No. 19-___

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

PETITION FOR A WRIT OF CERTIORARI

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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"?

PARTIES TO THE PROCEEDING

Petitioner is the Fresno County Superintendent of Schools. *See* Sup. Ct. R. 35.4. Respondent is Aileen Rizo. These parties were the only parties in the Ninth Circuit below.

RELATED PROCEEDINGS

Petitioner is not aware of any other proceedings that are directly related to this case. The prior proceedings in this case are:

Eastern District of California:

Rizo v. Yovino, Fresno County Superintendent of Schools, No. 14-cv-0423 (Dec. 18, 2015)

U.S. Court of Appeals for the Ninth Circuit:

Rizo v. Yovino, Fresno County Superintendent of Schools, No. 16-15372 (Apr. 27, 2017) (original panel decision)

Rizo v. Yovino, Fresno County Superintendent of Schools, No. 16-15372 (Apr. 9, 2019) (original en banc decision)

Rizo v. Yovino, Fresno County Superintendent of Schools, No. 16-15372 (Feb. 27, 2020) (post-remand en banc decision)

Supreme Court of the United States:

Yovino, Fresno County Superintendent of Schools v. Rizo, No. 18-272 (Feb. 25, 2019)

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PETITION FOR A WRIT OF CERTIORARI

The Equal Pay Act requires "equal pay for equal work regardless of sex," subject to four exceptions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974). The fourth, catchall exception authorizes disparities based on "any other factor other than sex." 29 U.S.C. § 206(d)(1). Section 206(d)(1)'s defenses apply both to Equal Pay Act claims and to pay-based Title VII sex-discrimination claims. *See* 42 U.S.C. § 2000e-2(h); *Washington County v. Gunther*, 452 U.S. 161, 168–70 (1981).

This petition asks whether prior salary is a factor other than sex. That question has badly divided the circuits. Three say employers may rely on prior pay. By contrast, the Ninth Circuit held below that employers may never do so. In the middle, four circuits allow employers to rely on prior pay in limited circumstances: two allow employers to use prior pay if they have a legitimate business reason for it, while two others allow employers to use prior pay if they do so along with another sex-neutral factor.

Confusion over this important question of law is unacceptable. This Court should grant certiorari and reverse the Ninth Circuit's incorrect view.

OPINIONS BELOW

The district court's amended and superseding opinion (Pet. App. 115a–145a) is unreported but available at 2015 WL 9260587. The Ninth Circuit's now-vacated panel decision (Pet. App. 104a–114a) is reported at 854 F.3d 1161. The en banc Ninth Circuit's now-vacated original decision (Pet. App. 53a–103a) is reported at 887 F.3d 453. The en banc

Ninth Circuit's decision on remand from this Court (Pet. App. 1a–52a) is reported at 950 F.3d 1217.

JURISDICTION

The en banc Ninth Circuit entered judgment on February 27, 2020. Petitioner timely filed this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(d) Prohibition of sex discrimination

> (1) No employer having employees subject to any provisions of this section shall discriminate … between employees on the basis of sex by paying wages to employees … at a rate less than the rate at which he pays wages to employees of the opposite sex … 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.

STATEMENT

1. From 1998 until 2015, the Fresno County Superintendent of Schools set new employees' salaries using their prior salaries. *See* Pet. App. 119a; Excerpts of Record 534, *Rizo v. Yovino*, No. 16-15372 (9th Cir.) ("ER"). Under what came to be known as "Standard Operating Procedure 1440," the Superintendent added five percent to each new employee's prior salary and, based on that figure, placed the employee on a corresponding "step" of the salary schedule. ER 534. The Superintendent had good reasons for this policy: It ensured objectivity and consistency in pay decisions; it made favoritism impossible; it helped attract high-quality candidates by ensuring that new hires would get a raise if they accepted the Superintendent's offer of employment; and it promoted the judicious use of public resources by curbing the prospect of overpaying after individualized salary negotiations. ER 582.

The Superintendent's policy applied to all employees. Take the current Superintendent of Fresno County schools. When he was hired as Deputy Superintendent in 2006, his starting salary was calculated by adding 5 percent to his prior salary and placing him in the corresponding step on the schedule for that position—Step 1, the lowest step. ER 581–82. His predecessor as Superintendent likewise started on Step 1 when he was hired as Deputy Superintendent in 2005. ER 584.

The policy did not favor either sex. In the decade after Yovino's hiring, the Superintendent hired or promoted nine female administrators whom it placed on salary steps *higher than* Step 1, where Yovino began. The same is true for just three male adminis-

trators. ER 584. And throughout the policy's existence, the Superintendent apparently deviated from it only once. When an employee in a 12-month position was promoted to an 11-month position, the County Superintendent placed him on Step 2 rather than Step 1 to avoid creating an annual salary loss for him. ER 535. (One female employee *may have* been placed on a step higher than she should have been, but her records were too incomplete to tell. ER 535.)

The Superintendent applied the policy to Respondent Aileen Rizo when she was hired as a "math Consultant" in 2009. ER 212. Rizo had most recently worked as a middle school math teacher in Arizona. ER 268. In that position, she earned $50,630 for 206 days of work, plus a $1,200 stipend because she held a master's degree. ER 269. To her knowledge, "gender was [not] a factor in determining" her starting salary in that position, and she "assume[d]" that her salary there was based on sex-neutral factors such as "years of experience." ER 315–16.

Adding 5 percent to Rizo's daily rate left her below the low end of the Superintendent's ten-step schedule for math consultants. ER 327. She thus started at Step 1, with an annual salary of $62,133 for 196 days of work and a $600 master's degree stipend. ER 231, 448; Pet. App. 123a. That amounted to a raise of over twenty percent. ER 513.

