No. 19-1176

IN THE

Supreme Court of the United States

JIM YOVINO,
FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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April 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

The Center for Workplace Compliance (CWC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes approximately 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

All of CWC's members are employers subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended by the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and other federal employment laws and regulations. As potential defendants to EPA compensation discrimination charges and lawsuits, CWC members have a substantial interest in the issue presented in this matter regarding the proper scope of the statute's "any other factor other than sex" affirmative defense. 29 U.S.C. § 206(d)(1). The Ninth Circuit below erroneously held that a pay disparity resulting from the application of a facially neutral system that considers prior salary in setting initial

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than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

pay is not a "factor other than sex" under the EPA, and is thus unlawful.

Since 1976, CWC has participated as *amicus curiae* in many cases before this Court and the federal courts of appeals involving significant issues of employment law. Because of its practical experience in these matters, CWC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

After relocating to the area from Maricopa County, Arizona, Respondent Aileen Rizo was hired in 2009 to serve as a math consultant for the Fresno County, California Office of Education (County) at an annual salary of $62,733 – $62,133 in base pay plus a master's degree stipend of $600. Pet. App. 3a. Her initial pay was determined using the County's standardized salary schedule known as "standard operation procedure 1440" (SOP 1440), under which management-level employees are placed in the salary level that most closely corresponds to their prior salary, increased by five percent. Pet. App. 2a-3a. SOP 1440 is entirely gender-neutral and has been applied in a nondiscriminatory manner, resulting in some men, and some women, being paid more than their similarly situated peers. Pet. App. 120a.

Rizo lobbied the County for a pay adjustment after learning that a recently hired male math consultant was placed at a higher salary level. Pet. App. 3a-4a. After conducting an extensive pay analysis of current management employees hired over the past 25 years in the same or similar position as Rizo, the County asserted that SOP 1440 had been applied consistently and in a nondiscriminatory manner, and that in fact,

more females had been placed at higher steps than males. Pet. App. 57a. It thus declined to adjust Rizo's pay. *Id.*

Rizo was dissatisfied with the County's results, believing that on average, men were placed at a higher level than females. *Id.* She sued the County, claiming that the difference in pay between her and her male peers was unjustified and thus violated the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. Pet. App. 3a-4a.

The County moved for summary judgment, arguing that Rizo's salary, though admittedly less than her male colleagues, was set in accordance with SOP 1440 and thus was based on "any other factor other than sex." Pet. App. 4a. The County pointed out that application of SOP 1440 was rooted in four sound business reasons: it (1) was objective; (2) encouraged candidates to leave their current jobs by providing a five percent pay increase over their current salary; (3) prevented favoritism and ensured consistency; and (4) was a "judicious use of taxpayer dollars." Pet. App. 110a.

In denying the County's motion for summary judgment, the district court concluded that prior salary alone never can be a factor "other than sex" under the EPA. Pet. App. 5a. It reasoned that "'a pay structure based exclusively on prior wages is so inherently fraught with the risk … that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate nondiscriminatory business purpose.'" *Id*. Recognizing its apparently direct conflict with binding Ninth Circuit precedent, however, the district court certified its ruling for interlocutory appeal. *Id*.

On the County's appeal, a three-judge panel reversed, relying principally on the Ninth Circuit's 1982 decision in *Kouba v. Allstate Insurance Co*., 691 F.2d 873 (9th Cir. 1982), *overruled by Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (*en banc*), *petition for cert. filed*, No. 19-1176 (U.S. Mar. 27, 2020). *Id*. There, it held that a pay differential based on use of prior salary can be a permissible "factor other than sex," so long as it "'effectuate[s] some business policy,' and [is used] 'reasonably in light of the employer's stated purpose as well as its other practices.'" Pet. App. 110a (citation omitted). The panel concluded that *Kouba* is dispositive to resolution of this case, pointing out, "[w]e do not agree with the district court that *Kouba* left open the question of whether a salary differential based solely on prior earnings violates the Equal Pay Act. To the contrary, that was exactly the question presented and answered in *Kouba*." Pet. App. 111a. It thus reversed the district court's ruling and remanded the case for a determination on whether the County used prior salary "reasonably in light of its stated purpose …." Pet. App. 113a (citation and internal quotations omitted).

