

Winter 2020

Salary History and the Equal Pay Act: An Argument for the Adoption of “Reckless Discrimination” as a Theory of Liability

Kate Vandenberg

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njlsp>



Part of the American Studies Commons, Business Administration, Management, and Operations Commons, Business Law, Public Responsibility, and Ethics Commons, Business Organizations Law Commons, Civil Rights and Discrimination Commons, Contracts Commons, Feminist, Gender, and Sexuality Studies Commons, Human Resources Management Commons, Labor and Employment Law Commons, Labor Relations Commons, Law and Gender Commons, Law and Society Commons, Legal Studies Commons, Litigation Commons, Organizations Law Commons, Public Affairs, Public Policy and Public Administration Commons, and the Social Statistics Commons

Recommended Citation

Kate Vandenberg, *Salary History and the Equal Pay Act: An Argument for the Adoption of “Reckless Discrimination” as a Theory of Liability*, 15 *Nw. J. L. & Soc. Pol’y.* 246 (2020).
<https://scholarlycommons.law.northwestern.edu/njlsp/vol15/iss2/4>

This Note or Comment is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

Salary History and the Equal Pay Act: An Argument for the Adoption of “Reckless Discrimination” as a Theory of Liability

Kate Vandenberg

ABSTRACT

The Equal Pay Act (EPA) purports to prohibit employers from paying female employees less than male employees with similar qualifications; however, the affirmative defenses provided in the EPA are loopholes that perpetuate the gender pay gap. In particular, the fourth affirmative defense allows for wage differentials based on a “factor other than sex.” Many federal circuits have read this defense broadly to include wage differentials based on salary history. That is, an employer can pay a female employee less than her male counterparts because she was paid less by her previous employer. While salary history was once viewed as an objective data point for wage setting, research now demonstrates that reliance on salary history merely continues the gender discrimination of previous employers.

This Note proposes that a model of recklessness in employment law should be applied to the EPA to cover employers who continue to use salary history to determine new hire salaries. Applying tort concepts, a plaintiff would show that the use of salary history is a gendered employment practice by satisfying two elements: first, her employer knew or should have known that using salary history carries the risk of perpetuating discrimination; second, her employer’s burden to reduce the risk of perpetuating discrimination was slight. This model allows a plaintiff to utilize an evolving understanding of gendered employment practices that perpetuate the pay gap in order to undermine the “factor other than sex” loophole in the EPA.

INTRODUCTION

Congress passed the Equal Pay Act (EPA) of 1963 with the hope of eliminating the pay disparity between men and women.¹ The EPA prohibits an employer from paying an employee less than her peers on the basis of sex.² However, under the EPA, an employer can rely on a variety of affirmative defenses against a wage differential, including that the differential is based on any factor other than sex.³ The “factor other than sex” defense is a broad loophole exploited by employers, and the circuit courts disagree on the extent to which employers can frame reliance on an employee’s salary history as a “factor other

¹ *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

² 29 U.S.C. § 206(d)(1)(2016).

³ *Id.*

than sex.”⁴ Nobody knows better than Ailene Rizo just how far the United States must go to fully close the gender pay gap because of this “factor other than sex” defense.⁵

Rizo was hired as a math consultant for the Fresno County School District and subsequently learned that her peers, all of whom were male, were paid a higher salary.⁶ The County used a hiring schedule consisting of ten stepped salary levels.⁷ Rizo holds a number of degrees, including a Bachelor of Science in Mathematics Education, a Master’s Degree in Educational Technology, and a Master’s Degree in Mathematics Education.⁸ Rizo had taught math, served as the head of a math department, and was a math curriculum designer at a private company before applying to the school district.⁹ Despite these qualifications, she was placed at step 1 of level 1 of the hiring schedule, whereas her male peers with similar qualifications were placed at higher levels.¹⁰

After the Fresno County School Board refused to fix the salary disparity, Rizzo brought a claim under the EPA and other discrimination statutes.¹¹ The county school board did not deny paying Rizo less than her male counterparts. Instead, it raised the affirmative defense that the wage differential was due to a factor “other than sex” because they used her prior salary to determine where to start her on a salary schedule.¹² The district court denied summary judgment to the county, reasoning 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”.¹³

The Ninth Circuit initially vacated the District Court’s decision, but later upheld the decision after rehearing the case *en banc*.¹⁴ The Ninth Circuit overturned precedent from 1982 that allowed employers to use the new hire’s salary history as a “factor other than sex” if that employer could show a legitimate business reason for doing so in new hire salary determinations.¹⁵ The *en banc* panel reasoned that:

The Equal Pay Act stands for a principle as simple as it is just: men and women should receive equal pay for equal work regardless of sex. The question before us is also simple: can an employer justify a wage differential between male and female employees by relying on prior

⁴ See *infra* Part IV.

⁵ Rizo v. Yovino, 887 F.3d 453, 456–57 (9th Cir. 2018), *rev’d en banc*, 139 S. Ct. 706 (2019).

⁶ Rizo v. Yovino, No. 1:14-cv-0423-MJS, 2015 WL 9260587, at *4 (E.D. Cal. Dec. 18, 2015).

⁷ Rizo, 887 F.3d at 457.

⁸ Rizo, No. 1:14-cv-0423-MJS at *3.

⁹ *Id.*

¹⁰ *Id.* at *3–4. At the time, Rizo worked with three other math consultants: Eric Crantz, Mike Chamberlain, and Carl Veater. While Rizo started on salary step 1, both Chamberlain and Veater began on step 7, and Crantz started at step 9. *Id.* at *17.

¹¹ *Id.* at *1.

¹² *Id.* at *7.

¹³ *Id.* at *10.

¹⁴ Rizo, 887 F.3d at 468.

¹⁵ See Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982). The plaintiff represented a class of all female agents working at Allstate who claimed that the use of salary history led to a wage differential on the basis of sex. The Ninth Circuit held that the use of salary history did not constitute a discriminatory wage setting practice.

salary? Based on the text, history, and purpose of the Equal Pay Act, the answer is clear: No.¹⁶

The defendant in the Ninth Circuit case petitioned for certiorari on September 4, 2018.¹⁷ Instead of reviewing the case on the merits, the Supreme Court ruled on a procedural issue, thus vacating and remanding the case without addressing salary history and the school board's affirmative defense.¹⁸ In 1992, the Supreme Court denied a petition for certiorari for another EPA case addressing whether the "factor other than sex" defense must be supported by a legitimate business reason.¹⁹ It continues to remain uncertain as to when the Court will decide to address the "factor other than sex" defense.

This Ninth Circuit opinion adds a new perspective to an existing circuit split on whether prior salary can be considered a "factor other than sex" in response to an EPA claim.²⁰ The "factor other than sex" affirmative defense is one of four available to employers under the EPA framework. If the Supreme Court eventually addresses the use of salary history in EPA defenses, it should uphold the Ninth Circuit's ruling that salary history is gendered and therefore cannot be used as an affirmative defense.

A Supreme Court holding that salary history cannot be used as part of the "factor other than sex" affirmative defense to an EPA claim would be an important first step towards closing the gender pay gap. But the EPA can and should go further to protect plaintiffs. Moving forward, courts should treat an employer's reliance on salary history as sufficient evidence of a gendered wage differential. Courts could do so under the model of reckless discrimination, a theory of liability that borrows principles from tort law.