Rizo realized her pay was lower than her colleagues' in 2012, when one mentioned that he had started at Step 9. ER 451. Rizo complained about the pay disparity to the Superintendent's Human Resources department in August 2012. ER 535.

As explained, the Superintendent had neutrally applied its policy to employees of both sexes for more than a decade when it hired Rizo. Indeed, one other female consultant had been hired at Step 8, a step higher than two male math consultants, and just one step below a fourth. ER 582–83, 565. Even though the Equal Pay Act does not create disparate-impact liability, the Superintendent responded to Rizo's complaint by reviewing the initial salary placements of all management-level employees for sex-based disparities. According to its analysis, there were none; men and women shared the same average starting salaries. The Superintendent repeated its analysis in 2013 and 2014, each time with the same result. ER 535–36. In 2012, both male and female consultants had an average initial salary at Step 4; in 2013, the average initial salary for both was Step 5; and in 2014, it was again Step 4 for both sexes. ER 536.

2. Rizo sued Petitioner in state court, alleging that the Superintendent's policy violated the Equal Pay Act, Title VII, and California state law. Petitioner removed the case and sought summary judgment. Petitioner argued that the disparity arose solely because of Rizo's prior salary; that prior salary is a "factor other than sex," 29 U.S.C. § 206(d)(1); and that any wage disparity based on that factor was therefore permitted by the Equal Pay Act.

The District Court denied Petitioner's motion. It reasoned that "a pay structure based exclusively on prior wages is so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if moti-

vated by a legitimate non-discriminatory business purpose." Pet. App. 136a–137a.

On interlocutory appeal, the panel reversed. In *Kouba v. Allstate Insurance Co.*, the court held that prior salary is a "factor other than sex"—and that employers may therefore consider it in setting wages—provided it is a reasonable means of effectuating some business policy. 691 F.2d 873, 875–77 (9th Cir. 1982). The panel held that *Kouba* applied equally to cases like Rizo's, where prior salary was the only factor explaining the disparity. Pet. App. 111a. It thus remanded for the District Court to consider the reasonableness of the Superintendent's business justifications for using its policy. Pet. App. 113a.

Rizo sought and received en banc review. Pet. App. 146a. The en banc court rejected the panel decision, affirming the District Court's denial of summary judgment. Pet. App. 53a–103a. Judge Reinhardt, who died more than a week before the decision issued, wrote the majority opinion. Pet. App. 53a n.*. It held that, as "a general rule," prior pay cannot be a "factor other than sex." Pet. App. 64a.

Petitioner sought certiorari on the Ninth Circuit's interpretation of the Equal Pay Act and its decision to count Judge Reinhardt's majority-forming vote after his death. This Court granted, vacated, and remanded, explaining that "federal judges are appointed for life, not for eternity," and so the Ninth Circuit erred in counting Judge Reinhardt's vote. *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019) (per curiam).

3. On remand, the Ninth Circuit appointed a judge to replace Judge Reinhardt but then issued a new majority opinion reaching the same result.

The majority first reasoned that, because the Act's fourth exception refers to "any *other* factor other than sex," that exception had to be construed in keeping with the first three exceptions. Because those exceptions—for seniority systems, merit systems, and quantity or quality of production systems—all supposedly involved "job-related" factors, the fourth exception must be "limited to job-related factors" as well. Pet. App. 12a–14a; *see also* Pet. App. 14a–16a (claiming that the Act's legislative history supported this reading). The majority acknowledged that this reading conflicted with the Seventh Circuit's supposedly "outlier" approach, under which any factor other than sex qualifies as a defense. Pet. App. 17a; *see id.* (declining to "follow" the Eighth Circuit's supposed "case-by-case analysis" into this question).

Applying its test, the majority then concluded that "[p]rior pay … is necessarily not a factor related to the job for which an EPA plaintiff must demonstrate unequal pay for equal work." Pet. App. 18a. It agreed that "any particular employee's prior wages" may not actually have been "depressed as a result of sex discrimination." Pet. App. 20a–21a. And it recognized that prior pay could "be viewed as a *proxy* for job-related factors such as education, skills, or experience." Pet. App. 21a. Nevertheless, "[b]ecause prior pay may carry with it the effects of sex-based pay discrimination, and because sex-based pay discrimination was the precise target of the EPA, an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay decision." Pet. App. 23a–24a.

In reaching this conclusion, the Ninth Circuit overruled its earlier decision in *Kouba*, which allowed an employer to demonstrate that it "considered prior pay reasonably to advance an acceptable business reason." Pet. App. 24a. It also rejected "[s]ome case law from other circuits [that] suggest[ed] that prior pay may serve as an affirmative defense if it is considered in combination with other factors." Pet. App. 26a. Since Petitioner relied solely on Rizo's prior pay to defend the disparity between her salary and others', the majority affirmed the order denying Petitioner summary judgment and remanded for further proceedings. Pet. App. 29a.

Judge McKeown (joined by Judges Tallman and Murguia) concurred. She noted that the other circuits "that have considered this important issue have either outright rejected" the majority's categorical ban "or declined to adopt it." Pet. App. 30a. Rather than "embrace[] a rule not adopted by any other circuit," *id.*, she would have allowed employers to use "prior salary along with valid job-related factors such as education" when setting a starting salary, Pet. App. 34a.

Judge Callahan (joined by Judges Tallman and Bea) also concurred. She explained that the EPA's fourth exemption is a "'general catchall provision' that 'was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination.'" Pet. App. 44a (quoting *Corning Glass*, 417 U.S. at 196, and *Gunther*, 452 U.S. at 170). But she then concluded that this catchall nonetheless includes only those factors that do not "promote[] or perpetuate[] gender discrimination." Pet. App. 45a. In her view, "while a pay system that

relies exclusively on prior salary is conclusively presumed to be gender-based—to perpetuate gender-based inequality—[one] that uses prior pay as one of several factors deserves to be considered on its own merits." Pet. App. 48a–49a.

