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# Nineteen Cents—the Cost of Being a Female in the Workplace: Cabining Consideration of Prior Salary in the Salary Setting Process

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## I. INTRODUCTION

You are thrilled to start your new job. Although not by much, your new salary exceeds your old one. Three years later, as you are having lunch with several of your male co-workers, it dawns on you that you are the only female employee. Even your newest co-worker is a male. Your stomach drops when the conversation turns to salary, and you realize that your new male co-worker is starting out at \$20,000 more than you make now. How can this be? You have three years of experience in this workplace compared to his mere three days, and you are both employees with similar qualifications performing “substantially equal work”<sup>1</sup> under the same conditions.<sup>2</sup> You learn that your employer did not consider your prior experience in setting your salary, but rather increased your previous salary by five percent, a standard procedure in this place of employment. You decide to sue your employer for violating the Equal Pay Act (EPA)<sup>3</sup> on the basis of sex discrimination, as the EPA “requires that men and women in the same workplace be given equal pay for equal work.”<sup>4</sup> Because there seems to be no other reason for the wage differential between you and your co-worker other than your sex, you feel that you have a solid case against your employer. However, your employer can easily defend its

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1. To prove a violation of the EPA (and to permit an inference that a pay differential was based on sex discrimination), the employee must show: “(1) she performed substantially equal work to that of her male colleagues; (2) the work conditions were basically the same; and (3) the male employees were paid more.” *Rizo v. Yovino*, 950 F.3d 1217, 1237 (9th Cir. 2020) (en banc).

2. *Id.*

3. 29 U.S.C. § 206(d)(1).

4. *Equal Pay/Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/equal-paycompensation-discrimination> (last visited Sept. 3, 2022).

salary setting process with ten simple words: “a differential based on any other factor other than sex.”<sup>5</sup>

Aileen Rizo understands this illustration all too well, as it became her reality in 2017.<sup>6</sup> Although Rizo prevailed as a claimant in her case decided by the Ninth Circuit,<sup>7</sup> most circuit courts will almost always hold that the use of prior pay in the salary setting process is a valid consideration because it is “a differential based on any other factor other than sex.”<sup>8</sup> While an employee’s sex and prior pay may seem unrelated, both are connected in a way that drafters of the EPA failed to anticipate when writing the sex discrimination prohibition section of the Act, section 206(d).<sup>9</sup>

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5. *Id.*

6. *See Rizo*, 950 F.3d at 1220 (describing Aileen Rizo’s experience working as a math consultant for Fresno County in California). In Fresno County, the pay scale was calculated per the county’s “Standard Operating Procedure 1440 (SOP 1440)”:

The schedule designated [twelve] salary levels. Each level corresponded to different job classifications and had up to [ten] steps. To calculate a new employee’s pay, the County started with the employee’s prior wages, increased the wages by [five percent], and placed the employee at the corresponding step on its pay schedule. Rizo’s prior employer paid her \$50,630 for 206 days of work, plus an additional \$1,200 because she had a master’s degree. Based on her prior wages, the County placed Rizo at Step 1, Level 1 on its pay schedule. Her starting wage at Fresno County was \$62,133 for 196 days of work, plus an additional \$600 for holding a master’s degree.

*Id.* Rizo noted the discrepancy at issue when she learned that her new, male co-worker started at Step 9, Level 1 with a salary of \$79,088. *Id.*

7. *Rizo*, 950 F.3d at 1232.

8. § 206. The Ninth Circuit’s interpretation of the EPA is an outlier among other circuit courts that have weighed in on whether prior salary is a factor other than sex that can justify a pay disparity. *Compare Rizo*, 950 F.3d at 1232, with *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992), *Spencer v. Va. State Univ.*, 919 F.3d 199, 202–03 (4th Cir. 2019), and *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).

9. *See Rosa Cho & Abigail Kramer, Everything You Need to Know About the Equal Pay Act*, INT’L CTR. FOR RES. ON WOMEN (2013), <https://www.icrw.org/wp-content/uploads/2016/11/Everything-You-Need-to-Know-about-the-Equal-Pay-Act.pdf> (summarizing the more blatant acts of sex-based wage discrimination taking

On average, a woman earns approximately eighty-one cents to each dollar made by a man in the United States.<sup>10</sup> Although originally intended to abolish employers' sex-based wage discrimination, § 206(d)(1), by its existence and through its policy,<sup>11</sup> allows employers to pay women less than their male counterparts. This is because the Act contains a loophole—it allows employers to consider a woman's prior pay when determining her new salary.<sup>12</sup> Thus, the loophole leaves employers with little accountability in the wage-setting process. While the loophole is not the only culprit in the perpetuation of wage disparities between men and women,<sup>13</sup> addressing its role in countering the effectiveness of the EPA and proposing a solution is a necessary step in fostering gender equality in the United States.<sup>14</sup>

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place during the drafting of the EPA). “In the early 1960s, job advertisements were listed by sex. Not surprisingly, most high-salary positions were allocated to men, and even when the same position was advertised to both sexes, a two-tiered scale ensured male candidates would be paid more than their female counterparts.” *Id.* For examples of job advertisements listed by sex, see Yeoman Lowbrow, *Stewardess or Secretary? Career Ads for Women in the 1960s and 70s*, FLASHBAK (June 15, 2017), <https://flashbak.com/stewardess-or-secretary-career-ads-for-women-in-the-1960s-and-70s-381571/>.

10. For an in-depth overview of the wage gap between men and women over time, the effects of more education on the wage gap, and a comparison of wage gaps across occupations consisting of mostly women, see Mary Liesenring, *Women Still Have to Work Three Months Longer to Equal What Men Earned in a Year*, U.S. CENSUS BUREAU (Mar. 31, 2020), <https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html>.

11. See *Equal Pay Act of 1963*, NAT'L PARK SERV., <https://www.nps.gov/articles/equal-pay-act.htm#:~:text=The%20Equal%20Pay%20Act%2C%20signed,different%20salaries%20for%20similar%20work> (last updated Apr. 1, 2016) (discussing how World War II brought more women into the workforce, thus sparking the beginning of a long struggle for equal pay).

12. § 206.

13. See Betsey Stevenson, *Five Facts About the Gender Pay Gap*, THE WHITE HOUSE: PRESIDENT BARAK OBAMA (Apr. 14, 2015, 3:56 PM), <https://obamawhitehouse.archives.gov/blog/2015/04/14/five-facts-about-gender-pay-gap> (containing information regarding the pay gap's effect when looking at workers' full compensation packages, the relationship between education and the pay gap, and the effects of motherhood on women's wages).

14. Women age sixteen and older make up approximately forty-seven percent of the labor force in the United States as of 2019. *Labor Force Statistics from the*

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This Note proposes that amending the language of the EPA’s section 206(d)(1)(iv) is a necessary step to close the loophole that is perpetuating wage discrimination among men and women in the United States. After the Supreme Court declined to review the Ninth Circuit’s July 2020 decision in *Rizo*, an interpretation of section 206(d)(1)(iv) by the Court seems unlikely, adding another sense of urgency to this issue.<sup>15</sup> In the meantime, merely appointing one of the three circuit court holdings as the “correct” interpretation of “a factor other than sex” is not enough.

This Note, instead, focuses on the Equal Employment Opportunity Commission’s (EEOC) interpretation of section 206(d)(1)(iv). Specifically, it proposes that Congress should replace “a differential based on any other factor other than sex” with “another factor related to job performance or business operations.”<sup>16</sup> Part II explores the language, purpose, and legislative history of the EPA, the EEOC’s interpretation of section 206(d)(1)(iv), and the major circuit split in which the Supreme Court declined to intervene. Part III analyzes the EPA, the EEOC, and current case law to show how the policy behind section 206(d)(1) fails to be effectuated properly in its current state. Part IV proposes that the language of section 206(d)(1)(iv) be amended to reflect legislative intent, opting for the wording set forth by the EEOC, as the next best, necessary step to closing the gender pay gap. And this Note provides guidance on what factors *should* explain such a pay

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*Current Population Survey*, U.S. BUREAU OF LABOR STAT. (Jan. 22, 2020), <https://www.bls.gov/cps/cpsaat11.htm>. Women are not the only ones affected by a pay gap in the United States. Black and Latino men earn approximately seventy cents to every dollar white men earn. See Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018) (discussing pay gaps based on race-based discriminatory factors).

