No. 19-1176

IN THE

Supreme Court of the United States

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 IN OPPOSITION

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QUESTION PRESENTED

Once a plaintiff has shown that she is paid less than her male counterparts who do the same work, is it an affirmative defense under the Equal Pay Act, 29 U.S.C. § 206(d), that her employer set the pay for her current job solely on the basis of the salary she previously received from a different employer for doing a different job?

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INTRODUCTION

The Equal Pay Act makes a simple promise: equal pay for equal work. Petitioner, the Fresno County Superintendent of Schools, has already conceded that the County paid respondent Aileen Rizo over $10,000 less per year than it paid men who performed exactly the same job. It also conceded that her prior salary—doing a different job for a different employer—is "the only factor explaining the disparity." Pet. 6. Neither her experience, nor merit, nor the quality of her work had anything to do with how it set her pay. *See* Pet. App. 6a.

Given Ms. Rizo's showing that she was paid less than her male counterparts while doing "equal work," 29 U.S.C. § 206(d)(1), two en banc panels of the Ninth Circuit held—without a single dissent—that the County's exclusive reliance on prior pay "received for a different job," Pet. App. 18a, does not provide an affirmative defense to her Equal Pay Act claim. And despite all its hand-waving about disagreement among the circuits, the County has not pointed to a single comparable case that any court of appeals has decided differently.

Hungry for a grant, though, the County and its amici claim this case presents broader questions about whether employers can "ask about and rely upon prior pay in setting salaries." Pet. 19. It does not. The Ninth Circuit was clear: As a matter of federal law, employers are still free to do so. Pet. App. 28a.

More puzzling still is the County's relentless effort, through this second petition for certiorari, to ask this Court to bless a practice it has already abandoned and cannot reinstate. California has now

prohibited employers like the County from basing salary on past pay regardless of what the Court might decide if it granted review. So even if the Court were inclined to take up the question presented, it should await a petition from a party with a more meaningful stake in the answer.

STATEMENT OF THE CASE

1. In the years following World War II, the Nation faced a "serious and endemic" problem: a "wage structure" in which men were "paid more" than women although their "duties [were] the same." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)). Both as a "matter of simple justice" and as a matter of economics, the results of this disparity were unacceptable. 109 Cong. Rec. H9213 (daily ed. May 23, 1963) (statement of Rep. Matsunaga). Women were not taking the jobs where they were "most needed" even though many of them had "advanced education and training." *Id.* Further, women's depressed wages harmed their ability to "earn a living" and "support [their] families." 109 Cong. Rec. S8916-17 (daily ed. May 17, 1963) (statement of Sen. Hart).

To "correct" this problem, Congress passed the Equal Pay Act. Equal Pay Act, § 2(b), Pub. L. No. 88-33, 77 Stat. 56 (1963). The objective of the Act is "simple in principle: to require that 'equal work will be rewarded by equal wages.'" *Corning Glass*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)).

Under the Act, a plaintiff can recover damages if she shows that she was paid less than a colleague of the opposite sex who performed "equal work."

29 U.S.C. § 206(d)(1). Petitioner admits that Aileen Rizo and her male counterparts were engaged in equal work. *See* Pet. 4.

Under the EPA, an employer becomes presumptively liable once the plaintiff has established the existence of a pay gap in which he or she is paid less than workers of the opposite sex. *Corning Glass*, 417 U.S. at 195. Petitioner no longer contests the existence of such a gap here. *See* Pet. 5; *see also* Pet. App. 130a.

The Act also creates an affirmative defense for employers who can prove that an otherwise illegal pay gap is due 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." 29 U.S.C. § 206(d)(1). Petitioner does not argue that Ms. Rizo was paid less due to seniority, merit, or the quality of her work. Only the fourth affirmative defense is at issue in this case.

2. Fresno County employs a number of "math consultants." These employees train high school math teachers on curricular standards. Fresno County Office of Education, *Consultant—Mathematics* (May 31, 2012), https://perma.cc/9XQL-WCNA. The County classifies them as managerial employees because they coordinate curricular standards across multiple school districts in Fresno County. *See id.*

From 2004 to 2015, when an applicant for a managerial job accepted the County's offer, the Office of Education set the individual's salary using an internal policy known as Standard Operation Procedure #1440 (SOP 1440). Pet. App. 118a. SOP 1440 eliminated the County's previous practice of

considering prospective hires' experience and qualifications in setting salaries. *Id.*[1]

Under SOP 1440, the County calculated new employees' wages by taking their most recent salaries, at whatever job they had been performing, adding five percent, and then placing them on the nearest step in a ten-step salary scheme. Pet. App. 118a. The only adjustment to that salary was a $600 stipend for a master's degree or a $1,200 stipend for a doctorate. RE 448.[2] Under SOP 1440, the average female employee hired into a management position was placed more than two steps below the average male employee.[3]

Aileen Rizo is a career educator. She holds a bachelor's degree in math education and master's degrees in both math education and educational technology. Pet. App. 2a. Prior to becoming a math consultant with Fresno County, she was a classroom teacher in Maricopa County, Arizona. *Id.* 56a. As part of her thirteen years' experience in education, she had gained extensive expertise in curricular development

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[1] Counsel for petitioner explained that SOP 1440 "was in effect through December 31, 2015." Mackenzie Mays, *Fresno Woman Wins Major Court Decision in Her Quest for Equal Pay for Equal Work*, Fresno Bee (Apr. 10, 2018) (quoting Michael Woods), https://perma.cc/ADH4-MAAW.

