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

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Equal Pay Act permits employers to pay men and women different wages for the same work "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." 29 U.S.C. § 206(d)(1). Is prior salary "[an]other factor other than sex"?

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I. THIS CASE TURNS ON AN ACKNOWLEDGED SPLIT

Everyone—the Ninth Circuit, the EEOC, Rizo herself—has recognized that the circuits would disagree about the outcome of this case. *See* Pet. App. 17a; EEOC Reh'g Amicus Br., CA9 Dkt. 46, at 12; Rizo Reh'g Pet., CA9 Dkt. 44, at 7 n.3. Rizo now claims that it "implicate[s]" no split. Opp. 12. She was right before; she is wrong now.

A. Petitioner Would Have Won in Three Circuits.

In three circuits, Petitioner would have prevailed because reliance on prior pay categorically qualifies as a factor other than sex.

1. *Wernsing v. Department of Human Services* held that "[w]ages at one's prior employer are a 'factor other than sex.'" 427 F.3d 466, 468 (7th Cir. 2005) (Easterbrook, J.). The court reiterated the point in *Lauderdale v. Illinois Department of Human Services*, following its "repeated[] h[olding] that a difference in pay based on the difference in what employees were previously paid" satisfies the EPA. 876 F.3d 904, 908 (7th Cir. 2017).

Rizo insists that Judge Easterbrook did not mean what he said. She reads the Seventh Circuit's decision in *Covington v. Southern Illinois University* to allow reliance on prior pay only for (1) "internal transfers" (not "external hires"), where (2) there is "no evidence" that the use of prior pay "ha[d] a discriminatory effect." Opp. 18, 19 (quoting 816 F.2d 317, 322 (7th Cir. 1987)).

Rizo misreads *Covington* twice over. Take first her proposed distinction between internal and external hires. *Covington* held that the EPA does not require

employers to give a business justification for relying on prior pay. *See* 816 F.2d at 322. In doing so, it gave several reasons for rejecting out-of-circuit cases that had adopted a business-justification rule. One was that those circuits were concerned that using prior pay might "perpetuate" a wage "depressed [by] discrimination by a previous employer." *Id.* The issue in *Covington* was "somewhat different": "whether [an employer] can consider the prior wages that *it* paid," not those paid by another. *Id.* The court was noting a factual distinction, not adopting a legal rule.

Wernsing later categorically rejected Rizo's groundless, atextual, un-Easterbrookian distinction: "Wages at one's prior employer are a 'factor other than sex.'" 427 F.3d at 468. In doing so, it again rejected the business-justification rule, the only support for that distinction. As Judge Easterbrook explained, the EPA says nothing about business justifications; judicial "ukase" alone had written it into the statute elsewhere. *Id.* at 469. Accordingly, no employer—whether "prior" or the same, "public [or] private"—must give a job-related (or "business-related") reason for using prior pay. *Id.* at 467, 468. The facts of *Wernsing* reflect as much; it involved an employee who moved from one agency to another, not an internal transfer. *See id.* at 467.

Lauderdale eliminates any doubt about Rizo's internal/external distinction. It held that prior pay was a factor other than sex where the comparator's salary stemmed from his pay *with a different employer*. *See* 876 F.3d at 906–07. Rizo does not dispute this reading of *Lauderdale*, instead arguing that the Seventh Circuit might reconsider. Opp. 21 n.9. True or not—it's not, *see infra* 3–4—under *cur-*

rent Seventh Circuit law, Petitioner would prevail even though Rizo was an external hire.

Rizo's second distinction also misfires. *Covington* stated: "We do not believe that the EPA precludes an employer from implementing a policy aimed at improving employee morale when there is no evidence that the policy is either discriminatorily applied or has a discriminatory effect." 816 F.2d at 322. Rizo chops this sentence up to suggest that *Covington* forbids the use of prior pay if it causes a disparate impact. Opp. 19. While courts after *Covington* expressed confusion about disparate-impact analysis, *see, e.g.*, *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994), it is gone now. "[T]he Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate-impact component." *Wernsing*, 427 F.3d at 469.