This Note will first address the history of pay equity in the United States. It will also address the current gender pay gap and efforts by states and local governments to address the use of salary history in new hire wage setting. Next, this Note will explore the current federal circuit split on the issue of salary history qualifying as a "factor other than sex" and explain why the Ninth Circuit's refusal to recognize salary history as a "factor other than sex" is the correct interpretation of this fourth affirmative defense. Further, the Note will argue that reliance on salary history undermines the purpose of the EPA and therefore should not be used to establish an affirmative defense for employers. To the contrary, the Note will conclude, an employer's reliance on an employee's prior salary history constitutes reckless discrimination.

I. BACKGROUND

A. *The Equal Pay Act and Pay Equity in the United States*

The need to prohibit gender-based wage discrimination arose after women entered the workplace to replace male employees who left to fight in the world wars.²¹ As of

¹⁶ *Rizo*, 887 F.3d at 456.

¹⁷ Petition for Writ of Certiorari, *Yovino v. Rizo*, 139 S. Ct. 706 (No. 18-272) (Aug. 30, 2018).

¹⁸ *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019).

¹⁹ Petition for Writ of Certiorari, *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992), *cert. denied*, 506 U.S. 965, 965 (1992).

²⁰ See *infra* Part III.

²¹ Charlotte Alter, *Here's the History of the Battle for Equal Pay for American Women*, TIME (Apr. 14, 2015), <https://time.com/3774661/equal-pay-history/>.

1963, on average, women made 58.9 cents on every dollar a man made.²² However, somewhat ironically, advocacy supporting the EPA centered around a concern that men's wages would decrease because businesses had the option of cheaper female labor.²³ Despite these wartime concerns, legislation addressing pay equality was not introduced until 1963,²⁴ when Congress enacted the EPA to address the persistent pay disparity between men and women.²⁵

During Congress's debate over the EPA, Democratic Senator Philip A. Hart, in support of pay equity, articulated the underlying values behind the EPA:

Justice and fair play [sic] speak so eloquently [on] behalf of the equal pay for women bill that it seems unnecessary to belabor the point. We can only marvel that it has taken us so long to recognize the fact that equity and economic soundness support this legislation.²⁶

The mandate of the statute is simple: Employers cannot pay men and women differently for the same work.²⁷ If employers are found liable under the EPA, they can assert one of four affirmative defenses: employers may argue that the wage disparity between male and female workers is justified if it was 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."²⁸

Numerous legal scholars have criticized the "factor other than sex" defense as a broad loophole for businesses seeking to continue discriminatory practices or to benefit from the financial savings from the wage differential.²⁹ As discussed in greater detail

²² Katherine Gallagher Robbins & Abby Lane, *The Wage Gap over Time*, NAT'L WOMEN'S L. CTR. (May 3, 2012), <https://nwlc.org/blog/wage-gap-over-time/>. The gap was even greater for women of color. For example, in 1967, Black women made only 43.2 cents for each dollar a white man earned. *Id.*

²³ Robbins, *supra* note 22; Alter, *supra* note 21.

²⁴ Alter, *supra* note 21.

²⁵ Robbins, *supra* note 22.

²⁶ 109 CONG. REC. 8916 (1963) (statement of Sen. Hart).

²⁷ Equal Pay Act, 29 U.S.C. § 206(d)(1) (2016). The relevant portion of the text is as follows:

No employer having employees subject to any provisions of this part shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

²⁸ *Id.*

²⁹ Carole Supowitz Katz, *Wage Discrimination Claims: Employee's Prior Salary Fails The 'Factor Other Than Sex' Test*, 15 COLUM. HUM. RTS. L. REV. 207, 225–26 (1984). *See, e.g.*, Peter Avery, *The Diluted Equal Pay Act: How Was It Broken? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849, 863–71 (2004). *See generally* Jeanne M. Hamburg, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085 (1989); Jeffrey K. Brown, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other Than Sex" Defense*, 13 HOFSTRA LAB. L.J. 181 (1995).

below, the federal circuits are split on how to address the “factor other than sex” defense.³⁰

Although the EPA has been in force for fifty-five years, the gender pay gap has not closed.³¹ Today, women make only 80.5 cents on every dollar earned by men in the United States.³² Certain states, localities, and territories of the United States have targeted salary history as a source of the perpetuation of the gender pay gap.³³ The following subpart will discuss state and local legislation addressing salary history in wage-setting.

B. State and Local Legislation Addressing Salary History

As of 2019, twenty localities, sixteen states and Puerto Rico have passed legislation or executive orders prohibiting the use of salary history in wage setting practices.³⁴ These laws vary in scope, both in terms of the types of employers covered and the restrictions that apply to those covered employers.

Some states—such as California, Connecticut, Delaware, Hawaii, Massachusetts, Oregon, and Vermont and Puerto Rico—have passed laws that prohibit all employers, private and public, from seeking prior salary information.³⁵ Two counties (Albany County, NY and Westchester County, NY) and two cities (New York City and San Francisco) passed similar ordinances.³⁶ In states such as California, Hawaii, and Oregon, as well as at the local level in San Francisco and New York City, employers are barred from relying on an employee’s prior salary to determine what salary to offer, even if the employer discovers that information without solicitation.³⁷ Additionally, employers in San Francisco are prohibited from disclosing prior salary even if such information is solicited by companies seeking to hire a former employee.³⁸ In Massachusetts, employers

³⁰ See *infra* Part III.

³¹ INSTITUTE FOR WOMEN’S POLICY RESEARCH, PAY EQUITY & DISCRIMINATION (2018), <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/>.

³² *Id.* The pay gap is even greater for women belonging to other protected classes. For example, Black women only earn 65 cents for every dollar a man makes. *Id.* Women with disabilities earn just over 52 cents for every dollar a man without a disability makes. NATIONAL WOMEN’S RESOURCE LAW CENTER, THE WAGE GAP: THE WHO, HOW, WHY AND WHAT TO DO (2019), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.

³³ *Salary History Bans: A Running List of States and Localities That Have Outlawed Pay History Questions*, HUMAN RESOURCES DRIVE (Aug. 24, 2018), <https://www.hrdrive.com/news/salary-history-ban-states-list/516662/> (last updated Dec. 6, 2019).

³⁴ *Id.*

³⁵ CAL. LAB. CODE § 432.3 (Deering 2019); CONN. GEN. STAT. § 18-8 (2019); DEL. CODE ANN. tit. 19, § 709B (2017); HAW. REV. STAT. § 378-2.4 (2019); MASS. GEN. LAWS ch. 149, § 105A(b) (2018); OR. REV. STAT. § 652.220 (2017); VT. STAT. ANN. tit. 21, § 495m (2017); P.R. LAWS ANN. (2017).

³⁶ S.F., CAL. POLICE & ADMINISTRATIVE CODES, No. 142-17 (2017); Committee on Civil Rights, 2017/067 (2017), [https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2813507&GUID=938399E5-6608-42F5-9C83-9D2665D9496F&Options=&Search](https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2813507&GUID=938399E5-6608-42F5-9C83-9D2665D9496F&Options=&Search;); Albany County, NY Local Law no. P for 2016; Westchester County, NY Resolution No. 28-2018 (2018).

