

TEXTUALISM CANONS APPLIED TO EQUAL PAY ACT
“FACTOR OTHER THAN SEX” EXCEPTION SUGGESTS NO
BRIGHTLINE RULE

*Daniel Rub**

Abstract

There is a circuit split regarding whether an employer can rely on an employee’s prior salary without violating the Equal Pay Act (EPA). The Seventh Circuit always allows an employer to consider prior salary, while the Ninth Circuit bans the use of prior salary considerations. The Federal Circuit joined the Eleventh and Eighth Circuit in a middle ground approach.

As Title VII incorporates the same exceptions as the EPA, the Supreme Court’s Title VII analysis will likely be probative to its eventual decision regarding the EPA. The Court will also likely employ textualist judicial canons to determine the desired lower court test. How the Supreme Court has employed these textualist canons in Title VII cases, such as plain meaning of text, avoidance of legislating from the bench, and other canons of construction, can be analogized to the EPA.

Ultimately, a plain text reading disfavors interpreting the “factor other than sex” exception altruistically—likely discounting the Ninth, Eleventh, and Federal circuit approaches that consider the purpose of the EPA over its text. Conversely, the Seventh Circuit also runs afoul of the textualist cannon *ejusdem generis*. A strict textualist understanding therefore favors the Eighth Circuit case-by-case analysis because it best balances the canons of textualism while scrutinizing business practices that perpetuate sex discrimination.

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* Assistant State Attorney in the Miami-Dade State Attorney’s Office and Class of 2026 graduate from American University Washington College of Law. I would like to first thank my mom and dad for all their love and support. Thank you to my faculty advisor Professor Susan Carle who helped guide my research, as well as AUBLR for growing my skills as a writer. A special thank you to the amazing members of UF JLPP for selecting this Article for publication, I am eternally grateful.

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INTRODUCTION

President Kennedy signed the Equal Pay Act (EPA)¹ into law on June 10, 1963. The EPA amended the Fair Labor Standards Act (FLSA)² and aimed to abolish wage disparity based on sex.³ There is a three-way split amongst the circuit courts regarding the EPA's general, catch-all affirmative defense exception; more specifically, whether the use of an employee's prior pay qualifies as a "factor other than sex."⁴ The circuit courts have developed approximately three approaches when interpreting this affirmative defense.⁵ The Federal Circuit, in *Boyer v. United States*,⁶ adopted a "middle ground" approach that aligned similarly to the balancing tests developed by other circuits.⁷ In the same opinion, the Federal Circuit determined that all businesses, public and private alike,

1. Equal Pay Act of 1963, 29 U.S.C. § 206.

2. Fair Labor Standards Act of 1938, 29 U.S.C. § 201.

3. See 29 U.S.C. § 206(d)(1); see also *Equal Pay Day*, NAT'L WOMEN'S HIST. MUSEUM (Apr. 9, 2013), <https://www.womenshistory.org/articles/equal-pay-day> [<https://perma.cc/FBG7-U7HL>].

4. *Boyer v. United States*, 97 F.4th 834, 841–44 (Fed. Cir.), *reh'g denied*, 98 F.4th 1073 (Fed. Cir. 2024).

5. See, e.g., *Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 468–69 (7th Cir. 2005) (allowing prior pay as a defense); *Boyer*, 97 F.4th at 844 (presenting a middle ground); *Rizo v. Yovino*, 950 F.3d 1217, 1229 (9th Cir. 2020) (denying prior pay as a defense).

6. 97 F.4th at 834.

7. *Id.* at 843–45.

are subject to the same scrutiny under the EPA.⁸ Thus, the fate of federal government liability is inextricably linked with private liability.