REASONS FOR GRANTING THE PETITION

The circuits widely disagree about whether prior salary is a "factor other than sex" for purposes of the Equal Pay Act. Here, the Ninth Circuit, overruling its own precedent, held that it never is. But the Fourth, Seventh and Eighth Circuits categorically allow employers to rely on prior salary. Four other circuits also allow the use of prior pay, but only in limited circumstances—two allow it only when the employer has a good business reason, and two allow it only when the employer relies on prior pay together with another factor to explain a wage disparity.

There should be no disagreement on this important question. This case, which turns on that question, is an ideal vehicle for resolving the dispute.

I. THE CIRCUITS DIVERGE ON WHETHER PRIOR PAY IS A "FACTOR OTHER THAN SEX."

A. Petitioner Will Lose as a Matter of Law in the Ninth Circuit Because Prior Pay Never Justifies a Disparity There.

The Ninth Circuit held that that reliance on prior pay "cannot serve as an affirmative defense to a prima facie showing of an EPA violation." Pet. App. 2a. The Ninth Circuit stated its categorical rule repeatedly. *See, e.g.*, Pet. App. 7a ("[E]mployers are not allowed to rely on prior pay to justify wage disparities."); Pet. App. 24a ("[T]he wage associated with an

employee's prior job does not qualify as a factor other than sex that can defeat a prima facie EPA claim.").

Under this categorical rule, Rizo is entitled to summary judgment. Rizo's pay, like her colleagues' pay, flowed directly from her prior salary and her master's degree stipend. Pet. App. 3a. And the disparity between her pay and her colleagues' pay is based solely on Rizo's prior salary. *See* Pet. App. 29a. Accordingly, Petitioner is doomed to lose when Rizo moves for summary judgment on remand.

B. Petitioner Would Lose as a Matter of Law in Two Other Circuits Because It Relied Solely on Prior Pay.

By contrast, the Tenth and Eleventh Circuits have held that "an individual's former salary *can* be considered in determining whether pay disparity is based on a factor other than sex." *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (emphasis added); *see Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (same). But there's a catch: employers may not "rely[] *solely* upon a prior salary to justify pay disparity." *Riser*, 776 F.3d at 1199 (emphasis added, internal quotation marks omitted); *Irby*, 44 F.3d at 955 ("While an employer may not … rest[] on prior pay alone," they may "utiliz[e] prior pay as part of a mixed-motive, such as prior pay *and* more experience.").

Petitioner would lose as a matter of law in these circuits as well. As just mentioned, this case has been litigated on the premise that Rizo's pay disparity is "based solely" on her prior salary. Pet. App. 4a. Because Petitioner did not raise any other grounds to justify the disparity, Rizo would be entitled to sum-

mary judgment in these circuits as well. *See* Pet. App. 31a (McKeown, J., concurring) (adopting this approach and holding Petitioner liable).

C. Petitioner Would Prevail as a Matter of Law in Three Circuits Because Prior Pay Categorically Qualifies as a Factor Other Than Sex in Those Circuits

1. At the other end of the spectrum, Petitioner would *win* as a matter of law in three other circuits because prior pay always counts as a factor other than sex in those circuits. In *Wernsing v. Department of Human Services*, for example, the employer "g[ave] lateral entrants a salary at least equal to what they had been earning, plus a raise if that [wa]s possible under the scale for the new job." 427 F.3d 466, 467 (7th Cir. 2005). The plaintiff sued, noting that her salary was "substantially" lower than those of coworkers, who had come from "more remunerative positions" elsewhere. *Id.*

The Seventh Circuit affirmed the judgment in the employer's favor. As Judge Easterbrook explained, the Equal Pay Act "forbids differences 'on the basis of sex' rather than differences that have other origins." *Id.* at 468. Because "[w]ages at one's prior employer are a 'factor other than sex,'" "an employer may use them to set pay consistently with the Act." *Id.*

Judge Easterbrook also explained that the Equal Pay Act "does not authorize federal courts to set their own standards of 'acceptable' business practices" by scrutinizing employers' business reasons for relying on prior pay. *Id.* "The Equal Pay Act forbids sex discrimination, an intentional wrong." *Id.* at 469. Under that regime, "the employer may act for

any reason, good or bad," so long as its decision is not based on "the prohibited criteri[on]." *Id.*; *see also Lauderdale v. Ill. Dep't of Hum. Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) (affirming where the discrepancy was based partially on prior pay because "a difference … based on the difference in what employees were previously paid is a legitimate 'factor other than sex'"); *Covington v. S. Ill. Univ.*, 816 F.2d 317, 322 (7th Cir. 1987) (affirming where the discrepancy was based partly on prior pay because a "factor other than sex" need not be "related to the performance of the employees who received the higher wage"); *Hubers v. Gannett Co.*, 2019 WL 1112259, at *5 (N.D. Ill. Mar. 11, 2019) (granting summary judgment where the male's "salary was higher than [the female's], not because of sex, but because of his prior salary").

The Fourth Circuit reads the statute the same way. In *Spencer v. Virginia State University*, a university paid two male professors more than a female professor because those two had previously served as university administrators, and their salary as professors was based on their higher administrative salaries. 919 F.3d 199, 202–03 (4th Cir. 2019). The court upheld summary judgment in the university's favor. "[T]here [wa]s no dispute that the wage difference at issue resulted from" the professors' "previous salaries as administrators," so the disparity "was based on a 'factor other than sex.'" *Id.* at 206. The Fourth Circuit also refused to second-guess the business rationale behind the employer's policy. "We do not sit as a super-personnel department weighing the prudence of employment decisions made by the defendants." *Id.* at 206–07 (internal quotation

marks omitted). "[The] law does not require, in the first instance, that employment be rational, wise, or well-considered—only that it be nondiscriminatory." *Id.* at 207 (internal quotation marks omitted).

