to the employer.[153]

c. The Tenth Circuit: *Riser v. QEP Energy*

In *Riser v. QEP Energy,* a female employee brought an EPA claim in federal court alleging that her employer had discriminated against her.[154] As of May 2011, Ms. Riser, the plaintiff, had been promoted to "Fleet

143. *Id.*
144. *See Irby*, 44 F.3d at 958.
145. *See id*. at 960.
146. *See* Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005).
147. *See id.* at 609.
148. *See id.* The male employee had negotiated a higher salary than the female employee based on his higher salary history. *See id.* at 613. He also had more relevant industry experience than the female employee. *See id.*
149. *See id.* at 612 (noting that "[i]n order to be entitled to summary judgment, the defendant must prove that there is no genuine issue as to whether the difference in pay is due to a factor other than sex.").
150. *See id.* at 612.
151. *See id.* at 613.
152. *See id.*
153. *See id.* at 617.
154. *See* Riser v. QEP Energy, 776 F.3d 1191, 1195 (10th Cir. 2015).

Administrator" after over 10 years with the company.[155] The employer also hired a male employee, Mr. Chinn, as Fleet Administrator.[156] Ms. Riser trained him until the employer terminated her in September 2011.[157] Ms. Riser's supervisor testified that Ms. Riser's and Mr. Chinn's duties were very similar.[158] After the employer hired Mr. Chinn, Ms. Riser's scope of responsibilities shifted.[159] Throughout Ms. Riser's employment, her supervisors received several complaints about her job performance.[160] These complaints ultimately led to her termination.[161]

The district court granted the employer's motion for summary judgment on the EPA claim.[162] The Tenth Circuit reviewed the district court's determination and found that a genuine issue of material fact existed regarding whether the employee had established a prima facie case.[163] The court concluded that a reasonable jury could have found Ms. Riser's position was "substantially equal" in skill, effort, and responsibility to her male co-worker.[164] The court also reviewed the employer's affirmative defense.[165] The employer argued that "the pay differential between Ms. Riser and Mr. Chinn was based on QEP's bona-fide, gender-neutral pay classification system that was based on compensation data in the industry."[166] The employer also argued that it set Mr. Chinn's salary to match his earnings at his previous position.[167] The Tenth Circuit disagreed that a factor other than sex conclusively explained the pay difference in this case.[168]

The Tenth Circuit identified several facts to support this conclusion.[169] First, the employer set Ms. Riser's position at Grade five, while it set her male co-worker at Grade seven.[170] The employer assigned the plaintiff's pay grade based on the work of an administrative

155. *See id.* at 1194.
156. *See id.*
157. *See id.*
158. *See id.* at 1194–95 (noting that the supervisor "stated that any changes to the fleet administration position dealt with *how* the job was performed; the core functions of the position remained intact").
159. *See id.* at 1195.
160. *See id.* (explaining that the complaints concerning Ms. Riser's job performance included her "unsatisfactory performance on a project in North Dakota and her general nonresponsiveness").
161. *See id.*
162. *See id.*
163. *See id.* at 1198.
164. *See id.*
165. *See Riser*, 776 F.3d at 1198.
166. *Id.*
167. *See id.* at 1199.
168. *See id.*
169. *See id.*
170. *See id.*

assistant.[171] However, her supervisors understood that the scope of her duties extended beyond that of an administrative assistant.[172] Second, more than once, the employee unsuccessfully asked her supervisors to re-evaluate her pay.[173]

The Tenth Circuit held that while an employer may consider prior pay when determining employees' wages, it may not solely rely on prior pay.[174] The circuit court also held that when defending an EPA claim, an employer could rely on a situation where it offered a higher salary after the employee rejected a lower one.[175] However, the court qualified that this justification must fully explain the pay differential.[176] Further, if an employer wishes to pay the employee a wage equivalent to his prior wage, the pay disparity must reflect that prior wage.[177] In *Riser*, the 31% pay disparity between Ms. Riser and Mr. Chinn did not reflect Mr. Chinn's prior salary.[178] Because a rational jury could find that the employer did not adequately prove its "factor other than sex" defense, the court reversed the motion for summary judgment.[179]

d. The Federal Circuit: *Boyer v. United States*

In *Boyer v. United States*, Dr. Leslie Boyer brought an EPA claim against the United States.[180] The Veterans Affairs Medical Center of Birmingham, Alabama ("BVAMC") hired Dr. Boyer as a clinical pharmacist in 2015.[181] Shortly after her hiring, BVAMC hired a male clinical pharmacist.[182] BVAMC hired both employees according to the General Schedule system, under which employers assign each employee a grade.[183] Salary increases are available within each grade, and agencies may hire employees over the minimum salary within the grade if the agency can show that the employee has certain qualities that justify higher pay.[184] These qualities include "superior qualifications, special needs of the government, and prior compensation."[185]

