## 2018 WRITE ON COMPETITION LIST OF MATERIALS

This document lists the primary and secondary sources included in the 2018 Write On Competition and summarizes the cases. Following the principal case (on which you should focus your case comment) are the remaining sources listed by type.

### Principal Case (22 Pages)

Aileen Rizo v. Jim Yovino  
2018 WL 1702982, 887 F.3d 453 (9th Cir. 2018) (22 pages)

### U.S. Supreme Court Cases (53 Pages)


### U.S. Circuit Court Cases (171 Pages)

Betty Lou Strecker v. Grand Forks County Social Services 640 F. 2d 96 (8th Cir. 1981) (14 pages)

Christine Plemer v. Parsons-Gilbranle 713 F.2d 1127 (5th Cir. 1983) (15 pages)

Russell S. Ende v. Board of Regents of Regency Universities 757 F. 2d 176 (7th Cir. 1985) (8 pages)

Carol D. Patkus v. Sangamon-Cass Consortium 769 F. 2d 1251 (7th Cir.1985) (15 pages)

Patricia Covington v. Southern Illinois University 816 F. 2d 317 (7th Cir. 1987) (8 pages)

Shelia Ann Glenn v. General Motors Corporation 841 F.2d 1567 (11th Cir. 1988) (10 pages)

Cleatrice B. Price v. Lockheed Space Operations Co. 856 F.2d 1503 (11th Cir. 1988) (5 pages)

Lynda Fallon, et al., v. State of Illinois 882 F.2d 1206 (7th Cir. 1989) (12 pages)

Cora Aldrich v. Randolph Central School District 963 F.2d 520 (2nd Cir. 1992) (10 pages)

Barbara R. Irby v. John Cary Bittick
44 F. 3d 949 (11th Cir. 1995) (13 pages)

Esther S. Taylor v. Thomas E. White 321 F. 3d 710 (8th Cir. 2003) (11 pages)

Andrew Angove v. Williams-Sonoma, Inc. 70 Fed. Appx. 500 (10th Cir. 2003) (9 pages)

Jenny Wernsing v. Department of Human Services, State of Illinois 427 F. 3d 466 (7th Cir. 2005) (5 pages)

Laura Beck-Wilson v. Anthony Principi 441 F. 3d 353 (6th Cir. 2006) (14 pages)

Pamela Murphy v. The Ohio State University 549 Fed.Appx. 315 (6th Cir. 2013) (7 pages)

Marybeth Lauderdale v. Illinois Department of Human Services 876 F. 3d 904 (7th Cir. 2017) (8 pages)

U.S. DISTRICT COURTS (26 PAGES)
Lucy Boriss v. Addison Farmers Insurance Company 1993 WL 284331 (N.D. Ill. 1993) (10 pages)


STATUTORY & REGULATORY PROVISIONS (4 PAGE)
SECONDARY SOURCES – LEGAL (49 PAGES)

Jeffrey K. Brown, Crossing The Line: The Second, Sixth, Ninth, and Eleventh Circuits’ Misapplication of The Equal Pay Act’s “Any Other Factor Other Than Sex” Defense, 13 HOFSTRA LAB. L.J. 181 (Fall 1995) (23 pages)


SECONDARY SOURCES – POPULAR (8 PAGES)


Shatter the Glass Ceiling, Not the Statute:

How the Ninth Circuit’s rejection of prior salary as a defense to Equal Pay Act liability is right – for all the wrong reasons.
In 1963, Congress passed the Equal Pay Act (EPA). The purpose of the act was clear: to remedy the “serious and endemic” problem of sex-based discrimination in the workplace by requiring equal pay for equal work. One year after passing the EPA, Congress affirmed its commitment to equal pay through the passage of Title VII, which prohibits intentional discrimination, including wage discrimination, on the basis of sex. Although these remedial statutes have been in place for over fifty years, women still face significant wage discrimination. This disparity is perpetuated by facially-neutral wage determination policies that stagnate progress, specifically, the reliance on a woman’s prior salary to determine her current wages. Statistics show that on average, women receive roughly eighty cents for every dollar earned by men. Therefore, the average woman’s prior salary unavoidably reflects an depreciated amount determined by a society that significantly undervalues her worth.

Courts and state legislatures have struggled to justify prohibiting employers from utilizing prior salary as an affirmative defense, particularly due to their reluctance to interfere with an employer’s discretion. When drafting the EPA, Congress attempted to preserve business freedom. In order to protect “bona fide” job evaluation systems, Congress included four affirmative defenses in the EPA, which Title VII adopted in full, exempting employers from liability when a wage differential is attributable to: “(i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production,” and a fourth general catchall provision, “(iv) a differential based on any other factor other than sex.”