The Eighth Circuit takes the same approach. In *Taylor v. White*, a female government employee was paid less than several male counterparts because those male counterparts' salaries stemmed from a "non-statutory salary retention policy" that paid them more in light of their previous earnings. 321 F.3d 710, 714–15 (8th Cir. 2003). The Eighth Circuit upheld the district court's grant of summary judgment in the employer's favor. "On its face, the EPA does not suggest any limitations to the broad catch-all 'factor other than sex' affirmative defense." *Id.* at 717. And "salary retention policies"—which may perpetuate preexisting salary disparities by basing employees' current salary on prior salaries for other positions—"are not necessarily gender biased." *Id.* at 718. Thus, where an employer has and neutrally applies a salary retention policy, the employer is entitled to the Equal Pay Act's factor-other-than-sex defense, regardless of the "wisdom or reasonableness" of the employer's decision to do so. *Id.* at 719; *see also Price v. N. States Power Co.*, 664 F.3d 1186, 1193–94 (8th Cir. 2011) (affirming summary judgment where differential was based in part on prior pay); *Thomas v. Gray Transp., Inc.*, 2018 WL 6531661, at *7 (N.D. Iowa Dec. 12, 2018) (granting summary judgment where disparity was based on prior salary).

2. Of course, these courts have noted that simply *citing* prior pay does not end an Equal Pay Act case. *See Wernsing*, 427 F.3d at 470; *Taylor*, 321 F.3d at 718. If prior pay is simply "a pretext for a decision

really made on prohibited criteria," the employer remains liable. *Wernsing*, 427 F.3d at 469; *Taylor*, 321 F.3d at 716 (examining whether the Army deployed its policy "as a mere pretext to hide gender-based wage discrimination"); *see also EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 123 (4th Cir. 2018) (remanding where the employer "exercise[d] discretion" in assigning new hires to a specific step so that the employer could prove that it exercised that discretion on sex-neutral grounds); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (remanding where it was uncertain whether the employer's policy was pretext to pay women less "simply because the market might bear such wages"). Dicta in *Wernsing* also suggests that if a plaintiff proves that her *own* prior pay was discriminatory, it may not be used to justify a differential. 427 F.3d at 470.

Neither of these possible caveats applies here, so Petitioner would have prevailed in these three circuits. Petitioner acted in good faith when it set Rizo's salary in accordance with SOP 1440, as it did for countless other employees during the time SOP 1440 was in force. *See supra* 3–4. And Rizo herself believed that "gender was [not] a factor in determining" her starting salary at her prior teaching position, and she "assume[d]" that her salary there was based on sex-neutral factors such as "years of experience." ER 315–16. Accordingly, Petitioner could not be held liable in the Fourth, Seventh, and Eighth Circuits.

D. Petitioner Could Have Prevailed Before a Jury in Two Circuits Because It Had Legitimate Reasons for Using Prior Pay.

Finally, two other circuits have allowed employers to rely solely upon prior pay, *provided* that they

could prove to a jury that they had good reasons for doing so. In this vein, the Second Circuit has held that "employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral" system—such as prior pay—"without more." *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992). But they may rely on prior pay (or another such wage-setting system) if they "prove[]" that the system "is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Id.* Thus, while the Second Circuit recognizes that a factor like prior pay is "literally *a* factor other than sex," an employer cannot rely that factor unless it can establish that its use of prior pay "has some grounding in legitimate business considerations." *Id.* at 527.

The Sixth Circuit applies the same rule. "[T]he Equal Pay Act's exception … does not include literally *any* other factor, but a factor that … was adopted for a legitimate business reason." *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006) (internal quotation marks omitted). So employers may not rely on a sex-neutral system (such as prior pay) to explain salary differentials unless they can identify court-approved "business-related" reasons for using that system. *Id.* at 366.

Petitioner would have had a chance to prove its affirmative defense before a jury in the Second and Sixth Circuits. Petitioner gave business reasons for its policy: it avoided subjectivity and favoritism; encouraged candidates to leave their present jobs; and saved taxpayer money. Pet. App. 110a. Under the Second and Sixth Circuits' current rule—and under

the Ninth Circuit's old rule, reversed in this case—those reasons were at least good enough to get to a jury, if not to absolve Petitioner without a trial. *See* Pet. App. 113a (vacating and remanding to consider these justifications under *Kouba*).

E. This Widespread Disagreement Cannot Reasonably Be Disputed

1. Everyone agrees that the circuits are divided. Rizo acknowledged the circuit split in her petition for rehearing en banc. There, she wrote that the Seventh and Eighth Circuits have "reject[ed] the claim that sole reliance on prior salary violates the Equal Pay Act," Rehearing Pet., Dkt. 44 in No. 16-15372 (9th Cir.), at 7 n.3, while the Tenth and Eleventh Circuits forbid employers from basing compensation "*solely* on … new employees' prior wages for previous employers," *id.* at 1–2.

The EEOC also acknowledged the conflict. It urged the en banc court to adopt the Tenth and Eleventh Circuits' view that "prior pay alone cannot be considered a 'factor other than sex' within the meaning of the EPA." EEOC Rehearing Amicus, Dkt. 46, at 6. But it "recognize[d] that even if [the Ninth Circuit] adopt[ed]" that rule, there would still be "circuit conflict" because "[t]he Seventh Circuit takes the position" that prior wages count as a "'factor other than sex.'" *Id.* at 12 (quoting *Wernsing*, 427 F.3d at 468).