171. *See id.*
172. *See id.*
173. *See id.*
174. *See id.*
175. *See Riser*, 776 F.3d at 1199.
176. *See id.*
177. *See id.*
178. *See id.*
179. *See id.*
180. *See* Boyer v. U.S., 97 F.4th 834, 838 (Fed. Cir. 2024).
181. *See id.*
182. *See id.*
183. *See id.* (explaining that the General Schedule or "GS" system is a federal hiring system that sets salaries based on locality).
184. *See id.*
185. *Id.*

BVAMC hired Dr. Boyer at Step Seven with a starting salary of $115,364.[186] BVAMC placed her at Step Seven based partly on her prior salary of $115,003.[187] BVAMC hired a male employee at Step 10 with a starting salary of $126,223, though his previous salary was $130,000.[188] Dr. Boyer made several arguments supporting her EPA claim.[189] Dr. Boyer claimed she was more experienced than the male comparator because she had seven more years of experience than him and "unique mental health work experience."[190] In response, the government argued that the male employee had a master's degree in addition to his doctorate in pharmacy.[191]

The government conceded that Dr. Boyer had established a prima facie case under the EPA but argued that a factor other than sex justified the pay disparity between Dr. Boyer and the male comparator.[192] In response, Dr. Boyer argued that the "factor other than sex" defense must fail because the BVAMC relied solely on prior salary when determining pay grades.[193] The Claims Court denied Dr. Boyer's motion for summary judgment, and the Federal Circuit Court reviewed de novo.[194]

The Federal Circuit addressed the concern regarding using prior pay alone as a factor other than sex.[195] The circuit court held that an employer may use prior pay as a factor along with other factors, including education, experience, or other legitimate non-sex-based factors.[196] The court reasoned, "prior pay might be artificially reduced by prior sex discrimination such that the prior pay would be lower than that for the male comparator and its consideration would improperly justify a lower starting salary for an equally qualified female hire."[197] The court further reasoned that relying on prior pay alone would contradict the main goals of the EPA.[198] The opinion includes authority cited by Dr. Boyer which shows that "when government actors have enacted bans on considering prior pay, they have seen increases in women's salaries and decreases in the gap between men and women's salaries." [199]

186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See Boyer*, 97 F.4th at 838.
191. *See id.*
192. *See id.* at 839.
193. *See id.*
194. *See id.* at 840.
195. *See id.* at 842.
196. *See id.*
197. *Id.*
198. *See id.* at 843.
199. *Id.*

The Federal Circuit joined the other middle ground circuits in holding that an employer cannot rely on prior pay unless an additional permissible factor not based on sex exists.[200] The court clarified that merely providing a "post hoc nondiscriminatory reason" without adequate evidence that the reason was legitimate cannot prove the "factor other than sex" defense.[201] The court also held that a further qualification is required: "[i]f the employer can establish that prior pay was not based on sex, the employer is relying on an 'other factor other than sex' to justify the disparity."[202] An employer may use an additional factor alongside prior pay or show that prior pay does not reflect sex-based discrimination.[203] However, this does not change the burden of proof—the employer always carries the burden after the employee successfully establishes a prima facie case.[204] While the Federal Circuit suggests that the employer must show significant evidence to support their defense,[205] the court has not specified the evidentiary showing required.[206]

Regarding Dr. Boyer, the Federal Circuit held that genuine issues of material fact remained and denied the Claims Court's summary judgment grant to BVAMC.[207] The circuit court noted testimony from the selecting official stating that prior pay is crucial in determining salary.[208] However, the hiring official emailed Dr. Boyer and stated that they would determine her salary based on several factors other than her current salary.[209] The Federal Circuit remanded the case to the Claims Court for further findings of fact.[210] The Federal Circuit directed the Claims Court to "explain in detail how prior pay together with another bona fide business reason explains the differential" to rule in the employer's favor.[211] Alternatively, if the court finds no reason other than sex to account for the disparity, "[t]he government should be provided an opportunity to attempt to prove that the prior pay on which BVAMC relied was not itself based on sex."[212]