This Article practically analyzes the various circuit court tests, employing textualist judicial canons commonly used by the Supreme Court to determine which test, if any, will pass muster. Part II discusses the background case law that established the various “factor other than sex” tests among the circuits, including Supreme Court decisions interpreting Title VII, which incorporates the EPA exceptions. Part III analyzes how Title VII case law reasoning can be analogized to the EPA and subsequently how these cases apply to each circuit test. Part IV recommends to private businesses that the Court is likely to adopt a test similar to the Eighth Circuit’s case-by-case approach and warns that a business can be in violation of the EPA if it bases an employee’s current salary on that employee’s prior salary that is found to be in violation of the EPA.

I. THE EQUAL PAY ACT AND THE COURTS

A. *The “Factor Other than Sex” Exception*

“[N]o employer . . . shall discriminate . . . between employees on the basis of sex” by paying less wages for equal work, with three enumerated exceptions and a general exception.⁹ These four total exceptions are affirmative defenses to a claim of sex discrimination under the EPA, meaning an employer whose business practice falls within an exception does not violate the EPA.¹⁰ These four affirmative defenses “allow disparate pay for equal work on the basis of: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on *any other factor other than sex*.”¹¹

The EPA’s coverage is limited to the coverage of the FLSA, which Congress first passed in 1938 to combat discrimination in the workplace.¹² Under the FLSA, the definition of employer did “not include the United States or any State or political subdivision of a State.”¹³ In 1974, Congress amended the FLSA and the EPA to apply to federal

8. *Id.* at 845–46.

9. Equal Pay Act of 1963, 29 U.S.C. § 206; *see Boyer*, 97 F.4th at 839 (defining equal work as “equal skill, effort, and responsibility, and which are performed under similar working conditions”).

10. *See* § 206(d)(1).

11. *Id.* (emphasis added); *see also* *Rizo v. Yovino*, 950 F.3d 1217, 1224 (9th Cir. 2020) (describing how some features of a job have to do with the “skill, effort, and responsibility” which reasonably explain wage disparity that is not based on sex discrimination).

12. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 201.

13. *Boyer*, 97 F.4th at 845 (citing 29 U.S.C. § 203(e)(2)(A)).

employees.¹⁴ Controversy arose among courts and legal commentators as to whether the EPA applied the same standard to the federal government and private business.¹⁵ The Federal Circuit settled this controversy by analyzing Senate Reports that state, in no uncertain terms, that the federal government should be held to the same standard as private business.¹⁶ These legislative documents from the Congressional Record persuaded the court that Congress intended the standards to be the same because of Congress' lack of explicit authorization on the issue.¹⁷ The Supreme Court's final decision in this circuit split will have grand repercussions on the ability for private and public businesses to consider an employee's prior salary—always, sometimes, or not at all—when establishing that employee's current salary.

B. *The Starting Pole: The Seventh Circuit's Broad Acceptance of Prior Pay as a "Factor Other than Sex"*

The Seventh Circuit provided the most expansive interpretation of the "factor other than sex" exception, allowing for almost any rationale to qualify, as long as the business practice was created without any discriminatory intent.¹⁸ In *Wernsing v. Department of Human Services*,¹⁹ the court examined the claim of a female plaintiff who did "the same work but at substantially different pay" than a male coworker.²⁰ The plaintiff earned \$2,478 monthly at her position in the Department, a 30% increase from her previous job.²¹ Meanwhile, a male coworker with the same work and same job classification as the plaintiff earned \$3,739 monthly, a 10% increase from his previous job.²² The court determined that a business practice—in this case, the Army's use of the plaintiff's salary from her previous occupation—qualified as a "factor other than sex" to legally

14. 29 U.S.C. § 203(c)(2)(A).

15. *Boyer*, 97 F.4th at 845–48.

16. *Id.* at 846 (quoting S. REP. NO. 92-842, at 18 (1972) ("Government should be willing to apply to itself any standard it deems necessary to apply to private employment."); *Id.* (quoting S. REP. NO. 93-690, at 1 (1974) (stating that the purpose of the bill was to extend the FLSA protections to additional employees))).