Finally, Rizo contends that the Seventh Circuit might reconsider because, in *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court stated that "'the EPA does not require' any 'proof of intentional discrimination.'" Opp. 20 (quoting 550 U.S. 618, 640 (2007)). If Rizo means to suggest that the EPA is a disparate-impact provision and covers prior pay because of its possible consequences, this Court has twice disagreed. *See Washington County v. Gunther*, 452 U.S. 161, 170 (1981) (Congress "confine[d]" the EPA's "application" to "wage differentials attributable to sex discrimination"); *Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005) (plurality op.) (Congress "prohibit[ed] all disparate-impact claims" in the EPA by "barr[ing] recovery" for differentials "based 'on any other factor'—reasonable or unreasonable—'other than sex.'") And if *Ledbetter*'s dicta *had* un-

dercut the Seventh Circuit's rule, *Lauderdale* would have said so. *See* 7th Cir. R. 40(e). It did not, so Petitioner would still prevail as a matter of law there.

2. So too for the Fourth Circuit. *Spencer v. Virginia State University* held that a differential stemming from male comparators' prior pay was "based on a factor other than sex." 919 F.3d 199, 206, 207 (4th Cir. 2019).

Rizo claims that the Fourth Circuit drew a salary-retention, new-hire line similar to the one that she divines in Seventh Circuit law. Opp. 15. No. The *employer* gave reasons for its policy, such as "retain[ing] the benefit of [existing employees'] skills, experiences, training, and institutional knowledge" while in another position. Opp. 15 (quoting Appellees' CA4 Br. 42–43). But the Fourth Circuit ignored those reasons. Under its rule, so long as the employer's policy is "nondiscriminatory," it need not be "rational, wise, or well-considered." 919 F.3d at 207. Because a differential based on "previous salaries" does not discriminate on the basis of sex, it passes muster under the EPA. *Id.* at 206.

EEOC v. Maryland Insurance Administrator is not to the contrary. There, the employer's salary schedule was "facially neutral," but it "exercise[d] discretion each time it assign[ed] a new hire" to a place on that schedule "based on its review of the hire's qualifications and experience." 879 F.3d 114, 123 (4th Cir. 2018). The Fourth Circuit held that the employer had not conclusively proven that "the job-related distinctions underlying the salary plan … *in fact* motivated [the employer] to place the claimants and the comparators on different steps." *Id.* That says nothing about whether an employer who *does* apply a bo-

na fide prior-pay policy must justify that policy to the court. The Fourth Circuit's subsequent decision in *Spencer* answered that question: No. *See* 919 F.3d at 207.

3. Finally, Petitioner would also prevail in the Eighth Circuit. If an employer neutrally applies a salary retention policy, it is entitled to the EPA's catchall defense, regardless of the "wisdom or reasonableness" of that policy. *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003); *see Price v. N. States Power Co.*, 664 F.3d 1186, 1193–94 (8th Cir. 2011) (same).

Rizo claims that it was "unnecessary" for the Eighth Circuit to address the employer's defense in *Price*. Opp. 17 n.6. Even so, the court addressed it all the same, alternatively holding that the employer's undisputed reliance on prior pay was "sufficient to establish [its] affirmative defenses." 664 F.3d at 1194. Rizo has no other response.

As for *Taylor*, Rizo asserts that the difference was justified because the plaintiff and her comparator "usually performed different work." Opp. 17. The Eighth Circuit said the opposite: It was "undisputed that [the plaintiff] established a prima facie case," so the case turned "solely" on the employer's "'factor other than sex' affirmative defense." 321 F.3d at 716. Rizo also appears to dismiss *Taylor* on the (familiar) ground that salary retention policies differ from prior-pay policies for new recruits. Opp. 17. Again, that distinction appears nowhere in the Eighth Circuit's decision. *Taylor* consistently referred to "prior salary *or* salary retention policies," and its reasoning applied to both: "[W]e reach the same conclusion as the Seventh Circuit which refused to adopt a per se rule that would exclude sala-

ry retention *or past salary* as qualifying 'factors other than sex.'" 321 F.3d at 718, 719 (citing *Covington*, 816 F.2d at 322–23) (emphases added). The inquiry for *all* facially neutral policies is limited to a "search for evidence that contradicts an employer's claims of gender-neutrality." *Id.*

Mindlessly borrowing from her prior brief, Rizo asserts that Petitioner "does not mention" *Drum v. Leeson Electric Corp.*, 565 F.3d 1071 (8th Cir. 2009), which supposedly "reached the same result as the Ninth Circuit." Opp. 16. There, the employer replaced the (promoted) plaintiff with a higher-paid man. It had no policy translating prior pay into salary; it simply "highlight[ed] [the plaintiff's low] prior salaries" as part of its attempt to justify the difference. 565 F.3d at 1073. The court thought that the employer's offhand reference to prior pay might have been pretext to pay the plaintiff less "simply because the market might bear such wages." Pet. 14 (quoting *Drum*, 565 F.3d at 1073). The court never suggested that genuine reliance on prior salary could not justify a disparity; in fact, the court recognized that it can. *See* 565 F.3d at 1073. Petitioner would have won in the Eighth Circuit just as in the Fourth and Seventh.