200. *See* Boyer v. U.S., 97 F.4th 834, 843 (Fed. Cir. 2024).
201. *Id.*
202. *Id.*
203. *See id.* at 845.
204. *See id.*
205. *See id.* at 844 ("It is necessary that 'the proffered reasons *do in fact* explain the wage disparity.'").
206. *See id.* ("We leave for future cases to consider what evidentiary showing is needed to carry this burden.").
207. *See id.* at 849.
208. *See id.*
209. *See id.*
210. *See Boyer*, 97 F.4th at 849.
211. *Id.*
212. *Id.*

The Federal Circuit issued a sua sponte request for a rehearing en banc, which the court denied shortly after issuing its opinion.[213] Dissenters of this decision criticized the outcome and expressed concern about denying a rehearing en banc.[214] The dissent criticized the "prior pay plus one" approach, which refers to the Federal Circuit's decision to allow an employer to defend using prior pay in addition to another factor unrelated to sex.[215] The dissent argued that requiring an additional factor will not necessarily "purge the discrimination."[216]

The dissent also argued that proving an employer did not base prior pay on sex would be an "impossible task."[217] The dissent questioned how employers would have access to the evidence needed to prove this defense.[218] The dissent argued that adding the "prior pay alone" approach, which requires the government to prove that an employee's prior pay was not based on sex, "creates an immediate potential claim for an untold number of the 1.5 million current Federal GS [General Schedule] employees."[219] The dissent concluded that en banc consideration was necessary based on the ruling's massive consequences for government entities and employees.[220]

Each of the seven circuits that addressed the "factor other than sex" issue has emphasized different concerns by balancing the interests of both employers and employees.[221] The resulting circuit split underscores the complexities of achieving equal pay in the modern workforce.[222] These conflicting interpretations of the EPA have created a pressing need for clarification.[223] Ultimately, the Supreme Court should adopt the middle

213. *See* Boyer v. United States, 98 F.4th 1073, 1074 (Fed. Cir. 2024) (per curiam) (order denying reh'g en banc).

214. *See id.*

215. *Id.* at 1079.

216. *Id.*

217. *Id.*

218. *See id.* at 1079–80.

219. *Id.* at 1080.

220. *See id.* at 1081.

221. *See* Wernsing v. Dep't of Human Servs., State of Ill., 427 F.3d 466, 467 (7th Cir. 2005); Spencer v. Va. State Univ., 919 F.3d 199, 207 (4th Cir. 2019); Rizo v. Yovino, 950 F.3d 1217, 1219 (9th Cir. 2020); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Riser v. QEP Energy, 776 F.3d 1191, 1196–97 (10th Cir. 2015); Balmer v. HCA, Inc., 423 F.3d 606, 613 (6th Cir. 2005); Boyer v. U.S., 97 F.4th 834, 843 (Fed. Cir. 2024).

222. *See* Rachel DiBenedetto, *To Shatter the Glass Ceiling, Clean the Sticky Floor and Thaw the Frozen Middle: How Discrimination and Bias in the Career Pipeline Perpetuates the Gender Pay Gap*, 29 AM. U. J. GENDER SOC. POL'Y & L. 151, 166–67 (2021).

223. *See* Tronolone, *supra* note 6 (explaining that the Supreme Court's failure to resolve the circuit split has fostered confusion among employers).

ground approach or develop a similar framework that effectuates the purpose of the EPA and ensures its consistent application.[224]

III. ANALYSIS

The Supreme Court has not addressed whether prior pay is a factor other than sex under the EPA.[225] This Comment argues that the Supreme Court should resolve the circuit split and hold that the middle ground approach most adequately balances the needs of employers, employees, and courts alike. The middle ground approach offers a more nuanced framework than the alternatives, allowing courts to evaluate situations holistically.[226] The middle ground approach also ensures a fairer application of the law, which considers both employers' and employees' best interests.[227] However, the Supreme Court must provide more guidance on which factors an employer may consider when setting employee salaries.