Rizo filed a petition for rehearing *en banc*, and the Ninth Circuit issued an opinion on April 9, 2018, reversing the panel and affirming the District Court's decision. It held that "prior salary alone or in combination with other factors cannot justify a wage differential" under the EPA, because in its view, reliance on prior salary would further perpetuate the gender wage gap. Pet. App. 54a-55a. The *en banc* opinion was authored by Judge Stephen Reinhardt, who died shortly before the decision was published. Pet. App. 53a. This Court granted a petition for certiorari and then vacated and remanded the *en banc* decision on the grounds that the Ninth Circuit could

not count Judge Reinhardt's vote. *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019) (per curiam).

On remand, the Ninth Circuit again overruled *Kouba* and reversed summary judgment for the County, concluding that the Equal Pay Act's "any other factor other than sex" exception "is limited to job-related factors only." Pet. App. 18a. Accordingly, "[b]ecause prior pay *may* carry with it the effects of sex-based pay discrimination," Pet. App. 23a (emphasis added), the Ninth Circuit concluded "that the wage associated with an employee's prior job does not qualify as a factor other than sex that can defeat a prima facie EPA claim." Pet. App. 24a. The *en banc* court thus held that "an employee's prior pay cannot serve as an affirmative defense to a prima facie showing of an EPA violation." Pet. App. 2a.

The County filed a Petition for a Writ of Certiorari with this Court on March 27, 2020. *Yovino v. Rizo*, No. 19-1176 (U.S. Mar. 27, 2020).

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), offers a simple framework that bars employers from paying men and women different rates of pay for performing equal work at the same establishment, unless the employer can demonstrate that the pay differential is based on one of four specific affirmative defenses, including "any other factor other than sex." 29 U.S.C. § 206(d)(1).

The Ninth Circuit below held that any pay differential between men and women that relies, in part, on the individuals' prior salary, is not based on a "factor other than sex" – and thus is unlawful – under the EPA.

The decision below is incorrect and impermissibly conflicts with the EPA's plain text, as interpreted by this Court and every other Court of Appeals to have considered the issue. Since prior salary is facially nondiscriminatory, it falls squarely within the scope of the EPA's "factor other than sex" affirmative defense. A compensation system such as the County's, which was applied consistently to all employees—including Respondent's male comparators—provides a complete explanation for the disparity at issue, and that explanation is, on its face, a "factor other than sex."

Not only does the decision below conflict with the EPA's plain text and this Court's precedent, but it also creates an impossible standard for employers to adhere to. The Ninth Circuit goes through great pains to explain why the EPA's fourth affirmative defense does not encompass the "bona fide" use of *any* factor other than sex, as this Court has held, but instead is limited to only those factors that that do not risk perpetuating historical sex discrimination, or what is commonly referred to as the "gender wage gap." Nothing in the EPA supports this result. Employers are only required to redress pay differentials that are caused by their own discriminatory employment practices. The EPA does not demand that employers determine which *nondiscriminatory* factors might perpetuate historical wage disparities.

Employers compensate their employees based upon numerous, legitimate nondiscriminatory business factors, and it is critical that they can do so in good faith and under a consistent framework established by the EPA. The decision below creates uncertainty for employers nationwide as to the validity of their compensation policies and systems, and exposes a number of facially nondiscriminatory wage systems to

future challenge under the EPA, including those that compensate employees based on specific skills, certifications, or degrees, simply because they on rely on factors that may have a correlation with the gender wage gap.