Prior salary falls under the catchall factor-other-than-sex defense, an exemption that has caused a circuit split. The Seventh and Eighth Circuits adhere to the plain language of the EPA, reading the fourth exemption broadly to include all gender-neutral factors, regardless of job relation. While the Eighth Circuit has not directly ruled on whether prior salary alone meets this broad definition, the Seventh Circuit considers it a valid defense. The Second, Sixth,
Ninth,²⁰ and Eleventh²¹ Circuits apply the exemption narrowly, requiring employers to show that wage differentials are attributable to job-related factors. The Supreme Court has not spoken directly on the issue, stating only generally that “the EPA is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.”²²

In Rizo v. Yovino, the United States Court of Appeals for the Ninth Circuit confronted the issue of a wage differential attributable solely to a woman’s prior salary.²³ Aileen Rizo, a female math consultant, sued her employer under the EPA and Title VII after learning that her male colleagues were paid higher salaries for the same work.²⁴ Her employer argued that the disparity was based entirely upon prior salary, a valid “factor other than sex” that precluded EPA and Title VII liability.²⁵ The district court denied summary judgment for the employer, reasoning that the salary schedule’s sole reliance on prior salary was “virtual[ly] certain” to perpetuate sex-based wage disparity.²⁶ The Ninth Circuit’s three-judge panel reversed, holding, in accordance with circuit precedent, that prior salary alone can constitute a “factor other than sex” as long as its use is “reasonable and effectuated some business policy.”²⁷ The Ninth Circuit granted Rizo’s petition for rehearing en banc.²⁸

The en banc court held that the employer’s use of prior salary alone to establish current salary is not a valid “factor other than sex.”²⁹ In dicta ultimately unnecessary for its finding of liability, the court broadly declared that any reliance on prior salary will invalidate an employer’s affirmative defense, even when prior salary is combined with acceptable factors such as work experience and education.³⁰ The court noted that any reliance upon prior salary perpetuates the perception that women are worth less than men, “entrenching in salary systems… the very discrimination that the Act was designed to prohibit.” Although Rizo’s narrower holding is correct – reliance upon prior salary alone perpetuates sex-based wage discrimination and should not be an
affirmative defense to EPA liability – the court’s overbroad dicta and strained interpretation of the EPA conflicts with its plain language,\textsuperscript{31} Congressional intent,\textsuperscript{32} and Supreme Court precedent,\textsuperscript{33} and ultimately led the court to adopt an overbroad, unnecessary rule.

This comment will argue that, despite a flawed interpretation of the EPA and overbroad dicta, the Ninth Circuit’s narrower holding that reliance upon prior salary alone violates the EPA is correct. In reaching the correct result, however, the \textit{Rizo} court utilized questionable reasoning leading to an unnecessarily overbroad holding. This comment will first argue that the Ninth Circuit erred in narrowly interpreting the EPA’s factor-other-than-sex exemption as requiring a strict job-relatedness requirement. Secondly, a broad interpretation of the factor-other-than-sex exemption prohibits prior salary alone from serving as an affirmative defense. Lastly, prohibiting employers from shielding themselves from EPA liability by relying upon prior salary alone is consistent with the Supreme Court’s construction of the statute as broadly remedial.

The Ninth Circuit erred in interpreting the factor-other-than-sex exemption narrowly to include a “job-relatedness” requirement. Other circuits have correctly held that the statute’s plain language and Congressional intent preclude a narrow interpretation.\textsuperscript{34} To reach this result, the Ninth Circuit claims to rely upon “basic principles of statutory interpretation,”\textsuperscript{35} but then ignores the statute’s unambiguous text, relying wholly on textual canons.\textsuperscript{36} As a principle of statutory construction, textual canons should be reserved for circumstances in which the plain meaning of the statute is ambiguous. Because the EPA unambiguously exempts wage disparities based on “any other factor other than sex,”\textsuperscript{37} the use of textual canons is inappropriate. Furthermore, various textual canons lead to an opposite interpretation. For instance, under the assumption of meaningful variation, because the first three affirmative defenses are specific, and the fourth is a distinctly general, it can be assumed that Congress intended for the exemption to cover a broadly cover all
gender-neutral factors. Interpretation of the EPA’s plain text supports a broad understanding of “any other factor other than sex” that does not include job-relatedness.

Perhaps because the Ninth Circuit has previously recognized that the plain language of the EPA does not require the “factor other than sex” to be job-related, it focuses primarily on the EPA’s legislative history and Congressional intent. However, its history and intent are inconclusive. Some interpret the legislative history to indicate that only sex-based discrimination violates the EPA, while others interpret it to indicate that Congress limited the fourth affirmative defense to job-related programs. The court erred in cherry-picking a favorable interpretation in contradiction of the EPA’s plain, unambiguous language.