15. The Supreme Court most recently declined to address whether prior salary is “a factor other than sex” under the EPA when it denied a petition for certiorari on July 2, 2020. *Rizo v. Yovino*, 139 S. Ct. 706 (2019), *cert. denied*, 141 S. Ct. 189 (2020).

16. *What You Should Know: Questions and Answers About the Equal Pay Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 10, 2013), <https://www.eeoc.gov/laws/guidance/what-you-should-know-questions-and-answers-about-equal-pay-act>.

differential, as the current statutory language merely states what factors *should not* explain a pay differential between men and women.<sup>17</sup>

## II. EXPLORING THE EQUAL PAY ACT

In the 1960s and before, blatant sex discrimination presented itself in many job advertisements and occupations.<sup>18</sup> “Women—train at home for a career in commercial aviation! Airlines need hostesses, receptionists, ticket agents, [and] reservationists.”<sup>19</sup> Notice that “pilot” is nowhere to be found in this quote from a 1960s airline career ad directed at women. Although the drafters of the EPA sought to eradicate such flagrant acts of discrimination running rampant in the 1960s, they only addressed the most obvious forms of sex-based wage discrimination.<sup>20</sup> Obvious forms of sex-based wage discrimination typically include those that explicitly offer jobs to one sex and not the other or those with practices reflecting a clear correlation between sex and salary.<sup>21</sup>

In contrast, the modern battle against sex-based wage discrimination consists of implicit forms of discrimination. Implicit forms include those that may seem facially neutral but that perpetuate the very harm of which the drafters sought to rid the workplace.<sup>22</sup> Because the

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17. See § 206. “A differential based on any other factor other than sex,” in simpler terms, means that the sex of the employee should not explain a pay differential between male and female employees. See *id.* Other than the three enumerated circumstances set forth in section 206(d)(1)(i)–(iii), the statutory language itself gives no other examples of what a differential not based on sex might look like. Nor does it give an example of what a differential based on sex might look like.

18. See Cho & Kramer, *supra* note 9, at 2–5 (discussing the history and timeline of women in the workforce and legislation pertaining thereto); see also Lowbrow, *supra* note 9.

19. Lowbrow, *supra* note 9.

20. See *Equal Pay Act of 1963*, *supra* note 11 (stating that after World War II, many employers “that had hired women reclassified their jobs and lowered their pay” and some “published separate job listings for men and women . . . but with different pay scales for men and women”).

21. Lowbrow, *supra* note 9 (showing job advertisements containing sex-based discrimination, typically with higher paying jobs directed toward men).

22. See Kim Elsesser, *Unequal Pay, Unconscious Bias, and What to Do About It*, FORBES (Apr. 10, 2018), <https://www.forbes.com/sites/kimelsesser/2018/04/10/unequal-pay-unconscious-bias-and-what-to-do-about-it/?sh=40957985600e>.

consideration of prior pay alone to determine a new employee's salary does not seem blatantly discriminatory on its face, the harm stemming from its inclusion in the hiring process is swept under the rug.

*A. Development of the Equal Pay Act*

In 1963, President Kennedy signed the EPA into law with the goal of abolishing wage disparity based on sex.<sup>23</sup> Section 206(d) of the EPA states:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except where such payment is made pursuant to* (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex . . .*<sup>24</sup>

Section 206(d) therefore includes a vague, all-encompassing fourth factor to explain wage differentials between employees of the opposite sex: “a differential based on any other factor other than sex.”<sup>25</sup> This fourth factor is the gravamen this Note's issue as it gives no meaningful guidance for courts to reach uniform results in similar sex-based wage discrimination cases under the EPA.<sup>26</sup>

The three specific factors that provide a legitimate basis for wage differentials in section 206(d) are based upon job-related qualities

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23. *Equal Pay Act of 1963*, *supra* note 11.

24. 29 U.S.C § 206 (emphasis added).

25. *See id.*

26. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *Spencer v. Va. State Univ.*, 919 F.3d 199, 202–03 (4th Cir. 2019); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015).

that measure experience, ability, and performance.<sup>27</sup> The seniority systems factor includes length of employment, the merit systems factor includes exceptional job performance, and the incentives systems factor includes quality of work or amount of work that the employee performs.<sup>28</sup> All three of these systems are based upon qualities other than sex, furthering the general purpose of the EPA—to “prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.”<sup>29</sup>

The fourth factor, however, is less clear. Still, guidance regarding “a factor other than sex” is found in the EPA’s declaration of purpose.<sup>30</sup> Congress states that wage differentials:

(1) depress[] wages and living standards for employees necessary for their health and efficiency; (2) prevent[] the maximum utilization of the available labor resources; (3) tend[] to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burden[] commerce and the free flow of goods in commerce; and (5) constitute[] an unfair method of competition.<sup>31</sup>

Because section 206’s “factor other than sex” language is so vague, the policy and purpose behind the EPA becomes necessary in its analysis. It provides guidance regarding enforcement of section 206(d)(1), language the statute itself lacks.<sup>32</sup>

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27. See § 206.

28. *Equal Pay for Equal Work*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/equal-pay-for-equal-work> (last visited Sept. 3, 2022).

29. *The Equal Pay Act of 1963*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statutes/equal-pay-act-1963> (last visited March 3, 2022) [hereinafter *EPA 1963*].

30. See *id.*

31. *Id.*

32. A “factor other than sex” is hardly helpful guidance for courts, especially when compared to the three other enumerated factors specifically outlined in section 206(d)(1). If reading section 206(d)(1)(iv) from a strictly textual perspective, the purpose behind the EPA becomes moot.

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B. *Modern Interpretations of the Equal Pay Act*

Within the past sixty years, government agencies and courts developed a plethora of interpretations of § 206(d)(1)(iv), ranging from strict and text-based approaches to flexible approaches considerate of modern developments in employment issues.<sup>33</sup> In the midst of the circuit court chaos, the EEOC offers its own guidance as to acceptable factors, other than sex, employers may consider in the salary setting process that falls somewhere in the middle of the spectrum.<sup>34</sup> Three differing circuit court opinions create a broad spectrum of application of § 206(d)(1)(iv), and within that spectrum, endless inconsistencies.

1. Agency Interpretation: Equal Employment Opportunity  
Commission

Guidance as to the meaning behind a “factor other than sex” may be found on the EEOC’s official webpage. Led by five commissioners who are appointed by the President and confirmed by the Senate, the EEOC is responsible for enforcing federal laws that make sex-based wage discrimination illegal.<sup>35</sup> Unlike federal judges who preside over cases involving many types of subject matter, the EEOC commissioners possess unique expertise in employment-related issues.<sup>36</sup> In particular, discrimination on the basis of sex falls into one of the narrow categories of employment-related issues that the EEOC is tasked with addressing.<sup>37</sup>

On the EEOC official webpage includes the four factors of section 206(d)(1) are listed in an Article located within an EEOC-

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33. See *infra* notes 45–46 and accompanying text; *infra* notes 48–50.

34. See *infra* note 38.

35. *What You Should Know: Questions and Answers About the Equal Pay Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 10, 2013), <https://www.eeoc.gov/laws/guidance/what-you-should-know-questions-and-answers-about-equal-pay-act>.

36. See *About the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/about-eeoc-2> (last visited Sept. 3, 2022) (listing the employment-related issues that the EEOC investigates, prevents, and, in some cases, sues employers in court to resolve).

37. *Id.*

approved guidance document.<sup>38</sup> The first three factors (seniority system, merit system, and incentives system) are listed as they are in the statute.<sup>39</sup> Instead of listing the fourth factor as “a differential based on any other factor other than sex,” however, the EEOC instead describes the fourth factor as “another factor related to job performance or business operations”<sup>40</sup>

While a disclaimer states, “[t]he contents of this document do not have the force and effect of law and are not meant to bind the public in any way,” it also states that the guidance document “is intended only to provide clarity to the public.”<sup>41</sup> The EEOC knew that the public would look to its guidance document for clarity on the EPA, making its limiting interpretation of section 206(d)(1)(iv) important in the analysis for legislative purpose and policy.<sup>42</sup>

The EEOC also provides a Compliance Manual that limits the availability of prior salary as a defense in sex-based wage discrimination suits to instances when prior salary is considered in relation to job requirements or reasonable business practices.<sup>43</sup> In its list of factors other than sex that may explain a pay differential, the EEOC states:

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38. *What You Should Know: Questions and Answers About the Equal Pay Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/what-you-should-know-questions-and-answers-about-equal-pay-act> (last visited Sept. 3, 2022). This document also contains information regarding exemptions, penalties, and the relation of the EPA to other laws. While such discussion falls outside of the scope of this Note, it may clarify the concept of minimum wages in general.