Review of the decision below is needed to correct the Ninth Circuit's clear deviation from the plain text of the EPA, and equally important, to provide for a clear and consistent standard that both the courts and employers may follow in developing, evaluating, and implementing nondiscriminatory, gender-neutral compensation policies.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION DEPRIVES EMPLOYERS OF CERTAINTY AND CONSISTENCY IN AN IMPORTANT AREA OF LAW AND THE IMPLEMENTATION OF NONDISCRIMINATORY WAGE SYSTEMS

A. The Decision Below Conflicts With The Plain Text Of The Equal Pay Act And This Court's Precedent

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), is remarkably simple. The law prohibits wage systems that discriminate "on the basis of sex" in situations where men and women are working at an establishment performing "equal work" on jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). The EPA explicitly authorizes four exceptions to this prohibition, authorizing wage differentials that are paid 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. Id.* (emphasis added).

This simplicity is by design. In *County of Washington v. Gunther*, the Court explained that the EPA "is divided into two parts: a definition of the violation, followed by four affirmative defenses." 452 U.S. 161, 169 (1981). While the former is "purely prohibitory," the latter "'authorizes' employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act." *Id.* This Court has characterized the fourth affirmative defense as a "general catchall provision," *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), and one that, as noted in *Gunther*, "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." 452 U.S. at 170 (footnote omitted). While the use of such factors must be "bona fide," the Court did not otherwise limit the factors to those that are "job-related" or do not perpetuate existing wage disparities.

The Ninth Circuit disagrees. In its decision below, the court held that because, in its view, seniority systems, merit systems, and systems that measure earnings by quantity or quality of production are "job-related," so too must "any other factor other than sex" to survive a prima facie EPA claim. Pet. App. 20a. The court reasons that "allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities." Pet. App. 21a.

The Ninth Circuit's argument misses the mark. As the Court made clear in *Gunther*, the EPA's enumerated exceptions exist not because they could never perpetuate a sex-based wage disparity, but rather because Congress recognized that despite the EPA's broad prohibition against wage systems that discriminate "on the basis of sex," there could be seniority systems, merit systems, or other "bona fide" systems where wage differences between men and women could still lawfully exist. *See Gunther*, 450 U.S. at 170 n.11 (noting that "earlier versions of the Equal Pay bill were amended to define equal work and to add the fourth affirmative defense because of a concern that bona fide job evaluation systems used by American businesses would otherwise be disrupted") (citations omitted). To be sure, much like prior salary, seniority systems, merit systems, and systems that measure earnings by quantity or quality of production all have the *potential* to perpetuate existing wage disparities, sex-based or otherwise. Nothing in the plain text of the EPA or this Court's precedent suggests that factors with this potential automatically constitute discrimination "on the basis of sex."

To the contrary, as a number of courts have observed, the EPA's "any other factor" affirmative defense "embraces an almost limitless number of factors, so long as they do not involve sex." *Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (citations omitted); *see also Taylor v. White*, 321 F.3d 710 (8th Cir. 2003). Indeed:

> On its face, the EPA does not suggest any limitations to the broad catch-all "factor other than sex" affirmative defense. The more specific factors that are enumerated—seniority systems, merit systems, and systems that

> measure earnings by quality or quantity of output—provide examples of the type of gender-neutral factors envisioned by the legislature. The legislative history supports a broad interpretation of the catch-all exception, listing examples of exceptions and expressly noting that the catch-all provision is necessary due to the impossibility of predicting and listing each and every exception. Given this facially broad exception, we are reluctant to establish any per se limitations to the "factor other than sex" exception by carving out specific, non-gender-based factors for exclusion from the exception.

Taylor, 321 F.3d at 717-18 (citation and footnote omitted).

Not only was the EPA's "any other factor" affirmative defense intended to apply broadly to any number of non-sex-based factors affecting pay, but Congress declined to qualify or place any limitations on the meaning of "any" in this context. It did not, for instance, limit application of the catchall defense only to "reasonable," "job-related," or otherwise "legitimate" non-sex factors. *See Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005) (comparing ADEA's "reasonable factors other than age" to EPA's "any other factor" affirmative defense).