[2] "RE" refers to petitioner's Excerpts of Record in the court of appeals (Doc. No. BL-12).

[3] The County's own data show that the average female management employee was placed at step 6.3 on the salary scale while the average male employee was placed at step 8.8. *See* Pl. Br. in Opp'n to Summ. J. at 10. In 2009, the year respondent was hired, this gap yielded at least a $5,000 salary difference. *See* RE 544-54; Pl. Br. in Opp'n to Summ. J. at 10; *see also* Rizo Decl. ¶ 11.

and served as a department head. Pl. Br. in Opp'n to Summ. J. at 7.

In 2009, Ms. Rizo moved her young family to Fresno in search of the opportunity to "grow as a professional." Tr. Rizo Dep. 13. She successfully applied for the position of math consultant. The starting salary for that position ranged from $62,133 for employees placed on Step 1 to $81,461 for employees placed on Step 10. RE 448. Applying SOP 1440 and relying solely on Ms. Rizo's salary as a classroom teacher in Maricopa County, petitioner placed her on Step 1—the lowest step. Pet. App. 122a-123a.

3. In 2012, Ms. Rizo discovered over lunch that her three male colleagues—who performed the same work that she did—had been initially placed on Steps 7, 7, and 9 of the County's ten-step scale. Pet. App. 123a, 129a. This had entitled each of them to starting salaries over $10,000 higher than Ms. Rizo's. *See* RE 448.

Ms. Rizo filed a formal internal challenge to the pay disparity. Pet. App. 123a-124a. In response, the County compiled a report analyzing the demographics and pay of employees who held similar positions. Using the report to assert that SOP 1440 did not produce a gender disparity, the County rejected Ms. Rizo's complaint. *Id.* 124a.[4]

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[4] The County's belief that SOP 1440 did not produce a pay disparity rests on a mistake. The County's data showed that women were twice as likely as men to be placed on the lower half of the salary scale. Pl. Br. in Opp'n to Summ. J. at 10. The County thought there was no problem because the policy "had placed

Ms. Rizo then filed suit in state court against petitioner, the Fresno County Superintendent of Schools in his official capacity. Pet. App. 3a-4a. (Like the Ninth Circuit, we refer to petitioner as "the County." Pet. App. 2a.) She sought damages for violations of the Equal Pay Act, Title VII, and California anti-discrimination statutes. *Id.* The County removed the case to federal court. *Id.* 4a.

After some discovery, the County moved for summary judgment. Pet. App. 4a. By this phase of the litigation, it had conceded that it paid Ms. Rizo "less than her male counterparts." *Id.* However, the County argued that it was entitled to do so because its exclusive reliance on her prior salary to set pay for her current job produced a permissible wage gap based on a factor other than sex under Section 206(d)(1)(iv).

The district court disagreed. It pointed to data from the federal Bureau of Labor Statistics showing that "male teachers out-earn their female counterparts." Pet. App. 127a. At the secondary school level, the median salary for female educators was twelve percent lower than the median salary for male educators. At the elementary and middle school level, it was thirteen percent lower. *Id.* 127a n.6. The court reasoned that under these circumstances "a pay structure based exclusively on prior wages," such as

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more females higher on the salary schedules than males in the same or similar position in the same department." Pet. App. 124a. But this assertion confused absolute numbers with the relevant measure, which is the relative step distribution within each gender. The absolute number of women receiving high-step salaries was higher than the absolute number of men receiving those salaries, because there were vastly more female employees. *See* RE 544-54.

SOP 1440, is "inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women." *Id.* 136a.

But the district court was uncertain about Ninth Circuit precedent addressing an employer's bare reliance on prior pay. *See* Pet. App. 144a. It therefore certified a narrow question for interlocutory appeal: "[W]hether, as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary." *Id.* 144a-145a.

4. A panel of the Ninth Circuit stated that under circuit precedent, there might be circumstances under which past pay could constitute an affirmative defense for an otherwise illegal pay disparity. *See* Pet. App. 112a. An employer could "base a pay differential on prior salary so long as it showed" that it had "used the factor reasonably in light of its stated purpose and its other practices," and that it "effectuated some business policy." *Id.* The panel therefore directed the district court to consider petitioner's rationales for its exclusive reliance on Ms. Rizo's prior salary—none of which was specific to her job as a math educator—and determine whether they could justify the uncontested pay disparity. *See id.* 113a.[5]

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[5] The four reasons the County had given were that basing starting salary solely on prior pay was (1) "objective"; (2) encourages candidates to take jobs with the County because of the five percent increase over current salary; (3) "prevents favoritism and ensures consistency in application"; and (4) reflects "a judicious use of taxpayer dollars." Pet. App. 110a.