2. The circuits themselves recognize their disagreement. Each opinion below acknowledged conflict with the Seventh Circuit. *See* Pet. App. 17a (majority op.) (declaring that the Seventh Circuit's supposedly "outlier" approach could not be "reconciled" with "well-settled rules of statutory construction or the

broadly remedial purpose of the EPA"); Pet. App. 36a (McKeown, J., concurring) (stating that the "Seventh Circuit[] ha[s] veered off course"); Pet. App. 47a (Callahan, J., concurring) (listing the Seventh Circuit as one with a "broader definition[] for 'factor other than sex'" than Judge Callahan would have adopted). The Seventh Circuit has recognized the difference as well. *See Wernsing*, 427 F.3d at 468 (rejecting circuits that demand a business justification).

The Ninth Circuit also effectively admitted that its decision conflicts with the Fourth and Eighth Circuits. The majority agreed that in *Spencer*, the Fourth Circuit "suggested it may share [the Seventh Circuit's] view," but shrugged off *Spencer*'s statements—central to the court's alternative holding—as somehow "dicta." Pet. App. 27a n.14. *But see* Pet. App. 36a (McKeown, J., concurring) (recognizing that "the Fourth and Seventh Circuits have … h[eld] that prior salary is *always* a 'factor other than sex'"); Pet. App. 47a (Callahan, J., concurring) (listing the Fourth Circuit alongside the Seventh).

As for the Eighth Circuit, the en banc majority was "not persuaded to follow [its] approach"—which in the majority's view deploys a "case-by-case analysis of the proffered factor" rather than a "bright-line rule defining factors other than sex"—because that view gives too much protection to "business freedoms." Pet. App. 17a. Other Ninth Circuit judges more accurately identified the categorical nature of the Eighth Circuit's position. *See* Pet. App. 47a (Callahan, J., concurring) (listing the Eighth Circuit with the Seventh Circuit for its "broader definition"); *see also Taylor*, 321 F.3d at 719 (rejecting the "reasona-

bleness" review method set forth in the Ninth Circuit's now-overruled decision in *Kouba*).

3. To be sure, the Ninth Circuit tried to downplay the distance between its approach and those of courts that allow employers to use prior pay in certain circumstances. *See, e.g.*, Pet. App. 26a–27a. But the Ninth Circuit cannot actually minimize the disagreement. Yes, some other circuits might agree that "only job-related factors provide affirmative defenses to EPA claims." Pet. App. 16a. But they do *not* agree that reliance upon prior pay always fails that test; in the Second Circuit, for instance, an employer may prove that its use of prior pay "has some grounding in legitimate business considerations." *Aldrich*, 963 F.2d at 527. And while the Ninth Circuit claimed that those circuits that allow consideration of prior pay alongside other factors "uniformly rely on those other factors to excuse wage differentials," Pet. App. 26a, that is not the rule those cases set forth. *See, e.g.*, *Riser*, 776 F.3d at 1199 ("[A]n individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex."); *Irby*, 44 F.3d at 955 ("This court has not held that prior salary can never be used … to establish pay, just that such a justification cannot solely carry the … defense.").

* * *

Petitioner loses as a matter of law in three circuits (for different reasons), wins as a matter of law in three others, and would at least get to a jury in two more. It is hard to imagine a cleaner circuit split.

II. THE COURT SHOULD DECIDE THIS QUESTION.

1. The Equal Pay Act "has the same basic coverage" as the Fair Labor Standards Act, but also covers "executive, administrative, and professional employees who are normally exempted from the FLSA" as well as all "State and local government employees unless they are specifically exempted." 29 C.F.R. § 1620.1(a); *see id.* § 1620.1(d) (noting that most federal employees are covered as well). In other words, the Equal Pay Act covers "[v]irtually all employers" in the country. EEOC, *Coverage of Business/Private Employers*, https://tinyurl.com/wgq7fux.

Recognizing the paramount importance of the uniformity of federal law, this Court has regularly granted certiorari to resolve disagreements about federal statutes. *See, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019) (resolving 1-1 circuit split about when the Fair Debt Collection Practices Act's statute of limitations begins to run); *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 210 (2012) (resolving disagreement about when injuries occur "as the result of operations conducted on the outer Continental Shelf" under 43 U.S.C. § 1333(b) (internal quotation marks omitted)). The statutory question presented here is especially worthy of this Court's review, since it concerns a key defense in a widely applicable employment law.

2. It is particularly important to grant certiorari because employers often ask about and rely upon prior pay in setting salaries when allowed to do so. One recent survey reported that two-thirds of employers allow interviewers to ask about prior salary

where the law permits it.[1] In another survey, more than 65% of executives reported that their operations would be affected by a ban on questions about prior pay, requiring "hundreds of thousands of employers … to modify their talent screening and hiring processes."[2] One of those employers is the federal judiciary, whose standard application requests prior salary information for the past ten years. *See* Federal Judicial Branch, *AO 78: Application for Employment*, uscourts.gov/sites/default/files/ao078.pdf; 29 U.S.C. § 203(e)(2)(iii) (Equal Pay Act covers judicial branch units with competitive-service positions).

These employers often have good reasons for doing so. Consider the Superintendent's former policy here. By relying upon prior pay, the Superintendent eliminated "subjective opinions as to the new employee's value," removing potential sources of bias, "prevent[ing] favoritism," and "ensur[ing] consistency." Pet. App. 110a. The policy also "encourage[d] candidates to leave their current jobs" by guaranteeing a raise. And it encouraged the "judicious use of taxpayer dollars" by ensuring that the Superintendent did not overpay in negotiations. *Id.*

There are other reasons why employers ask about and rely upon prior pay, even if they do not have a fixed system like SOP 1440. For instance, employers

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[1] *See* Roy Maurer, *Employers Split on Asking About Salary History*, Soc'y for Hum. Res. Mgmt. (April 2, 2018), https://bit.ly/2naruoL.