Despite this simple framework, according to the Ninth Circuit, because prior salary is "not a factor related to the work an employee is currently performing," Pet. App. 21a, relying on it as a justification for paying men and women different wages does not square with the EPA, because this "risks perpetuating the history of sex-based wage discrimination." *Id*. In doing so, it adopted an interpretation of the "any other

factor" affirmative defense that simply cannot be reconciled with the statute's plain text.

B. Equal Pay Act Affirmative Defenses Are Not Limited To Those That Do Not Risk Perpetuating Wage Disparities

The *Gunther* Court did not rule that a factor can be a "factor other than sex" only if it does not "risk[] perpetuating the history of sex-based wage discrimination," as asserted by the Ninth Circuit. Pet. App. 21a. Rather, the Court observed that a factor other than sex must only be "bona fide." *Gunther*, 452 U.S. at 170. Importantly, however, while the employer's *use* of a factor other than sex must be "bona fide," the Court did not suggest that the factor *itself* must be so.

By reading into the EPA its "risks perpetuating" delimiter, the Ninth Circuit in essence promotes a form of disparate impact liability available under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, under which the application of a gender-neutral policy based on a factor (in this case, prior pay) that *potentially* could have an adverse impact on future pay violates the EPA. Neither the EPA's text nor legislative history, as interpreted by this Court, supports such a contention, however, or this novel form of liability.

To the contrary, in *Gunther*, the Court considered whether the Bennett Amendment to Title VII, which incorporates the EPA's four affirmative defenses, limits sex-based wage discrimination claims under Title VII to *only* those claims that could *also* be brought under the EPA. 452 U.S. at 168. In holding that Title VII contained no such limitation, the Court suggested that the "factor other than sex" defense was inconsistent with the disparate impact doctrine

established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), observing that it was meant primarily to limit the application of the EPA to disparate treatment claims. *Gunther*, 452 U.S. at 170.

In particular, the *Gunther* Court noted that Title VII was designed to prohibit "'not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.'" *Id.* (quoting *Griggs*, 401 U.S. at 431). In contrast, the EPA's "factor other than sex" defense "was designed differently, to *confine the application of the act to wage differentials attributable to sex discrimination*." *Id.* (citation omitted) (emphasis added). Accordingly, the EPA "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" *Id.* (footnote omitted); *see also Corning Glass*, 417 U.S. at 195 ("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 solution adopted was quite simple in principle: to require that 'equal work will be rewarded by equal wages'") (citation omitted).

The Ninth Circuit's declaration that "[b]ecause prior pay may carry with it the effects of sex-based pay discrimination ... an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay decision," Pet. App. 23a-24a, has no basis in the EPA or this Court's precedents. We respectfully urge this Court to grant the petition, reverse the decision below, and confirm that the plain text of the EPA does not place any restrictions on the application of the "any other factor" affirmative defense – other than the requirement that the factor in question be non-sex-based.

C. Prior To The Decision Below, Every Court Of Appeals To Consider This Issue Had Determined That Prior Salary Can Constitute A "Factor Other Than Sex" Under The Equal Pay Act

Both the Seventh and Eighth Circuits have held that differentials based on prior salary – in other words, "a difference in pay based on the difference in what employees were previously paid …," *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (citing *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005)) – constitute a "factor other than sex" under the EPA. In *Taylor v. White*, the Eighth Circuit reasoned that "[o]n its face, the EPA does not suggest any limitations to the broad catch-all 'factor other than sex' affirmative defense." 321 F.3d at 717. It thus explicitly rejected the argument that because prior pay may permit the "perpetuation of unequal wage structures," *id.*, use of prior salary should be precluded as a matter of law. *Id*. at 718. Rather, the reliance on prior salary is simply one of any number of factors that the courts must consider in evaluating the viability of the employer's affirmative defense. *See, e.g., Taylor*, 321 F.3d at 718 (holding that the risks of perpetuating a pay differential "simply highlight the need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay").