5. Instead of remanding the case, the Ninth Circuit granted rehearing en banc. Pet. App. 53a-54a. The Equal Employment Opportunity Commission (EEOC) supported Ms. Rizo as an amicus curiae. It argued that "the County could not base the starting pay of a new employee solely on that employee's prior salary, without regard to what the employee had been doing and whether the salary was disproportionately high or low" relative to other employees doing the same job. EEOC C.A. Br. 29. That conclusion flowed from the position adopted in its Compliance Manual, which has long provided that "[p]rior salary cannot, by itself, justify a compensation disparity." EEOC Compliance Manual § 10-IV(F)(2)(g). *See* EEOC C.A. Br. 14.

All eleven judges on the en banc panel agreed that the County's reliance on Ms. Rizo's prior pay did not constitute an affirmative defense to her EPA claim. Pet. App. 80a-81a, 89a.

6. The County petitioned for certiorari. This Court did not take up the County's claim that its exclusive reliance on Ms. Rizo's prior pay defeated her EPA claim as a matter of law. But the Court granted, vacated, and remanded because one of the eleven judges on the en banc panel, Judge Reinhardt, died two weeks before the Ninth Circuit's opinion was issued and thus "was no longer a judge" when the decision was filed. *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019) (per curiam).

7. On remand, Judge Bea was selected at random to replace Judge Reinhardt on the en banc panel. Pet. App. 5a. n.2. All eleven judges once again agreed that petitioner's bare reliance on Ms. Rizo's former pay to

set her salary did not constitute an affirmative defense. Pet. App. 1a, 31a, 46a.

The opinion for the court was written by Judge Christen and joined by five other judges. The core of that opinion was the principle that "only job-related factors may serve as affirmative defenses to EPA claims." Pet App. 2a.

First, the court "examine[d] every word" of the operative phrase: "'any *other* factor other than sex.'" Pet. App. 12a (quoting 29 U.S.C. § 206(d)(1)(iv)). The first "other" in that phrase "requires that the fourth exception be read in relation to the three exceptions that precede it, as well as in relation to the 'equal work' principle to which it is an exception." *Id.* The first "other" would be superfluous unless the fourth defense was limited to factors relevant to the job at hand. *Id.*

The court explained that "familiar principles of statutory construction"—the canons of *noscitur a sociis* and *ejusdem generis*—reinforced this conclusion. Pet. App. 11a. Those canons required limiting the fourth defense to those factors that are "'similar'" to merit, seniority, and productivity, each of which was "job-related." *Id.* 13a-14a; *see also id.* at 13a (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012)).

The court added that the "history and purpose" of the EPA "confirm[ed]" its reading of the text. Pet. App. 14a. If women could be paid less than men for "reasons unrelated to their jobs," the EPA's "equal-pay-for-equal-work mandate would mean little." *Id.* 16a. The court also pointed to broad agreement among the circuits that "only job-related factors provide affirmative defenses to EPA claims." *Id.*

The court then turned to whether SOP 1440 would afford petitioner an affirmative defense. The court held that prior pay, because it is "pay received for a different job" is "necessarily not a factor related to the job for which an EPA plaintiff must demonstrate unequal pay for equal work." Pet. App. 18a. Indeed, prior pay may have nothing to do "with an employee's present position." *Id.* 21a. Pointing to the persistent "wage gap" between men and women "across nearly all occupations and industries, regardless of education, experience, or job title," *id.* 22a, the court emphasized that "prior pay may carry with it the effects of sex-based pay discrimination"—"the precise target of the EPA," *id.* 23a. Thus, the majority concluded that prior pay "does not qualify as a factor other than sex" that could justify paying Ms. Rizo less than men who were doing the same job. *Id.* 24a; *see id.* 29a.

The court emphasized the limited nature of its holding. In particular, the court underscored that it did not impose any new restrictions on "consideration of prior pay to make a competitive job offer, to negotiate higher pay, or to set a salary." Pet. App. 28a. Nor did it "prevent employers from considering prior pay when employees disclose it." *Id.* It decided only that when an employer was shown to be paying a woman less than men doing exactly the same job, it could not escape liability under the EPA by relying entirely on her prior salary at a different job to justify the current differential.

The two concurrences in the judgment agreed that the County has no affirmative defense to Ms. Rizo's claim. Judge McKeown (joined by Judges Murguia and Tallman) described "Rizo's case [as] an easy one" and a "textbook violation" of the Equal Pay Act. Pet. App.

31a-32a. Prior salary alone could not be "a defense to unequal pay for equal work." *Id.* 31a. But she believed that in another case, prior salary might "provide a lawful benchmark for starting salary" if used "along with valid job-related factors." *Id.* 34a.