B. Petitioner Would Have at Least Gotten to a Jury in Two Other Circuits

Disagreement between the Seventh and Ninth Circuits—let alone the Fourth, Seventh, Eighth, and Ninth—justifies certiorari. But the split runs deeper. Unlike the decision below, the Second and Sixth Circuits allow employers to rely solely on prior pay so long as that decision is "ground[ed] in legitimate business considerations." *Aldrich v. Randolph Cent.*

Sch. Dist., 963 F.2d 520, 527 (2d Cir. 1992); *see Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006).

Rizo argues that, under this test, the employer's reasons must "relate[] to the performance" of the job in question, not other business considerations. Opp. 14. Incorrect. The Sixth Circuit held as much in *EEOC v. J.C. Penney Co.* (which *Beck-Wilson* later followed). J.C. Penney provided insurance only for those spouses who earned less than the employee. *See* 843 F.2d 249, 250 (6th Cir. 1988). The court rejected the plaintiffs' challenge, holding that the employer's policy was adopted for a "legitimate business reason"—to "provide the greatest benefits for the people who needed the coverage." *Id.* at 253. J.C. Penney's policy was not "job-related"; it was "legitimate" nonetheless. It thus qualified as "a valid 'factor other than sex' justifying [the] differential" treatment. *Id.* at 252 (citing 42 U.S.C. § 2000e-2(h), incorporating the EPA's defenses into Title VII).

Rizo admits that the Second Circuit "applies the same rule" as the Sixth, Opp. 14, so it too rejects her "job-related" requirement. *Aldrich* said as much, referring broadly to "bona fide business-related reason[s]," not just job-specific ones. 963 F.2d at 526. Indeed, the Ninth Circuit's own old case law proves the point. *Aldrich* (like *Beck-Wilson*) adopted the rule set forth in the Ninth Circuit's now-overruled decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982). *See Aldrich*, 963 F.2d at 526; *Beck-Wilson*, 441 F.3d at 366. Under *Kouba*, however, Petitioner was entitled (at least) to a jury trial, because SOP 1440 may have "reasonably" "effectuate[d] some business policy." Pet. App. 114a (quoting *Kouba*, 691 F.2d at 876–77). As Rizo notes, Opp. 14,

those policies are not necessarily job-related. The Ninth Circuit panel remanded anyway, proving that *Kouba* and its progeny are not limited to job-specific rationales.

Finally, even if these circuits *do* require job-specific justifications, they still diverge from the decision below. There are many job-related reasons for using prior pay. *See* Pet. 20–22; Chamber Br. 12–17; SHRM Br. 9–16. Those reasons are irrelevant in the Ninth Circuit; it categorically concluded that "prior wages do not qualify as 'any factor other than sex.'" Pet. App. 29a. If this Court were to disagree, however, Petitioner could advance such reasons on remand. While Rizo complains that the reasons Petitioner has previously cited were not job-specific, she gives no reason why Petitioner would be stuck with only those reasons after an intervening decision setting forth a new standard.

II. THIS CASE IS A GOOD VEHICLE FOR THIS IMPORTANT QUESTION

The Circuits thus disagree about the legality of a widespread employment practice. Rizo provides no reason to ignore that disagreement.

A. The Ninth Circuit's Decision Eliminates a Widespread Employment Practice

Petitioner and its amici explained that many employers (including the Federal Judiciary) ask about and rely upon prior pay. *See* Pet. 19–20; Chamber Br. 5–6; SHRM Br. 9–11. Rizo does not disagree. Instead, she argues that the question presented is unimportant "to most … employers within the Ninth Circuit," because California, Oregon, and Hawaii have restricted the use of prior pay. Opp. 22.

This argument ignores the 12 million residents of Arizona, Nevada, and Idaho. It also ignores the differences between the Ninth Circuit's blunderbuss rule and the states' tailored approaches. Even California allows employers to base pay on prior salary if the employee voluntarily discloses it. *See* Cal. Labor Code § 432.3(h). Employers who do so in compliance with state law will still face liability under the EPA. Rizo also ignores the out-of-circuit pull of the Ninth Circuit's decision. Multi-jurisdictional employers often adopt the most stringent rule, even though they would prefer a different one. Pet. 24. The Ninth Circuit's rule harms them across the country, not just out west.