The Fourth Circuit recently had occasion to consider this issue in *Spencer v. Virginia State University*, 919 F.3d 199 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 381 (2019), and adopted a similar approach. In *Spencer*, the university paid former administrators according to a "9/12ths" policy, in which professors who are former

administrators receive 75% of their prior salary. The wage system resulted in Spencer receiving less than two of her male counterparts, and the Fourth Circuit held that the wage differentials were lawful and that the university's explanation was a "factor other than sex" under the EPA. 919 F.3d at 206-07.

In contrast, the Tenth and Eleventh Circuits have held that while prior salary "can be considered in determining whether pay disparity is based on a factor other than sex …, the EPA 'precludes an employer from relying *solely* upon a prior salary to justify pay disparity.'" *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (citation omitted) (emphasis added); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (employer's reliance on prior salary and experience justified a difference in pay).

The Second and Sixth Circuits take a similar approach, permitting employers to assert the fourth affirmative defense where the factors used serve a legitimate business purpose. *See, e.g.*, *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992) (employer may assert a "factor other than sex" defense when the "differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue"); *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006) (holding that a factor other than sex "does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason") (citing *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988)).

Thus, in the Fourth, Seventh, and Eighth Circuits, prior salary alone can constitute a "factor other than sex." In the Tenth and Eleventh Circuits, however, prior salary may be used to justify a gender pay

disparity, but only in conjunction with other factors. In the Second and Sixth Circuits, a "factor other than sex," which would include prior salary, must serve a legitimate business purposes. And now in the Ninth Circuit, under no circumstances is prior salary considered a "factor other than sex" under the EPA. Review by this Court is warranted to bring much needed clarity to this extremely important aspect of workplace compliance.

D. The Decision Below Inexplicably Permits Employers To Use Nondiscriminatory Factors In Making Compensation Decisions, But Not In Defending Those Same Decisions

While the Ninth Circuit acknowledges the split in the Courts of Appeals on this issue, it explicitly rejects the notion that its decision has somehow "deepen[ed]" that split. Pet. App. 27a. Incredibly, the Ninth Circuit's "cure" for this split is to suggest that employers can indeed use prior pay in making compensation decisions, but not in defending those same decisions:

> Our holding prevents employers from relying on prior pay to defeat EPA claims, but the EPA does not prevent employers from considering prior pay for other purposes. For example, it 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. Certainly, our opinion does not prohibit this practice. But whatever factors an employer considers, if called upon to defend against a prima facie showing of sex-based wage discrimination, the employer must demonstrate that any wage differential was in fact justi-

> fied by job-related factors other than sex. Prior pay, alone or in combination with other factors, cannot serve as a defense.

Pet. App. 27a-28a (footnote omitted).

Here, the Ninth Circuit reasons that "[o]ur statement that 'prior pay, alone or in combination with other factors, is not [a job-related factor]' addresses the use of prior pay as an affirmative defense, not the consideration of prior pay to make a competitive job offer, to negotiate higher pay, or to set a salary." Pet. App. 28a. In other words, the Ninth Circuit is suggesting that employers can indeed use factors that, in the court's view, *are not job-related*, so long as they don't plan on *using* those same factors in their defense.

This statement is incredible. Employers compensate their employees in myriad ways for, and based upon, legitimate nondiscriminatory business factors. These include, but are in no way limited to knowledge, skills, abilities, experience, certifications, and education. Remarkably, none of these factors are explicitly listed under the EPA's affirmative defenses, and yet all of them would reasonably be considered factors other than sex. That is, until the Ninth Circuit or another court determines that one or more of these factors is not "job-related," or "risks perpetuating the history of sex-based wage discrimination." Pet. App. 21a.

