

# ADDRESSING PERPETUAL PAY INEQUITY: A CONTINUED MUDDYING OF THE EQUAL PAY ACT'S STRICT LIABILITY STANDARD

**Abstract:** On March 26, 2024, in *Boyer v. United States*, the Court of Appeals for the Federal Circuit held that employers may leverage prior pay as an affirmative defense to Equal Pay Act (EPA) claims where they demonstrate that gender discrimination did not influence previous compensation rates and that federal and private employers are equally subject to the parameters of the EPA. In doing so, the Federal Circuit furthered judicial discourse on the use of prior pay as a defense under the EPA, while extending a significant protection to federal employees. This Comment argues that *Boyer* errs by imposing a quasi-intent requirement in an analysis of EPA claims and that the Ninth Circuit's *Rizo v. Yovino* decision better comports with the Act's legislative purpose.

## INTRODUCTION

When the United States Congress passed the Equal Pay Act (EPA) in 1963, gender equality advocates hoped to secure a meaningful workplace protection to bridge the staggering forty-one percent gender pay gap of the 1960s.<sup>1</sup> After nearly 100 years of state, local, and national activism, these efforts led to the Equal Pay Act.<sup>2</sup>

The debate regarding pay inequity first rose to the national stage when an 1869 *New York Times* Letter to the Editor boldly questioned unequal pay for female government employees.<sup>3</sup> Despite continued efforts over the subsequent

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<sup>1</sup> *Equal Pay Act of 1963*, NAT'L PARK SERV. (Apr. 1, 2016), <https://www.nps.gov/articles/equal-pay-act.htm> [<https://perma.cc/ADV9-Z5K5>] (highlighting that President Kennedy's historical legislation recognized women's essential role in the nation's economic success and underscored their right to equal treatment in the workplace). In 1942, during the Second World War, the National War and Labor Board initially advocated for gender-equal pay, with the Act proposed three years later, though it took eighteen years to pass into law. See Melissa Fugiero, *The Equal Pay Act of 1963*, BRITANNICA (June 12, 2024), <https://www.britannica.com/topic/Equal-Pay-Act> [<https://perma.cc/A22N-EZCJ>] (discussing the history of the EPA).

<sup>2</sup> See Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 562 (2020) (highlighting nationwide activism for equal pay protections).

<sup>3</sup> See Letter to the Editor, *Women as Government Clerks*, N.Y. TIMES, Feb. 18, 1869, at 2 (explaining that despite a lack of consensus on political equality of men and women, few would deny the basic principle of equal work necessitating equal pay). The letter notes the lack of action on this principle, complaining that "it is one thing to acknowledge the right of a principle and quite another to practice it." *Id.*

decades, it was not until World War II that Congress began to contemplate federal legislation to remedy the devaluation of women in the workforce.<sup>4</sup>

Irrespective of the Act's ambitions, more than sixty years later, a meaningful pay disparity persists on a national scale.<sup>5</sup> Today, females make approximately eighty-three cents for each male dollar.<sup>6</sup> This disparity remains inexcusably escalated for minorities such as Hispanic and Black women who earn sixty-five and seventy cents, respectively, compared to white male employees.<sup>7</sup> In practice, courts continue to diverge on key issues regarding the EPA's enforcement—chiefly, how to interpret prior pay as an affirmative defense to EPA violation claims.<sup>8</sup>

In 2024, in *Boyer v. United States*, the Court of Appeals for the Federal Circuit considered this question.<sup>9</sup> The Federal Circuit held that employers *may* use prior pay as an affirmative defense if they can demonstrate that gender discrimination did not cause the prior pay rate or that the prior pay analysis occurred in tandem with non-gender-based factors.<sup>10</sup> Additionally, the court held that the EPA applied equally to federal and private employers.<sup>11</sup>

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<sup>4</sup> See 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/> [<https://perma.cc/A22N-EZCJ>] (summarizing prominent outcries for equal pay throughout the 19th and early 20th centuries). Early attempts towards pay equity included a weakened 1870 resolution for equal pay among government employees, an unsuccessful 1883 Western Telegraph Company strike seeking "equal pay for equal work," and a 1911 victory of NY teachers in receiving equal pay to their male colleagues from the Board of Education. *Id.*

<sup>5</sup> See Janet L. Yellen, *The History of Women's Work and Wages and How It Has Created Success for All of Us*, BROOKINGS INST. (May 2020), <https://www.brookings.edu/articles/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/> [<https://perma.cc/A22N-EZCJ>] (highlighting the persistent challenges to achieving true pay equity, with a present wage gap of eighty-three cents made by women to every male dollar).

<sup>6</sup> *Id.*; Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/article/quick-facts-gender-wage-gap/> [<https://perma.cc/C77M-UCJT>].

<sup>7</sup> See Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RSCH. CTR. (Mar. 1, 2023), <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/> [<https://perma.cc/4FGK-EGQE>] (examining the gender-pay gap by age, marital and parental status, education, occupation, race and ethnicity). Across a woman's lifetime, as she ages her pay relative to men of her age cohort decreases, and regardless of parental status, employed mothers earn approximately the same as similarly situated female counterparts without children, with both groups making less than employed fathers. *Id.*

<sup>8</sup> See *Boyer v. United States*, 97 F.4th 834, 841 (Fed. Cir. 2024) (considering the three different ways appellate circuits interpret prior pay affirmative defenses).

<sup>9</sup> *Id.* at 840.

<sup>10</sup> See *id.* at 843 (holding the *Boyer* determination is compatible with the EPA's aim of providing employer flexibility, meeting legitimate business needs, and undoing gender discrimination). In reaching this decision, the *Boyer* court widened the circuit split on the question of whether prior pay serves as a permissible affirmative defense to EPA violation claims, and the extent to which it must be evaluated in consideration with other factors. *Id.*

<sup>11</sup> See *id.* at 848 (finding that federal pay statutes only authorize contemplation of prior pay where this is *not* in conflict with an existing statute, as these statutes do not mandate such consideration but

Part I of this Comment explores the history and current status of the EPA and outlines the background of *Boyer*.<sup>12</sup> Part II examines differing judicial approaches to using prior pay as an affirmative defense in EPA gender disparity claims.<sup>13</sup> Part III argues that *Boyer* wrongly imposes a quasi-intent requirement into EPA claim review and that the Ninth Circuit's *Rizo v. Yovino* offers a superior analysis in light of the enduring pay disparity that better achieves the original purpose and aims of the EPA.<sup>14</sup>

## I. CONTEXT AND BACKGROUND OF *BOYER V. UNITED STATES*

In 2024, in *Boyer v. United States*, the Court of Appeals for the Federal Circuit held that employers may leverage prior pay as an affirmative defense to Equal Pay Act (EPA) violation claims.<sup>15</sup> The Court also determined that federal and private employers must meet the same standards under the EPA.<sup>16</sup> Section A of this Part discusses applicable federal law, which includes the Fair Labor Standards Act (FLSA), the EPA, Title VII of the 1964 Civil Rights Act (Title VII), and relevant federal pay statutes.<sup>17</sup> Section B focuses on the circuit split, across the Fourth, Seventh, Eleventh, Sixth, Ninth, and Federal Circuits, wherein courts determine whether prior pay alone, or in combination with other factors, can act as an EPA affirmative defense.<sup>18</sup> Finally, Section C reviews the background and procedural history of *Boyer*.<sup>19</sup>

### A. Development of the FLSA, EPA, and Title VII

Congress passed the FLSA in 1938 to protect American workers by creating the federal minimum wage, child labor laws, and a maximum work week.<sup>20</sup>

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merely permit it). This determination came in response to attempts by the government employer in *Boyer* to exempt itself from equal application of the EPA, in light of existing federal pay setting statutes that provided contrary guidance. *Id.*

<sup>12</sup> See *infra* notes 15–54 and accompanying text.