Further, the Ninth Circuit’s interpretation conflicts with the Supreme Court’s previous holding in Washington v. Gunther. In Gunther, the Supreme Court broadly declared that the factor must be “bona-fide” and that “courts… are not permitted to substitute their judgment for the judgment of the employer.” Prohibiting a judge from substituting his own opinion for the employer’s bars the addition of a subjective job-relatedness requirement into the statute. Requiring employers to prove a factor is bona fide prevents the defense from pretextually using a facially neutral factor to circumvent the EPA. Because the EPA’s plain language and congressional intent support a broad interpretation of the factor-other-than-sex defense, the Ninth Circuit erred in construing the exemption narrowly.

Rizo inappropriately narrows the factor-other-than-sex exemption to arrive at an overbroad answer that does not comport with the EPA’s plain language. However, its narrow holding – that employers cannot rely on salary alone as an affirmative defense to EPA liability – is entirely possible under, and consistent with, the plain meaning of the statute. The EPA broadly exempts only gender-neutral factors. Because prior wage is statistically proven to reflect gender discrimination, it is not gender neutral. Circuits that have adopted a broad
interpretation of the factor-other-than-sex exemption have issued opinions that are harmonious
with this notion. The Eighth Circuit has articulated that salary retention policies violate the EPA
when an employer cannot “ensure that reliance on past salary is not simply a means to
perpetuate historically unequal wages caused by past discrimination.”

Unlike the salary retention policy at issue in the Eighth Circuit (a policy relying on a salary established by the
employee’s current employer), prior salary policies, like those at issue in Rizo, rely solely on
salaries set by prior employers. It is impossible for an employer to provide sufficient evidence
to carry the “heavy” burden of proof it must to establish its affirmative defense, let alone
“ensure” that each of its female employees’ prior salaries were not affected by the statistically
proven wage disparity, because its female employees’ salaries were set by independent prior employers.

Therefore, because prior salary inherently reflects sex-based discrimination, sole
reliance upon it perpetuates wage disparities and cannot be a valid affirmative defense.

Similarly, when applying a broad reading of the factor-other-than-sex exemption, the
Seventh Circuit has historically considered whether the factor “causes a discriminatory effect.”

So long as women’s salaries reflect a wage disparity, reliance upon discriminatorily depreciated wages
will clearly cause a discriminatory effect. In 2005, however, the Seventh Circuit abandoned this
effect-based approach, holding, despite the disparate effect on women, that reliance upon prior
salary alone is a valid defense because the disparity may reflect a woman’s “choices made about
allocating time between family and market endeavors.” This approach is deeply flawed because a
woman’s choice to allocate time to her family is not gender-neutral, even facially. Motherhood it is
something biologically, socially, and uniquely assigned to the female sex. This is exactly the type
of discrimination that the EPA prohibits, even under a broad interpretation of its affirmative
defenses, and should not be considered a “factor other than sex.”
The Supreme Court has repeatedly emphasized the EPA’s broadly remedial purpose, and this consideration should fundamentally inform its application. In *Ende v. Board of Regents of Regency University*, the Seventh Circuit acknowledged the remedial purpose of the EPA, holding that remedial programs implemented to compensate women for past wage differentials do not violate the EPA. Although remedial programs created a sex-based wage disparity between men and women (favoring women), because the programs served the EPA’s purpose of eliminating sex-based discrimination, the disparity was justified. Because the EPA is remedial, courts forgive technical violations in order to effectuate its remedial purpose. It follows that a court can enforce violations, even when the plain language of the “factor other than sex” exemption suggests applicability, so long as it acts to remedy past violations. Although prior salary facially appears to be a “factor other than sex,” prior salary inherently reflects and perpetuates sex-based discrimination. Therefore, courts should find EPA liability in order to remedy past discrimination.

Although some studies suggest that a ban on sharing prior salary might leave women worse off, thereby undermining the EPA’s remedial purpose, a limited rule that an employer cannot rely solely upon a woman’s prior salary when establishing her current compensation does not carry such implications. Banning reliance on prior salary alone as an affirmative defense does not prohibit a woman from voluntarily sharing her prior salary or from using her prior salary as a negotiating tool. Additionally, denying an employer this affirmative defense to EPA liability does not impose an undue economic burden on the employer. It does not impede the employer’s ability to ask a woman her prior salary, provided that the employer ultimately gives due consideration to her education, qualifications, skill, and value as a unique employee – considerations that will actually improve economic efficiency. Further, the need for an affirmative defense only arises after an employee makes a prima facie showing of sex-based wage discrimination. Even if an employer considers a
woman’s prior salary before determining her current salary, so long as her salary is no less than a man who holds a substantially equal position, it will not be subject to EPA liability.