17. *See id.* at 848 (finding the government's argument unpersuasive because the two statutes they cited, 5 U.S.C. § 5333 and 38 U.S.C. § 7408, do not control the interpretation of the EPA as the differences in the statutes are reconcilable and capable of co-existing with the court's interpretation of the EPA).

18. *Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 468–69 (7th Cir. 2005).

19. *Id.* at 468.

20. *Id.* at 467.

21. *Id.* (increasing her earnings from \$1,925 to the minimum payable for her job classification).

22. *Id.* (including the fact that annual raises preserve the pay gap until it tops out at the maximum payable for that job classification of \$4,466).

justify disparate pay for equal work.²³ The Seventh Circuit went far beyond prior salary, stating, “the employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age, or religion.”²⁴ Federal courts, the Seventh Circuit argues, do not set standards for what are “good” factors for businesses to rely on, as it is not the court’s jurisdiction to set “acceptable business standards.”²⁵ Thus, the court narrowly read the EPA to punish business practices that result in disparate treatment, not disparate impact.²⁶

Despite acknowledging that women are paid less than men based on all market wages, the Seventh Circuit rejected the assertion that the use of an employee’s prior salary to set their current salary is *per se* sex discrimination.²⁷ The court characterized markets as “impersonal” with “no intent,” and therefore, wages based on market forces do not qualify as an EPA violation.²⁸ The Eleventh Circuit described the Seventh Circuit’s approach as “market force theory,” an approach it claimed is proscribed by the Supreme Court in *Corning Glass Works v. Brennan*.²⁹ The Seventh Circuit retorted that the Eleventh Circuit’s opinion was “manufactured by the judges . . . by digging through legislative debates, [and] lacks any footing in enacted texts.”³⁰

Although some law review articles have described the Seventh Circuit’s decision as “always” permitting prior salary considerations, the court left open the possibility that if the employee’s prior salary was affected by sex discrimination, the current employer’s reliance on that prior pay may be considered a violation of the EPA.³¹ Notably, the

23. *Id.* at 470; *accord* *Lauderdale v. Ill. Dep’t of Hum. Servs.*, 876 F.3d 904 (7th Cir. 2017) (citing *Wernsing*, 427 F.3d at 470–71).

24. *Wernsing*, 427 F.3d at 469.

25. *Id.* at 468–69 (citing 29 U.S.C. § 206(d) and claiming the “acceptable business practice” language was promulgated arbitrarily from the Ninth Circuit’s decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982)).

26. *See id.* (explaining that a mere salary disparity (i.e., disparate impact) is not a *per se* violation of the EPA, whereas intentional sex-based discrimination (i.e., disparate treatment) is).

27. *Id.* at 470 (agreeing with *Wernsing* on the fact that women in the marketplace are paid, in general, less than men, yet describing the conclusion that prior pay is thus discriminatory as a “non-sequitur”).

28. *Id.* at 469 (finding that sex discrimination is an “intentional wrong” which requires intent to discriminate based on sex as necessary for a violation of the EPA and, as markets have no intent, using market-based wages lacks the requisite *mens rea* for an EPA violation).

29. *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570–72 (11th Cir. 1988) and *Corning Glass Works v. Brennan*, 417 U.S. 188, 207 (1974).

30. *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466, 469 (7th Cir. 2005) (suggesting the Eleventh Circuit improperly legislated from the bench and describing its opinion as a “ukase”).

31. *See id.* at 470 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974)) (describing that if an employee’s “feeder” job pay was affected by sex discrimination, using that pay perpetuates discrimination and “violate[s] the Equal Pay Act[;]” however, it remains to be seen if this language can be considered nonbinding dicta); *see also* Nicole Tronolone, *The Blurry Limits of the Equal Pay Act’s “Factor Other Than Sex”: An Argument For Limiting The Use of Salary*

Seventh Circuit's decision puts the burden of proof squarely on the plaintiff to establish that the use of their prior salary violates the EPA.³²