<sup>13</sup> See *infra* notes 55–80 and accompanying text.

<sup>14</sup> See *infra* notes 81–119 and accompanying text.

<sup>15</sup> See *Boyer*, 97 F.4th at 841–43 (recognizing that allowing prior pay to serve as an affirmative defense may perpetuate present discrimination, and aligning with the Sixth, Tenth, and Eleventh Circuits by adopting a “middle ground” stance to the prior pay affirmative defense).

<sup>16</sup> See *id.* at 846 (citing the lack of congressional statutory language indicating a desire for the EPA to apply differently to federal employees than those with other employers).

<sup>17</sup> See *infra* notes 20–33 and accompanying text.

<sup>18</sup> See *infra* notes 34–40 and accompanying text.

<sup>19</sup> See *infra* notes 41–54 and accompanying text.

<sup>20</sup> See Steven F. Pockrass, *The FLSA After 80 Years, Part I: Major Changes, Current Compliance Concerns, and Possible Revisions*, OGLETREE DEAKINS (June 26, 2018), <https://ogletree.com/insights-resources/blog-posts/the-flsa-after-80-years-part-i> [<https://perma.cc/F9T6-ASZZ>] (taking stock of the FLSA's major changes in light of the Act's 80th anniversary, including the Portal to Portal Act of 1947, the EPA, the Employee Commuting Flexibility Act of 1996, and other meaningful updates throughout the 70s, 90s, and early 2000s). Over the past eighty-six years, lawmakers have made several revisions to the

In 1963, Congress expanded the FLSA to include protections against sex-based wage discrepancies, seeking to eradicate the long-standing practice of compensating women less than men.<sup>21</sup> The amended language outlined four exceptions to impermissible wage discrimination, notably including “a differential based on any other factor other than sex.”<sup>22</sup> When passing the EPA, Congress intended to address gendered pay differentials that burdened commerce, artificially lowered living standards, and led to under-utilization of the workforce.<sup>23</sup> Only one year later, Congress passed the Civil Rights Act (CRA) of 1964.<sup>24</sup> Title VII of the CRA included protections against *intentional* employment discrimination for protected classes, including gender, when setting an employee’s compensation or employment terms.<sup>25</sup> To clarify potential disparities between the EPA and

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FLSA, including raising the federal minimum wage, passing the EPA, and extending its coverage to public sector employees. *Id.* At its inception the FLSA applied to only one-fifth of the American labor force and included a message to Congress to provide “able-bodied working men and women a fair day’s pay for a fair day’s work.” Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978 22, 22–25. The 1974 amendments expanded the FLSA’s protections to include Federal employers who Congress originally excluded from the Act’s coverage. 29 U.S.C. § 203(e)(2)(A); *Boyer*, 97 F.4th at 847.

<sup>21</sup> See 29 U.S.C. § 206(d)(1) (stating that no employer shall discriminate “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”); *Rizo v. Yovino*, 950 F.3d 1217, 1219 (9th Cir. 2020) (summarizing the purpose of the EPA, noting that the Act served to advance a mandate both “simple” and “profound,” when seeking to guarantee equal pay for equal work).

<sup>22</sup> See 29 U.S.C. § 206(d)(1) (excepting “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production”).

<sup>23</sup> See Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (outlining Congress’s declaration of purpose, which included findings on the harms sex-based pay differences caused to the overall economy and labor market). In the 1960s, before Congress enacted the EPA, approximately twenty-five million American women participated in the labor market, representing roughly thirty-seven percent of the workforce but only earning fifty-nine cents for every dollar earned by men. *Equal Pay Act of 1963*, *supra* note 1. World War II boosted women’s participation in the workforce, but post-war federal and local policies favored male replacements and reclassified female roles, resulting in enduring pay disparities that eventually spurred the EPA legislation of the 1960s. See *id.* (reviewing the background of the EPA and the evolving role of women in the workforce).

<sup>24</sup> See *Equal Pay Act of 1963*, *supra* note 1 (noting that this Act bolstered legal gender-equality protections).

<sup>25</sup> 42 U.S.C. § 2000e-2(a)(1) (outlining general unlawful employment practices forbidden on the categories of “race, color, religion, sex, or national origin”). To raise a Title VII claim, courts must follow a three-step process wherein the plaintiff must establish a *prima facie* case, the defendant must assert a non-discriminatory reason for the adverse employment action, and the plaintiff may attempt to prove pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973), *holding modified by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 (1993). Title VII forbids *intentional* discrimination when determining an employee’s compensation or other terms of employment. See *id.* at 797 (stating it is unlawful for an employer to reject a candidate, fire an employee, or discriminate against an individual regarding their “compensation, terms, conditions, or privileges of employment” because of a status within a protected group).

Title VII, Congress passed the Bennett Amendment, directing courts to allow behavior that might be unlawful per the CRA, if permitted under the EPA.<sup>26</sup>

In 1974, in *Corning Glass Works v. Brennan*, the Supreme Court established the standard for raising a claim under the EPA.<sup>27</sup> To succeed, a plaintiff must demonstrate that their employer paid unequal wages to employees of different sexes for work on jobs requiring “equal skill, effort, and responsibility,” when performed under parallel working conditions.<sup>28</sup> Once the plaintiff establishes a prima facie case, their employer then bears the burden to demonstrate that the wage differential qualifies as a legitimate EPA exception.<sup>29</sup> If the employer meets this burden, the plaintiff must then prove that the employer’s defense is merely a pretext.<sup>30</sup> In the same year that the Supreme Court decided the seminal *Corning* case, Congress also passed amendments to the FLSA extending its protection to employees of the United States government.<sup>31</sup>

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<sup>26</sup> 42 U.S.C. § 2000e-2(h). The Bennett Amendment provides:

It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 4(d) of the Fair Labor Standards Act of 1938, as amended.

*Id.* See Victoria Lazar, *Not Any Factor Other Than Sex: A Proper Limit to Defending the Equal Pay Act*, 1989 U. CHI. LEGAL F. 309, 310 (explaining how the EPA establishes a “floor” for which cases regarding disparities in pay may be brought under Title VII). Legal scholars debate whether the Bennett Amendment incorporates the elements required of an EPA claim into Title VII, and subsequently weakens potential Title VII wage-based-discrimination protections. *Id.*; James B. Ropp, *The Bennett Amendment: A Loophole in the Prohibition Against Sex Discrimination in Compensation Under Title VII?* 85 DICK. L. REV. 67, 68 (1980).

<sup>27</sup> See 417 U.S. 188, 190 (1974) (identifying an EPA violation when an employer paid male night-shift workers more than female day-shift workers, holding that the employer failed to prove that they set the higher male pay based on the status of “night work” instead of the sex).