[2] Korn Ferry, *Korn Ferry Executive Survey: New Laws Forbidding Questions on Salary History Likely Changes the Game for Most Employers* (Nov. 14, 2017), *available at* https://tinyurl.com/y9gb4aru.

face the difficult and time-consuming task of trying to assess an applicant's true value to the company. But resumes and references may be incommensurable or indistinguishable; who's to say whether St. Mary's or St. John's produces the best employees, whether Joe's time as a tour guide speaks better of his interpersonal skills than Sam's volunteer efforts, or whether Larry's current boss really thinks highly of him or just wants him out the door.[3] Information about prior salary provides real-world data on what employers need to know: whether "the marginal increase in revenue from a worker's labor" will exceed "what they will have to pay to obtain that labor." In "competitive labor market[s], a very recent wage in a similar job is approximately the worker's marginal productivity."[4]

Employers ask about and rely upon prior pay for other purposes as well. Interviewing and evaluating applicants takes a lot of time on each side. If an employer can't identify those applicants who *already* make more than the employer is willing to pay, that time might be wasted. Similarly, many employers don't have the time to "go around and create comparable stats" to determine the market rate for a position, and for some positions, it may be difficult to tell what the "market" even is. Asking applicants about

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[3] *See, e.g.*, Brian Wallen & Jo Bennett, *Three Hiring Hurdles Posed by Philly Salary History Ban*, Law360 (Mar. 10, 2020), *available at* https://tinyurl.com/sm9dgw6.

[4] Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History? Evidence from a Field Experiment*, NBER Working Paper No. 266277, at 2 (Jan. 2020), *available at* https://tinyurl.com/v2vlhox.

their salary history allows these employers to "determine how to pay fairly"—to identify the going rate, and then (in many instances) to beat it.[5]

3. To be sure, there are potential downsides to asking about and relying upon prior pay in setting salary. The Superintendent's old policy, for instance, may have made it difficult to hire truly exceptional candidates, because the flat 5% raise may not have been enough to lure them away from their existing jobs. And as the Ninth Circuit noted, relying upon prior pay may unknowingly perpetuate preexisting disparities that could have been based on sex.

In light of the pros and the cons of the practice, there is now an ongoing, robust debate about whether and how employers should use prior pay in setting salaries. A few jurisdictions have banned employers from relying upon prior pay in setting an applicant's salary, though even those jurisdictions have usually not followed the Ninth Circuit's under-no-circumstances approach.[6] Others have prohibited

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[5] Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. Times (Feb. 16, 2018), *available at* https://nyti.ms/2C65i8H.

[6] *See, e.g.*, Cal. Labor Code § 432.3(a), (h) (prohibiting employers from using prior pay "as a factor in determining … what salary to offer" unless the applicant discloses it "voluntarily and without prompting"); Colo. Rev. Stat. § 8-5-102(1)(d) (prohibiting employers from relying on prior pay to "justify a disparity in current wage rates"); Haw. Rev. Stat. § 378-2.4(c)(1) (allowing employers to rely on prior pay only when voluntarily disclosed without prompting and for "[a]pplicants for internal transfer or promotion"); Mass. Gen. Laws ch. 149, § 105(b) ("An employee's previous wage or salary history shall not be a defense to an action."); N.J. A1094, § 1(a)(1), (b)(1), (c)(1) (enacted July 25, 2019)

employers from *asking* about prior pay, without barring them from relying upon it if innocently discovered.[7] And some jurisdictions have imposed narrower restrictions covering only public-sector employment.[8]

But most jurisdictions retain the traditional rule—that employers may ask about and rely upon prior salary when hiring employees and setting salaries. *See* HR Dive, *Salary History Bans* (updated Feb. 28, 2020), *available at* www.hrdive.com/news/salary-history-ban-states-list/516662/. And two states have responded to the rise in local restrictions by preempting such ordinances under state law. *See* Mich. Comp. Laws § 123.1384(4); Wis. Stat. Ann. § 103.36.

The Ninth Circuit's rule short-circuits all of this democratic experimentation. Employers in states like Arizona, Idaho, and Nevada—which have retained the traditional rule—must now live under the Ninth Circuit's categorical ban. And even those

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(continued…)

(allowing use of prior pay where voluntarily disclosed or for internal transfers); N.Y. Labor Law § 194-a(1), (2) (allowing applicants to disclose salary history); Ore. Rev. Stat. § 652.220(1)(d) (outlawing consideration of prior pay in setting salary except for "current employee[s] of the employer").

[7] *See, e.g.*, Conn. Gen. Stat. Ann. § 31-40z(b)(5) (allowing inquiries only after voluntary disclosure); 19 Del. Code § 709B(b)(2), (c) (prohibiting pre-offer requests for salary information).

[8] *See, e.g.*, D.C. Personnel Instruction No. 11-92 (prohibiting inquiries by hiring officials unless a candidate makes a counteroffer based on "current or previous salary history"); N.C. Exec. Order No. 93, § 3(a); Pa. Exec. Order 2018-18-03, § 1 (prohibiting inquiries "at any stage during the hiring process").

states like California that *have* passed legislation on the subject will often find their more targeted approach superseded. Under state law, California employers may use prior pay if an applicant provides that information unprompted. *See* Cal. Labor Code § 432.3(h). But using prior pay in such circumstances would still not count as a "factor other than sex" under the Ninth Circuit's reading of the Equal Pay Act, so this state-authorized, unobjectionable use of prior pay would violate federal law. Of course, the effects of the Ninth Circuit's decision won't just fall upon employers within it. According to one survey, 46% of multijurisdictional employers "adopt policies to comply with the strictest laws in their region."[9]

Remarkably, the Ninth Circuit asserted that its position somehow allows employers "to discuss prior pay in the course of negotiating job offers" and even to "consider[] prior pay when setting a salary," just not to "rely[] on prior pay to defend an EPA violation." Pet. App. 28a, 29a (emphasis omitted). That is ridiculous. Employers do not purposefully acquire—let alone *discuss*, and certainly not *act upon*—information that could later subject them to liability under federal employment law. "Permitting prior pay in setting salary but not as an affirmative defense to the Equal Pay Act results in an indefensible contradiction." Pet. App. 39a (McKeown, J., concurring). If there is going to be a nationwide federal ban on the use of prior pay in setting salaries, this Court, not the Ninth Circuit, should be the one to say so.