A. The Middle Ground Approach Would Benefit Employees

One benefit of the middle ground approach for employees is that it limits an employer's ability to rely on arbitrary factors.[228] Because the middle ground approach does not allow an employer to rely solely on prior pay as a factor other than sex, it forces the employer to cite other reasons for the pay disparity.[229] The approach also helps to effectuate the primary purpose of the EPA by reducing the risk of perpetuating pay discrimination.[230] One of the main concerns about using prior pay as a factor other than sex is that employers may have set an employee's prior wages using discriminatory practices.[231] The middle ground approach stops employers from perpetuating the gender wage gap by relying on prior pay alone.[232]

224. *See* Cacchioli, *supra* note 77, at 485 ("In order to mitigate this pernicious cycle of wage inequality that continues to affect women, the Supreme Court should solve the circuit split . . . ").

225. *See id.* at 470 ("While the Supreme Court addressed elements of the EPA in *Corning Glass Works*, it has not yet addressed if use of prior pay to set compensation constitutes a 'factor other than sex' within the EPA's fourth affirmative defense.").

226. *See Boyer*, 97 F.4th at 842.

227. *See id.*

228. *See id.* (explaining that relying on prior pay may reflect past sex discrimination, whereas legitimate differences like education, experience, or recommendations can adequately justify pay disparities when considered alongside prior pay).

229. *See id.*

230. *See id.*

231. *See id.*

232. *See id.*

The middle ground approach adequately addresses the concerns raised by the Ninth Circuit in *Rizo*.[233] The *Rizo* court's primary concern about using prior pay with other factors is that it "waters down the influence of whatever historical wage discrimination remains."[234] The court further explained that while the EPA prevents employers from relying on prior pay alone, it does not prevent employers from considering prior pay during job offer negotiations.[235] The *Rizo* court suggested that an employer may use prior pay to set salaries but may not rely on prior pay, even in part, when defending an EPA violation.[236] The middle ground approach eliminates the arbitrary distinctions drawn in *Rizo*, providing a clearer standard for employers and courts.[237]

Allowing employers to consider an employee's prior pay is one of many factors that may give women an advantage in certain circumstances.[238] Judge McKeown's concurrence emphasized the importance of allowing employees to use prior salary history as a bargaining chip for higher wages.[239] However, allowing employers to consider prior pay when setting wages could disadvantage women who are new to their fields or who have experienced sex discrimination in the past.[240] The middle ground approach addresses this weakness by requiring employers to consider more than prior pay when defending an EPA claim.[241]

Requiring an employer to provide reasons for pay disparities other than prior pay places a fair burden on the employer.[242] Once an EPA plaintiff establishes a prima facie case, the burden of proof shifts to the employer to show an affirmative defense.[243] The middle ground approach correctly places the burden on employees to prove that prior pay was not the only factor relied upon when setting wages.[244] The Fourth and Seventh Circuits' approach, that prior pay may be used as a factor other than sex

233. *See* Rizo v. Yovino, 950 F.3d 1217, 1228 (9th Cir. 2020) (en banc).

234. *Id.* at 1230.

235. *See id.* at 1231 ("[I]t is not unusual for employers and prospective employees to discuss prior pay in the course of negotiating job offers, and the EPA does not prohibit this practice.").

236. *See id.*

237. *See* Boyer v. U.S., 97 F.4th 834, 838 (Fed. Cir. 2024).

238. *See Rizo*, 950 F.3d at 1236 (McKeown, M., concurring).

239. *See id.*

240. *See Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, *supra* note 2. ("By using a person's salary history to evaluate her suitability for a position or to set her salary, new employers allow past discrimination to drive hiring and pay decisions.").

241. *See* Boyer v. U.S., 97 F.4th 834, 843–44 (Fed. Cir. 2024).

242. *See id.* at 845.

243. *See Rizo*, 950 F.3d at 1223.

244. *See Boyer*, 97 F.4th at 845.

by itself,[245] does not adequately burden the employer. The Fourth and Seventh Circuits' approach also deviates from the EPA's original intent: to eliminate pay discrimination based on sex.[246] Allowing employers to defend EPA claims using prior pay alone perpetuates the problem that the EPA seeks to address.[247] The Fourth and Seventh Circuits' approach diminishes an employee's recourse under the EPA.