<sup>28</sup> *Id.* at 195. Establishing EPA claims does not require intent, and the law indicates a standard more akin to strict liability. See *Meeks v. Comput. Assocs. Int’l*, 15 F.3d 1013, 1019 (11th Cir. 1994) (indicating that, unlike Title VII claims, the EPA does not require the plaintiff to demonstrate the defendant’s discriminatory intent).

<sup>29</sup> See *Corning*, 417 U.S. at 195 (holding that although the FLSA does not explicitly outline this procedure, once the plaintiff demonstrates that an employer pays workers of one gender more than those of another for the same work, the burden shifts back to the employer to establish one of the noted exceptions). A prima facie case is “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.” *Prima Facie*, BLACK’S LAW DICTIONARY (12th ed. 2024).

<sup>30</sup> See *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (allowing a plaintiff to challenge the purported “legitimate” reason for the questioned pay differential (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802–04)).

<sup>31</sup> *Boyer v. United States*, 97 F.4th 834, 845–46 (Fed. Cir. 2024). Leading up to these amendments, the Senate Committee on Labor and Public Welfare’s 1972 report noted that standards for private employers ought to apply equally to the government. See S. REP. NO. 92-842, at 18 (1972) (stating that government ought to “apply to itself any standard it deems necessary to apply to private employment”). Similarly, in 1974, a Senate Report stated the bill’s purpose was amending the FLSA to cover additional employees. See S. REP. NO. 93-690, at 1–2 (1974) (articulating the intent of the Senate committee’s desire to broaden the Act’s protection to cover more workers).

Federal statutory guidance for employee pay-setting eventually threw this protection into question.<sup>32</sup> Finally, in 2007, in *Ledbetter v. Goodyear Tire and Rubber Co.*, the Supreme Court held that EPA claims do not require preliminary filing with the Equal Employment Opportunity Commission (EEOC) or proof of deliberate discrimination.<sup>33</sup>

### *B. Circuit Split Regarding Prior Pay Affirmative Defenses*

As circuits applied the rules set forth in the EPA and modeled by *Corning*, they came to differ on how to interpret the “factor other than sex” exception, particularly as it applied to questions of prior compensation.<sup>34</sup> In 1987, in *Covington v. Southern Illinois*, the Seventh Circuit addressed this question, holding that prior wages as part of a salary retention policy *could* amount to a “factor other than sex.”<sup>35</sup> This decision established the view of the Fourth and Seventh

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<sup>32</sup> See 5 U.S.C. § 5333 (addressing the pay-setting authority given to federal employers, permitting specific exceptions to the established minimum pay grades, and indicating that the Office of Personnel Management may consider factors such as current pay, exceptionally high or unique qualifications, or special governmental needs when appointing a salary above the minimum rate in their grade); 38 U.S.C. § 7408(b) (stating that the Secretary “after considering an individual’s existing pay, higher or unique qualifications, or the special needs of the Department, may appoint the individual . . . at a rate of pay above the minimum rate”). Courts have considered the use of the word “may” to indicate permissive, non-mandatory, statutory language. See *Opati v. Republic of Sudan*, 590 U.S. 418, 428 (2020) (stating that where courts “may” award punitive damages, the use of “may” grants district courts discretion to consider the nuances of the case at hand but does not mandate such an award); *Biden v. Texas*, 597 U.S. 785, 802 (2022) (discussing that in statutory language regarding immigration and deportation, where language indicates a Secretary “may return the alien . . . pending a proceeding,” the use of “may” grants discretion to the Secretary to determine whether to execute contiguous-territory return).

<sup>33</sup> 550 U.S. 618, 640 (2007), *superseded by statute on other grounds* by Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111–2, 123 Stat. 5 (rejecting the plaintiff’s argument that EPA claims were not limited by the same rigid statute of limitations as seen for Title VII). In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, modifying the Civil Rights Act of 1964 to remove undue restrictions on the time limit imposed for filing claims. 2 U.S.C. § 2000e–5. This Act was seen as necessary to avoid undermining the statutory protections provided under the FLSA, seeking to provide a “restorative” approach to addressing unfair and gendered workplace discrimination. Suzette M. Malveaux, *Is it Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2455 (2022).

<sup>34</sup> *Boyer*, 97 F.4th at 841.

<sup>35</sup> See 816 F.2d 317, 323 (7th Cir. 1987) (allowing an employer to consider wages previously paid to their employee to determine salary, so long as the policy is not applied discriminatorily based on sex); see also *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987) (determining that not all male-female salary differences are based on a “factor other than sex” according to the statute, if the prior salary classification was caused by sex discrimination); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (recognizing employees who try to negotiate wages near their prior salaries may be unwilling to accept roles unless their compensation nears or equals that of their previous role, but that this evidence should be reviewed cautiously noting that “undue reliance” on prior wage history may “perpetuate differentials that ultimately may be linked to sex”).

Circuits that prior pay alone may justify unequal wages between men and women.<sup>36</sup>

In 1988, in *Glenn v. General Motors Co.*, the Eleventh Circuit rejected this Seventh Circuit holding, finding instead that prior salary *alone* cannot act as an EPA affirmative defense.<sup>37</sup> This decision established the “middle-ground” perspective in the circuit split, supported by the Sixth, Tenth, and Eleventh Circuits.<sup>38</sup> These courts find that employer defendants may only deploy the “factor other than sex” exception if it is paired with evidence of an individual’s prior expertise, capabilities, or training.<sup>39</sup> In 2020, in *Rizo v. Yovino*, the Ninth Circuit most recently re-addressed this issue, and held that consideration of prior pay is incompatible with the EPA, risks perpetuating inequality, and thus may *never* serve as an affirmative defense.<sup>40</sup>

### C. Factual History of *Boyer v. United States*

In 2015, the Birmingham Veterans Affairs Medical Center (BVMC) hired a female clinical pharmacist, Dr. Leslie Boyer (Plaintiff).<sup>41</sup> Six months

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<sup>36</sup> *Covington*, 816 F.2d at 323; see *Spencer v. Va. State Univ.*, 919 F.3d 199, 206 (4th Cir. 2019) (holding that prior salaries are a justified basis for establishing higher compensation). Many courts hold that employers may set higher salaries on “gender-neutral market factors” including “market demand for a skill, trade or profession practiced by the employee” thus qualifying as a “factor other than sex” per the EPA. SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 8:7 (2024). *Black’s Law Dictionary* defines a comparator as someone “treated differently from something or someone else and used as evidence of unlawful treatment of the latter.” *Comparator*, BLACK’S LAW DICTIONARY, *supra* note 29.

<sup>37</sup> See 841 F.2d 1567, 1571 (11th Cir. 1988) (disagreeing with the Seventh Circuit’s *Covington* decision, holding that the court erred when ignoring legislative intent as to the definition of a “factor other than sex”); see also *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988) (holding that to utilize prior salary alone as a “factor other than sex” would “contravene Congress’ intent” and perpetuate existing inequality).

<sup>38</sup> *Glenn*, 841 F.2d at 1571.

<sup>39</sup> See Jeanne M. Hamburg, *When Prior Pay Isn’t Equal Pay: A Proposed Standard for the Identification of “Factor Other Than Sex” Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1096 (1989) (highlighting an 88th Congress House Report finding that the “factor other than sex” exception applies where factors such as shift differentials, experience, training, ability, or circumstances justify a difference in pay).