39. *Id.*

40. *Id.*

41. *Id.*

42. The EEOC interprets section 206(d)(1)(iv) using the canon of construction, *eiusdem generis*. “*Eiusdem generis* is a Latin phrase that means ‘of the same kind’ . . . [f]or example, if a law refers to automobiles, trucks, tractors, motorcycles, and other motor-powered vehicles, a court might use *eiusdem generis* to hold that such vehicles would not include airplanes, because the list included only land-based transportation.” Cornell L. Sch., *Eiusdem Generis*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/eiusdem\\_generis](https://www.law.cornell.edu/wex/eiusdem_generis) (last visited Sept. 3, 2022). In the same way that the seniority, merit, and incentives systems measure job-related performance, the EEOC expects “a factor other than sex” to *also* include factors related to job performance.

43. *See Section 10 Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 5, 2000) <https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination#2.%20Factor%20Other%20Than%20Sex>. The EEOC guidance provides:

The EPA permits a compensation differential based on a factor other than sex. While this defense encompasses a wide array of

Prior salary cannot, by itself, justify a compensation disparity. This is because prior salaries of job candidates can reflect sex-based compensation discrimination. Thus, permitting prior salary alone as a justification for a compensation disparity “would swallow up the rule and inequality in compensation among genders would be perpetuated.” However, if the employer can prove that sex was not a factor in its consideration of prior salary, and that other factors were also considered, then the justification can succeed. The employer could, for example, show that it: (1) determined that the prior salary accurately reflected the employee's ability based on his or her job-related qualifications; and (2) considered the prior salary, but did not rely solely on it in setting the employee's current salary.<sup>44</sup>

Despite the guidance given by the EEOC, courts have yet to find a consistent interpretation of whether prior pay should be considered in the salary setting process.

## 2. Case Law Interpretations: The Three-Way Circuit Split

Eight federal circuit courts that have interpreted the EPA's “a differential based on any other factor other than sex” language. These courts have done so in cases challenging the use of prior pay in determining salary, and three different holdings resulted: First, prior salary, alone or in combination with other factors, is not a defense to a claim of sex-based wage discrimination.<sup>45</sup> Second, prior salary, *only* if considered in combination with other factors, is a defense to a claim of sex-

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possible factors, the employer must establish that a *gender-neutral factor*, applied consistently, in fact explains the compensation disparity. An employer asserting a ‘factor other than sex’ defense also *must show that the factor is related to job requirements or otherwise is beneficial to the employer's business. Moreover, the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices.*

*Id.* (emphasis added) (footnotes omitted).

44.

*Id.* (footnotes omitted).

45. Rizo v. Yovino, 950 F.3d 1217, 1232 (9th Cir. 2020) (en banc).

based wage discrimination.<sup>46</sup> Third, prior salary alone is a defense to a claim of sex-based wage discrimination.<sup>47</sup>

*i. Prior Salary, Standing Alone, is not a Factor Other than Sex*

In July 2020, the Supreme Court declined to review an appeal from a decision made by the Ninth Circuit in *Rizo v. Yovino*.<sup>48</sup> The female plaintiff, Rizo, realized that men working in similar roles within her same school district made as much as \$20,000 more than her.<sup>49</sup> Rizo then discovered that the school district's policy when determining the salary of a new employee did not consider prior experience, but rather gave a blanket five percent raise from the employee's previous salary.<sup>50</sup> Rizo sued the school district alleging several violations, including under section 206(d)(1)(iv) of the Equal Pay Act, Title VII, and California law.<sup>51</sup>

Moving for summary judgment in federal court, the school district focused on the language in section 206(d)(1) of the EPA and argued that Rizo's prior salary was "a factor other than sex" to justify the disparity in pay.<sup>52</sup> The district court denied the school district's motion for summary judgment. It held that basing an employee's salary exclusively on the employee's prior wages is "inherently fraught with risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women."<sup>53</sup> The school district appealed the district court's ruling to the Ninth Circuit Court of Appeals.<sup>54</sup>

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46. *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006).

47. *See Spencer v. Va. State Univ.*, 919 F.3d 199, 202–03 (4th Cir. 2019); *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009).

48. *Rizo*, 950 F.3d at 1220 (en banc).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* While originally filed in a California state court, the school district removed the case to federal court, moving for summary judgment. *Id.*

53. *Id.* at 1221.

54. *Id.*

The Ninth Circuit reversed and held that a “‘factor other than sex’ . . . does not include literally *any* other factor”<sup>55</sup> and that “the fourth affirmative defense comprises only job-related factors, not sex.”<sup>56</sup> In forming its holding, the Ninth Circuit defined the scope of § 206(d)(1)(iv) through two different statutory construction canons, *noscitur a sociis*<sup>57</sup> and *ejusdem generis*.<sup>58</sup> In the context of the EPA, the Ninth Circuit concluded that *noscitur a sociis* limited the scope of section 206(d)(1)(iv) to only job-related factors, as the more general fourth factor should have similar meaning to the other three more specific factors preceding it.<sup>59</sup> Under the *ejusdem generis* canon, “any factor other than sex”<sup>60</sup> really means “any other *similar* factor other than sex.”<sup>61</sup> Both canons of statutory construction, according to the Ninth Circuit, meant that section 206(d)(1)(iv) is restricted to job-related factors.<sup>62</sup> For employers using section 206(d)(1)(iv) as a defense, the Ninth Circuit concluded that prior pay alone is not a factor other than sex that an employer can use to defend against a *prima facie* showing of sex-based wage discrimination.<sup>63</sup>

In his concurring opinion, Judge McKeown agreed with the majority that prior salary *alone* cannot be used as a defense under the EPA.<sup>64</sup> On the other hand, he felt it important to point out that the majority’s embracing of a rule that eliminates prior salary completely

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55. *Id.* at 1224 (quoting *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988)).

56. *Id.*

57. *See id.* (explaining that *noscitur a sociis* means “a word is known by the company it keeps” and “that words grouped together should be given similar or related meaning to avoid ‘giving unintended breadth to the Acts of Congress’”).

58. *See id.* at 1225 (explaining that *ejusdem generis* means when “a more general term follows more specific terms in a list, the general term is usually understood to ‘embrace only objects similar in nature to those objects enumerated by the preceding specific words’”).

59. *Id.*

60. 29 U.S.C. § 206(d)(1)(iv).

61. *Rizo*, 950 F.3d at 1225.

62. *Id.*

63. *Id.* at 1229 (explaining that allowing prior pay alone to serve as a defense to a *prima facie* showing of sex-base wage discrimination is violative of the EPA’s purpose and ultimately perpetuates sex-based wage discrimination).

64. *Id.* at 1233.

as a defense conflicts with the view of the EEOC.<sup>65</sup> According to Judge McKeown, the majority disclaims that its holding “does not prevent employers from *considering* prior pay for other purposes.”<sup>66</sup> But rather, its holding prevents the use of prior salary, alone or in combination with other factors, *as a defense to defeat an EPA claim*.<sup>67</sup> Judge McKeown argues that the majority’s disclaimer is vague and contradictory, as it makes little sense to “[p]ermit[] prior pay in setting salary but not as an affirmative defense to the [EPA].”<sup>68</sup> Several other circuits agree with Judge McKeown, as evidenced in their holdings that prior pay in combination with other factors, or alone, is a factor other than sex.

*ii. Prior Salary, Only in Combination with Other Factors, is a Factor Other than Sex*

The Tenth<sup>69</sup> and Eleventh<sup>70</sup> Circuits took a middle-ground approach in their interpretations of section 206(d)(1). Those circuits held that an employer may determine an employee’s salary based on that employee’s prior pay *only if* considered with another factor. Both attempted to offset the discriminatory effects of considering prior pay in the salary setting process without taking away an employer’s ability to consider that factor if he or she chooses.