C. The Ending Pole: The Ninth Circuit's Ban on Use of Prior Salary

The Ninth Circuit, in its recent decision in *Rizo v. Yovino*,³³ stands diametrically opposite to the Seventh Circuit and finds that there is no legal rationale for an employer to consider an employee's prior salary pay as a "factor other than sex."³⁴ In *Rizo*, the plaintiff, a math teacher, was paid significantly less than her male counterparts despite having more experience and education.³⁵ Her employer, Fresno County, set pay according to Standard Operating Procedure 1440.³⁶ These procedures factored in an employee's prior salary when establishing the employee's starting salary.³⁷ The County argued in district court that applying the Standard Operating Procedure is an "acceptable business reason" as established by precedent.³⁸ The Ninth Circuit conducted extensive analysis in parsing the plain text of the EPA exceptions, applying the works of Justice Antonin Scalia as well as legislative documents and records, to determine Congress's intent when drafting the EPA.³⁹

The Ninth Circuit established that the "factor other than sex" exception only applies to "job-related factors."⁴⁰ The court relied on the judicial canon of *ejusdem generis*, where a general term follows a list of specific terms.⁴¹ The general term is understood to include only objects similar in nature to the previous specific terms.⁴² As the enumerated exceptions are related to "job experience, job qualifications, and job performance," the general catchall term should accordingly fall within

History and the Benefit to Employers, 11 WAKE FOREST L. REV. ONLINE 21, 26 (2021) (calling the Seventh Circuit's decision an "unequivocal" upholding of prior pay as a factor other than sex).

32. *Wernsing*, 427 F.3d at 470 (finding that the plaintiff has the burden of persuasion in civil litigation).

33. *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020).

34. *Id.* at 1229.

35. *Id.* at 1220 (finding that the plaintiff made \$62,133, while a male math consultant with less experience made \$79,088).

36. *Id.*

37. *Id.* (describing Standard Operating Procedure 1440 as the text adopted by Fresno County that creates guidelines to determine an employee's earnings bracket).

38. *Id.* at 1221 (relying on the Ninth Circuit's decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982)).

39. *Id.* at 1224–26 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012) and statements of Representatives Adam Powell and Edith Green).

40. *Id.* at 1224 (determining that a too-permissive reading of the general catchall exception would render the three enumerated exceptions "meaningless").

41. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56, 199, 206 (2012).

42. *Rizo*, 950 F.3d at 1225 (citing *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512 (2018)).

the scope of “job relatedness.”⁴³ The court claimed the legislative documentation likewise strengthened its argument that the intention of Congress was to limit the scope of the catchall exception to only job-related factors.⁴⁴

The Ninth Circuit further determined that an employer cannot use an employee’s prior salary to justify disparate pay because it is not sufficiently job-related to qualify under the “factor other than sex” exception.⁴⁵ The court stated that the employer’s prior pay is merely a “proxy” or a “heuristic” for other job-related factors, such as education or skill, but is not, itself, a factor.⁴⁶ Therefore, the EPA’s general catchall exception must be limited only to “legitimate job-related factors,” and prior salary does not qualify.⁴⁷ The court also found the EPA does not prevent the use of prior pay during contract negotiations.⁴⁸

The Ninth Circuit distinguished the EPA burden of proof from Title VII because it read the EPA as a “strict liability framework,” meaning intent plays no role in EPA litigation.⁴⁹ The court rejected the *McDonnell-Douglas* burden-shifting framework of Title VII in EPA cases.⁵⁰ This Title VII framework requires the plaintiff employee to show proof of the employer’s discriminatory intent.⁵¹ Instead, the Ninth Circuit placed the burden on the employer to prove their reasons for disparate pay are legitimate and non-pretextual.⁵²

43. *Id.* (citing SCALIA & GARNER, *supra* note 41, at 199, 208, where Justice Scalia explains the *ejusdem generis* canon as reading in “similar” to a general catchall at the end of an enumerated list and this similarity is based on a reasonableness test).