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[9] Yuki Noguchi, *More Employers Avoid Legal Minefield by Not Asking About Pay History*, NPR (May 3, 2018), *available at* https://tinyurl.com/y8d44oqk.

III. PRIOR SALARY IS A "FACTOR OTHER THAN SEX" UNDER THE EQUAL PAY ACT

In addition to deepening an entrenched, important circuit split, the Ninth Circuit wrongly limited employers' ability to rely on prior pay.

A. Prior Salary Is a Factor Other Than Sex.

The Equal Pay Act generally requires employers to pay equal wages for equal work; employers may not "discriminate … on the basis of sex by paying wages to employees … at a rate less than the rate at which [they] pay[] wages to [similarly situated] employees of the opposite sex." 29 U.S.C. § 206(d)(1). But the Act allows such differentials 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." *Id.*; *see also* 42 U.S.C. § 2000e-2(h) (incorporating the Equal Pay Act's defenses into analogous Title VII claims).

The question here is whether a wage differential based on the employees' prior salaries is "a differential based on any other factor other than sex." To ask that question is to answer it. "In common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007). It therefore "has the same meaning as the phrase 'because of.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). As this Court has explained, that phrase "mean[s] 'by reason of: on account of.'" *Id.* (citation omitted). And this Court has "often held" that those "terms … indicate a but-for causation requirement." *Comcast Corp. v. Nat'l Ass'n of African Am.-*

Owned Media, __ S. Ct. __, 2020 WL 1325816, at *4 (U.S. Mar. 23, 2020); *see also, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (Title VII's anti-retaliation provision "require[s] proof that the desire to retaliate was the but-for cause of the challenged employment action" because it makes it unlawful to take action against an employee "because" of his protected activities). Accordingly, a wage disparity is "based on" sex only if sex is "the 'reason' that the employer" paid male and female workers differently. *Gross*, 557 U.S. at 176. If the wage disparity stems from any other source, the employer is not liable; the disparity is based on a "factor other than sex."

A system that determines current pay based on prior pay is permissible under these straightforward provisions. By definition, the *reason* for wage disparities in such a system is the employees' wages in their former positions, not their sex. But as just explained, wage disparities justified on grounds *other* than sex are "based on any other factor other than sex" for purposes of the Act. Disparities based on prior pay thus fall outside the statute's reach.

This remains true even if, as the Ninth Circuit asserted, prior pay is correlated with sex—indeed, even if, *unlike* here, *see supra* 3–5, it is directly correlated with sex in a particular case. Imagine a pharmaceutical company that pays more to sales reps with a B.S. in physics than to those with a B.A. in English—an indisputable "factor other than sex." Now suppose a male rep who studied Chaucer gets paid less than a woman who studied Newton. He might be able to show that, in fact, his pay was *affected* by sex; for instance, he could prove that his alma mater's

science departments preferred female candidates and that this preference forced him into the humanities. But he cannot show that his pay was "based on" sex; it was "based on" educational attainment, a sex-neutral factor that does not transform into a sex-based one simply because the two are correlated. Only if the company used field of study as *pretext* to pay him less would the Equal Pay Act intervene.

This textual conclusion derives additional strength from the Equal Pay Act's focus on disparate treatment rather than disparate impact. The Equal Pay Act was "designed differently" than Title VII. *Gunther*, 452 U.S. at 170. Unlike that statute, Congress "confine[d] [its] application" to disparate treatment—that is, "to wage differentials attributable to sex discrimination"—through the catchall defense. *Id.*; *see id.* at 171 ("[C]ourts and administrative agencies are not permitted to substitute their judgment for the judgment of the employer … who [has] established and applied a bona fide job rating system, so long as it does not discriminate on the basis of sex." (alteration in original, internal quotation marks omitted). Of course, this is not to say that the Equal Pay Act mirrors Title VII's disparate-treatment provisions in every respect. Unlike a Title VII plaintiff, an Equal Pay Act plaintiff need not "pro[ve] … intentional discrimination"; she can prevail if she proves a wage disparity and the employer provides no defense. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007), *superseded by statute on other grounds*, Pub. L. No. 111-2 (2009). But once an employer invokes the Act's general defense, liability turns on whether the disparity is "based on" sex or

something else, *see Gunther*, 452 U.S. at 170–71, the hallmark question of disparate-treatment liability.

An Equal Pay Act claim based on prior pay is, at best, a disguised disparate-impact claim. Indeed, the Ninth Circuit admitted as much. It rejected Petitioner's (and *Gunther*'s) explanation that the Equal Pay Act's catchall defense incorporates disparate-treatment principles. *See* Pet. App. 19a. And it grounded its rejection of prior pay as a "factor other than sex" in large part on the effects that using prior pay allegedly has on women. *See, e.g.*, *id.* ("[A]llowing prior pay to serve as an affirmative defense would undermine the Act's promise of equal pay for equal work."); Pet. App. 21a ("[T]he history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex."). But even if prior pay and sex correlated perfectly, this reasoning would be mistaken. The Equal Pay Act does not cover "practices that are fair in form, but discriminatory in operation." *Gunther*, 452 U.S. at 170 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). Instead, it attacks only "sex-based wage discrimination." *Id.* at 171.

B. The Ninth Circuit's and Other Circuits' Counterarguments Are Unpersuasive

Prior pay is thus a "factor other than sex" under the Equal Pay Act. The two other possibilities—that prior pay is *never* a factor other than sex, or that it sometimes is and sometimes isn't—are incorrect.