Judge Callahan (joined by Judges Bea and Tallman) agreed that the district court "properly denied [the County] summary judgment." Pet. App. 52a. In her view, the proper test for whether a factor qualified under the fourth defense was not whether a factor was job related, but "whether regardless of its 'job-relatedness,' the factor promotes or perpetuates gender discrimination." *Id.* 45a. Given "the history of pay discrimination and the broad purpose of the Equal Pay Act," she agreed with the majority that "prior salary by itself does not qualify as a 'factor other than sex.'" *Id.* 46a. She stated that there might be other occasions, particularly in the private sector, where "a pay system that uses prior pay as one of several factors deserves to be considered on its own merits." *Id.* 49a; *see also id.* 42a.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to decide whether employers may "rely on prior pay in setting salaries." Pet. 19. But the answer to that question is not in dispute—at least as a matter of federal law. Of course they can. And nothing in the Ninth Circuit's decision here holds otherwise. The Ninth Circuit correctly held only that employers cannot justify paying a lower salary to a woman who does exactly the same job as a man *solely* on the grounds that it is basing her current salary in her current job on her prior salary in a different job.

Moreover, contrary to the arguments of petitioner and its amici, this is not the right case for answering other, more sweeping questions about the ways in which other employers may be setting starting salaries. Most strikingly, in light of recent state legislation, the decision below shapes neither the County's future legal obligations nor the legal obligations of most employers in the Ninth Circuit.

I. This case does not implicate any split among the circuits.

The County asserts that there is "[w]idespread [d]isagreement" among the circuits. Pet. 16. The County is wrong. There is no disagreement among the circuits as to whether a policy like the County's can satisfy the Equal Pay Act's fourth affirmative defense. The County does not cite any decision, from any circuit, holding that an employer's sole reliance on an individual's prior pay in a different job with a different employer defeats liability as a matter of law. Thus, there is no "genuine conflict" here: On these facts, no court of appeals would reach a different conclusion. Stephen M. Shapiro et al., *Supreme Court Practice* 242 (10th ed. 2014).

As for any potential disagreement with respect to other uses of prior pay in setting salaries, this Court should "await a day when the issue is posed less abstractly," *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted).

1. Petitioner concedes that the Tenth and Eleventh Circuits would decide this case exactly the same way the Ninth Circuit did because those two circuits have held that an employer cannot rely solely

on an employee's prior salary to justify a pay disparity. Pet. 10 (citing *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015), and *Irby v. Bittick,* 44 F.3d 949 (11th Cir. 1995)).

2. As for the Second and Sixth Circuits, the County is wrong to suggest that it "could have prevailed before a jury" in either circuit, Pet. 14 (capitalization omitted). To the contrary, both circuits clearly limit the fourth affirmative defense to practices where the pay differential can be tied to the employee's performance of her current job—a relationship the County has never claimed. Indeed, the very cases the County cites establish this conclusion.

Consider *Aldrich v. Randolph Central School District*, 963 F.2d 520 (2d Cir. 1992). *See* Pet. 15. There, a female school "cleaner" brought suit because her all-female cohort made less than the district's all-male cohort of "custodians" despite the fact that both groups did the same work. 963 F.2d at 522-23. The district's defense was that the disparity was solely the product of a formally neutral civil service exam. *Id.* at 524.

The Second Circuit rejected that argument. Unless the school district could prove that the higher pay for custodians was "related to performance of the custodian's job"—that is, to the job for which the pay was being set—it would violate the Equal Pay Act to pay women less. *Aldrich*, 963 F.2d at 527. Reliance on the examination results alone did not "provide a valid factor-other-than-sex defense." *Id.* Likewise, an employer cannot rely on prior pay, a facially neutral factor, unless it shows that prior pay is "related to [the] performance" of an employee's current job. *Id.* The County therefore could not invoke the fourth

affirmative defense in the Second Circuit because it does not claim that the pay differential here was related to the performance of Ms. Rizo's job as a math consultant.

The County admits that the Sixth Circuit "applies the same rule" as the Second Circuit. Pet. 15. The County's discussion of *Beck-Wilson v. Principi*, 441 F.3d 353 (6th Cir. 2006), is incomplete at best. There, the Sixth Circuit explained that the fourth affirmative defense operates as "a sort of hybrid between the seniority and merit defenses." *Id.* at 365-66. Thus, past salary can justify a pay differential only if it is "rooted in in work responsibilities and qualifications for the particular positions at issue." *Id.* at 366 (quoting *Aldrich*, 963 F.2d at 525). As Ms. Rizo has already explained, the County's purported business reasons for SOP 1440 are unrelated to *her* job. *Supra* page 7. Thus, the County would lose its case in the Sixth Circuit as well.

3. The County misstates the law in the Fourth and Eighth Circuits. Contrary to its claim, nothing in the cases it cites shows that the County "would *win* as a matter of law" in those circuits, Pet. 11.

In fact, the Fourth Circuit takes the same approach as the Second Circuit. In *EEOC v. Md. Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018), that court cited the page in *Aldrich* where the Second Circuit held that, for the fourth affirmative defense to apply, differential pay must be rooted in "differences in work responsibilities and qualifications for the particular positions at issue." *Id.* at 123 (citing *Aldrich*, 963 F.2d at 925). It then insisted that an employer "must present evidence that job-related distinctions" explain "different starting salaries." *Id.* In this case, the

County has never argued that there are any *job-related* distinctions that explain why Ms. Rizo was paid less.