This is an impossible standard for employers to adhere to, and one not required by the EPA. The EPA simply does not impose an obligation on employers to become social scientists and make individual, gender-based compensation decisions based on the latest research regarding the existence of a wage gap and the

degree to which this gap *may* be the product of discrimination.

E. If Permitted To Stand, The Decision Below Will Have A Profound, Largely Negative, Impact On Employers Nationwide

1. Ensuring nondiscrimination in compensation does not require ensuring all employees are paid the same

The mere fact that a wage disparity exists between male and female employees does not, in itself, constitute an EPA violation. Rather, the Act obligates employers to ensure that pay decisions are made for nondiscriminatory reasons, in other words, without regard to sex; it does not require they ensure across-the-board pay parity between all men and all women. Indeed, the EPA is "not the 'Pay Everyone Exactly the Same Act.'" *Behm v. U.S.*, 68 Fed. Cl. 395, 405 (2005) (citations omitted). Yet according to the Ninth Circuit, "setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination." Pet. App. 21a.

It is worth emphasizing here that the Ninth Circuit did not find that Rizo's prior salary was *in fact* the product of sex discrimination that violated the EPA or any other law. Pet App. 20a-21a. ("We do not presume that any particular employee's prior wages were depressed as a result of sex discrimination"). Rather, "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." Pet App. 21a.

Here the Ninth Circuit is referring to what is commonly called the "gender wage gap," and assumes that the sole cause of the gender pay gap is sex discrimination. As a result, women's prior salaries *always* will be lower than similarly situated males' because of sex. Accordingly, the argument goes, because prior salary is influenced by the gender pay gap, its use is always sex-based. Even assuming that some women's prior salaries are lower than that of similarly situated males consistent with the wage gap generally, it does not follow that use of prior salary itself is inherently discriminatory.

The Ninth Circuit's position would amount to a requirement that employers eliminate any pay disparity between genders, even those created by a gender-neutral policy – a requirement that simply does not exist under any federal law. As this Court observed in *Smith v. City of Jackson*, "in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based 'on any other factor' – *reasonable or unreasonable* – 'other than sex.'" 544 U.S. 228, 239 n.11 (2005) (emphasis added).

Accordingly, any notion that employers must guarantee gender pay parity in the absence of any evidence of sex-based discrimination or face liability under the EPA should be soundly rejected by this Court. So too should any notion that employers nationwide adopt gender-based or, at the very least, "gender-conscious," compensation systems designed to achieve pay parity, regardless of any evidence of actual sex-based discrimination. In fact, forcing employers to adjust pay based on sex where no evidence of actual discrimination exists could expose employers to claims that such adjustments themselves violate Title VII. See *Ricci*

v. DeStefano, 557 U.S. 557, 585 (2009); *see also Rudebusch v. Hughes*, 313 F.3d 506 (9th Cir. 2002).

In both discretionary and non-discretionary compensation systems, sound business and policy reasons can exist for assigning employees different compensation. Here, those reasons were a combination of prior salary and the County's mandatory pay scale. Sometimes that system resulted in women, such as Rizo, receiving less compensation than their male counterparts, and in other instances, females were paid more than males. In each instance, objective, nondiscriminatory reasons justified the pay decisions, and the County was under no obligation to "cure" any incidental pay differences stemming from prior salary. Such a notion runs directly counter to the principles of meritocracy that form the basis of most private sector employer compensation practices in the U.S. and should be squarely rejected by this Court.

2. The Equal Pay Act does not create an affirmative obligation on employers to identify or "cure" the effects of the gender wage gap

According to the Ninth Circuit, "[b]ecause prior pay may carry with it the effects of sex-based pay discrimination, and because sex-based pay discrimination was the precise target of the EPA, an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay decision." Pet. App. 23a-24a. The court reasons that "[t]o the extent the present-day pay gap is the product of historical wage discrimination based on sex—rather than different pay due to unequal qualifications, effort, productivity, regional cost of living, or other factors other than sex—the gap is a continuation of the

very discrimination Congress sought to end." Pet. App. 23a.