The Ninth Circuit rule. Literally speaking, prior pay must be a "factor other than sex"; it is differ-

ent than sex, and it is the basis for some employees' differential wages. The Ninth Circuit thus had to explain why "any … factor other than sex" does not really mean "*any* … factor other than sex." To do so, the court first reasoned that if any sex-neutral factor qualified, then the first "other" in "any other factor other than sex" would be superfluous. Pet. App. 12a. This is a strange argument. Without that "other," the Act would wrongly suggest that its specific exemptions—for seniority systems, merit systems, and quality- or quantity-of-production systems—are "based on sex." Reading the catchall as Petitioner does gives full meaning to that "other" while recognizing what unites all the exemptions: each allows disparities not "based on … sex."

The Ninth Circuit also reasoned that section 206(d)(1)'s specific exceptions are each "job-related." Pet. App. 12a. From that, it concluded that section 206(d)(1)'s "general exception" should be similarly limited to "job-related factors." Pet. App. 13a; *see* Pet. App. 13a–14a (invoking the *noscitur a sociis* and *ejusdem generis* canons); Pet. App. 14a–16a (discussing legislative history to prove the same point). Because the majority believed that prior salary "is necessarily" not a job-related factor, Pet. App. 18a, it held that prior salary "does not qualify as a factor other than sex" under the EPA. Pet. App. 24a.

That argument also fails. *First*, in the context of section 206(d)(1)—a provision that forbids sex discrimination in the wage context—the most obvious common feature of the first three exceptions is that each is sex-neutral; they otherwise have little in common. (Merit-based systems and seniority-based systems, for example, are typically viewed as oppo-

sites.) Given that chief commonality, section 206(d)(1)'s catchall should be construed exactly as its plain language suggests: to cover any factor that is sex-neutral, as prior salary is. In fact, a plurality of this Court has already adopted that reading: "[I]n the Equal Pay Act … , Congress barred recovery if a pay differential was based 'on any other factor'—*reasonable or unreasonable*—'other than sex.'" *Smith v. City of Jackson*, 544 U.S. 228, 239 n.11 (2005) (plurality op.) (emphasis added).

Second, even if the first three exceptions were "job-related," that would not justify the Ninth Circuit's ultimate conclusion. Prior salary *is* job-related; more qualified, experienced, and high-performing employees tend to make more. Employers' actions demonstrate as much. If prior pay were as disconnected from qualifications, performance, and experience as the Ninth Circuit suggests, it would be remarkable that "many employers both public and private" give "lateral entrants a salary at least equal to what they had been earning." *Wernsing*, 427 F.3d at 467; *see supra* 19–22. So even if the Ninth Circuit rightly cabined "any other factor other than sex" to "job-related" factors, prior salary would make the cut.

The Ninth Circuit also relied on what it regarded as the overarching purpose of the Equal Pay Act: to stop "pervasive wage discrimination in the American workforce." Pet. App. 21a. Per the court, "allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose … by perpetuating sex-based wage disparities." *Id.*

This atextual, unmanageable position—that the use of any factor that might "perpetuat[e] sex-based wage disparities" violates the Act—makes no sense

given the rest of the statute. Seniority systems undoubtedly had the potential to perpetuate sex-based discrimination in 1963, yet Congress exempted them. So too for merit-based systems; women systematically deprived of training and educational opportunities could hardly have been expected to compete on equal footing going forward. But Congress did not pass a disparate-impact provision targeting residual harms; it "confine[d]" the Equal Pay Act's "application" "to wage differentials attributable to sex discrimination." *Gunther*, 452 U.S. at 170.

This is not surprising. Even if some legislators had wanted to wipe away every trace of prior discrimination, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Id.* at 526. In the Equal Pay Act, Congress arrived at a legislative compromise that broadly permits disparate salaries, so long as they are based on "*any* other factor other than sex." 29 U.S.C. § 206(d)(1) (emphasis added).

In any event, the legislative history confirms that Congress meant what it said in the catchall:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible

> to list each and every exception, the broad general exclusion has also been included.

House Comm. on Equal Pay Act of 1963, H.R.Rep. No. 88-309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 689. Petitioner's reading fully accords with this understanding that the factor-other-than-sex exclusion would constitute a "broad general exclusion."

The Other Alternatives. In four other circuits, prior salary is sometimes, but not always, a "factor other than sex." These circuits have provided no good reason for their positions.

Consider the circuits that allow the use of prior pay where the employer has "legitimate business reason[s]" for doing so. *Aldrich*, 963 F.2d at 526; *accord Beck-Wilson*, 441 F.3d at 365. They defend their view on grounds much like the Ninth Circuit's—that the Act's "statutory history" supposedly shows that "Congress intended for a job classification system to serve as a factor-other-than-sex defense … only when the employer proves that the job classification system … is rooted in legitimate business-related differences." *Aldrich*, 963 F.2d at 525; *see Beck-Wilson*, 441 F.3d at 365. These circuits are mistaken for the same reason as the Ninth Circuit: the Act's text and legislative history demonstrate that "any" means "any."

Nor is it coherent to hold that prior pay can be a factor other than sex only if it is used along with other factors. Prior salary is or is not a "factor other than sex"; whether prior salary is considered together with other factors cannot affect that interpretive question. As Judge Reinhardt's now-vacated opinion put it, these courts have adopted a "distinction with-

out reason," one that "cannot [be] reconcile[d] … with the text or purpose" of the Act. Pet. App. 79a.

* * *

There should be one, uniform answer to the important question whether the Equal Pay Act permits employers to base wages on prior pay. Because there is not, and because the Equal Pay Act permits employers to consider prior salary, this Court should grant certiorari and reverse the decision below.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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