Nor does *Spencer v. Virginia State University*, 919 F.3d 199 (4th Cir. 2019) (Pet. 12), provide support for the County's claim. The plaintiff in that case was a female sociology professor, earning "a median salary when compared to the men who were also full professors" in her department. She complained that she earned less than two male professors in other departments who had previously served as high-level administrators at the university. *Id.* at 202-03. The Fourth Circuit agreed with the district court that she had failed to show that she and the proposed comparators were "engaged in equal work, which categorically dooms her attempt to establish wage discrimination under the Equal Pay Act." *Id.* at 206. In other words, the plaintiff never met the "initial burden" necessary to establish a prima facie case. *Id.* There was thus no need for the court to address, let alone adjudicate, any affirmative defense.

The court's brief discussion of the prior-pay issue may well be mere dicta. Pet. App. 27a n.14. But even if conceived of as an alternative holding, it would not support the County here. The two male professors' pay was tied to their prior service as senior administrators because the university sought to "retain the benefit of their skills, experiences, training, and institutional knowledge" for a short period of time by means of a term contract. Appellees' C.A. Br. 42-43, *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019) (No. 17-2453). It was in this context—setting current pay as a percentage of past pay for the same employer—that the Fourth Circuit suggested that the fourth

affirmative defense was available; the court made no broad pronouncements about reliance on prior pay in general. *Spencer*, 919 F.3d at 206. *Spencer* therefore says precisely nothing about how the Fourth Circuit would decide a case like this one, where the County does not argue that Ms. Rizo is doing a different job than her proposed comparators nor that the difference in pay has anything to do with skills, experiences, training, or institutional knowledge.

Nor does the law in the Eighth Circuit support the County. Although the County does not mention it, the Eighth Circuit has considered a case that resembled Ms. Rizo's, and it reached the same result as the Ninth Circuit did here. In *Drum v. Leeson Electrical Corp.*, 565 F.3d 1071 (8th Cir. 2009), the employer "attempt[ed] to justify" a plaintiff's salary "by highlighting her prior salaries." *Id.* at 1073. The Eighth Circuit rejected the employer's argument. It held that prior salary, without evidence of male employees' better "education, experience, or other qualifications," "fails to prove as a matter of law" that the discriminatory wage practices were "due to a factor other than sex." *Id.* This holding gives the lie to the County's assertion that in the Eighth Circuit "prior pay always counts as a factor other than sex," Pet. 11. Here, of course, the County has never argued that Ms. Rizo's male colleagues have more education, experience, or other qualifications. Quite the contrary: Ms. Rizo had better qualifications and more experience than her male comparators. *See* Pl. Br. in Opp'n to Summ. J. at 8.

The County's reliance on *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003), does not undercut this analysis. That case is inapposite, for reasons Congress

explained in the Equal Pay Act's legislative history. As the County concedes, Pet. 13, *Taylor* involved a distinctive employment practice known as a "salary retention policy." 321 F.3d at 716-17. Such policies enable employers to temporarily "transfer employees to other less demanding jobs" but "continue to pay them a premium rate in order to have them available when they are again needed" to resume their former responsibilities. *See* House Comm. on Education & Labor, H.R. Rep. No. 309, 88th Cong., 1st Sess., at 3 (1963). The wage gap at issue in *Taylor* was not attributable to the plaintiff's prior salary history; rather, it was a product of the fact that she and her male comparator usually performed different work, 321 F.3d at 716-17, and consequently had different value to the company. Here, by contrast, the County admits that Ms. Rizo and her male comparators are *always* performing the same work, and it has never suggested that she is less valuable to the school system.[6]

4. That leaves the Seventh Circuit, on which the County relies most heavily. Pet. 11-12. But the Seventh Circuit's position is nowhere near as categorical as the County suggests. And even if the Seventh Circuit actually had adopted the extreme position the County attributes to it, it might well reconsider that outlier view if given the opportunity.

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[6] In the other Eighth Circuit case the County cites, *Price v. N. States Power Co.,* 664 F.3d 1186 (8th Cir. 2011), the plaintiffs failed to establish their prima facie case of different pay for the same work. *See id.* at 1194. Thus, it was unnecessary to address whether the employer would have had an affirmative defense that the differential was based on a factor other than sex.

Contrary to what the County says (Pet. 12), *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987), actually provides two reasons why SOP 1440 would not succeed as an affirmative defense under the Equal Pay Act in the Seventh Circuit.

First, the Seventh Circuit highlighted the risk of unjustifiable wage disparities when an employer looks to a worker's pay history with a "previous employer." *Covington*, 816 F.2d at 322-23. This is because reliance on a prior employer's practices can unknowingly "perpetuate" the very wage disparities that the Equal Pay Act targets. *Id.* at 322. After all, "there are enormous difficulties involved in determining whether another business discriminated on the basis of sex." *Id.* at 323.