<sup>40</sup> See 950 F.3d 1217, 1219–20 (9th Cir. 2020) (asserting that using the prior pay affirmative defense to avoid liability would “defeat the purpose of the Act”).

<sup>41</sup> *Boyer v. United States*, 97 F.4th 834, 838 (Fed. Cir. 2024). At Veterans Affairs hospitals, the U.S. government provides care for current and former American service men and women. 38 U.S.C. § 1703. The Veterans Health Administration (VHA) is the largest VA administration, providing hospital care, outpatient clinics, telemedicine, and other services to American veterans, comprising approximately 144 medical centers and 1,232 outpatient care centers. *VA History Summary*, U.S. DEP’T VETERANS AFFS., <https://department.va.gov/history/history-overview/> [<https://perma.cc/N8YM-5FYT>] (Aug. 6, 2024). One study with the National Library of Medicine found that medical facilities, such as VA medical centers, meaningfully contributed to better socio-economic outcomes beyond the clear benefits to veterans’ medical needs. Christos A. Makridis, J.D. Kelly, Gil Alterovitz, *The Effects of Department of Veterans Affairs Medical Centers on Socio-Economic Outcomes: Evidence from the Paycheck Protection Program*, PLOS ONE 17(12) (December 22, 2022), <https://journals.plos.org/plosone/article/>

later, BVAMC hired a male clinical pharmacist to a parallel role.<sup>42</sup> BVAMC assigned Plaintiff and her colleague pay in accordance with the federal hiring General Schedule (GS) System, which sets salary scales by location and outlines various pay grades reflective of salary increases.<sup>43</sup> GS guidance stated that should BVAMC establish a starting salary exceeding the minimum pay within a defined grade, the hiring agent would need to show that the candidate in question possessed qualities justifying the pay raise.<sup>44</sup> Per these instructions, BVAMC hired Plaintiff at grade GS-12 with a Step 7 pay scale, at least partially due to Plaintiff's prior salary of \$115,003 with a former employer, thus qualifying her for a starting salary of \$115,364.<sup>45</sup> BVAMC also assigned Plaintiff's male counterpart the grade of GS-12, but set a Step 10 pay scale, at least partially due to his prior salary of \$130,000 with a previous employer, thus establishing his starting salary at \$126,223.<sup>46</sup> Notably, Plaintiff held seven additional years of experience compared to her colleague, including a background in providing patient mental health services.<sup>47</sup> Despite his comparative lack of experience, the male pharmacist held a biological sciences masters' degree in addition to his pharmacy doctorate.<sup>48</sup>

In 2018, when Plaintiff became aware of the pay disparity, she contacted BVAMC's Human Resources department and subsequently filed a complaint

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id=10.1371/journal.pone.0269588 [https://perma.cc/5X6X-AWJ9]. Additionally, the National Bureau of Economic Research (NBER) has found that VA hospitals saw better patient outcomes, which the NBER attributed partly to the integrated nature of the care, and compensation outside of the privatized "fee-for-service" model seen in most American hospitals. See *VA Hospital Care Improves Health and Lowers Cost*, NAT'L BUREAU ECON. RSCH. (July 6, 2022), <https://www.nber.org/bh-20222/va-hospital-care-improves-health-and-lowers-cost> [https://perma.cc/N8YM-5FYT] (analyzing factors contributing to improved patient outcomes, including compensation).

<sup>42</sup> *Boyer*, 97 F.4th at 838.

<sup>43</sup> *Id.*; 5 C.F.R. § 531.212 (2024).

<sup>44</sup> *Boyer*, 97 F.4th at 838; 5 C.F.R. § 531.212.

<sup>45</sup> *Boyer*, 97 F.4th at 838. As of May 2024, American pharmacists earn an average annual wage of \$134,790. See *Occupational Employment and Wage Statistics*, U.S. BUREAU LAB. STAT. (Oct. 11, 2024), <https://www.bls.gov/oes/current/oes291051.html> [https://perma.cc/QW2N-JC39] (highlighting salaries for pharmacists in the United States). Generally, the pharmaceutical profession is a lucrative field that offers notable pay equality, demonstrating a narrower gender earnings gap compared to other professions of college graduates. See Claudia Goldin & Lawrence F. Katz, *A Most Egalitarian Profession: Pharmacy and the Evolution of a Family-Friendly Occupation*, 34 U. CHI. J. LAB. ECON. 705, 706 (2016) (addressing fair compensation within the pharmacy profession).

<sup>46</sup> *Boyer*, 97 F.4th at 838.

<sup>47</sup> *Id.* By industry, the gender pay gap is most significant in the social assistance and health care fields, with women making up seventy-seven percent of the workforce but earning just forty-three cents for each male dollar. See *Women Continue to Struggle for Equal Pay and Representation*, U.S. GOV'T ACCOUNTABILITY OFF. (Mar. 14, 2023), <https://www.gao.gov/blog/women-continue-struggle-equal-pay-and-representation> [https://perma.cc/4YH9-3LHC] (illustrating the gender pay gap in various industries).

<sup>48</sup> See *Boyer*, 97 F.4th at 838 (noting that the government argued that the master's degree of the male comparator made him "more qualified" in other capacities than Plaintiff, despite her additional work experience).



with the EEOC.<sup>49</sup> Her EEOC wage discrimination claim did not result in any formal recommendations or conclusions from the Commission.<sup>50</sup> Plaintiff then filed an EPA suit with the U.S. District Court for the Northern District of Alabama, where the court initially awarded Plaintiff summary judgment.<sup>51</sup> In response, BVAMC filed a motion to dismiss, citing a lack of subject matter jurisdiction.<sup>52</sup> Thereafter, the magistrate vacated the prior summary judgment and transferred the case to the Federal Claims Court.<sup>53</sup> Both parties again moved for summary judgment, which the court granted to BVMAC, bringing Plaintiff to appeal.<sup>54</sup>

## II. CONFLICTING APPROACHES TO PRIOR PAY

In 2024, in *Boyer v. United States*, the Federal Circuit joined the Sixth, Tenth, and Eleventh Circuits' middle-ground position by conditionally allowing the prior pay affirmative defense.<sup>55</sup> The Federal Circuit also added a new wrinkle to this interpretation, providing employers a path to demonstrate that prior pay was not the result of gender discrimination.<sup>56</sup> Section A of this Part analyzes the Fourth and Seventh Circuits' broad approach to the prior pay affirmative defense, allowing courts to consider prior pay equally to any other relevant consideration.<sup>57</sup> Section B focuses on the Ninth Circuit's complete rejection of the

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<sup>49</sup> See *id.* (referencing the impetus for Plaintiff's EEO discrimination complaint).

<sup>50</sup> *Id.* (recognizing the failure of Plaintiff's attempts to resolve her pay-discrepancy complaint with the EEOC, in advance of her federal claim).

<sup>51</sup> See *id.* at 838–39 (holding that other business reasons, namely prior experience with a division, justified the use of prior salary per the EPA). Summary judgment is awarded where “there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law.” *Summary judgment*, BLACK'S LAW DICTIONARY, *supra* note 29.

<sup>52</sup> *Boyer*, 97 F.4th at 839. Jurisdiction refers to a government's broad authority to govern all people and entities within its territory. See *Jurisdiction*, BLACK'S LAW DICTIONARY, *supra* note 29 (broadly defining “jurisdiction”). Subject matter jurisdiction, more specifically, represents a court's authority over the nature of a case and the relief requested. See *id.* (clarifying “subject-matter jurisdiction”).