Conversely, the Ninth Circuit's approach in *Rizo* overburdens employers.[248] Evidence of prior pay may be informative in assessing an employee's market value or salary expectations when considered with other factors.[249] Experienced female employees can also use prior pay as a powerful tool.[250] By entirely prohibiting the use of prior pay, even in conjunction with legitimate factors such as education and experience, *Rizo* limits employers' ability to assess compensation fairly and accurately.[251] *Rizo*'s rigid approach fails to account for situations where prior pay reflects merit and qualification, making it unnecessarily restrictive and impractical for employers.[252]

The middle ground approach strikes a balance that fairly burdens the employer.[253] This approach also ensures that employers make pay decisions based on legitimate, measurable criteria, which helps to break the cycle of pay discrimination.[254] Further, the middle ground approach offers significant advantages to employers.[255] This approach allows

245. *See* Wernsing v. Dep't of Human Servs., State of Ill., 427 F.3d 466, 467 (7th Cir. 2005); Spencer v. Va. State Univ., 919 F.3d 199, 207 (4th Cir. 2019).

246. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

247. *See Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, *supra* note 2 ("Because women systematically are paid less than men, employers who rely on salary history to select job applicants and set new hires' pay tend to perpetuate gender- and race-based disparities in their workforce.").

248. *See Rizo*, 950 F.3d at 1236 (McKeown, M., concurring) (arguing that the majority's holding goes too far in "making it a violation of federal antidiscrimination law to consider prior salary, even when an employee chooses to provide this information as a bargaining chip for higher wages").

249. *See* Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History? Evidence from a Field Experiment*, 39 J. OF LAB. ECON. 193, 194 (2020) ("In a competitive labor market, a very recent wage in a similar job is approximately the worker's marginal productivity . . . precisely what a would-be employer is interested in learning.").

250. *See Rizo*, 950 F.3d at 1236 (McKeown, M., concurring) (explaining that the majority approach "shackles women from using prior pay in their favor").

251. *See id.* (McKeown, M., concurring).

252. *See id.* at 1233 ("Merely because prior pay is unavailable as a standalone defense does not mean that employers should be barred from using past pay as a factor in setting an initial salary.").

253. *See* Boyer v. U.S., 97 F.4th 834, 844 (Fed. Cir. 2024) (explaining that the middle ground approach accommodates "legitimate business interests, particularly the requisite flexibility to hire and retain employees").

254. *See id.*

255. *See Rizo*, 950 F.3d at 1232 (McKeown, M., concurring).

employers to be flexible in hiring, provides a clear framework for defenses, and aligns with modern hiring practices.[256]

B. The Middle Ground Approach Would Benefit Employers

In *Rizo*, Judge McKeown noted that prior pay "is not inherently a reflection of gender discrimination."[257] However, she acknowledged that there is a presumption that the use of prior pay "perpetuates discrimination."[258] The Supreme Court must consider employers' needs and interests when determining the most equitable approach for all parties involved.

Preserving an employer's flexibility in the hiring process is important. The Ninth Circuit's approach, that courts may never consider prior pay as a factor other than sex, is too rigid and deprives employers of flexibility in the hiring process.[259] There are several reasons why employers may consider prior pay in the hiring process.[260] First, employers may use prior pay as an indicator to gauge what candidates expect in terms of compensation.[261] Offering a salary aligned with or higher than a candidate's prior pay allows employers to attract the best talent.[262] Furthermore, using prior pay ensures that employers do not underpay or overpay an employee relative to industry standards.[263]

The Fourth and Seventh Circuits' approach that prior pay may be used alone as a factor other than sex excessively empowers employers. If employers have unchecked power to rely on prior pay, they may carry forward disparities that originated from biases in previous workplaces.[264] This approach is contrary to the intent of the EPA: to end years of systemic pay discrimination against women.[265] The Fourth and Seventh Circuits' approach may also have a chilling effect on salary negotiations.[266] Historically, women have been less likely than men to negotiate higher wages.[267] Allowing consideration of prior pay alone may further deter

256. *See id.* (explaining that the majority "fails to account for the realities of today's dynamic workforce").

257. *Id.* at 1241.

258. *Id.*

259. *See Rizo*, 950 F.3d at 1232 (McKeown, M., concurring).

260. *See* Cacchioli, *supra* note 77, at 481–82.

261. *See id.*

262. *See id.*

263. *See id.*

264. *See Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, *supra* note 2.

265. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

266. *See* Rizo v. Yovino, 950 F.3d 1217, 1236 (9th Cir. 2020) (McKeown, M., concurring).