In *Riser v. QEP Energy*,<sup>71</sup> Kathy Riser sued her employer, QEP, alleging that it discriminated against her on the basis of sex when it paid her significantly less than her male co-worker.<sup>72</sup> After six years at QEP, a gas and oil exploration and production company, Riser was promoted to an administrative services representative position where

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65. *Id.* (McKeown, J., concurring). To see the EEOC document referenced by Judge McKeown with which the majority’s opinion conflicted, see *Section 10 Compensation Discrimination*, *supra* note 43.

66. *Rizo*, 950 F.3d at 1231 (emphasis added).

67. *Id.* The Ninth Circuit also notes that “[t]he statute places no limit on the factors an employer may consider in setting employees’ wages, but it places on employers the burden of demonstrating that sex played no role in causing wage differentials.” *Id.* at 1232.

68. *Id.* at 1236.

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

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

71. *Riser*, 776 F.3d at 1199.

72. *Id.*

she managed “a fleet of over 250 vehicles and perform[ed] various facilities-management duties.”<sup>73</sup> QEP determined its employees’ salaries based on industry compensation data, designating positions within the company on a grade scale, with higher grades representing a higher level of knowledge of tasks performed.<sup>74</sup> Riser’s position was classified as Grade 5 where she earned \$47,382 per year, but a third of the duties performed by Riser, involving fleet management, were classified as Grade 7.<sup>75</sup> In fact, QEP created a new, Grade 7 position consisting only of such fleet management duties, paying the new, male Fleet Manager \$66,000 per year.<sup>76</sup> Riser argued that she could present a prima facie showing of sex-based wage discrimination based on three facts: (1) a third of her duties were fleet management duties; (2) the Fleet Manager position’s duties were based off her description of her fleet administration responsibilities; and (3) she trained the new Fleet Manager.<sup>77</sup> The Court agreed, and the burden shifted to QEP to show that the wage differential was based on a factor other than sex.<sup>78</sup>

QEP argued that the wage differential was based upon QEP’s desire to pay the new Fleet Manager an amount equal to what he earned at his previous job.<sup>79</sup> Initially, QEP offered him \$62,500 but negotiated up to \$66,000.<sup>80</sup> The Tenth Circuit noted that “QEP is correct that an individual’s former salary can be considered in determining whether pay disparity is based on a factor other than sex,” but the court then clarified that prior salary may not be relied upon alone.<sup>81</sup> Thus, because QEP could not clearly rebut the inference of sex-based discrimination under the EPA, the Tenth Circuit held in favor of Riser.<sup>82</sup>

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73. *Id.* at 1194.

74. *Id.*

75. *Id.*

76. *Id.* at 1195.

77. *Id.* at 1194.

78. *Id.* at 1198.

79. Although, in many cases, employers will attempt to explain away a lower-paid female by *her* prior salary, this case is interesting because it depicts the instance where an employer may use the prior salary of the higher-paid *male* to justify his higher salary. *Id.* at 1199.

80. *Id.* at 1195. See also Sabrina L. Brown, *Negotiating Around the Equal Pay Act: Use of the “Factor Other Than Sex” Defense to Escape Liability*, 78 OHIO ST. L.J. 471 (2017), for a discussion on negotiation of salary as a defense to sex-based wage discrimination.

81. *Riser*, 776 F.3d at 1199.

82. *Id.*

In *Irby v. Bittick*, Barbara Irby sued her employer, Monroe County Sheriff's Department, alleging sex-based wage discrimination in violation of the EPA.<sup>83</sup> Irby worked as the only female investigator in the criminal investigations division.<sup>84</sup> Two male investigators, who were formally employed by the city as investigators at the Sheriff's Department, chose to continue working for the city as county criminal investigators. In their work for the county, the two investigators perform the same duties as before, just under a different employer.<sup>85</sup> However, the salaries of the two male investigators substantially exceeded Irby's salary.<sup>86</sup> Irby made a prima facie case showing of sex-based wage discrimination, thereby shifting the burden to her employer to show that the differential was based on a factor other than sex.<sup>87</sup>

The defense argued that the two men's salaries were set based on their prior pay.<sup>88</sup> But the Court rejected this argument, pondering into the legislative history of the EPA and the meaning behind the "any other factor other than sex" language:

[Such language] is a general exception to the application of the EPA . . . . In the past, we have found that such factors include "unique characteristics of the same job; . . . an individual's *experience*, training or ability; or . . . special exigent circumstances connected with the business."<sup>89</sup>

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83. *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995).

84. *Id.* at 952. The *Irby* court writes:

Irby earned \$ 15,757.00 in 1989. Jones and Evans were hired in 1989 at \$ 23,987.50. Irby earned \$ 18,519.80 in 1993; Jones and Evans each earned \$ 27,868.10. In 1993, Irby was paid the same as all other employees hired in 1987 who have not been promoted in rank.

*Id.* at 953 at n.3 (cleaned up).

85. *Id.* at 952–53.

86. *Id.* at 953.

87. *Id.* at 954.

88. *Id.* at 955.

89. *Id.* (alterations in original) (quoting *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988)).

Further, the Eleventh Circuit stated that “if prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated.”<sup>90</sup> The EEOC found this reasoning so powerful that it agreed with the Eleventh Circuit and included language from the majority’s holding in its guidance document, stating that prior pay may not be considered alone in the salary setting process.<sup>91</sup> In the end, the defendant prevailed because it showed that prior salary *and* experience justified the wage differential between Irby and the two male investigators.<sup>92</sup>

While the Tenth and Eleventh Circuits permit employers to consider an employee’s prior salary only in combination with *other* factors in the salary-setting process, the Second and Sixth Circuits narrowed the scope of what *other* factors employers could consider. In particular, the Second<sup>93</sup> and Sixth<sup>94</sup> Circuits drew their focus to business-related factors, holding that an employer may determine an employee’s salary based on her prior pay alone *only if* the employer has a “good business reason.”

In *Aldrich v. Randolph Central School District*, Cora Aldrich sued the School District where she was employed as a “cleaner,” alleging that she was paid less than the male “custodians” even though their job duties were essentially identical.<sup>95</sup> Within the School District, two classifications of maintenance positions are available—cleaners and custodians.<sup>96</sup> In its hiring of cleaners, the School District can choose to hire anyone who can learn to follow the duties in the job description.<sup>97</sup> Custodians, on the other hand, are paid more than cleaners and the hiring process is more competitive;<sup>98</sup> the School District may only hire a custodian from among the top three applicants on the eligibility

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90. *Id.*

91. See Section 10 Compensation Discrimination, *supra* note 43 (quoting Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995)).

92. Irby, 44 F.3d at 957. The defendant prevailed by showing that it considered the investigators’ previous salaries *and* their “unique, long-term experience as [] investigator[s].” *Id.* Thus, it did not rely on prior salary *alone* in setting the salaries of the two male investigators.

93. Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992).

94. Beck-Wilson v. Principi, 441 F.3d 353, 365 (6th Cir. 2006).

95. Aldrich, 963 F.2d at 522–23.

96. *Id.* at 522.

97. *Id.*

98. *Id.*

list who also took a civil service examination.<sup>99</sup> Although Aldrich took the civil service examination and applied for a custodian position, she never scored high enough to rank among the top three applicants.<sup>100</sup> Thus, the School District never offered her a position as a custodian.<sup>101</sup>

As she worked as a cleaner alongside male custodians, Aldrich claimed that she performed the same work as they did but was paid less.<sup>102</sup> In its defense, the School District claimed that following the sex-neutral civil service classification justified the pay differential between the cleaner and custodian positions.<sup>103</sup> However, the Second Circuit disagreed based on the legislative history of the EPA. One of the original drafts of section 206(d)(1) included as a defense to wage differentials “a job classification system”<sup>104</sup> which was excluded from the final draft of the legislation. The Court concluded that “Congress intended for a job classification system to serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for particular positions at issue.”<sup>105</sup>

Further, the Court stated that without such a standard, employees could lose EPA claims over informalities. Such informalities

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 522–23.

103. *Id.* at 524.

104. The first draft of the defenses to wage differentials only included “where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex.” H.R. 3861, 88th Cong., reprinted in *Equal Pay Act: Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 2–6 (1963). After criticism that this version was too narrow, the legislation was restructured and new defenses were added:

(i) a seniority system; (ii) a merit system; (iii) a *job classification system*; (iv) a system which measures earnings by quantity or quality of production; (v) reasonable differentiation based on a factor or factors other than sex; or (vi) ascertainable and specific added costs resulting from employment of the opposite sex, or any combination of these exceptions.