<sup>53</sup> *Boyer*, 97 F.4th at 839 (recalling that the Northern District of Alabama granted Plaintiff's motion to transfer her case to the Court of Federal Claims following the government's attempt to obtain a dismissal).

<sup>54</sup> See *id.* at 839–40 (recounting the Claims Court's holding, based on the conclusion that the statute in question did permit evaluation of “factors other than sex” and finding that prior pay standing alone did constitute such a factor).

<sup>55</sup> *Id.* at 843; see *infra* notes 75–80 and accompanying text.

<sup>56</sup> See *Boyer*, 97 F.4th at 844 (distinguishing itself from the Fourth and Seventh Circuits' permissive use of prior pay as an affirmative defense and the Ninth Circuit's total rejection of the prior pay defense). The *Boyer* court's additional “qualification” of this pre-existing rule provides for allowing employers to “otherwise establish that prior pay . . . was not based on sex.” *Id.*

<sup>57</sup> See *infra* notes 60–67 and accompanying text.

same.<sup>58</sup> Finally, Section C examines the Sixth, Tenth, and Eleventh Circuits' middle-ground approach and *Boyer's* contribution to this circuit split.<sup>59</sup>

### *A. Broad Use of Prior Pay: Fourth and Seventh Circuits*

In 1987, in *Covington v. Southern Illinois*, the Seventh Circuit held that prior wages within a salary retention policy were a "factor other than sex" under the EPA, unless employers applied the policy in an unequal manner.<sup>60</sup> This position, later adopted by the Fourth Circuit, advanced the view that prior pay alone may justify unequal wages between male and female comparators.<sup>61</sup> Courts in these circuits reason that markets are unbiased and devoid of intent and emphasize the value of pure supply and demand in setting wages.<sup>62</sup> These circuits reflect the most relaxed treatment of the prior pay affirmative defense, granting courts discretion to consider this factor as they would any other relevant consideration.<sup>63</sup>

Many courts disfavor this approach, because they find it incompatible with the reasoning behind the seminal Supreme Court case on this question.<sup>64</sup> In 1974, in *Corning Glassworks v. Brennan*, the Supreme Court held that the EPA did not allow an employer to pay women less than men simply because they

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<sup>58</sup> See *infra* notes 68–74 and accompanying text.

<sup>59</sup> See *infra* notes 75–80 and accompanying text.

<sup>60</sup> See 816 F.2d 317, 323 (7th Cir. 1987) (permitting an employer to consider an employee's previous wages to determine salary, so long as the policy is not applied discriminatorily based on sex); see also *Riordan v. Kempiners*, 831 F.2d 690, 699 (7th Cir. 1987) (declaring that not all male-female salary differences are based on a "factor other than sex" by the statute's intent, if the prior salary classification was caused by sex discrimination); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (advising caution when relying on prior compensation rates to set pay, but ultimately allowing such considerations where courts determine a higher wage is not related to sex).

<sup>61</sup> See *Spencer v. Va. State Univ.*, 919 F.3d 199, 206 (4th Cir. 2019) (finding that prior salaries are a justified basis for establishing higher compensation). In the *Spencer* decision, the court rejected plaintiff's claims that her male colleagues were overpaid when compared to plaintiff's wages, additionally rejecting plaintiff's claims that her work was "equal" to that of her co-workers in question. *Id.*

<sup>62</sup> See *Wersing v. Dep't of Hum. Servs., State of Ill.*, 427 F.3d 466, 468–70 (7th Cir. 2005) (rejecting the plaintiff's argument that "because all pay systems discriminate on account of sex, any use of prior pay to set salary must be discriminatory," and discounting the premise that wages must be set by employers purely on merit).

<sup>63</sup> See *Boyer v. United States*, 97 F.4th 834, 841 (Fed. Cir. 2024) (noting that these courts view the fourth factor as a "catchall" to include effectively any consideration outside of sex or gender); Lazar, *supra* note 26, at 323–24 (emphasizing that Congress failed to identify limits to "factor other than sex" "catchall" defense, thus leaving courts to establish these limits, often forcing courts to reckon with employer compensation based on factors highly correlated with sex and gender).

<sup>64</sup> See *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988) (rejecting *Covington* and the Seventh Circuit's implicit use of the "market force theory" to justify gendered pay disparities); *Rizo v. Yovino*, 950 F.3d 1217, 1230 (9th Cir. 2020) (noting that per *Corning's* rejection of the "market force theory," the Ninth Circuit could not allow exceptions where "business reasons" or "business policy" justified pay).

were willing to work for less.<sup>65</sup> The Court noted that this theory, while “understandable as a matter of economics,” did not comport with principles of equality articulated within the Act.<sup>66</sup> Despite this, courts in this permissive category hold that employers may set higher salaries based on neutral market factors.<sup>67</sup>

### *B. Total Rejection of Prior Pay: Ninth Circuit*

In 2020, in *Rizo v. Yovino*, the Ninth Circuit expressed a holding in stark contrast to the Fourth and Seventh Circuits when it reexamined the question of prior pay.<sup>68</sup> Here, the Ninth Circuit held that prior pay may *never* be the basis of an EPA affirmative defense because such consideration is both incompatible with the EPA’s legislative purpose and text, and prone to exacerbate inequality.<sup>69</sup> The court reasoned that use of prior pay would necessarily, naturally, and indefinitely perpetuate a gendered pay disparity.<sup>70</sup> The Ninth Circuit’s stance reflects the least permissive treatment of the prior pay affirmative defense.<sup>71</sup>

Within its analysis, the *Rizo* court held that a strict treatment of prior pay was compatible with a close textual reading of the EPA and most comported with Congress’s goals, particularly in the face of persistent disparities.<sup>72</sup> The Ninth Circuit also articulated that a middle-ground approach that pushes courts to explore the “reasonability” of prior pay blurs the distinction between the

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<sup>65</sup> See 417 U.S. 188, 205 (1974) (holding that an employer’s exploitation wage differential was incompatible with the EPA).

<sup>66</sup> See *id.* (recognizing that in *Corning*, employers were responding to the reality that male workers would refuse the low rates paid to female inspectors, thus creating conditions where the factory was incentivized to pay female workers below male counterparts, for the same manner of work).

<sup>67</sup> OMILIAN & KAMP, *supra* note 36, § 8:7.

<sup>68</sup> See 950 F.3d 1217, 1219–20 (9th Cir. 2020) (hearing the case of a Fresno County education consultant, who brought a suit upon learning she was paid less than all of her male colleagues, despite possessing higher education and more years of experience).

<sup>69</sup> See *id.* (overturning the Ninth Circuit holding of *Kouba v. Allstate Insurance Co.* which did permit some consideration of prior pay, in closer alignment with the Sixth, Tenth, and Eleventh Circuits); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (holding that the EPA did not prohibit the prior pay affirmative defense where “reasonably” advancing a “acceptable business reason”), *overruled by Rizo*, 950 F.3d at 1217.