Ms. Rizo's case involves the County's reliance on the salary she earned with a prior employer—precisely the kind of policy *Covington* warned about. And there is good reason to be concerned with that sort of reliance. Ms. Rizo's prior employer, Cartwright School District, was the defendant in at least one lawsuit alleging employment discrimination on the basis of sex. *See* Complaint at 2, 4-5, *Bailey v. Cartwright Sch. Dist.*, No. 2:11-cv-01432 (D. Ariz. July 19, 2011). While it is unclear whether Ms. Rizo's own pay at Cartwright was affected by sex discrimination, Fresno County was in no position to investigate or respond to that possibility. Moreover, given the significant wage disparities between male and female teachers nationwide, *see* Pet. App 127a; *see also id.* 22a-23a, any policy that sets a teacher's salary based on her prior salary in another district can perpetuate the wage gap the EPA is designed to combat.

Second, in *Covington*, the Seventh Circuit emphasized that there was "no evidence" that the employer's use of prior pay was "either discriminatorily applied or has a discriminatory effect." 816 F.2d at 322; *see also Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989); *EEOC v. Grinnell Corp.*, 881 F. Supp. 406, 412 (S.D. Ind. 1995) (denying summary judgment where a facially neutral prior-pay policy disproportionately "rewarded male employees").

By contrast, Ms. Rizo's case involves a policy that, while neutral on its face, systematically disadvantaged women. The County's own data show that, under SOP 1440, the average woman was placed more than two steps below the average man—corresponding to a pay disparity of over $5,000. *See supra* page 4 n.3. On these facts, the County could not satisfy *Covington*'s standard.[7]

To be sure, Judge Easterbrook did say in *Wernsing v. Illinois Department of Human Services*, 427 F.3d 466 (7th Cir. 2005), that "[w]ages at one's prior employer are a 'factor other than sex,'" *id.* at 468. But *Wernsing* did not purport to disturb the distinction that *Covington* drew between internal transfers and external hires. *See id.* Indeed, the court relied on *Covington* as a correct statement of the Seventh Circuit rule. *Id.* District courts within the

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[7] There was also evidence before the district court that the County "has deviated from the standards set forth in SOP 1440." Pet. App. 121a. For example, Mark Hammons, like Ms. Rizo, "should have been placed at Step 1" under SOP 1440, but petitioner approved placing him at Step 2 instead. *Id.* 122a. His resulting starting salary was over $1,500 more per year than SOP 1440 would have dictated. *See* RE 448.

circuit have therefore continued to reject bare reliance on prior pay from a different employer as justification for a wage gap. *Schultz v. Dep't of Workforce Dev.*, 752 F. Supp. 2d 1015, 1030 (W.D. Wisc. 2010).

Moreover, the basis for Judge Easterbrook's construction of the fourth defense as permitting even non-job-related factors to justify pay disparities was his belief that "[t]he Equal Pay Act forbids sex discrimination, an intentional wrong." *Wernsing*, 427 F.3d at 469. Under that view, a plaintiff would not even establish a prima facie case unless she could show a discriminatory purpose. Thus, an employer who paid a female employee less than her male counterpart because she was a White Sox fan, rather than a Cubs fan, would either defeat the plaintiff's prima facie case or have a meritorious affirmative defense.

But this Court subsequently clarified that "the EPA does not require" any "proof of intentional discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007). That clarification wipes out the underpinning of Judge Easterbrook's suggestion. If the point of the EPA is to insure equal pay for "equal work," 29 U.S.C. § 206(d)(1), rather than to root out a particular employer's conscious bias against women, then it makes no sense to permit differentials based on factors unrelated to the job for which the wages are being paid.[8]

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[8] The County makes the same error when it argues that the EPA prohibits a wage gap only if it results from some form of "disparate treatment" or "pretext." Pet. 27. *Ledbetter* and *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974), clearly state the opposite.

In light of *Ledbetter*, it is entirely possible the Seventh Circuit would reconsider its statement in *Wernsing* if it ever mattered to the outcome of a case. And that is especially likely given the Seventh Circuit's outlier status among its sister circuits. As the Seventh Circuit itself has explained, "[w]hen a number of other circuits reject a position that we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts comes into play; and if we are asked to reexamine our position, we can hardly refuse." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995).[9]

5. In short, on the facts of this case—that is, an employer who concedes that an equally qualified female employee is doing exactly the same job as her male counterparts but is paid less based solely on her prior salary doing a different job for a different employer—the County has failed to identify a single circuit that would decide it differently. And the Court need not take Ms. Rizo's word for this. All eleven judges on the en banc panel agreed, regardless of the construction they would have given to the fourth affirmative defense, that the County could not invoke it. If there are other circumstances in which the circuits might disagree, this case does not implicate that disagreement.

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[9] *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017), *see* Pet. 12, did not provide the court with such an opportunity. The core of the plaintiff's argument was an assertion that the defendants' use of their Pay Plan was not bona fide. *See* Appellant's C.A. Br. 26, *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017) (No. 16-3830). And she never moved for rehearing en banc.

II. The Ninth Circuit's decision in this case has only minimal practical importance.

Petitioner has already abandoned the very policy that gave rise to Ms. Rizo's claim in this particular case. *See supra* page 4 n.1.

Indeed, it had no choice. In 2016, the California Legislature amended state law governing the use of prior pay. California Labor Code Section 432.3(a) now provides that an employer "shall not rely" on an applicant's "salary history information" in determining "what salary to offer an applicant." And Section 432.3(i) expressly requires that the California analogue to the Equal Pay Act, Cal. Lab. Code § 1197.5, not be "construed to allow prior salary, by itself, to justify any disparity in compensation" between men and women.