Rizo similarly suggests that the issue isn't important nationwide because 18 states and 21 localities have laws like California's. Opp. 23. But 18 isn't 50; it isn't even half of it. Most states and the (vast) majority of localities continue to allow employers to ask about and rely upon prior pay. For employers in these jurisdictions, questions about prior pay are hardly of mere "scholarly interest." Opp. 23 (quoting *Rice v. Sioux Mem'l Park Cemetery*, 349 U.S. 70, 74–75 (1955)).

B. This Case Is a Good Vehicle

Unless, then, there is something wrong with this case (a forfeited issue, an alternative holding) this Court should grant certiorari. Rizo does not name one. Instead, she notes that Petitioner has dropped SOP 1440, claiming that it therefore has little "practical stake" in the case. Opp. 22. Rizo acknowledges, however, that her "individual claim for retrospective damages" (and attorney's fees)—worth hundreds of

thousands of dollars—turns on the question presented. Opp. 22. This Court has never required more.

Rizo also claims that this case is the "wrong vehicle" because employers may still "ask about and rely on prior pay" in every jurisdiction. Opp. 23, 24. But this isn't a vehicle problem; if Rizo were right, then *every* case involving prior pay would be the "wrong vehicle" in which to address the clear split.

More importantly, Rizo's argument is baffling. Petitioner faces significant liability here *precisely because* it "rel[ied] on prior pay." Perhaps Rizo means to suggest that employers remain "entirely free to use prior pay" because nothing (other than EPA liability) stops them from doing so. Opp. 24; *see* Pet. App. 28a–29a. That is no freedom at all. It is an "indefensible contradiction" to tell employers that they may ask about and rely on prior pay when that reliance cannot defeat an EPA suit. Pet. App. 39a (McKeown, J., concurring).

Rizo also suggests that employers who ask about prior pay may "use the knowledge they [thereby] acquire [about an applicant's skills and ability] to explain why a job-related factor other than sex explains [a] wage gap." Opp. 25. But an employer would not *need* to identify a "job-related factor" supporting its use of prior pay in the Second or Sixth Circuits, or any business justification at all in the Fourth, Seventh, or Eighth Circuits. *See supra* 1–8. And even in the Ninth Circuit, Rizo's promise is illusory. It prohibited the use of prior salary as a "proxy" for job-related factors. Pet. App. 21a. An employer could hardly escape by noting that the employee's lower prior pay probably reflected her lesser value to her old boss.

III. PRIOR PAY IS A FACTOR OTHER THAN SEX

The EPA allows disparities based on three enumerated sex-neutral factors and "any other factor other than sex." 29 U.S.C. § 206(d)(1). In ordinary English, prior pay is "[an]other factor other than sex"; it applies to men and women alike. Pet. 25–26.

Blindly cribbing from her prior brief again, Rizo insists that Petitioner "ignores completely the critical phrase 'any *other* factor.'" Opp. 25. But "[w]ithout that 'other,' the Act would wrongly suggest that its specific exemptions … are 'based on sex.'" Pet. 29. Rizo also retreads the Ninth Circuit's points about *noscitur a sociis* and *ejusdem generis*. Opp. 26. Sex neutrality, not "job-relatedness," is the unifying feature of the enumerated exemptions, and Rizo admits that prior pay *can* be a "stand-in for a worker's qualifications, experience, and performance," even if she thinks it's not a "good" one. Opp. 28–29.

Rizo also contends that the enumerated exemptions are "superfluous" on Petitioner's reading. Opp. 27. She proves too much. *Any* list followed by a catchall renders technically "superfluous" the specific examples. Rizo's interpretation shows as much; if the catchall covers all "job-related" factors, then the enumerated examples are unnecessary. Moreover, had Congress wished to limit employers to "job-related" factors, it would have said so, as it did in other employment provisions. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Title VII disparate-impact claims fail if the practice "is job related for the position in question"); *id.* § 12112(b)(6) (same for ADA challenges to selection criteria).

Finally, Rizo grasps at the EPA's legislative history and purposes. Opp. 28–29. But Congress "confine[d]" the EPA to "wage differentials attributable to sex discrimination." *Gunther*, 452 U.S. at 170. If it wishes to change course, it may. Until then, this Court should enforce its rule.

CONCLUSION

The Court should grant the petition.

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