<sup>70</sup> See *Rizo*, 950 F.3d at 1222 (finding that such a policy “by its nature, would perpetuate the gender-based pay gap indefinitely”). This opinion received wide attention in overturning *Kouba*, setting a new Ninth Circuit precedent and deepening a circuit split by prohibiting employers from using prior salary history. Jennifer Safstrom, *Salary History, and Pay Parity: Assessing Prior Salary History as a “Factor Other Than Sex” in Equal Pay Act Litigation*, 31 YALE J.L. & FEMINISM 135, 137–38 (2019). Although in 2019 the Supreme Court remanded and vacated on procedural grounds, in 2020 the Ninth Circuit reaffirmed the *Rizo* decision. Lobel, *supra* note 2, at 550.

<sup>71</sup> See *Boyer v. United States*, 97 F.4th 834, 841 (Fed. Cir. 2024) (determining that prior pay can never serve as a justification, noting that America’s history of systemic pay discrimination prevents use of the prior pay affirmative defense).

<sup>72</sup> See *Rizo*, 950 F.3d at 1224–25 (reviewing the EPA’s language and the congressional commentary in the lead-up to the Act’s passage).

Title VII and EPA tests.<sup>73</sup> Finally, in *Rizo*, the court preempted criticism of a lack of feasibility caused by its perspective, citing *Covington*'s rejection of a "market forces" argument.<sup>74</sup>

### *C. An Evolving Middle Ground: Sixth, Tenth, and Eleventh Circuits*

In 1988, in *Glenn v. General Motors Co.*, the Eleventh Circuit created a middle-of-the-road approach to addressing the question of whether prior pay may serve as an affirmative defense.<sup>75</sup> Here, the court found that employers could not use the "factor other than sex" exception when considering prior pay alone, but could cite this defense when considering pay in tandem with other factors.<sup>76</sup> The Sixth and Tenth Circuits joined this approach, articulating the basic logic that if discrimination contributed to a pre-existing pay gap, relying on this pay standard could create cyclical inequality.<sup>77</sup>

These circuits permit employers to use prior compensation as an affirmative defense only if they can demonstrate they considered at least one allowed category of activity.<sup>78</sup> In this way, these circuits aim to protect against reliance on prior pay where gender unduly influenced the prior pay rate.<sup>79</sup> This approach is more lenient than the Ninth Circuit in responding to the argument that prior pay considerations are essential for salary negotiations and potentially reflective of "legitimate business-related differences" among employees.<sup>80</sup>

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<sup>73</sup> See *id.* at 1230 (finding the Ninth Circuit's previous consideration of whether employers "reasonably" used prior pay conflicted with the EPA's status as a strict liability test).

<sup>74</sup> See *id.* (rejecting the Ninth Circuit's previous reliance on "business reasons" as a justification for prior pay disparity).

<sup>75</sup> See 841 F.2d 1567 at 1568–71 (reviewing the case of three female General Motors employees, who alleged EPA violations wherein the highest paid among the three made less than the lowest paid male counterpart, despite the plaintiffs' superior tenure in their positions).

<sup>76</sup> *Id.*; see Hamburg, *supra* note 36, at 1096 (highlighting that the "factor other than sex" affirmative defense can most likely best be explained as congressional responsiveness to industry considerations when setting pay, as opposed to other non-business related characteristics).

<sup>77</sup> See *Boyer v. United States*, 97 F.4th 834, 841–42 (Fed. Cir. 2024) (concluding that the Sixth, Tenth, and Eleventh circuits represent a middle-ground in their treatment of the pay affirmative defense). Despite the gradual reduction in the earnings gap between male and female employees, in 2022, women working full-time earned markedly less than their male counterparts. See Yellen, *supra* note 6 (highlighting the continued earnings disparity).

<sup>78</sup> See *Balmer v. HCA, Inc.*, 423 F.3d 606, 613 (6th Cir. 2005) (holding that employer defendants may cite prior pay as an affirmative defense to a pay disparity, provided that it is not the sole justification).

<sup>79</sup> *Id.*; *Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (noting that prior pay may be a consideration, but the EPA prohibits employers from using prior salary alone to defend a gender-based pay differential).

<sup>80</sup> See *Riser*, 776 F.3d at 1199 (holding that the EPA does not allow a pay disparity to be solely justified by prior salary, instead requiring a showing of "legitimate business-related differences in work responsibilities and qualifications"); *Balmer*, 423 F.3d at 612 (holding that defendant's higher salary was justified when rooted in a combination of several factors, including that defendant explicit-

### III. *BOYER* AS A MOVEMENT FARTHER AWAY FROM THE EPA'S STRICT LIABILITY ROOTS

In 2024, in *Boyer v. United States*, the Federal Circuit adopted the middle-ground stance, adding the caveat that employers may also leverage the prior pay affirmative defense if they can prove that prior pay was not the result of gender discrimination.<sup>81</sup> Yet the Federal Circuit failed to clarify how parties would establish this position.<sup>82</sup> The *Boyer* determination was notable for the Federal Circuit, as it aligned itself with a growing majority of circuits adopting the middle-ground approach.<sup>83</sup> Additionally, the *Boyer* court held that government employers, including the Veterans Affairs (VA), cannot avoid EPA liability and must uphold the same standards as private employers in this regard.<sup>84</sup>

Although *Boyer* provided this important protection for federal workers, it contributed to the wider trend of incorrectly muddying the strict liability standard of the EPA.<sup>85</sup> Section A of this Part revisits the Ninth Circuit's analysis of the quasi-intent requirement of the middle-ground test, applying this reasoning to the facts in *Boyer* case.<sup>86</sup> Section B considers how this interpretation is in-

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ly requested a higher pay point than the plaintiff, previously held a higher compensation rate, and possessed a more applicable background in the industry).

<sup>81</sup> See 97 F.4th at 843 (holding that use of the middle-ground approach satisfies the EPA's central purpose and goals and at the same time recognizes that prior pay can be a proxy for sex).

<sup>82</sup> See *id.* (leaving it to future cases to determine and evaluate the evidence necessary to meet this newly established burden).

<sup>83</sup> See *id.* (aligning the Federal Circuit with the holdings of the Sixth, Tenth, and Eleventh Circuits). This case overturned the Federal Circuit's previously restrictive perspective, determined in the 2018 case *Gordon v. United States*. See 903 F.3d 1248, 1251–52 (Fed. Cir. 2018) (holding against two women who claimed raises given to male co-workers violated the EPA), *vacated*, 754 F. App'x 1007 (Fed. Cir. 2019), and *abrogated by* *Moore v. United States*, 66 F.4th 991 (Fed. Cir. 2023). The rule articulated in *Gordon* required that an EPA plaintiff show “that discrimination based on sex exists or at one time existed.” *Id.* (quoting *Yant v. United States*, 588 F.3d 1369, 1373 (Fed. Cir. 2009)).

<sup>84</sup> See *Boyer*, *supra* note 31 (holding that the text and legislative intent of the FLSA and EPA indicate the Act should equally apply to federal employers). In its textual argument, the government in *Boyer* relied on two federal statutes, 5 U.S.C. § 5333 and 38 U.S.C. § 7408, to contest being governed by the EPA in the same manner as private-sector employers. *Id.* at 846–47. The texts of these statutes are permissively worded, turning on the use of the term “may.” 5 U.S.C. § 5333. In considering legislative intent, the court cited Senate committee hearings from the 1970s, during which Congress articulated a desire for the government to apply the same standards to itself that it imposed on private-sector employers. S. REP. NO. 92-842, at 18 (1972). Thus, the court applied the general rule that where parallel statutes can coexist without an expressed congressional intent to the contrary, they should be interpreted to make both effective. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (stating that where “two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective”).