³⁷ CAL. LAB. CODE § 432.3 (Deering 2019); HAW. REV. STAT. § 2351-1 (2018); OR. REV. STAT. § 652.220 (2017); S.F., CAL. POLICE & ADMINISTRATIVE CODES, No. 142-17 (2017); Committee on Civil Rights, 2017/067 (2017), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2813507&GUID=938399E5-6608-42F5-9C83-9D2665D9496F&Options=&Search>.

³⁸ CAL. LAB. CODE § 432.3; HAW. REV. STAT. § 2351-1 (2018); OR. REV. STAT. § 652.230 (2017); S.F., CAL., POLICE & ADMINISTRATIVE CODES, No. 142-17 (2017); Committee on Civil Rights, 2017/067

are not allowed to use salary history as a defense to a state claim of a gendered wage disparity, even if the candidate offered that information to the potential employer without solicitation.³⁹

Other states and localities have enacted legislation that only covers public employees. Five municipalities—Chicago, IL; Louisville Jefferson County, KY; New Orleans, LA; Kansas City, MO; and Pittsburgh, PA—prohibit public employers from asking about salary history but have not extended that prohibition to the private sector.⁴⁰ In Pittsburgh, however, public employers may rely on prior salary to set present wages so long as the candidate offers the information unprompted.⁴¹ The New York State legislature has not yet passed a ban on inquiring about salary history.⁴² However, in 2017 Governor Andrew Cuomo of New York State imposed restrictions on state agencies through an executive order.⁴³ Similar executive orders have been imposed by Governor Tom Wolf of Pennsylvania and Governor Philip D. Murphy of New Jersey in 2018.⁴⁴

Although it was poised to be the first city to ban asking about salary history,⁴⁵ Philadelphia’s salary history ban⁴⁶ on both public and private employers is currently being challenged in court.⁴⁷ In April 2018, Judge Goldberg of the Eastern District of Pennsylvania granted a preliminary injunction against the ban on asking about salary history, holding that the ordinance violated the First Amendment.⁴⁸ However, he did not grant an injunction against the prohibition against relying on prior salary to determine present wages.⁴⁹ The city has not yet appealed this decision.⁵⁰

In contrast, some states have taken a pro-employer stance on the use of salary history. Michigan and Wisconsin both passed legislation prohibiting localities from instituting salary history bans.⁵¹ The language of the Wisconsin statute is illustrative of the mindset behind these prohibitions. The act sought to protect “the employer’s right to solicit salary information of prospective employees”⁵² taking a pro-business stance on the

(2017), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2813507&GUID=938399E5-6608-42F5-9C83-9D2665D9496F&Options=&Search>.

³⁹ MASS. GEN. LAWS ch. 149, § 105A(b) (2018).

⁴⁰ Chi., Ill., Exec. Order No. 2018-1 (2018); Louisville, Ky., Ordinance No. 066 (2018); New Orleans, La., Exec. Order MLJ 17-01 (2017); Kansas City, Mo., Resolution No. 180519 (2018); Pittsburgh, Pa., Ordinance No. 2017-1121 (2017).

⁴¹ Pittsburgh, Pa., Ordinance No. 2017-1121 (2017).

⁴² Chris Chrisbens, *New York State’s Latest Push to Broaden Salary History Ban*, PAY EQUITY ADVISOR BLOG (Apr. 19, 2018), <https://www.payequityadvisor.com/2018/04/new-york-states-latest-push-to-broaden-salary-history-ban/>.

⁴³ Governor of the State of New York, Exec. Order No. 161 (2017).

⁴⁴ Governor of the State of Pennsylvania, Exec. Order No. 2018-18-03 (2018); Governor of the State of New Jersey, Exec. Order No. 1 (2018).

⁴⁵ Valerie Bolden-Barrett, *Philadelphia Becomes First US City to Ban Pay History Questions*, HUMAN RESOURCES DRIVE (Feb. 10, 2017), <https://www.hrdrive.com/news/philadelphia-becomes-first-us-city-to-ban-pay-history-questions/435894/>.

⁴⁶ Philadelphia, Pa., Wage Equity Ordinance No. 7.4 (2017).

⁴⁷ Kathryn Moody, *Philadelphia’s Salary History Ban Violates First Amendment, Judge Says*, HUMAN RESOURCES DRIVE (May 2, 2018), <https://www.hrdrive.com/news/philadelphias-salary-history-ban-violates-first-amendment-judge-says/522569/>.

⁴⁸ Chamber of Commerce for Greater Phila. v. City of Phila., 319 F. Supp. 3d 773, 812 (E.D. Pa. 2018).

⁴⁹ *Id.*

⁵⁰ Moody, *supra* note 47.

⁵¹ MICH. COMP. LAWS SERV. § 123.1384 (Lexis 2018); WIS. STAT. ANN. § 103.36 (West 2018).

⁵² *Id.* at § 103.36 (2018).

question of reliance on salary history. These statutes suggest that the Michigan and Wisconsin state legislatures worry that localities will unnecessarily interfere with the business in their state.⁵³

While certain states, territories, and localities have made steps towards prohibiting the use of and reliance on salary history in new hire wage determinations, actions in states such as Michigan and Wisconsin, as well as Philadelphia's salary history ban, show that it is necessary to abolish the use of salary history by closing loopholes in federal legislation. As discussed later in this Note, the EPA already prohibits the use of salary history to justify a wage differential.⁵⁴ The problem lies not with the EPA, but rather with many circuits' interpretations that allow salary history to constitute the fourth affirmative defense.

II. SALARY HISTORY – AFFIRMATIVE DEFENSE OR GENDERED?

The circuit courts take varying approaches to the salary history affirmative defense. Some circuits allow salary history to be the sole “factor other than sex,” while other circuits allow the use of salary history as a justification so long as it is paired with other considerations.⁵⁵ The Ninth Circuit's holding in *Rizzo v. Yovino* makes that Circuit the outlier, as it is the only Circuit that outright prohibits the use of salary history as the fourth affirmative defense.⁵⁶

A. *The Seventh and Eighth Circuits: Employers Can Defend with Salary History Alone*

The decisions of the Seventh and Eighth Circuits view the “factor other than sex” defense the most broadly, and therefore the most employer-friendly. Both Circuits allow a defendant's reliance on prior salary, without more, to qualify as the fourth affirmative defense.⁵⁷

In *Wernsing v. Department of Human Services*, the Seventh Circuit held that prior salary is a legitimate “factor other than sex” that may stand on its own without requiring additional justification for the wage differential.⁵⁸ The plaintiff, Wernsing, was hired in the Office of the Inspector General in the Department of Human Services in Illinois (Department) as an internal security investigator.⁵⁹ Wernsing entered the Department from the private sector, where her total salary was significantly less than the lowest salary offered in the Department.⁶⁰ Upon her hiring, the Department started her at a monthly pay

⁵³ WIS. STAT. ANN. § 103.36 (West 2018); MICH. COMP. LAWS SERV. § 123.1384. “A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution regulating information an employer or potential employer must ... exclude on an application.” *Id.*

⁵⁴ See *infra* Part IV.