Despite the noble aim of promoting equal pay for equal work, the Ninth Circuit’s holding in *Rizo* ignores the plain language of the scrupulously-drafted EPA and instead imposes an overbroad policy judgment into the supposedly neutral arena of a court of law. In our free-enterprise system, federal regulations that intrude into an employer’s salary practices require a delicate, carefully-deliberated approach, and should not be expanded unless by deliberate legislative action. Although incorrect in its statutory interpretation and unwarranted in its broad dicta, the Ninth Circuit ultimately reached the correct narrow result. Under a broad reading of the EPA’s affirmative defense, prior salary alone cannot be relied upon as valid exemption. So long as society systematically discounts a woman’s worth, allowing her employer to set her compensation based on a prior salary that is statistically proven to be undervalued will undoubtedly perpetuate discrimination. Exempting reliance upon prior salary as a “factor other than sex” immutably licenses employers to maintain the current discriminatory status quo, leads to the stagnation of the EPA’s glass-ceiling-shattering purpose, and should not be validated by the courts.


7 Negotiating, supra note 5, at 476.

8 Compare Glenn v. Gen. Motor Co., 841 F.2d 1567, 1571 (11th Cir. 1988) (prior salary alone can never be factor other than sex), with Lauderdale v. Illinois Dep’t of Human Servs., 876 F.3d 905, 908 (7th Cir. 2017) (prior salary is legitimate factor other than sex).

9 See, e.g., Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 249 (1981) (employers should have discretion to set hiring policies provided no sex-based discrimination).

10 Crossing the Line, supra note 1, at 186 (EPA intended to preserve employer discretion and only prohibit employers from setting wages based on sex).


14 See, e.g., Fallon v. Illinois, 88 F.2d 1206, 1211 (7th Cir. 1989) (rejecting job relatedness requirement).

15 See, e.g., Taylor v. White, 321 F.3d 710, 718 (8th Cir. 2002) (rejecting job relatedness requirement).

16 Id. at 720 (salary retention policy can be factor other than sex).

17 Wernsing v. Dep’t of Human Servs., Illinois, 427 F.3d 466, 468 (7th Cir. 2005).

18 Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 526 (2d Cir. 1992) (job classification systems exempt only when “based on legitimate business-related considerations”).

20 Aldrich, 963 F.2d at 526 (quoting Kouba v. Allstate Ins. Co., 691 F.2d 873, 876 (9th Cir. 1982) (factor must be business-related), overruled by Rizo v. Yovino, 887 F.3d 453, 458 (9th Cir. 2018) (en banc)).


23 Rizo v. Yovino, 887 F.3d 453, 458 (9th Cir. 2018) (en banc).

24 Id.

25 Id.


27 Id. (citing Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2015)), rev’d en banc, 887 F.3d 453 (9th Cir. 2018).

28 Id. at 459.

29 Id. at 456.

30 Id. at 468.


32 See, e.g., Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2002) (broad interpretation “preserves the business freedoms Congress intended to protect”).


34 See, e.g., Covington v. S. Illinois Univ., 816 F.2d 317, 323 (7th Cir. 1987) (rejecting job relatedness requirement).

35 Rizo v. Yovino, 887 F.3d 453, 461 (9th Cir. 2018) (en banc).

36 Id.

37 Equal Pay Act (EPA), 29 U.S.C.A. § 206(d) (West 2016) (“any other factor other than sex”).

38 Irby v. Bittick, 44 F.3d 949, 957 (11th Cir. 1995).

39 Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2002) (quoting Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982) (per se rejection of reliance on prior salary is inconsistent with EPA), overruled by Rizo, 887 F.3d 453).

40 Crossing the Line, supra note 1, at 189 (legislative history inconclusive).
41 Id. at 187 (quoting 109 Cong. Rec. H9198 (1963) (statement of Rep. Goodell)) (a differential based on any factor or factors other than sex does not violate EPA).

42 Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992) (legislative history indicates only job-related programs are exempt).


44 Id.


46 But see Aldrich, 963 F.2d at 525 (without job-relatedness, EPA has “gaping loophole”).

47 Rizo v. Yovino, 887 F.3d 453, 476 (9th Cir. 2018) (en banc) (Callahan, J., concurring).

48 Taylor v. White, 321 F.3d 710, 718 (8th Cir. 2002).


50 Rizo, 887 F.3d at 479 (Watford, J., concurring).

51 Fallon v. Illinois, 88 F.2d 1206, 1211 (7th Cir. 1989).

52 Wernsing v. Illinois Dep’t of Human Servs., 427 F.3d 466, 468 (7th Cir. 2005).

53 Rizo, 887 F.3d at 468.


55 See, e.g., Ende v. Bd. of Regents of Regency Univs., 757 F.2d 176 (7th Cir. 1985).

56 Id. at 183.