<sup>85</sup> See *Boyer*, 97 F.4th at 841, 844 (holding that consideration of prior pay may be a factor if it is assessed with another permissible characteristic, and inviting employers to “otherwise establish that prior pay is not based on sex”). Per the Ninth Circuit, such an analysis invites consideration of *intent* to discriminate. *Rizo v. Yovino*, 950 F.3d 1217, 1230 (9th Cir. 2020) (emphasis added).

<sup>86</sup> See *infra* notes 88–102 and accompanying text.

consistent with the EPA's legislative purpose and highlights how the Act's central objectives remain unrealized.<sup>87</sup>

### A. Boyer's Imposition of Implied Intent

Through its failure to align with the Ninth Circuit, the Federal Circuit infuses an analysis of intent into EPA claims, like the Sixth, Tenth, and Eleventh Circuits before it.<sup>88</sup> In doing so, these courts conflate the EPA's chosen strict liability standard with the animus requirements of Title VII.<sup>89</sup> In 2007, in *Ledbetter v. Goodyear Tire and Rubber Co.*, the Supreme Court clarified the important distinction between the protections offered by the EPA and Title VII.<sup>90</sup> The Court emphasized that the former does *not* require evidence of intentional discrimination or animus.<sup>91</sup> In 2020, in *Rizo v. Yovino*, the Ninth Circuit incorporated this rationale when aptly noting that any consideration of prior pay sits "in tension with the EPA's strict liability framework."<sup>92</sup> This is because the EPA requires no intent to discriminate.<sup>93</sup>

All circuit courts applying the middle-ground approach to the prior pay affirmative defense have mixed standards in this way, but the issue is particularly relevant in *Boyer*, where intent is most clearly evaluated.<sup>94</sup> The EEOC amicus brief presented in *Rizo* highlighted the risk that the existing middle-ground tests "could be read to blur the lines between Title VII and the EPA."<sup>95</sup>

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<sup>87</sup> See *infra* notes 103–119 and accompanying text.

<sup>88</sup> Lobel, *supra* note 2, at 581.

<sup>89</sup> See *id.* (summarizing the reasoning of the *Rizo* court, and noting the controversy surrounding bans on inquiry into, and reliance upon, prior pay). Strict liability refers to responsibility that does not require proving negligence or intent to harm, but instead relies on the obligation to compensate for harms directly caused by the activity or conduct in question under the liability rule. *Strict Liability*, BLACK'S LAW DICTIONARY, *supra* note 29. Animus refers to ill-will, or intention, and class-based animus to "prejudicial disposition towards a discernible, usu. constitutionally protected, group of persons." *Animus*, BLACK'S LAW DICTIONARY, *supra* note 29.

<sup>90</sup> See 550 U.S. 618, 640 (2007) (describing the distinction between the EPA and Title VII standards). In *Ledbetter*, the petitioner was a salaried employee at a plant of Goodyear Tire and Rubber Company, who asserted both EPA and Title VII pay discrimination claims, on the basis that her salary had been suppressed by poor performance evaluations based on her gender. *Id.*

<sup>91</sup> See *id.* (noting that for *Ledbetter*, the obstacles faced under Title VII are distinct from those under the EPA, which the district court dismissed).

<sup>92</sup> 950 F.3d 1217, 1230 (9th Cir. 2020).

<sup>93</sup> See *id.* (contrasting the EPA's two-step strict liability test, with the three-step animus test outlined by *McDonnell Douglas*).

<sup>94</sup> See *Boyer v. United States*, 97 F.4th 834, 844 (Fed. Cir. 2024) (clarifying the additional qualification imposed by the Federal Circuit on the middle-ground application of the prior pay affirmative defense).

<sup>95</sup> See Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellee and in Favor of Affirmance, at \*21, *Rizzo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (No. 16-15372), 2016 WL 5869872 (analyzing the burden defendants carry when seeking summary judgment for EPA violation claims). When seeking summary judgment in these cases, defendants

In *Boyer*, the Federal Circuit added a new qualifier to the middle-ground position, allowing, although not requiring, an employer to “otherwise establish that the prior pay is not based on sex.”<sup>96</sup> The court did not elaborate on how an employer would effectively establish the basis of prior pay in these circumstances, but it seemingly invited exploration into *why* wage gaps were set, precariously close to an intent analysis.<sup>97</sup>

Next, one should note that the principle of strict liability is often employed to shape public policy by focusing on the harms caused by specific actions rather than requiring proof of negligence or intent to harm.<sup>98</sup> When Congress passed the EPA, it recognized the staggering gender pay gap as a public policy concern of a high order.<sup>99</sup> Thus, the Act aimed to challenge the long-held and arcane belief that men were deserving of higher pay than women for the same work.<sup>100</sup> Congress opted to exclude an intent requirement from the EPA’s language, stating no employer may pay employees “at a rate less than the rate at which he pays” those of the opposite sex for equal work.<sup>101</sup> As a result, the *Boyer* decision wrongfully weakened the EPA’s strict liability standard by adding an element of quasi-intent to the analysis.<sup>102</sup>

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must introduce enough evidence that, in the face of rebuttal, would point to a finding in the defense’s favor. *Id.*

<sup>96</sup> *Boyer*, 97 F.4th at 844.

<sup>97</sup> See *id.* (directing “future cases to consider what evidentiary showing is needed”).

<sup>98</sup> See Frank C. Bozeman, *Mens Rea and Strict Liability Criminal Statutes*, 16 WASH. & LEE L. REV. 238, 246 (1959) (noting that courts apply strict liability, disregarding knowledge and intent requirements, where seeking to advance the greater good, in pursuit of larger social interests). Strict liability standards are often used in the context of “public welfare” violations, for regulatory offenses with minimal penalties, and in the criminal context for crimes concerning victim’s age (e.g., statutory rape, alcohol and firearm sale to minors, child pornography), along with violations of environmental law. Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 417–18 (2007).

<sup>99</sup> See *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (emphasizing the need to “legislate out of existence” complacency with illogical gender pay discrimination).

<sup>100</sup> *Id.* The prevalent belief that male compensation ought to out-pace that of female counterparts can be traced, in-part, to pure gender-based discrimination, but also to outdated legal theories like the “head-of-household scheme,” which tended to provide benefits only to male employees and their dependents, on the assumption that males are most likely to serve as the “principle wage earner,” a framework disproportionately excluding female employees from workplace benefits. Lazar, *supra* note 26, at 311, 316; see *E.E.O.C. v. J.C. Penney Co.*, 843 F.2d 249, 254 (6th Cir. 1988) (holding that the “head-of-household” test for spousal medical and dental benefit coverage was a valid “factor other than sex” under the Equal Pay Act, and thus not prohibited per Title VII and disagreeing with the Seventh Circuit’s holding in *Wersing v. Department of Human Services State of Illinois*).

<sup>101</sup> See 29 U.S.C. § 206(d)(1) (requiring only that a plaintiff demonstrate a different rate of pay, not that animus or discriminatory intent was present when setting the wage).

<sup>102</sup> See *Boyer*, 97 F.4th at 844 (adopting the middle-ground position, with an additional allowance for an employer to justify the basis behind the prior pay).