Not only is there no affirmative obligation on employers under the EPA to "cure" the effects of the gender pay gap, the Ninth Circuit's assumption that sex discrimination explains the gender pay gap is unfounded. While the existence of a persistent, global gender pay gap is undeniable, so too is the fact that there are numerous causes for the gap, and no research exists that can fully account for the disparity, much less pin the entire disparity on unlawful sex discrimination.

For example, in January 2009 the CONSAD Research Corporation released a report, *An Analysis of Reasons for the Disparity in Wages Between Men and Women*,[2] commissioned by the Department of Labor, aimed at researching and quantifying the cause of the gender wage gap. The study identified numerous factors that contributed to the gap, including career choice in occupation and industry, employment interruptions mid-career, and different decisions made by men and women in balancing their work, personal, and family lives. After conducting a statistical analysis of these and other factors, an "adjusted gender wage gap" remained, estimated between 4.8 and 7.1 percent. *Id.* at 1. Other studies have produced similar results. *See, e.g.*, Christianne Corbett, M.A. & Catherine Hill, Ph.D, Am. Ass'n of Univ. Women, *Graduating to a Pay Gap* vii (Oct. 2012)[3] (concluding

[2] *Available at* https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/Gender%20Wage%20Gap%20Final%20Report.pdf (last visited Apr. 24, 2020).

[3] *Available at* https://files.eric.ed.gov/fulltext/ED536572.pdf (last visited Apr. 24, 2020).

that "women's choices—college major, occupation, hours at work—do account for part of the pay gap[, but also that] about one-third of the gap remains unexplained" and may be the product of other factors such as negotiations and even discrimination) (quoting Foreword by Carolyn H. Garfein, AAUW President & Linda D. Hallman, CAE, AAUW Executive Director); Dr. Andrew Chamberlain, Chief Economist, Glassdoor, *Demystifying the Gender Pay Gap* 18 (Mar. 2016)[4] (concluding that the U.S. adjusted wage gap was 5.4% in base compensation and 7.4% in total compensation, after controlling for factors such as industry, experience, education, and job title).

The "adjusted gender wage gap," is what remains of the wage gap once quantifiable characteristics such as occupation, industry, experience, and other factors are controlled for in statistical studies. Also referred to as the "unexplained" wage gap, some suggest that this unexplained gap is caused by unlawful discrimination. While there is no question that unlawful, gender-based discrimination *may* account for portions of the adjusted gender wage gap, the fact remains that no research to date has been able to quantify which portion of the gap is attributable to discrimination. More importantly, the EPA simply does not impose an obligation on employers to become social scientists and make individual, gender-based compensation decisions based on the latest research regarding the existence of a wage gap and the degree to which this gap *may* be the product of discrimination.

Employers are not obligated under any federal law to equalize their employees' starting pay to ensure

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[4] *Available at* https://www.glassdoor.com/research/app/uploads/sites/2/2016/03/Glassdoor-Gender-Pay-Gap-Study.pdf (last visited Apr. 24, 2020).

perfect parity between people performing the same job. Ensuring perfect parity in compensation among all employees in a particular job group would require, for instance, that every person promoted into a job be compensated at the same rate of pay as the highest earner (likely the most experienced or best performer), thus disregarding differences in skills, knowledge, ability, and/or time in job. Alternatively, employers would resort to compensating every employee at the *lowest* wage without regard to merit.

The former would increase payroll budgets exponentially, while the latter would severely impede efforts to attract the best talent and produce the highest quality product, thus ensuring a quick race to the bottom, rather than to the top. Under either scenario, American businesses would be placed at a significant and extremely damaging competitive disadvantage.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2020