267. *See* Katie Shonk, *Women and Negotiation: Narrowing the Gender Gap in Negotiation*, PROGRAM ON NEGOT. AT HARV. L. SCH. DAILY BLOG (Jan. 6, 2025), https://perma.cc/68WY-MMZ2.

women from negotiating a higher salary, knowing their current pay will follow them to the next role.[268]

Similarly, employees from lower-paying industries, which often have a higher concentration of women, may be permanently disadvantaged.[269] Under this approach, employers can justify offering lower salaries solely based on prior pay, even when the employee transitions to a higher-paying field.[270] Allowing prior pay alone as a defense erodes the EPA's burden-shifting framework, which requires employers to prove that sex was not the basis of the pay disparity.[271] This approach shifts the balance of power too far in favor of employers, making it more difficult for employees to succeed in EPA claims.[272]

The middle ground approach recognizes that modern hiring practices rely on a combination of factors to determine salaries.[273] The Ninth Circuit's approach, which does not allow employers to consider prior pay, is unrealistic in modern hiring strategies.[274] Furthermore, the middle ground approach demands that employers justify pay disparities using legitimate, non-sex-related factors in addition to prior pay,[275] which accommodates the modern pressures for salary transparency.[276] This approach also adapts to the negotiation process. Negotiations are common in modern hiring, and employers and employees often disclose prior pay in the process.[277] The middle ground approach reflects the reality that prior pay may influence negotiations but ensures that prior pay is not the sole factor driving final compensation.[278] Finally, the middle ground approach incentivizes employers to conduct audits to ensure they can justify pay

268. *See Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, supra note 2.

269. *See id.* ("Relying on applicants' salary histories to set starting salaries perpetuates the systemic undervaluing of women's work, even where women enter male-dominated or mixed-gender industries.").

270. *See id.*

271. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

272. *See* Rizo v. Yovino, 950 F.3d 1217, 1236 (9th Cir. 2020) (McKeown, M., concurring).

273. *See id.* (explaining that employers consider many legitimate, job-related factors in determining salaries).

274. *See id.* ("[T]he majority fails to account for the realities of today's dynamic workforce, choosing instead to view the workplace in a vacuum. In doing so, it betrays the promise of equal pay for equal work and disadvantages workers regardless of gender identity.").

275. *See* Boyer v. U.S., 97 F.4th 834, 843–44 (Fed. Cir. 2024).

276. Julia B. Bear et al., *Gender, Pay Transparency, and Competitiveness: Why Salary Information Sometimes, but Not Always, Mitigates Gender Gaps in Salary Negotiations*, 32 GRP. DECISION & NEGOT. 1143, 1144 (2023) (explaining that pay transparency may help to solve the pay gap).

277. *See Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, supra note 2.

278. *See Boyer*, 97 F.4th at 845.

decisions with legitimate factors beyond prior pay.[279] Audits help to carry out the EPA's purpose.[280] While the middle ground approach aligns with modern hiring practices and offers a balanced solution to employment considerations, the approach is far from perfect.[281] The Supreme Court needs to issue additional guidance to clarify its application, ensure consistent enforcement, and address lingering ambiguities that could impact both employers and employees.[282]

C. The Need for Clearer Guidance from the Supreme Court

The middle ground approach offers a balanced solution, but ambiguities in its application could leave both employees and employers with uncertainties.[283] The Supreme Court must adopt the middle ground approach and address key unresolved issues to better align with the EPA's intent.

The Supreme Court should address several ambiguities. First, the circuit courts have not clarified which additional factors suffice to justify pay disparities. Courts have addressed this issue on a case-by-case basis, without clear guidance on how to apply the law.[284] Furthermore, a challenge exists when determining whether prior pay is free from discrimination under the Federal Circuit's *Boyer* approach.[285] This burden can be particularly difficult for employers, making the *Boyer* approach unrealistic.[286] Additionally, there is a lack of clear guidance on the type and amount of evidence employers must present to demonstrate that factors beyond prior pay—such as experience, education, or performance—are legitimate, job-related, and non-discriminatory.[287] Clarifying these standards would help define how thoroughly employers must justify pay disparities to meet their legal burden under the law.[288]

279. *See id.*

280. *See id.* ("[I]n a recent study, a significant percentage of employers who conduct pay equity audits found that relying on applicants' salary history is a key driver of gender wage gaps within their company.").