*B. Today's Majority Position Fails to Meet the EPA's Legislative Purpose*

In the seminal 1974 *Corning Glass Works v. Brennan* case, the Supreme Court emphasized that the EPA aimed to be broadly remedial and advised construing the Act's language to fulfill Congress's underlying aims.<sup>103</sup> The justices articulated their interpretation that the primary objective was to remedy the "serious and endemic problem of employment discrimination."<sup>104</sup> It is important to note that at the time of the EPA's passage, any and all prior compensation was heavily based on a heavily discriminatory market.<sup>105</sup> Thus, all prior pay rates would be tilted in favor of male employees based on decades of discriminatory pay-setting.<sup>106</sup> Accordingly, one may question whether Congress, when drafting legislation aimed at eliminating these endemic disparities, would include an exception allowing said discrepancies to influence future pay.<sup>107</sup> The answer to this question is logically no.<sup>108</sup> As a result, the *Boyer* court should have instead followed the Ninth Circuit's lead in *Rizo* by ruling that prior pay may never constitute an affirmative defense to an EPA claim.<sup>109</sup>

Although over sixty years have passed since the EPA's enactment, the gender pay gap remains a pervasive public policy concern that continually justifies a strict liability application to achieve Congress's purported goals.<sup>110</sup> The wage gap that Congress ambitiously aimed to address in 1963 may have narrowed, but it continues across occupations, industries, education levels, experience, and job titles.<sup>111</sup> Research institutes, including the Council for Economic Advisors, have found that even after controlling for factors that might explain the remaining

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<sup>103</sup> 417 U.S. 188, 208 (1974).

<sup>104</sup> See *id.* at 195 (stating that courts should apply the EPA to address the "outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same" (quoting S. REP. NO. 176 (1963))).

<sup>105</sup> See *Rizo v. Yovino*, 950 F.3d 1217, 1225–26 (9th Cir. 2020) (recounting how, in 1963, women in the United States could only anticipate earning sixty percent of the compensation of their male counterparts).

<sup>106</sup> See *id.* at 1226 (urging readers of the EPA to consider its purpose when conducting statutory interpretation).

<sup>107</sup> See *id.* (emphasizing that all of the exceptions listed to the EPA in the House Report at the time of its passage were job-related, including based on shift, time-of-day, hours, physical demands, or differences in experience or training).

<sup>108</sup> See *id.* (expressing that the "equal-pay-for-equal-work mandate would mean little" should existing pay disparities be permitted to influence and dictate future pay rates).

<sup>109</sup> See *id.* at 1219–20 (holding that "allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate").

<sup>110</sup> See Carlton M. Hadden, *In Pursuit of Pay Equity: Examining Barriers to Equal Pay, Intersectional Discrimination Theory, and Recent Equal Pay Initiatives*, EEOC (Nov. 2021), <https://www.eeoc.gov/pursuit-pay-equity-examining-barriers-equal-pay-intersectional-discrimination-theory-and-recent-pay> [<https://perma.cc/FL5Z-DDSZ>] (highlighting that in more than ninety percent of jobs, women still earn significantly less than men, and suggesting actionable steps to address and recognize pay disparities).

<sup>111</sup> Lobel, *supra* note 2, at 557.



wage gap, a disparity between men and women's compensation remains.<sup>112</sup> This gap is classified by some as a proxy for discrimination.<sup>113</sup> According to a 2022 study, these results remain staggeringly close to the numbers observed in 2002, where women earned approximately 80 cents compared to each male dollar.<sup>114</sup>

These continual gaps illuminate that the ambitions of the Act have yet to be achieved.<sup>115</sup> In Senate Committee hearings prior to the EPA, the Secretary of Labor articulated that the Committee was tasked with identifying how employers and courts ought to apply the equal-pay principal upon "the widest possible practice on grounds of justice."<sup>116</sup> In light of this instruction, and the stagnancy in the wage disparity over the last twenty years, courts ought to interpret the EPA broadly and in pursuit of justice.<sup>117</sup> Until the discrimination proxy in the wage gap reaches zero, any other reading of the text fails to achieve congressional intent.<sup>118</sup> Where the Ninth Circuit has offered an in-depth and plausible analysis of the prior pay affirmative defense, courts should leverage this analysis to meet the crisis of unequal pay.<sup>119</sup>

## CONCLUSION

In 2024, in *Boyer v. United States*, the Court of Appeals for the Federal Circuit held that employers may deploy a prior pay affirmative defense to EPA claims, wherein they may illustrate that gender discrimination did not cause

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<sup>112</sup> See COUNCIL OF ECON. ADVISERS, THE GENDER PAY GAP ON THE ANNIVERSARY OF THE LILLY LEDBETTER FAIR PAY ACT 5 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160128\\_cea\\_gender\\_pay\\_gap\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160128_cea_gender_pay_gap_issue_brief.pdf) [<https://perma.cc/SLF3-4H84>] (noting that even after holding variables such as education, age, region, marital status constant, a gap in earnings persisted).

<sup>113</sup> See Lobel, *supra* note 2, at 557 (quoting the findings of Ariane Hegewisch, from the Institute of Women's Policy Research, in qualifying the unexplained gap in male-female pay as the "proxy for discrimination" when all other relevant factors have been controlled for).

<sup>114</sup> Kochhar, *supra* note 7.

<sup>115</sup> See President John F. Kennedy, Remarks on Signing the Equal Pay Act of 1963 (June 10, 1963) (transcript available at [https://www.jfklibrary.org/asset-viewer/archives/jfkpof-045-001#?image\\_identifier=JFKPOF-045-001-p0002](https://www.jfklibrary.org/asset-viewer/archives/jfkpof-045-001#?image_identifier=JFKPOF-045-001-p0002) [<https://perma.cc/3W35-Z4WS>]) (providing President Kennedy's remarks when signing the EPA, noting his statement that the EPA addresses "the unconscionable practice of paying female employees less wages than male employees for the same job").

<sup>116</sup> See *Equal Pay Act of 1963: Hearings on S. 882 and S. 910 Before the Subcomm. on Lab. of the Comm. on Lab. and Pub. Welfare*, 88th Cong. 16–18 (1963) (quoting W. Willard Wirtz, in his advocacy for passage of the EPA, and his resolve that the question of pay equality could not be left to employer responsibility alone). Secretary Wirtz also added, concerning the relationship between the EPA and Competition, that although competition is "the life-blood of our economy . . . it is only the means to an end—a better economy" and thus warrants some "specific restrictions on competition." *Id.* at 17.

<sup>117</sup> *Id.* at 17; see *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974) (directing the EPA to be read in a "broadly remedial" fashion in order to meet Congress's "underlying aims").

<sup>118</sup> See Lobel, *supra* note 2, at 557 (summarizing the research process for controlling for other potential wage-gap factors, as it is unable to account for the full male-female pay disparity).

<sup>119</sup> *Rizo v. Yovino*, 950 F.3d 1217, 1227 (9th Cir. 2020).

prior pay levels, and that federal and private employers are subject equally to EPA guardrails. In doing so, the Federal Circuit added a vital protection for federal employees, yet further weakened the Act's status as a strict liability test, merely watering down the influence of historical pay discrimination in present-day wages. In comparison, the majority opinion by the Ninth Circuit in *Rizo v. Yovino* outlines a preferable approach to gender-disparity cases, and one that is better situated to truly achieve the goals articulated within the EPA.

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