The 2016 legislation was tailor-made to reach policies like SOP 1440. In fact, its preamble cites Ms. Rizo's experience by name as an example of the "problematic" practice of "relying on prior salary to set employees' pay rates" that California law now forbids. A.B. 1676 § 1(f), (b), 2015 Reg. Sess. (Cal. 2016). State law now precludes the County from using SOP 1440 or relying on it as a defense in future state Equal Pay Act claims. Thus, petitioner's practical stake in this case is limited entirely to Ms. Rizo's individual claim for retrospective damages.

Nor is the question presented important to most other employers within the Ninth Circuit. Since 2016, Oregon and Hawaii, like California, have prohibited reliance on prior pay in setting an employee's starting salary—making policies like SOP 1440 illegal in those states. *See* Recent Legislation, *Oregon Equal Pay Act*

of 2017, 131 Harv. L. Rev. 1513, 1515-16 (2018); An Act Relating to Equal Pay, S.B. 2351, 29th Leg. Reg. Sess. (Haw. 2018). In 2019, Washington State amended its Equal Pay Act to ban employers from "[s]eek[ing] the wage or salary history of an applicant for employment from the applicant or a current or former employer" until after an offer, with a compensation amount, has been made. *See* Wash. Rev. Code Ann. § 49.58.100(1)(a). These states house the vast majority of Ninth Circuit businesses and residents. And because employers subject to conflicting state and federal law must comply with both, state law effectively controls employment practices based on prior pay.

Nor are states within the Ninth Circuit the only jurisdictions that regulate the use of prior pay to set salaries. There are now 18 statewide bans and 21 local bans on requesting or relying on prior salary information to set a new salary. *See* H.R. Dive, *Salary History Bans*, https://perma.cc/6MWB-P7PV (last updated Feb. 28, 2020) (last visited May 15, 2020); *see also* Recent Legislation, 131 Harv. L. Rev. at 1515-16. Numerous other jurisdictions have been considering such legislation. *See id.* For employers in these jurisdictions, any review by this Court would do nothing more than "satisfy a scholarly interest," *Rice v. Sioux Mem'l Park Cemetery*, 349 U.S. 70, 74-75 (1955) (dismissing certiorari as improvidently granted because of subsequent state legislation).

III. This case is the wrong vehicle for addressing broader questions about the use of prior pay in setting salaries.

In their effort to inflate this case's importance, petitioner and its amici argue that certiorari is

necessary here to resolve whether employers may "ask about and rely on prior pay" in any way. Pet. 19. But that question is neither posed by this case nor in doubt under federal law: Of course they can.

An employer's ability to ask about, or to rely upon, an applicant's prior pay is left untouched by the Equal Pay Act unless and until those practices result in employees of one sex being paid less than employees of another for doing the same work. Thus, as long as employers do not violate the Act's requirement of equal pay for equal work, they are entirely free to use prior pay to assess a candidate's level of experience or skill. And employers may continue to use prior pay to suss out a candidate's productivity or experience, Pet. 20, to evaluate a candidate's pay expectations, or to screen out candidates whose prior salary makes it unlikely they will accept a particular role, *id.* at 21, as long as those practices do not introduce an illegal wage disparity between men and women.

And contrary to the County's suggestion, acquiring prior salary information in no way increases the risk that employers will later face "liability under federal employment law," Pet. 24. Any liability stems entirely from their paying women less, and not from *why* they chose to do so.

First, prior pay is irrelevant to whether a plaintiff can establish a prima facie case under the EPA. That question turns solely on whether the "employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1)). The fact that the

employer knew the plaintiff's prior salary does nothing to make that showing easier.

Second, once the employee carries that initial burden, an employer is still no worse off for having requested salary information. To be sure, it cannot rely on prior salary, by itself, as an affirmative defense. But employers who ask about prior salary to assess an applicant's "skills and ability," Br. of Amicus Curiae Society for Human Resource Management 9, they are still free to do so, and to use the knowledge they acquire to explain why a job-related factor other than sex explains the wage gap.

But as even those judges on the Ninth Circuit en banc who believed prior pay could sometimes provide a legal benchmark when combined with other factors agreed, it could not do so here. *See* Pet. App. 32a, 46a. This case is thus a poor vehicle for resolving broader questions about the scope of the EPA.

IV. The Court of Appeals' decision is correct.

The Ninth Circuit rightly concluded that an employer cannot pay a female employee less than her male counterparts solely because of her prior salary at a different job with a different employer. Such a policy does not qualify as "a differential based on any other factor other than sex" within the meaning of 29 U.S.C. Section 206(d)(1)(iv). The Ninth Circuit's holding follows straightforwardly from the text, history, and logic of the Equal Pay Act.