*Id.*

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

include the “employer choos[ing] to call one employee a cleaner and another employee a custodian.”<sup>106</sup> Thus, an employer asserting a “factor-other-than-sex” as a defense must also prove that a legitimate business reason supports use of the factor.<sup>107</sup> In accordance with this opinion, the Second Circuit held in favor of Aldrich, stating that the lower court erred in granting summary judgment to the School District.<sup>108</sup> It went on to say that the district court decision was based on an improper, literal interpretation of “a factor other than sex” and the failure of the School District to prove a legitimate business reason behind its job classification system.<sup>109</sup>

In *Beck-Wilson v. Principi*, Laura Beck-Wilson and sixteen other current and former nurse practitioners filed suit against the Department of Veterans Affairs (VA) under the EPA.<sup>110</sup> The plaintiffs alleged that as female nurse practitioners, they were paid less than male physician assistants “for performing jobs of equal skill, effort, and responsibility under similar working conditions.”<sup>111</sup> The district court concluded that the plaintiffs made a prima facie showing of sex-based wage discrimination. However, because the VA attributed the wage differential to separate statutory-based pay scales, the district court held that the VA established an affirmative defense.

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106. *Id.* at 525–26. The Second Circuit includes an example in its opinion of the inequities that the EPA seeks to correct. For example:

[T]he [job] classification names may not match—there would be male packagers and female selectors, nonetheless the work the two groups perform is identical in every respect. This . . . would be a violation if the men as a group received more pay than the women. On the other hand, the male packagers may be required to lift the heavy crates off the assembly line and place them on dollies or do various jobs requiring additional physical effort. The women selectors may work on the assembly line, selecting small items, for example, and placing them in crates. This would be a significant difference which would justify a difference in pay.

*Id.* at 526.

107. *Id.* at 526.

108. *Id.* at 526–27.

109. *Id.*

110. *Beck-Wilson v. Principi*, 441 F.3d 353, 356 (6th Cir. 2006).

111. *Id.* at 356.

On appeal, the Sixth Circuit rejected the VA's argument that the statutory pay scales were the reason for the pay differential between physician assistants and nurse practitioners.<sup>112</sup>

Previously, the VA issued a special salary pay scale for physician's assistants due to difficulties recruiting local candidates to fill entry level physician assistant positions, and it continued to do so although recruitment was no longer an issue.<sup>113</sup> So, the VA's argument that it had no discretion to increase pay for nurse practitioners presented a material issue of fact.<sup>114</sup> Thus, the Sixth Circuit reversed the lower court's grant of summary judgment.<sup>115</sup>

When an employer cannot point to any other factor to explain a pay discrepancy between male and female employees, his or her section 206(d)(1)(iv) defense fails in the Second, Sixth, Tenth, and Eleventh Circuit. But if the employer can point to other legitimate factors in combination with prior salary that explain a wage discrepancy, those circuits will likely hold in favor of the employer. Simply explaining a wage discrepancy between male and female employees is based on their arbitrary job titles will not suffice.<sup>116</sup> Nor will placing the blame on statutory pay scales suffice where an employer has shown previously his, her, or its ability to modify the wages of employees.<sup>117</sup>

### *iii. Prior Salary Alone is a Factor Other than Sex*

The Fourth, Seventh, and Eighth Circuits took a textualist approach in their interpretations of section 206(d)(1)(iv).<sup>118</sup> This is because these circuits held that an employer may determine an employee's salary based on that employee's prior wages alone. All chose to apply the statute exactly as it reads, refraining from exploring in depth how the statute perpetuates sex-based wage discrimination.

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112. *Id.* at 367.

113. *Id.* at 357–58.

114. *Id.* at 357, 368–69.

115. *Id.* at 369.

116. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 524 (2d Cir. 1992).

117. *See Beck-Wilson*, 441 F.3d at 367–69.

118. *See Spencer v. Va. State Univ.*, 919 F.3d 199, 202–03 (4th Cir. 2019); *Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 470 (7th Cir. 2005); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009).

*Spencer v. Virginia State University* provides a good example. In that case, Zoe Spencer, a sociology professor, sued the University under the EPA for sex-based wage discrimination due to a salary differential between her and two higher-paid male professors.<sup>119</sup> The two male professors worked in different departments than Spencer, worked more hours than Spencer, and taught graduate courses whereas she taught undergraduate courses.<sup>120</sup> Further, both were former administrators, and University policy set the two men's salaries at seventy-five percent of their prior administrator salaries.<sup>121</sup> Thus, Spencer could not make a prima facie showing for sex-based wage discrimination under the EPA.<sup>122</sup> However, the Fourth Circuit said that even if she did, "her claim would still fail because the University established that the salary difference was based on a 'factor other than sex.'"<sup>123</sup> In fact, the court stated that even if the two professors were overpaid based on the seventy-five percent policy, it was not its place to judge the rationale of such a salary-setting process.<sup>124</sup>

In *Wernsing v. Department of Human Services*,<sup>125</sup> Jenny Wernsing sued her employer, the Department of Human Services (DHS), alleging that its practice of paying new employees "at least equal to what they had been earning" was discriminatory against women.<sup>126</sup> Wernsing earned \$1,925 per month at her previous job, and

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119. *Spencer*, 919 F.3d at 202.

120. *Id.* at 204–05.

121. *Id.* at 206.

122. *Id.* at 209. To prove a violation of the EPA (and to permit an inference that a pay differential was based on sex discrimination), an employee must show that "(1) she performed substantially equal work to that of her male colleagues; (2) the work conditions were basically the same; and (3) the male employees were paid more." *Rizo v. Yovino*, 887 F.3d 453, 473 (9th Cir. 2018). Spencer could show that the two male professors were paid more, but she failed to show that she performed "substantially equal work" to them and that "the work conditions were basically the same." *Id.*; see also *Spencer*, 919 F.3d at 203–06.

123. *Spencer*, 919 F.3d at 206.

124. *Id.* at 206–07. In adopting the statement that "[the] law does not require, in the first instance, that employment be rational, wise, or well-considered—only that it be nondiscriminatory," the Fourth Circuit failed to consider that prior salary does fall within sex-based wage discrimination, showing that a textualist approach may not provide the perspective needed to address the issue of sex-based wage discrimination effectively. *Id.* at 207 (quoting *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1156–57 (2d Cir. 1978)).

125. *Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 467 (7th Cir. 2005).

126. *Id.* at 467.

DHS started her at \$2,478 with a potential to max out at \$4,466 as an investigator of employee reports and liaison between DHS and other agencies.<sup>127</sup> Her newly-hired male co-worker earned \$3,399 at his previous job and DHS set his salary at \$3,739 as a child welfare specialist, where he visited homes and other residential facilities to investigate living conditions.<sup>128</sup> Wernsing and her male co-worker performed the same duties under the same conditions.<sup>129</sup>

However, the Seventh Circuit rejected Wernsing's argument that DHS's practice of setting its employees' salaries based on their prior pay violated the EPA.<sup>130</sup> Although it pondered the idea that market wages themselves were discriminatory and should be ignored in the salary setting process,<sup>131</sup> the Seventh Circuit noted that in this particular case, Wernsing alleged that her pay hurt *her*, not women in general.<sup>132</sup> In her argument, Wernsing never suggested that her previous employer or DHS failed to comply with the EPA when they each set her salary, or when DHS declined to give her a raise.<sup>133</sup> Wernsing merely stated that the only reason her prior salary was lower than that of her male co-worker was because her previous employer was a small, non-profit organization.<sup>134</sup> Thus, the Seventh Circuit held that DHS's use of prior

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127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.* at 470–71.

131. *Id.* at 470. The Seventh Circuit agreed with the premise that women, on average, earn less than men. *Id.* But it noted that “wages rise with experience” and “that many women spend more years in child-rearing than do men thus implies that women’s market wages will be lower on average—but such a difference does not show discrimination.” *Id.* Interestingly enough, the court also agreed that “[w]age patterns in some lines of work could be discriminatory.” But because Wernsing failed to offer “expert evidence . . . to support a contention that the establishments from which the Department recruits its employees use wage scales that violate the Equal Pay Act and thus discriminate against women,” the court did not need to delve into a perpetuation argument based on a general assumption.