⁵⁵ See *infra* Part III, subparts i-iii.

⁵⁶ See *infra* Part II.

⁵⁷ *Taylor v. White*, 321 F.3d 710, 715 (8th Cir. 2003); *Wernsing v. Dep't of Human Servs.*, 427 F. 3d 466, 468 (7th Cir. 2005).

⁵⁸ *Wernsing*, 427 F.3d at 468.

⁵⁹ *Id.* at 467.

⁶⁰ *Id.*

rate of \$2,478. This figure represented an almost 30% pay increase from what she was making in the private sector.⁶¹

If the facts ended there, Wernsing would seem to have been treated very well at the Department. However, male employees in substantially similar roles to her earned significantly more than Wernsing.⁶² For example, one male employee in a similar role commenced his employment with the Department at a monthly salary of \$3,739.⁶³ Based on these facts, Wernsing had a *prima facie* case for wage discrimination, but the Department escaped liability by raising the “factor other than sex” affirmative defense.⁶⁴

Wernsing argued that “because women earn less than men from private employment, all market wages must be discriminatory and therefore must be ignored when setting salaries.”⁶⁵ The Seventh Circuit accepted her argument empirically but attributed the statistics to a difference in experience, which the court held was not an inherently discriminatory motive to pay the individuals differently.⁶⁶ It argued that because women take time out of the workplace to rear children, they have less employment experience than men, which justified the compensation differential.⁶⁷ The court reasoned that “[w]ages rise with experience as well as with other aspects of human capital.”⁶⁸

The Seventh Circuit’s reasoning ultimately undermines its holding. Even if we concede that the gender pay gap is caused exclusively by maternity leave, the resulting pay differential is inherently gendered by the fact that only women get pregnant. As such, the Seventh Circuit erred in allowing salary history to be used as a “factor other than sex.”⁶⁹ Alternatively, if the Seventh Circuit is implying that an experience differential results in a pay differential, then the court could have (and should have) required the Department to show a difference in the level of experience that Wernsing held compared with her male counterparts. A gap in experience would have been a legitimate, ungendered justification for the wage differential.

Similarly, the Eighth Circuit has treated the fourth affirmative defense as a “catch-all” for any excuse an employer could create to explain a wage gap between men and women.⁷⁰ In *Taylor v. White*, the Eighth Circuit dismissed the plaintiff’s argument that a reliance on prior salary perpetuates the gender pay gap because she failed to show that the reliance was gendered.⁷¹ The plaintiff, Taylor, worked as a civilian employee at the Army’s Arkansas Arsenal (the Arsenal).⁷² She and three other employees, one female and two males, transferred to a different program where all of the individuals “shared a lack

⁶¹ *Id.* Both the plaintiff and her male counterparts held the title “Internal Security Investigator II.” Brief for Appellant-Petitioner at *9, *Wernsing v. Dep’t of Human Servs.*, 427 F. 3d 466 (7th Cir. 2005) (No. 04-2225), 2005 U.S. 7th Cir. Briefs LEXIS 160.

⁶² *Wernsing*, 427 F. 3d at 467.

⁶³ *Id.*

⁶⁴ *Id.* at 471.

⁶⁵ *Id.* at 470.

⁶⁶ *Id.*

⁶⁷ *Id.* “That many women spend more years in child-rearing than do men thus implies that women’s market wages will be lower on average.” *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.* at 468–70.

⁷⁰ *Taylor*, 321 F.3d at 715.

⁷¹ *Id.* at 720–21.

⁷² *Id.* at 712.

of relevant experience and training” when they first began the program.⁷³ Despite this, Taylor and the other female employee began the program at a lower salary than their male counterpart.⁷⁴

In its opinion, the Eighth Circuit cautioned that an employer should not justify paying women less simply because the market does so.⁷⁵ It was also wary about the plaintiff’s prior salary being used to perpetuate lower wages because that would risk perpetuating the gender pay gap.⁷⁶ Nevertheless, the court still upheld the use of salary history as a “factor other than sex” because, while the wage differential was suspect, the Eighth Circuit did not find that the employer’s actions rose “above the level of merely suspicious.”⁷⁷ Just like the Seventh Circuit, the Eighth Circuit conceded that reliance on prior salary runs a risk of perpetuating the gender pay gap.⁷⁸ However, both Circuits have allowed salary history to be interpreted as a gender-neutral affirmative defense in subsequent cases.⁷⁹ These Circuits have failed to uphold the purpose of the EPA by allowing a gendered practice to set new hire wages.

B. The Tenth and Eleventh Circuits: Salary History as One Element of the Affirmative Defense

The Tenth and Eleventh Circuits have taken a relatively more employee-friendly approach, allowing consideration of salary history only when it is not the sole justification for a wage disparity.⁸⁰ However, these Circuits’ reasoning still demonstrates an unsatisfactory approach to the fourth affirmative defense.

In *Irby v. Bittick*, the plaintiff began working as an undercover agent for the county sheriff before moving to other divisions within the police force.⁸¹ Eventually, she was the only female investigator in the criminal investigations division.⁸² Irby later discovered that the division paid her less than her male colleagues, despite doing substantially the same work.⁸³

The Eleventh Circuit accepted the defendant’s affirmative “factor other than sex” defense because the employer set the male employees’ salaries higher after considering both salary history *and* experience.⁸⁴ To the court, the combination of factors justified the wage disparity between men and women.⁸⁵

However, in its reasoning, the Eleventh Circuit laid out the standard that “defendants must show that the factor of sex provided *no* basis for the wage

⁷³ *Id.* at 713.

⁷⁴ *Id.*

⁷⁵ *Id.* at 718.

⁷⁶ *Id.* at 718–19.

⁷⁷ *Id.* at 722. The court held that “no reasonable finder of fact could reject the undisputed evidence concerning the actual employees in this case and the benefits received by those employees.” *Id.* at 723.

⁷⁸ *Id.*

⁷⁹ *Lauderdale v. Ill. Dep’t of Human Servs.*, 876 F.3d 904, 908 (7th Cir. 2017); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1072-73 (8th Cir. 2009).

⁸⁰ *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

⁸¹ *Irby v. Bittick*, 44 F.3d 949, 952 (11th Cir. 1995).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 955.

⁸⁵ *Id.* at 959.

differential.”⁸⁶ Additionally, the Eleventh Circuit previously held that prior salary alone cannot qualify as a factor other than sex.⁸⁷ If salary history does not qualify as a “factor other than sex,” then it is illogical to allow defendant employers to use salary history at all, even with other rationales, when raising the fourth affirmative defense.