44. *Id.* at 1225–26 (quoting H.R. REP. NO. 88-309, at 3 (1963); 109 CONG. REC. 8683, 8694 (1963)) (using statements from members of Congress that claim the purpose of the EPA exceptions is to acknowledge job related factors).

45. *Id.* at 1227 (reasoning that the identification of an employee’s prior salary is not relevant to whether an employer engaged in sex discrimination when they established that employee’s current salary).

46. *Id.* at 1228 (finding that prior salary considerations is not probative for whether the business practice qualified for the general exception).

47. *Id.*

48. *Id.* at 1231 (clarifying that prior salary discussions in contract negotiations are prohibited by California state law, but not prohibited by the EPA).

49. *Id.* at 1223 (explaining that proof of discriminatory intent is not required, only a “prima facie showing of a sex-based wage differential,” and “if the plaintiff is successful, the burden shifts to the employer to show an affirmative defense” with “[n]o showing of pretext [] required”).

50. *Id.*

51. *Id.*

52. *Id.* at 1219–20 (finding the business practice of considering an employee’s prior salary in creating their current salary as unpersuasive to shift the burden away from the employer). *But see* Wernsing v. Dep’t of Hum. Servs., 427 F.3d 466, 469 (7th Cir. 2005) (finding that prior wages are not one of the prohibited criteria for determining wages); *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995) (applying the *McDonnell-Douglas* framework to an EPA claim).

*D. Between the Poles: The Middle Ground Tests in the Eighth,
Eleventh, and Federal Circuits*

When considering whether an employer's reliance on prior pay violates the EPA, the remaining circuits conducted a balancing test that uses an employee's prior salary in conjunction with other factors to determine whether an employee's pay disparity is based on sex discrimination.⁵³

The Eighth Circuit's balancing test took a deeper look into the business practice that considered an employee's prior salary in setting their current salary. In *Taylor v. White*,⁵⁴ the plaintiff wrote technical reports regarding unwanted munitions for the Army.⁵⁵ The plaintiff earned pay based on the General Schedule (GS), a government pay scale used to classify employees and positions.⁵⁶ The plaintiff received WG-9 wages for GS-4 work through a reduction-in-force process.⁵⁷ Some of her coworkers likewise were downgraded to GS-4 work but retained higher pay from their previous positions.⁵⁸ The plaintiff complained about these wage disparities to her male coworkers and to her superiors, and she was ignored.⁵⁹

The court did not find evidence of sex discrimination because the consideration of an employee's prior salary was a business practice allowing all employees to retain higher work salaries relative to what they would receive when they moved to reduced work schedules.⁶⁰ The court emphasized the need for the "factor other than sex" to be read broadly to preserve "business freedoms."⁶¹ The Eighth Circuit acknowledged that this need is balanced with the need to scrutinize the trial court record for any reliance on "market force theory," which is prohibited.⁶² The court adopted a case-by-case analysis, which calls for diligent scrutiny to

53. See, e.g., *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003).

54. *Id.* at 710.

55. *Id.* at 712.

56. *Id.* at 712 n.2.

57. *Id.* at 712 n.3 (describing how WG wages were a separate pay scale to GS and, for any given number on the scale, WG salaries are lower than GS salaries).

58. *Id.* at 712–13 (describing how Theodis J. Thornton and Willie J. Early earned GS-11 pay for their prior work and performed "identical duties" as the plaintiff).

59. *Id.* at 714.

60. See *id.* at 722–23 (finding nothing more than "mere suspicion," which is insufficient to displace the district court ruling for the defendant).

61. *Id.* at 720 (describing the general catchall exception as an intent of Congress to protect unforeseen business practices).