1. As a matter of statutory language, the Act's fourth affirmative defense protects employers only if the pay differential is "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). Petitioner ignores completely the critical phrase "any *other* factor" in its

construction of the statute. *Id.* (emphasis added). The phrase "any other" refers to a thing "specified or understood contextually." *Other*, Oxford English Dictionary (3d ed. 2004). Congress's use of this phrase therefore highlights the importance of where Section 206(d)(1)(iv) is situated—namely, (a) in a list of (b) affirmative defenses.

a. The canons of statutory construction on which the Ninth Circuit relied, *see* Pet. App. 12a-13a, explain how to treat a general term that appears after a list of specific provisions. *Noscitur a sociis* stands for the principle that words are to be understood by the company they keep. *Ejusdem generis* applies this principle to general provisions following specific lists: "[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)).

b. Moreover, Section 206(d)(1)(iv) involves an affirmative defense. Words in a statute must be construed "with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). In this statute, the phrase "any other factor" operates to identify an exception under which an employer can justify a pay disparity that would otherwise be illegal. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). When "a general statement of policy is qualified by an exception," this Court "read[s] the exception narrowly

in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989).

In light of these, principles, the Ninth Circuit correctly limited the fourth affirmative defense to "job-related factors," Pet. App. 12a. The first three affirmative defenses relate to an employee's current job. Seniority rewards the "heightened value" that employees accrue through "personal work experiences" over time, *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 535 (1983), and helps to retain employees with firm-specific knowledge. Merit rewards skills. And quality and quantity of production reward output. In this way, the three specific affirmative defenses enable an employer to pay more to an employee who has more to offer. The fourth affirmative defense should therefore also be limited to job-related factors, and the County has never even attempted to argue that Ms. Rizo's prior pay indicates anything about her value as a math consultant. Nor has it explained why an affirmative defense like Section 206(d)(1)(iv) should be construed broadly to include factors unrelated to job performance.

2. Additionally, petitioner's reading would render the enumerated affirmative defenses surplusage. This Court has warned against interpretations that "render superfluous" another part of the statutory text. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012). In the context of a list containing both specific and general terms, this Court "will not read a 'catchall' provision" to create general terms "that would include those specifically enumerated." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 186 (2011). In

petitioner's reading, the specifically enumerated exceptions are unnecessary. But rather than passing a statute with a single exception, Congress enacted a statute with four. The Ninth Circuit was right to give Congress's choice meaning.

3. Petitioner cannot escape the meaning of the text by selectively resorting to legislative history. Petitioner quotes language from a House Committee Report for the proposition that courts should construe Section 206(d)(1)(iv) broadly. Pet. 31-32. But it leaves out the Report's very next sentence, which provides specific examples of practices that would fall within that provision. Each one—"shift differentials, differences based on time of day worked, hours of work, lifting or moving heavy objects, and differences based on experience, training, or ability," H.R. Rep. No. 88-309, at 3 (1963)—involves a factor related to the employee's current job that would easily satisfy the Ninth Circuit's test.

Far from serving the purposes of the Equal Pay Act, petitioner's reading would have rendered the Act a dead letter on the day it was passed. In 1963, women's wages averaged less than two thirds of men's. 109 Cong. Rec. H9199 (daily ed. May 23, 1963) (statement of Rep. Green). If prior pay could have justified a wage differential, the Act would have simply enshrined the persistent "wage differentials" it was designed to "correct." Pub. L. 88-38 § 2(a). Given the continued wage gap, *see supra* pages 6, 10, the same is true today.

4. Contrary to the County's conclusory statement, Pet. 30, prior pay is not as a matter of law job-related. Petitioner is simply wrong to claim that prior pay is a good stand-in for a worker's qualifications, experience,

and performance—all the more so when, as here, a worker is moving into a different job. For example, under petitioner's view, a law firm could pay a male first-year associate whose pre-law school job was at a consulting firm $190,000 per year while paying a female first-year associate who worked her way through law school as a waitress the minimum wage. This cannot be the law. Under the Equal Pay Act, deviations from equal pay require a tangible relationship to differences in what the plaintiff and opposite sex comparators are doing *now*.

Ms. Rizo's situation offers a powerful rebuttal to the claim that prior salary alone can legitimately explain why a female worker is being paid less than her male colleagues. Ms. Rizo had better qualifications and more experience than her male comparators. *See* Pl. Br. in Opp'n to Summ. J. at 8. Nonetheless, the County assigned her a starting salary over $10,000 lower than the salary it gave them. *See* RE 448.[10]

The Ninth Circuit was therefore correct in unanimously rejecting petitioner's claim that it could pay Ms. Rizo $10,000 less per year for performing exactly the same job as her male colleagues solely on

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[10] In the Ninth Circuit, the EEOC provided this pointed example of the disconnect between prior pay and current job responsibilities: "Under Defendant's policy, an applicant who had supported herself as an Instructor at the University of California (where she earned about $50,000) while getting her Ph.D. in curriculum development—highly relevant for a math consultant—would, like Plaintiff, start at Step 1. In contrast, a tech worker from Silicon Valley (where pay would normally exceed $80,000) who wanted to change careers but had no relevant experience in education would likely start at Step 9 or 10, earning nearly $20,000 more." EEOC C.A. Br. 27.

the basis of her prior salary in a different job for a different employer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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