Similarly, employers in the Tenth Circuit are required to bundle prior salary information with other factors to satisfy the “factor other than sex” affirmative defense in a wage disparity case.⁸⁸ In *Mickelson v. New York Life Insurance Company*, the plaintiff was hired at an insurance company but earned a significantly lower starting salary than her male colleagues, despite her professional experience and a law degree.⁸⁹ When she inquired about this wage disparity, she was told that the company sets salaries by weighing experience, qualifications, market factors, and salary history.⁹⁰ However, the plaintiff did not find these rationales believable, as she had more experience than her male colleague who made a higher salary.⁹¹ Unsatisfied with her employer’s explanation, she continued to complain to individuals higher up on the supervisory chain, which eventually led to alleged retaliatory adverse employment actions.⁹²

For context, the Tenth Circuit agreed with the premise that while prior salary alone cannot justify a wage disparity between the sexes, it can be used in conjunction with other rationales to function as an affirmative defense under the EPA.⁹³ However, the court failed to rationalize why salary history information alone would not justify a pay differential, inferring that without more, the employer may be found to have discriminated against the employee.⁹⁴ As with the flawed reasoning of the Eleventh Circuit, it is not logical to prohibit a practice in isolation because it is discriminatory against one gender, but then conversely hold that the same practice is not discriminatory on the basis of gender when it is paired with other factors. A gendered rationale is illegitimate regardless if it is paired with another factor or justified by a legitimate business rationale.⁹⁵

C. The Second and Sixth Circuits: Salary History as a Legitimate Business Purpose

The Second and Sixth Circuits take a more moderate approach than the Seventh and Eighth Circuits by requiring the “factor other than sex” defense to be supported by a legitimate business purpose,⁹⁶ similar to the Ninth Circuit’s abandoned reasoning in *Kouba v. Allstate Insurance Co.*⁹⁷ While the issue of salary history and the fourth affirmative defense has not been explicitly addressed by these Circuits, their rationales behind similar applications of the defense can be used to anticipate how they might

⁸⁶ *Id.* at 954 (citing *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 589-90 (11th Cir. 1994)).

⁸⁷ *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

⁸⁸ *Mickelson v. New York Life Ins. Co.*, 460 F.3d 1304, 1307-11 (10th Cir. 2006).

⁸⁹ *Id.* at 1308.

⁹⁰ *Id.* at 1309.

⁹¹ *Id.* at 1313.

⁹² *Id.* at 1309–10. For example, Ms. Mickelson alleges that she was denied leave and a promotion. The court found the claims of retaliation unfounded.

⁹³ *Id.* at 1314 (“To be sure, [other reasons for the wage differential] could explain the disparity. . .”).

⁹⁴ *Id.* at 1312–14.

⁹⁵ See *supra* Part II, subpart iii.

⁹⁶ *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 526 (2d Cir. 1992).

⁹⁷ *Kouba*, 691 F.2d at 878.

approach salary history in future cases, assuming the Supreme Court does not rule on this issue.

In *Aldrich v. Randolph Cent. School Dist.*, the plaintiff worked for a school district under the title of “cleaner,” and earned less than her coworkers who were classified as “custodians.”⁹⁸ All of the cleaners for the school district were women, and all of the custodians were men.⁹⁹ The school district argued that the pay differential was not because of the different genders of the two jobs, but was caused instead by the classification system applied to the two roles.¹⁰⁰ However, the Second Circuit held that “an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor . . . in order to establish the factor-other-than-sex defense.”¹⁰¹ Because the school district could not provide a legitimate reason for the classification system, the court did not allow it to be used as a “factor other than sex” defense.¹⁰² However, this suggests that the Second Circuit would be willing to allow policies that overtly implicate gender, as the classification in *Aldrich* did, so long as those policies have an underlying business rationale, although this has not yet been definitively applied.

The Sixth Circuit similarly limits the fourth affirmative defense, holding that the “‘factor other than sex’ defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.”¹⁰³ For example, in a suit arguing a violation of the EPA, the plaintiff in *Beck-Wilson v. Principi* established a question of fact for the jury when she demonstrated that her that her job as nurse practitioner, which was predominantly occupied by female employees, could be viewed as substantially similar to the role of physician assistant, a job predominantly filled by male employees.¹⁰⁴ On appeal, the Sixth Circuit remanded the claim, reasoning that a reasonable factfinder could have found the employer’s rationale for different pay scales for the two positions to be illegitimate, or, in other words, a pretext for discrimination.¹⁰⁵ The court therefore held that summary judgment for the employer was in error, and the case was remanded.¹⁰⁶ However, the Sixth Circuit was not inherently hostile towards the use of different pay scales; it simply required that the employer produce a legitimate business justification for its practice.¹⁰⁷

In light of these decisions, it is likely that both the Second and Sixth Circuits would welcome the presentation of prior salary history information as a basis to support the fourth affirmative defense so long as employers have a legitimate business reason for relying on prior salary information. However, as discussed later in this Note,¹⁰⁸ businesses have ample resources for determining a new hire’s wage, which do not rely on a potentially discriminatory metric. Therefore, reliance on prior salary cannot be a

⁹⁸ *Aldrich*, 963 F.2d at 522.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 524.

¹⁰¹ *Id.* at 526.

¹⁰² *Id.*

¹⁰³ *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988).

¹⁰⁴ 441 F.3d 353, 356 (6th Cir. 2006).

¹⁰⁵ *Id.* at 363.

¹⁰⁶ *Id.* at 369.

¹⁰⁷ *Id.* at 368-69.

¹⁰⁸ *See infra* Part IV.

legitimate business practice, as there are alternatives that do not carry the risk of liability under the EPA.¹⁰⁹

In *County of Washington v. Gunther*, the Supreme Court held that the application of the EPA is confined to “the act of wage differentials attributable to sex discrimination,”¹¹⁰ allowing employers to defend against a claim with a bona fide use of the “factor other than sex” defense. In the following part, this Note will show why the reliance on salary history to determine present wages is not a bona fide “factor other than sex” and will argue that the Ninth Circuit’s opinion in *Rizo v. Yovino*¹¹¹ is thus consistent with Supreme Court precedent.

III. RECKLESSNESS IN EMPLOYMENT

Professor Stephanie Bornstein articulated a model of “reckless discrimination” under Title VII, whereby an employer’s reckless disregard for biased employment practices can establish a Title VII discrimination claim.¹¹² Title VII bans discrimination based on protected classes, including race and gender.¹¹³ Under Bornstein’s model, plaintiffs would be allowed to bring a claim for an employer’s reckless disregard for biased employment practices under Title VII.¹¹⁴ Based on the circuits’ inconsistent holdings on the use of salary history as a factor other than sex, this author proposes that a model of recklessness in employment law should be applied to the EPA to cover employers who continue to use salary history to determine new hire salaries.

A. Bornstein and Title VII

In her 2017 article titled *Reckless Discrimination*, Bornstein was the first to articulate a model of reckless discrimination that applied to Title VII claims.¹¹⁵ Bornstein argued that the modeling of discrimination law after tort law is appropriate given recent Supreme Court decisions.¹¹⁶ Specifically, the Roberts Court decided three cases between 2009 and 2013 that applied tort concepts, particularly causation and proximate cause, to discrimination cases.¹¹⁷ In one case, Justice Scalia, writing for the majority, directly acknowledged the incorporation of “the traditional tort-law concept of proximate cause” into the opinion.¹¹⁸

Some scholars have expressed concern about the “tortification” of discrimination law, fearing that but-for causation and proximate cause are high bars for a plaintiff to

¹⁰⁹ See *infra* Part IV(b).