On the other hand, if Wernsing could show that “sex discrimination led to lower wages in the ‘feeder’ jobs, then using those wages as the base for pay at [DHS] would indeed perpetuate discrimination and violate the [EPA].” *Id.* at 470. Thus, even though the Seventh Circuit held for the defendant employer here, it hinted that a perpetuation argument would be successful if supported with the proper contentions.

132. *Id.*

133. *Id.*

134. *Id.*

salary as one factor in determining its employees' new salaries did not violate the EPA.

In *Drum v. Leeson Electric Corp.*,<sup>135</sup> Tammy Drum argued before the Eighth Circuit that her employer, Leeson, discriminated against her based on her sex when it hired her male replacement at almost a fifty percent salary increase from what she made in the same position.<sup>136</sup> Drum made a prima facie showing of sex-based wage discrimination, thereby shifting the burden of proof to her employer to show that the wage differential was based on a factor other than sex.<sup>137</sup> Leeson Electric Corporation failed to identify a factor other than sex, attempting to explain Drum's male replacement's higher salary based on his qualifications.<sup>138</sup>

However, the Court emphasized that the defendant need not justify the *salary* of one, but rather the *differential* itself.<sup>139</sup> The defendant attempted to justify Drum's salary based on her prior pay.<sup>140</sup> It claimed that the differential "resulted from a hiring policy that set salaries slightly under industry averages" and that "[Drum's male replacement] was hired under a new 'broad band salary structure.'"<sup>141</sup> Although Leeson provided the names of the new and former holders of the same position, their genders, and their salaries, it failed to provide their education, experience, or other qualifications.<sup>142</sup> Thus, Leeson's case was

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

136. *See id.* at 1072.

137. *Id.* at 1073.

138. *Id.*

139. *Id.*

140. The Eighth Circuit stated that:

[W]hen prior salary is asserted as a defense to a claim of unequal pay, this 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 simply because the market might bear such wages . . . In conducting this examination, this court's concern is related solely to the issue of whether the prior salary is based on a factor other than sex.

*Id.* So while the court states that its focus is solely whether the differential is based on sex, its concern that defendants may use a "market force theory" to justify lower wages for its female employees implies that the Court recognizes a perpetuation of sex-based wage discrimination issue.

141. *Id.*

142. *Id.*

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not strong enough to explain away the wage differential based on a policy change.<sup>143</sup> This led to the Eighth Circuit holding in favor of the plaintiff-employee because the defendant-employer relied solely on the salaries of others to justify the salary of one, failing to explain the differential itself.<sup>144</sup>

The case law from each of the circuits discussed in this section is crucial to gain an understanding of modern interpretation and application of section 206(d)(1). From the three-way circuit split, two interpretation approaches emerge: (1) textual, meaning the court adopts a literal interpretation of a “factor other than sex,” or (2) text-plus, meaning that the court looks to other sources such as legislative history to apply the statute as the drafters intended it to be. Within those two approaches, courts may reach different conclusions by balancing discriminatory effects with the rights of employers. The opinion of the courts and their discussions, offer a helpful, multi-perspective foundation to analyze whether prior pay is a factor other than sex that stays true to the main thrust of the EPA.

### III. DIFFERENT INTERPRETATIONS: STAYING TRUE TO THE PURPOSE OF THE EQUAL EMPLOYMENT ACT

As eight circuit courts interpret “a factor other than sex” in three distinct ways, an inconsistency is apparent regarding whether prior pay is such a factor. After all, how can eight courts look at the same language and come to three different conclusions as to what that statement means?<sup>145</sup> In the meantime, women and men in the workforce still suffer from the lack of guidance by the Supreme Court and insufficiency of guidance provided thus far in case law of what section 206(d)(1) aims to achieve.

As a result, many professions remain male-dominated as women are discouraged to apply for lack of equal pay, and some professions remain female-dominated based on the employer’s ability to pay them

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143. *Id.*

144. *Id.*

less.<sup>146</sup> In a time when more women than ever are part of the United States workforce, the progress towards closing the wage gap between men and women is at a standstill. If no action is taken to address the discrimination taking place, the United States workforce will fail to become the most efficient and prosperous version of itself. Surely, the drafters of the EPA sought the opposite when they wrote section 206(d)(1).<sup>147</sup> To determine the scope of “a factor other than sex,” the first logical step is to analyze the statutory language itself, the context surrounding the language, and the legislative history behind section 206(d)(1).

#### *A. A Need for Uniformity*

As eight circuit courts are split in three different directions regarding whether prior pay is a “factor” other than sex to justify a pay disparity between male and female employees and the Supreme Court declined to intervene, the courts need guidance for the sake of uniformity.<sup>148</sup>

Some courts such as the Fourth, Seventh, and Eighth Circuit take a textualist approach and apply section 206(d)(1) exactly how it reads.<sup>149</sup> Thus, if a pay differential exists between a male and female employee, the defendant employer has an affirmative defense simply by arguing that its salary setting process considers only an employee’s

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146. See Kim Elsesser, *The Gender Pay Gap and the Career Choice Myth*, FORBES (Apr. 1, 2019, 9:57 AM), <https://www.forbes.com/sites/kimelsesser/2019/04/01/the-gender-pay-gap-and-the-career-choice-myth/?sh=556878d3114a> (“It’s not that women choose low-paying jobs (that’s just ridiculous). It’s the other way around. Society values women’s work less, and therefore jobs dominated by women generally pay less than those dominated by men. Elementary school teaching is a great example. It’s an insanely difficult job, requires multiple skills and lots of education, and the success of our future generations depends on good teachers. Yet, because elementary teachers are mostly women, the pay is not commensurate with the importance of the job and the skill required.”).

147. *EPA 1963*, *supra* note 29.

148. See *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Spencer v. Va. State Univ.*, 919 F.3d 199, 206 (4th Cir. 2019); *Rizo v. Yovino*, 950 F.3d 1217, 1231 (9th Cir. 2020) (en banc).

149. See *Spencer*, 919 F.3d at 206; *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466, 470 (7th Cir. 2005); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1072 (8th Cir. 2009).

prior pay.<sup>150</sup> Because of this, an issue regarding the perpetuation of sex-based wage discrimination becomes prevalent. Even if the current employer's salary setting process does not *add* any discriminatory factors to the mix, it is still accepting *any* factors that a former employer considered when setting the employee's prior salary, including sex.<sup>151</sup>

Following a text-plus approach, the Tenth and Eleventh Circuits attempted to address this issue by restricting the consideration of prior salary in the salary setting process to circumstances where it is considered in conjunction with other factors. In their holdings, the two courts merely placed a bandage on a bullet hole. Courts cannot control how much deference an employer may give to prior salary versus experience, education, and other factors in the salary setting process. The Tenth and Eleventh Circuits recognize that considering prior pay in the salary-setting process is discriminatory.<sup>152</sup> Even so, they attempted to offset such discrimination by allowing a discriminatory factor—prior salary—to be considered in conjunction with factors deemed non-discriminatory.<sup>153</sup> However, permitting discrimination based on sex, alone or in conjunction with other factors, is *still* discrimination. But the benefits of prior salary as a negotiation tool likely outweighs this concern.<sup>154</sup>

Similar to the Tenth and Eleventh Circuits, the Second and Sixth Circuits perpetuate sex-based wage discrimination by permitting employers to rely on an employee's prior pay *alone*, but only when the employer has a legitimate business reason for doing so.<sup>155</sup> In contrast to the other seven circuit courts that weighed in on this issue, the Ninth Circuit rejected an employer's defense that the "factor other than sex" provision encompassed prior pay based on its text-plus approach.<sup>156</sup> Specifically, the court held that prior pay, alone or in combination with other factors, is not a defense to a claim against sex-based wage

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150. *Rizo*, 950 F.3d at 1232.

153. *See id.*

152. *Riser*, 776 F.3d at 1199; *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

153. *Riser*, 776 F.3d at 1199; *Irby*, 44 F.3d at 955.

154. *See Rizo*, 950 F.3d at 1235 (McKeown, J., concurring).

155. *See Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526–27 (2d Cir. 1992).