281. *See* Cacchioli, *supra* note 77, at 466 (arguing that the middle ground approach permits prior salary to be a determinative factor in pay setting and preserves employer discretion at the expense of wage equality).

282. *See* discussion *infra*, Section III.C.

283. *See* Boyer v. U.S., 98 F.4th 1073, 1079 (Fed. Cir. 2024) (per curiam) (order denying reh'g en banc).

284. *See Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); Riser v. QEP Energy, 776 F.3d 1191, 1200 (10th Cir. 2015); Balmer v. HCA, Inc., 423 F.3d 606, 613 (6th Cir. 2005); Boyer v. U.S., 97 F.4th 834, 843 (Fed. Cir. 2024).

285. *See* Boyer, 98 F.4th at 1079–80 (describing the government's burden to prove that an applicant's prior pay was not based on sex as "impossible").

286. *See id.*

287. *See id.* at 1079 n.10.

288. *See id.*

Clarification of these ambiguities benefits employers, employees, and courts. Clearer guidelines benefit employers by providing more information from which they can design pay-setting policies that comply with the EPA.[289] Clarification also informs employers how to successfully build defenses in EPA claims.[290] Further, clearer guidelines benefit employees by ensuring that employees can effectively challenge discriminatory practices.[291] Finally, clearer guidelines benefit courts through uniform application of the law.[292] Uniform application of the law helps to streamline litigation and reduce inconsistent outcomes in EPA claims.[293]

The Supreme Court must resolve the ambiguities of the middle ground approach. Doing so would resolve the circuit split and ensure consistent application of the EPA. The three approaches currently implemented by courts take vastly different stances on prior pay, creating legal unpredictability for employers and employees.[294] A Supreme Court ruling would harmonize these differences.[295]

Furthermore, Congress has not substantially reformed the EPA in decades, leaving much of the act's interpretation to courts.[296] The Supreme Court can fill gaps in the EPA and ensure the statute is applied evenly.[297] Without Supreme Court intervention, lower courts will continue to struggle with inconsistent interpretations of the EPA, leading to prolonged litigation and uncertainty.[298] The middle ground approach offers courts flexibility to decide issues on a case-by-case basis, but it is important that courts adopt the approach with clear, actionable guidelines that serve the interests of all parties.[299]

289. *See* Rizo v. Yovino, 950 F.3d 1217, 1227 (9th Cir. 2020).
290. *See Boyer*, 97 F.4th at 845.
291. *See id.*
292. *See* Cacchioli, *supra* note 77, at 469.
293. *See id.*
294. *See id.*
295. *See id.*
296. *See* Sara L. Zeigler, *Litigating Equality: The Limits of the Equal Pay Act,* 26 REV. OF PUB. PERS. ADMIN. 199, 214 (Sept. 2006) (calling for a "fundamental restructuring of employment compensation law," and, particularly, of the EPA); *see also* Paul S. Greenlaw and Robert D. Lee, *Three Decades of Experience with the Equal Pay Act,* 13 REV. OF PUB. PERS. ADMIN. 43, 56 (Oct. 1, 1993) (identifying the "factor other than sex" defense as an issue that the Supreme Court should clarify).
297. *See id.*
298. *See* Cacchioli, *supra* note 77, at 469.
299. *See id.*

IV. CONCLUSION

The persistent wage gap in the United States highlights the ongoing need for clarity and consistency in the enforcement of the EPA.[300] Courts' conflicting interpretations of prior salary as a factor other than sex have deepened the issue, allowing unfair pay disparities to persist under the appearance of standard business practices.[301] The Supreme Court should adopt the middle ground approach to fulfill the EPA's original purpose and ensure that wage-setting practices do not perpetuate historical inequities.[302]

The middle ground approach strikes the necessary balance between employer flexibility and employee protections by allowing prior pay to be considered only when combined with other legitimate, non-discriminatory factors.[303] It acknowledges the realities of modern hiring while safeguarding against the entrenchment of past wage disparities.[304] Uniform adoption of this standard would provide much-needed guidance to employers and reinforce the EPA's mission to promote true pay equality.[305] Until courts provide such clarity, many American workers will not experience the promise of equal pay for equal work.[306]

300. *See supra* Section II.A.
301. *See supra* Section II.C.
302. *See supra* Part III.
303. *See supra* Section III.A–B.
304. *See supra* Section III.A–B.
305. *See supra* Section III.C.
306. *See supra* Section III.C.