¹¹⁰ *Washington v. Gunther*, 452 U.S. 161, 170 (1981).

¹¹¹ *Rizo*, 887 F.3d at 453.

¹¹² Stephanie Bornstein, *Reckless Discrimination*, CAL. L. REV. 1055, 1059 (2017).

¹¹³ 42 U.S.C. § 2000(e)-2.

¹¹⁴ Bornstein, *supra* note 112, at 1059.

¹¹⁵ *Id.* at 1055.

¹¹⁶ *Id.* at 1088.

¹¹⁷ *Id.* (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-80 (2009); *Univ. of Tex. Sw. Med. Ctr. V. Nassar*, 133 S. Ct. 2517, 2525 (2013); *Staub v. Proctor Hospital*, 562 U.S. 411 (2011)). While the Roberts Court has not explicitly called for the “tortifying” of employment discrimination, it has applied tort concepts to these three employment discrimination cases.

¹¹⁸ *Staub*, 562 U.S. at 420.

meet in discrimination cases.¹¹⁹ These scholars argue that discrimination law requires only that a plaintiff's protected class be a motivating factor in the adverse action, a lower bar than what tort law requires.¹²⁰

However, recent Supreme Court precedent applies tort concepts to discrimination claims, and moving forward, plaintiffs will need to meet the standards laid out by the Court, even if the bar was raised by the application of tort concepts.¹²¹ For example, in *Staub v. Proctor Hospital*, the Court adopted the tort law concept of proximate cause, holding that the plaintiff's protected class need only be a motivating factor in the employer's discriminatory employment action.¹²² In *University of Texas Southwest Medical Center v. Nassar*, the Court went so far as to describe the "but for" causation standard used in that case as "textbook tort law" that was the "background against which Congress legislated in enacting Title VII."¹²³ Bornstein's application of tort law concepts to discrimination law thus extends the Roberts Court's understanding of Title VII.

Under Bornstein's model of reckless discrimination, plaintiffs must show two elements of recklessness in their employer's practices to establish a Title VII claim. First, plaintiffs must show that the employer knew or should have known of the risk of perpetuating discrimination by using the specific employment practice at issue.¹²⁴ Second, the plaintiff needs to show that the employer's burden to reduce the risk of the employment practice perpetuating discrimination was slight, demonstrating the employer's "indifference to the risk."¹²⁵ These elements are modeled after the Restatement (Third) of Torts.¹²⁶

Bornstein applies this framework to workplace policies and practices, particularly those dealing with hiring and promotion, to provide employees with a new cause of action under Title VII.¹²⁷ Under the model, a Title VII plaintiff would point to social science data that demonstrate the extent to which stereotypes and biases infiltrate the workforce and affect employment decision-making.¹²⁸ Additionally, a plaintiff would also need to point to the prevalence of implicit bias in "mainstream lexicon" as providing the employer with adequate notice.¹²⁹ For example, an employee who seeks to show that he was passed on for a promotion could point to studies that show that men of color are less likely to be promoted than white men; he would then have to show that this is a

¹¹⁹ Martha Chamallas & Sandra F. Sperino, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021, 1021–22 (2014); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1074–75 (2014).

¹²⁰ Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1451-53 (2012).

¹²¹ Bornstein, *supra* note 112, at 1088.

¹²² 562 U.S. at 413-15.

¹²³ 133 S. Ct. at 2524-25.

¹²⁴ Bornstein, *supra* note 112, at 1106.

¹²⁵ *Id.* (quoting Restatement (Third) of Torts § 2).

¹²⁶ RESTATEMENT (THIRD) OF TORTS § 2.

A person acts recklessly in engaging in conduct if:

- (a) The person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and
- (b) The precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk. *Id.*

¹²⁷ Bornstein, *supra* note 112, at 1093.

¹²⁸ *Id.* at 1094.

¹²⁹ *Id.* at 1095.

problem that is often covered in implicit bias trainings and other human resource department materials. These developments fulfill the first element of reckless discrimination, as this would show that the employer knows or should know that biases and stereotypes may result in discrimination against protected groups.¹³⁰

Second, the plaintiff would need to show that other employers within the plaintiff's industry have voluntarily and successfully taken steps to reduce bias in their workforce.¹³¹ For example, many employers have diversified their recruitment processes, created diversity initiatives, established protocols and policies to reduce harassment, and monitored the effects their practices have on the diversity of their workforce.¹³²

Technology has also created the ability for employers to conduct blind screenings of applicants.¹³³ This prevents implicit biases of the hiring committee to unfairly disadvantage certain candidates. Not only are these best practices only minimally burdensome, but they have been shown to be ultimately profitable for employers by establishing a reputation of progressive anti-discrimination policies.¹³⁴ A failure to engage in these best practices allows for the inference that the employer is indifferent to the risk that its practices are discriminatory. By satisfying these two elements, the plaintiff would adequately state a claim for reckless discrimination under Title VII.

B. Applicability to the Equal Pay Act

Given the recent developments in the Roberts Court, it is “doctrinally incoherent for the Court to fail to extend tort concepts to Title VII.”¹³⁵ Similarly, it would be incoherent to fail to extend the concept of recklessness to the EPA, especially given the fact that many courts treat the EPA and Title VII interchangeably in discrimination jurisprudence.¹³⁶

If adopted, the reckless discrimination model could correct the circuit split on whether prior pay history qualifies as a “factor other than sex.” Not only would the model of reckless discrimination undermine an employer's affirmative defense, but it would function as proof of liability for a discriminatory wage differential under the EPA. For example, after an EPA plaintiff establishes that there is a pay differential along gender lines, the defendant employer may raise the “factor other than sex” defense by arguing that it relied on the plaintiff's prior salary to set her new salary.¹³⁷ The plaintiff could then attempt to undermine that affirmative defense through the model of reckless discrimination, as described below. Not only would this model show that reliance on prior salary is not a “factor other than sex,” but it would lend weight to the plaintiff's claim that the pay differential she suffered was, in fact, “on the basis of sex.”¹³⁸

¹³⁰ *Id.* at 1094–96.

¹³¹ *Id.* at 1096–99.

¹³² *Id.* at 1097–98.

¹³³ *Id.* at 1100.

¹³⁴ *Id.* at 1102.

¹³⁵ *Id.* at 1104.

¹³⁶ See generally Peter Avery, *The Diluted Equal Pay Act: How Was It Broke? How Can It Be Fixed?*, 56 RUTGERS L. REV. 849 (2004). “[C]ourts often mangle the analysis when they are confronted with Equal Pay Act and Title VII claims side-by-side. . . . Judges cannot be expected to be experts in employment law.” *Id.* at 863.

¹³⁷ See, e.g., *Riser*, 776 F.3d at 1193.

¹³⁸ 29 U.S.C. § 206(d)(1).