156. *Rizo*, 950 F.3d at 1227–28.

discrimination because it is certain to perpetuate discriminatory wage disparity between men and women.<sup>157</sup>

Factors such as experience, education, and ability<sup>158</sup> are far less controversial than prior salary. This is because there is typically tangible evidence of one's job history to show experience, a transcript to show education, and a simple interview or trial run in the workplace to show an employee's abilities. But there is no way to know how sex factored into an employee's prior salary.<sup>159</sup> So grouping all factors together with no direction on how much weight should be given to each of them is not only failing to correct sex-based wage discrimination but aiding its harmful effects.<sup>160</sup>

### *B. Effectuating the Purpose and Policy of the Equal Pay Act*

The drafters of the EPA stated that its main purpose is to “prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.”<sup>161</sup> While created to prohibit sex-based wage discrimination, section 206(d)(1)(iv) offers employers a loophole in the form of “a factor other than sex” defense.<sup>162</sup> One of the “factor[s] other than sex” that employers historically point to in their defense is prior salary. However, courts that accept prior salary alone as a section 206(d)(1)(iv) defense fail to recognize their role in the perpetuation of sex-based

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157. *Id.* at 1228.

158. *See Equal Pay for Equal Work*, *supra* note 28.

159. *Rizo*, 950 F.3d at 1228.

160. For more information regarding the “middle-ground approach,” see generally Jessica Gottsacker, Note, *Waging War Against Prior Pay: The Pay Structure that Reinforces the Systemic Gender Discrimination in the Workplace*, 64 ST. LOUIS U. L.J. 113 (2019); Mariah Savage, Note, *Money Talks: Using Prior Salary as an Affirmative Defense in Equal Pay Claims*, 20 UTAH L. REV. 289 (2020); Torie Abbott Watkins, Note, *The Ghost of Salary Past: Why Salary Inquiries Perpetuate the Gender Pay Gap and Should Be Ousted as a Factor Other than Sex*, 103 MINN. L. REV. 1041 (2018).

161. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

162. *Id.*

wage discrimination.<sup>163</sup> Women, on average, earn less than men.<sup>164</sup> Basing a woman's new salary solely off of her old salary therefore prevents her from being considered holistically for her experience, education, fitness for the job description, or any other readily observable or provable factor related to job performance.<sup>165</sup> Not only does this practice counter the main goal of the EPA, but it counters the EPA's declaration of purpose as well.<sup>166</sup> Moreover, using a woman's prior salary to set her new salary inevitably will cause more labor disputes and create unfair competition among women and men in the hiring process and in the workplace.<sup>167</sup>

First, considering prior salary alone as a factor in the salary-setting process will cause more labor disputes.<sup>168</sup> As more women enter the workforce, become more educated, and become more aware of their rights, they will dispute factors in the salary setting process that leave them at a disadvantage relative to men. Not only do these legal disputes clog the courts,<sup>169</sup> but they create more legal confusion surrounding the EPA. With circuit courts split in three different directions regarding the consideration of prior pay in the salary setting process,<sup>170</sup> confusion and inconsistency in the interpretation of the EPA as a whole are prevalent. Almost sixty years after the enactment of the EPA,<sup>171</sup> a modernized solution is needed to prevent these labor disputes.

Second, considering prior salary alone in the salary-setting process will create unfair competition among women and men in the

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163. For a handful of much of the existing case law regarding the specific issue of prior pay relative to the EPA see, for example, *Spencer v. Va. State Univ.*, 919 F.3d 199, 206 (4th Cir. 2019); *Rizo v. Yovino*, 887 F.3d 453, 470 (9th Cir. 2018) (McKeown, J., concurring); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006).

164. *EPA 1963*, *supra* note 29.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. See *Spencer v. Va. State Univ.*, 919 F.3d 199, 206–07 (4th Cir. 2019); *Rizo v. Yovino*, 887 F.3d 453, 468 (9th Cir. 2018); *Riser v. QEP Energy*, 776 F.3d 1191, 1199–1201 (10th Cir. 2015); *Beck-Wilson v. Principi*, 441 F.3d 353, 365–69 (6th Cir. 2006) (showing the three main holdings resulting from eight circuit courts weighing in on the consideration of prior pay in the salary setting process).

171. *EPA 1963*, *supra* note 29.

hiring process and in the workplace.<sup>172</sup> When it comes to the hiring process, men should also be concerned if prior salary alone is considered when setting their new one. After all, with women making eighty-one cents to every dollar that men make,<sup>173</sup> an employer may be incentivized to hire a female employee rather than a male because he can pay her less to perform the same work. In the hiring process and in the workplace, women who are paid less than their male co-workers who perform the same jobs may be discouraged from applying for such jobs. An inevitable result of less women in certain occupations leaves such jobs to become male-dominated, further setting back the progress women have made in closing the wage gap since 1963.<sup>174</sup>

Still, consideration of prior salary has its benefits, allowing critics to argue that considering prior salary in the salary setting process should not be banned completely if it is done in combination with other job-related factors. Employees, women included, may provide information about their past salaries for negotiation purposes.<sup>175</sup> Judge McKeown noted in his concurrence that “companies . . . often consider prior salary in making offers to lure away top talent from their competitors or to attract employees with specific skills.”<sup>176</sup> In some industries, the value that the consideration of prior salary, in combination with other factors, adds to the competitive aspects of the workforce may be advantageous to men and women. Thus, the consideration of prior salary in combination with other work- or business-related factors is unlikely to perpetuate sex-based wage discrimination as consideration of prior salary alone does.<sup>177</sup>

Looking at policy behind the EPA is essential to forming a solution that addresses sex-based wage discrimination and how it

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172. *Id.*

173. Mary Liesenring, *Women Still Have to Work Three Months Longer to Equal What Men Earned in a Year*, U.S. CENSUS BUREAU (Mar. 31, 2020),

<https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html>.

174. *See Cho, supra* note 9, at 7. (“Men (approximately 49%) work in industries predominantly occupied by men, and women (41%) work in industries predominantly occupied by women. Male-dominated industries tend to offer more better-paid positions versus more poorly paid positions in female-dominated industries – a phenomenon observed by some as a ‘jobs gap.’”).

175. *Rizo*, 950 F.3d at 1235 (McKeown, J., concurring).

176. *Id.*

177. *Id.*

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continues on through factors other than sex, particularly prior pay. Because the effects of considering prior pay alone in the salary-setting process can be just as discriminatory as considering sex itself, the policy behind the EPA calls for more inclusive language in section 206(d)(1)(iv). One important agency central to the execution of the EPA, the EEOC, recognized the importance of specificity in its interpretation of section 206(d)(1)(iv).

In 2013, the EEOC released a guidance document to clarify workplace protections of and employee rights under section 206(d)(1).<sup>178</sup> When read with legislative history and case law, the guidance document reinforces a narrow, text-plus interpretation of section 206(d)(1)(iv).<sup>179</sup> The EEOC's choice of language, "another factor related to job performance or business operations," requires its own analysis.<sup>180</sup> For prior salary to serve as an affirmative defense to an employer under EEOC standards, it must relate to (1) job performance or (2) business operations.<sup>181</sup>

Under the first portion of the EEOC's interpretation, a "factor related to job performance" includes those that can be measured in some way, such as experience, education, abilities, training, or any other factor that would affect how the employee would perform her duties at her new job.<sup>182</sup> Prior salary is not related to job performance, as it is a previous employer's subjective valuation of that employee's skill for a different job.<sup>183</sup> Therefore, it would fail under the first part of the EEOC's language.

Under the second portion of the EEOC's interpretation, "another factor related to . . . business operations" potentially excludes prior pay from being considered in the salary setting process but only if prior salary is unrelated to the business itself.<sup>184</sup> The EEOC illustrates that a pay differential based on business operations would be one "such as

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178. *EPA 1963, supra* note 29.

179. *Id.*

180. *Id.*

181. *Id.*

182. *See supra* note 25 and accompanying text.

183. *See supra* note 25. A previous employer's valuation of an employee's skills required for *that* job is not a relevant factor in a new employer's valuation of that same employee's skills required for *this* job.

184. *EPA 1963, supra* note 29.