In order to use the reckless discrimination model to show that the use of salary history is a gendered employment practice, not a “factor other than sex,” the plaintiff would first need to show that the employer knew or should have known that using salary history carries the risk of perpetuating discrimination.¹³⁹ First and foremost, the gender pay gap is well-documented.¹⁴⁰ Not only do human resource departments have access to a vast amount of research on the pay gap, but the gender pay gap is also well-publicized through Equal Pay Day (as well as other Pay Days for intersectional identities)¹⁴¹ and the passage of state and local regulations banning employers from asking about prior salary.¹⁴² Furthermore, organizations like the Society for Human Resource Management encourage their members to forgo reliance on salary history in favor of setting present salary based on other factors such as market data and objective qualifications.¹⁴³ Given the prevalence of this information in both the human resource space and in the news more broadly, it is reasonable to expect employers to know that relying on salary history to determine present wages carries the risk of perpetuating discrimination. Employers would be unable to rebut the presumption by claiming that they did not have actual or constructive knowledge of these best practices, given the wide coverage of these best practices.

In defense, employers may argue that the issue of adequate notice is foreclosed by the current precedent in the circuit courts.¹⁴⁴ However, this proposed framework allows for evolving standards in human resources and shifts in social science to bolster the plaintiff’s claims in light of negative precedent. Recklessness in employment practices looked different when the Ninth Circuit decided *Kouba v. Allstate Insurance Co.* in 1982.¹⁴⁵ In the thirty-six years since that case, employers (and courts) have learned a great deal more about implicit bias, diversity in the workplace, and the gender pay gap, as evidenced by the Ninth Circuit’s holding in *Rizo*.¹⁴⁶ While this Note discusses recklessness in wage-setting generally, the court should engage in a fact-intensive inquiry; therefore, what an employer should have known in 1982 will look different than what an employer should have known today. Thus, existing circuit court precedent does not undermine the notice requirement.

¹³⁹ RESTATEMENT (THIRD) OF TORTS § 2 (AM. LAW INST. 2005); Bornstein, *Reckless Discrimination*, *supra* note 112, at 1095.

¹⁴⁰ Mary Cornish, *Closing the Global Gender Pay Gap: Securing Justice for Women’s Work*, 28 COMP. LAB. L. & POL’Y J. 219 (2007); Alexandra N. Phillips, *Promulgating Parity: An Argument for A States-Based Approach to Valuing Women’s Work And Ensuring Pay Equity In The United States*, 92 TUL. L. REV. 719 (2018). *See generally* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581 (2018).

¹⁴¹ *See* P.R. Lockhart, *Tuesday is Black Woman’s Pay Day. Here’s What You Should Know About the Gap.*, VOX ONLINE (Aug. 7, 2018), <https://www.vox.com/identities/2018/8/7/17657416/black-womens-equal-pay-day-gender-racial-pay-gap>; *see, e.g.*, Lilly Ledbetter, *Lilly Ledbetter: My #MeToo Moment*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/opinion/lilly-ledbetter-metoo-equal-pay.html>; Shelley Zalis, *What You Need to Know About Latina Equal Pay Day.*, FORBES ONLINE (Nov. 1, 2018), <https://www.forbes.com/sites/shelleyzalis/2018/11/01/what-you-need-to-know-about-latina-equal-pay-day/#45303d98b732>.

¹⁴² *See supra* Part II(b)(ii).

¹⁴³ Susan Milligan, *Salary History Could Reshape Pay Negotiations*, SOC’Y FOR HUM. RESOURCE MGMT. (Feb. 16, 2018), <https://www.shrm.org/hr-today/news/hr-magazine/0318/pages/salary-history-bans-could-reshape-pay-negotiations.aspx>.

¹⁴⁴ *See supra* Part III.

¹⁴⁵ *Kouba*, 691 F.2d at 878.

¹⁴⁶ *Rizo*, 887 F.3d at 456.

The second element of reckless discrimination requires an evaluation of the burden on employers to avoid the risk of discrimination.¹⁴⁷ State and local laws that prohibit employers from inquiring about prior salary imply that there are other ways that public and private employers alike can determine a new hire's salary.¹⁴⁸ Additionally, human resource departments and organizations have long used other methods to establish a starting salary,¹⁴⁹ including: evaluating the new hire's qualifications and experiences against current employees; conducting market research that considers comparable positions beyond job title; updating salary schedules regularly; and considering the requirements of a position holistically, as opposed to relying solely on the job title.¹⁵⁰

The ability to avoid the risk by using other wage-setting practices may depend on the employer's industry or the size of the company, and this second element requires a fact-intensive inquiry. However, given the multitude of alternatives available to employers and human resource departments to avoid the risk of perpetuating wage discrimination, it is likely that the failure to avoid using prior salary to set present wages would constitute an "indifference to the risk" of perpetuating pay discrimination.¹⁵¹

If the Supreme Court eventually addresses the fourth affirmative defense as used in *Rizo*, it should categorize salary history as inherently gendered. Thus, rather than functioning as an affirmative defense, proof of an employer's reliance on prior salary would instead prove employer liability under the EPA.

C. Counterarguments

Proponents for the use of prior salary information to determine new hire wages may argue that the EPA does not require employers to completely close the gender pay gap.¹⁵² However, the EPA does forbid employers from engaging in practices that amount to pay discrimination, even if employers are not tasked with eliminating all societal contributions to the gender pay gap. Employers are responsible for their policies and practices. The reckless discrimination framework holds employers accountable for adopting and maintaining policies that may perpetuate pay discrimination. This framework does not impose additional responsibilities on businesses to fix society at large; it does, however, require employers to clean up their own shops by ending the recklessly discriminatory practice of relying on salary history.

Furthermore, a *Amici Curiae* Brief by the Center for Workplace Compliance and National Federation of Independent Business Small Business Legal Center prepared for the *Rizo* petition for writ of certiorari argues that the gender wage gap cannot be pinned

¹⁴⁷ RESTATEMENT (THIRD) OF TORTS § 2 (2005).

¹⁴⁸ Martha T. Moore, *These States Are Banning Questions About Salary History to Close The Pay Gap*, THE HUFFINGTON POST (June 25, 2018), https://www.huffpost.com/entry/whats-your-current-salary-none-of-your-business_b_5b3100f2e4b00b9b51c4215e.

¹⁴⁹ SOC'Y FOR HUM. RESOURCE MGMT., *How to Establish Salary Ranges* (May 23, 2018), <https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/howtoestablishsalaryranges.aspx>.

¹⁵⁰ *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm>.

¹⁵¹ RESTATEMENT (THIRD) OF TORTS § 2 (2005).

¹⁵² Brief for the Center for Workplace Compliance and National Federation of Independent Business Small Business Legal Center as Amici Curiae Support of Petitioner at 16; Petition for Writ of Certiorari, *Yovino v. Rizo*, 139 S. Ct. 706 (2019) (No. 18-272) (Aug. 30, 2018).

on any one cause; it argues that blaming the gap on salary history alone is unfounded and unnecessary.¹⁵³ The brief points to a 2009 study that identified a number of factors, such as women having to pause their careers when they become pregnant and different choices in occupation along gender lines, that could also explain the persistence of the gender pay gap.¹⁵⁴ This Note makes no assertions about the cause of the gender pay gap, only that employers run the risk of perpetuating that gap by relying on salary history. Thus, factors other than salary history can and should be used to set wages.

Relying on salary history does not allow employers to make an assessment of an applicant's potential contribution to the company. It merely uses a metric established by a previous employer to set an employee's salary despite both the risk of perpetuating the gender pay gap and the availability of other tools to set wages. As an alternative, employers can use an employee's amount and quality of professional experience and level of education to determine wages. Reliance on salary history carries a risk of perpetuating a discriminatory wage differential, and employers should be liable if they do not use best practices in their industry to determine a new hire's salary.

Other scholars worry that forbidding employers from relying on salary history may actually exacerbate the gender pay gap.¹⁵⁵ They fear that without salary history information, employers will instead rely on a practice called "statistical discrimination," an economic term for reliance on group averages in place of individualized information.¹⁵⁶ These scholars argue that in the absence of individualized information, employers will make assumptions about a woman's prior salary based on women's salaries in the aggregate, which would exacerbate the gender pay gap.¹⁵⁷ This argument conveniently ignores the fact that the EPA still holds employers liable for wage differentials—even when they do not use salary history as an affirmative defense. If an employer relies on statistical discrimination, rather than an employee's prior salary, to pay female employees less than male employees, the employer's actions are nevertheless prohibited by the EPA because these statistics are gendered on their face.

Alternatively, other scholars fear that the void of salary histories may leave women to negotiate their salaries, which may disproportionately harm women.¹⁵⁸ Studies show that women tend to undervalue their economic worth to a company, a phenomenon called entitlement theory, which leads to women negotiating for lower salaries, as well as employers offering female candidates weaker compensation packages.¹⁵⁹ Some scholars

¹⁵³ *Id.* at 17-18.

¹⁵⁴ CONSAD RESEARCH CORP., AN ANALYSIS OF REASONS FOR THE DISPARITY IN WAGES BETWEEN MEN AND WOMEN (2009) (prepared for the United States Department of Labor), <https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/Gender%20Wage%20Gap%20Final%20Report.pdf>.

¹⁵⁵ Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/business/economy/salary-history-laws.html>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Hannah Riley Bowles et al., *Social Incentives for Gender Difference in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, ORG. BEHAV. & HUM. DECISION PROCESSES 84 (2007).

¹⁵⁹ Julia Johnson, *Gender Difference in Negotiation: Implications for Salary Negotiation*, 23 UCLA WOMEN'S L.J. 131, 133-34 (2014).

go so far as to advocate for the practice of negotiating salaries as failing to satisfy the as a “factor other than sex” affirmative defense as well.¹⁶⁰

As discussed above,¹⁶¹ employers have ample information that is independent from prior salary information or from direct negotiation tactics that can be used to determine present wages. However, it is important to note that the model of reckless discrimination as applied to salary history does not seek to end all wage discrimination and close the gender pay gap completely; that is a monumental task that will require a number of private, local, state, and federal initiatives. This Note merely proposes to close one loophole that has allowed employers to perpetuate discrimination without liability and does not aim to tackle the problem of salary negotiations, although it is possible that the reckless discrimination framework could be applied to other employment practices.

Finally, opponents to this framework may argue that the issue of reliance on salary history should be resolved by Congress through the Paycheck Fairness Act (PFA) instead of by the courts through the EPA.¹⁶² The PFA is a proposed bill that aims to address shortcomings of the EPA and the Lilly Ledbetter Fair Pay Act.¹⁶³ A cornerstone of this bill is a provision that would explicitly narrow the “factor other than sex” affirmative defense.¹⁶⁴ In theory, the PFA seems like a sufficient remedy. However, it has failed to pass time and time again,¹⁶⁵ in no small part because many members of Congress worry about limiting business discretion in employment practices.¹⁶⁶ It could be argued that Congress has also failed to narrow the scope of the “factor other than sex” defense; however, Congressional action is unnecessary because social science research and improvements in human resources departments’ best practices and policies already narrow the scope of the affirmative defense.

While the PFA may be the future solution to many loopholes in pay equity legislation, the EPA as currently written provides the necessary language for closing the prior salary loophole found in the fourth affirmative defense. The EPA mandates that “[n]o employer . . . shall discriminate . . . between employees on the basis of sex.”¹⁶⁷ Research demonstrates the gendered nature of salary history, and that improved understanding should be used to reexamine interpretations of the EPA as written. Furthermore, this is not a case of either/or, but rather an opportunity to get relief for plaintiffs harmed by reliance on salary history using existing law while Congress works towards larger systemic changes to close the gender pay gap.

¹⁶⁰ See generally Sabrina L. Brown, *Negotiating Around the Equal Pay Act: Use of “Factor Other than Sex” Defense to Escape Liability*, 78 OHIO ST. L.J. 471 (2017).

¹⁶¹ See *supra* Part III(b).

¹⁶² Deborah L. Brake, *Revising Paycheck Fairness: Why and How the Factor-Other-Than-Sex Defense Matters*, 52 IDAHO L. REV. 889 (2016); see also Nicole Michele Barnhart, *Gender Wage Inequality: Is More Legislation the Answer?*, 40 SEATTLE U. L. REV. 1435 (2017).

¹⁶³ Brake, *supra* note 162, at 890. The Lilly Ledbetter Fair Pay Act resets the 180-day statute of limitations for Title VII claims with each new paycheck affected by an employer’s discriminatory wage-setting. 123 Stat. 5 (2009).

¹⁶⁴ *Id.* at 890–91.

¹⁶⁵ Irin Carmon, *Republicans Block Paycheck Fairness Act Yet Again*, MSNBC.COM (Sept. 15, 2014), <http://www.msnbc.com/msnbc/republicans-block-paycheckfairness-act-again>.

¹⁶⁶ Brake, *supra* note 162, at 891.

¹⁶⁷ 29 U.S.C. 206(d)(1).

CONCLUSION

The Ninth Circuit correctly overturned its earlier line of cases that allowed salary history to qualify as a “factor other than sex” in the fourth affirmative defense to an EPA claim.¹⁶⁸ As the Circuit explained, salary history is inherently gendered, and its use as an affirmative defense undermines the goals of the EPA.¹⁶⁹

The Ninth Circuit’s reasoning adds to the growing understanding that reliance on salary history perpetuates the gender pay gap. As evidenced by the actions taken by ten states, nine local governments, and Puerto Rico to eliminate the reliance on prior history to set new wages, many have accepted the premise that forbidding employers from inquiring about prior salary can help close the gender pay gap. To that end, plaintiffs should be able to co-opt this former affirmative defense and hold employers liable for reckless discrimination. The framework for reckless discrimination does not rely on outdated precedent, but instead looks to social science to address a persistent problem in employment. Just as the Ninth Circuit and a number of state and local governments have reconsidered their approach to salary history, plaintiffs should rethink how they frame their wage differential claims under the Equal Pay Act.

If the Supreme Court has the opportunity to address the fourth affirmative defense in an Equal Pay Act claim, the Court should view the reliance on salary history as a gendered practice which does not qualify as a “factor other than sex” under the EPA. In future cases, plaintiffs should argue that an employer’s reliance on prior salary is proof of liability for a wage differential under the model of reckless discrimination. Closing the “factor other than sex” loophole in the EPA is one necessary step, albeit small, towards closing the gender pay gap.

¹⁶⁸ *Rizo*, 887 F.3d at 456.

¹⁶⁹ *Id.*