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paying a shift differential to workers on less popular shifts.”<sup>185</sup> It is unlikely that a court would consider prior pay to be based on a business operation. Thus, the language offered by the EEOC to replace section 206(d)(1)(iv) sets a high bar for employers to prove that their consideration of prior pay in the salary setting process is relevant and necessary to the job itself. While the EEOC lays out a specific interpretation of section 206(d)(1)(iv), courts have yet to agree on its proper interpretation.

Thus, if employers consider prior salary in the salary setting process, they must be able to justify its relevance to job performance or business operations. Narrowing the scope of section 206(d)(1)(iv) mitigates the effects that consideration of prior salary in the salary setting process may have on sex-based wage discrimination. After analyzing the policy behind the EPA, the intent of the EEOC, and current case law, the language of section 206(d)(1)(iv) must be amended to effectuate the goals of the EPA.

#### IV. A LEGISLATIVE SOLUTION: WHY AMENDING THE LANGUAGE OF THE EQUAL PAY ACT IS NECESSARY

As the language of section 206(d)(1) has been left untouched for almost sixty years,<sup>186</sup> it is time to amend its language to further its goals and address ongoing, implicit sex-based wage discrimination. Particularly, the “factor other than sex” language in section 206(d)(1)(iv) that permits the use of prior salary alone as an employer defense must be narrowed to prevent perpetuation of wage disparity between men and women in the workplace. Following the guidance of the EEOC’s interpretive language and the Second, Sixth, Tenth, and Eleventh Circuits’ legislative history-based reasoning is a necessary step to eradicate sex-based wage discrimination. Women deserve the opportunity to work in an environment where their pay is determined by their current job-based abilities rather than a prior salary alone that is presumptively discriminatory in itself. Because the Supreme Court declined to

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185. *What You Should Know: Questions and Answers About the Equal Pay Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Jun. 10, 2013), <https://www.eeoc.gov/laws/guidance/what-you-should-know-questions-and-answers-about-equal-pay-act>.

186. *See EPA 1963*, *supra* note 29 (stating that the EPA was enacted in 1963, and the 1963 statutory language remains the same today).

intervene and circuit courts are inconsistent in their interpretations, the best avenue for this solution lies in the hands of elected officials.

Thus, Congress should amend section 206(d)(1)(iv) to read “another factor related to job performance or business operations.”<sup>187</sup> A narrow and more specific section 206(d)(1)(iv) will: (A) help further the purpose of the EPA intended by its drafters; and (B) create uniformity where circuit courts are split, and the Supreme Court has declined to intervene.

*A. Furthering the Purpose of the Equal Pay Act*

The EEOC’s interpretation of the EPA not only excludes prior pay as “a factor other than sex,” but it actually defines the scope of section 206(d)(1)(iv).<sup>188</sup> As eight circuit courts have interpreted the same section of the EPA in three different ways,<sup>189</sup> a solution calls for *more* than just interpretation, especially because the Supreme Court declines to weigh in.<sup>190</sup> Leaving this ambiguous language as is will only perpetuate sex-based wage disparity, and a strictly textualist approach fails to account for the legislative history and policy reasons behind the creation of the EPA.

Amending the statutory language accounts for Congress’s purpose for enacting the EPA, the EEOC’s interpretation of the language, and circuit court precedent. Legal disputes will be lessened, as employers must be able to identify a job performance or business operations related purpose for any wage differential between its male and female employees. Further, competition in the workplace between men and women will become fairer, as both will be hired and paid based on their experience, education, abilities, and other valid factors rather than a prior salary alone. Women will also still be able to use prior salary as a bargaining chip and a negotiation tool, potentially resulting in higher salaries for women. With more economic equality, the number

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187. *EPA 1963*, *supra* note 29.

188. *See id.* (defining a “factor other than sex” as one that relates to job performance or business operations).

189. *See* discussion *supra* Section II.C.1–4 (laying out the three main holdings resulting from eight circuit court decisions).

190. *Rizo v. Yovino*, 950 F.3d 1217, 1220 (9th Cir. 2020) (en banc).

of jobs dominated by one sex will lessen, aiding in the EEOC's goal of "maximiz[ing] the utilization of the available labor resources."<sup>191</sup>

*B. Creating Uniformity by Deferring to the Agency Interpretation*

Further, as the EEOC is the agency that enforces the EPA, its language holds power. Agencies and their commissioners are created by Congress to resolve issues in which that legislature lacks the time, expertise, or general ability to effectively address.<sup>192</sup> Therefore, an interpretation by experts of equal employment issues holds more merit than an interpretation of a statute by Article III courts.<sup>193</sup> Also, refining and limiting the application of the fourth factor by those who enforce it is indicative of intent and shows that section 206(d)(1)(iv) is not a catch-all, after all. To narrow the vague language of the EPA, factors that may be used to explain a wage differential must be limited to those related to job performance or business operations. It is illogical to base an employee's pay on factors outside of his or her own measurable abilities or factors involving business policies.

As a disclaimer, amending the language of section 206(d)(1)(iv) will not resolve the wage disparity between men and women completely.<sup>194</sup> To effectuate Congress's intent to correct the conditions caused by wage differentials,<sup>195</sup> amending the language of the EPA is

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191. *EPA 1963*, *supra* note 29.

192. *See Authority & Role*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/overview> (last visited Feb. 3, 2022) (overviewing the EEOC's authority and role in the investigation of discrimination against employers).

193. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), for an overview of Article III deference to agency interpretations.

194. *See Sarah Jane Glynn, Milia Fisher & Emily Baxter, 7 Actions that Could Shrink the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Sept. 14, 2014), <https://www.americanprogress.org/issues/women/reports/2014/09/18/97421/7-actions-that-could-shrink-the-gender-wage-gap/>; Erin Coghlan & Sara Hinkley, *State Policy Strategies for Narrowing the Gender Wage Gap*, INST. FOR RSCH. ON LAB. & EMP. (Apr. 10, 2018), <https://irle.berkeley.edu/state-policy-strategies-for-narrowing-the-gender-wage-gap/> (discussing other issues perpetuating the wage gap); Kim Elsesser, *Two Solutions for the Gender Pay Gap That Can Be Implemented Today*, FORBES (Nov. 19, 2015), <https://www.forbes.com/sites/kimelsesser/2015/11/19/two-solutions-for-the-gender-pay-gap-that-can-be-implemented-to-day/?sh=35c0bb3f2d35>.

195. Wage differentials "(1) depress[] wages and living standards for employees necessary for their health and efficiency; (2) prevent[] the maximum utilization of

a necessary step. Amending section 206(d)(1)(iv) will help rid the salary setting process of discriminatory factors, promote fair competition in the workplace between men and women, and clarify vague language that has been at the root of many legal disputes.

## V. CONCLUSION

In conclusion, the issue of sex-based wage discrimination is very much alive nearly sixty years after the enactment of the EPA. Although progress is being made, the vague language of section 206(d)(1)(iv) must be amended to reflect the past six decades of change and to address new factors other than sex that may present the same harmful effects. To effectuate the purpose and policy of the EPA, the intent of the EEOC, and bring uniformity to the circuit courts, it is necessary to amend the language of section 206(d)(1)(iv).

Implicit, but equally harmful, forms of sex-based wage discrimination, such as the consideration of prior salary alone in the salary-setting process, erodes away at the twenty-one cents of progress women made since 1963.<sup>196</sup> True economic equality is not a possibility for women until this implicit discrimination is addressed. As President John F. Kennedy stated during the signing ceremony of the Equal Pay Act in 1963, “[the Equal Pay Act] is a significant step forward . . . [but] much remains to be done to achieve full equality of economic opportunity . . . .”<sup>197</sup> Another significant step forward is needed and amending the language of section 206(d)(1) is that necessary step.

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the available labor resources; (3) tend[] to cause labor disputes, thereby burdening, affecting, and obstructing commerce; (4) burden[] commerce and the free flow of goods in commerce; and (5) constitute[] an unfair method of competition.” *EPA 1963*, *supra* note 29.

196. See *Remarks on Signing Equal Pay Act of 1963*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (June 10, 1963), <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/045/JFKPOF-045-001> (stating that women made “60 percent of the average wage for men”); Mary Leisenring, *Women Still Have to Work Three Months Longer to Equal What Men Earned in a Year*, U.S. CENSUS BUREAU (Mar. 31, 2020), <https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html> (noting that women currently make eighty-one percent of what the average wage for men equals).

197. *Remarks on Signing Equal Pay Act of 1963*, *supra* note 196.