62. *Id.* at 718; see *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974) (prohibiting use of market force theory); see also *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (citing *Taylor* in support of prohibiting market force theory).

qualify such a practice as a “factor other than sex” and “careful attention to alleged gender-based practices.”⁶³

The Eighth Circuit deviated from the *McDonnell-Douglas* burden-shifting framework as the defendant, not the plaintiff, had the burden to prove that its business practice used an employee’s salary for a “legitimate non-discriminatory reason,” which incidentally resulted in disparate pay.⁶⁴ Accordingly, defendants must explain why they considered an employee’s prior salary and how this reason justifies the “pay differential” of employees who do the same work.⁶⁵ At the same time, the Eighth Circuit rejected the notion that courts should conduct a “reasonableness inquiry” into the mind of the employer to determine whether their actions violated the EPA.⁶⁶

Ultimately, the court determined that the Army’s consideration of an employee’s prior salary helped all employees retain higher wages.⁶⁷ In this case, an employee’s prior salary was not a “proxy for sex discrimination” because it identified higher wages available to employee’s without considering the sex of the employee.⁶⁸

The Eleventh Circuit developed a prior-pay-plus-one balancing test in *Glenn v. General Motors Corp.*⁶⁹ Three women sued General Motors (GM) for earning lower wages compared to their male coworkers for equal work.⁷⁰ GM justified its pay disparity by describing its business practice, which encouraged hourly-paid employees to move to salaried positions without taking a pay cut.⁷¹ GM claimed this policy explained the disparity—the women were either hired “off the street” or from previous lower-paying, salaried positions, as opposed to the men who

63. *Taylor*, 321 F.3d at 719, 720 (concluding that the consideration of prior salary is not a *per se* violation of the EPA and that merely relying on prior salary has a heightened risk for perpetuating past discrimination which necessitates a “careful review of the record”).

64. *Id.* at 716.

65. *Id.* (citing *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981)) (describing the need for the defendant to have a “bona fide” reason to have a business practice that considers an employee’s prior salary).

66. *Id.* at 719 (suggesting the Eighth Circuit follows the Seventh Circuit in having the burden of proof be on the plaintiff to provide “evidence that contradicts an employer’s claims of gender-neutrality”). *But see id.* at 716 n.6 (suggesting courts may scrutinize a defendant’s evidence *sua sponte*, even where the plaintiff has not challenged it).

67. *See id.* at 718.

68. *Id.*

69. *See* 841 F.2d 1567, 1570–71 (11th Cir. 1988); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (affirming that the prior-pay-plus-one test is still employed by the Tenth and Eleventh Circuits); *see also Boyer v. United States*, 98 F.4th 1073, 1079 (Fed. Cir. 2024) (Moore, C.J., dissenting) (describing the Eleventh Circuit’s balancing test as “plus one”).

70. *Glenn*, 841 F.2d at 1568 (explaining how the highest paid plaintiff-appellee made less money than the lowest paid man).

71. *See id.* at 1570.

previously held higher-paying, salaried positions.⁷² The court found that GM improperly relied on “market force theory.”⁷³ The Eleventh Circuit selected excerpts from the congressional record to supplement its decision—claiming legislative intent does not bar the consideration of prior salary *per se*, but nevertheless decided “prior salary alone cannot justify pay disparity.”⁷⁴ Employers under this test must point to an additional factor from the previous job (i.e., the “plus one”) that justified the reliance on an employee’s prior salary.⁷⁵

In a subsequent decision, the Eleventh Circuit clarified that although “prior pay alone” does not qualify as an affirmative defense, it can be a part of a “mixed-motive” consideration.⁷⁶ The court’s rationale for requiring an employer to establish an additional motive to justify the consideration of prior salary rests on the reasonableness of this factor.⁷⁷ Under this framework, the plaintiff still has the opportunity to allege the defendant’s nondiscriminatory reason was a pretext for discrimination.⁷⁸

The Federal Circuit is the most recent court to join in the circuit split, and its decision is significant for two reasons: (1) it established an expanded middle ground test that adopted many of the rationales of the Eleventh, Eighth, Ninth, and Seventh Circuits; and (2) it determined that federal government employers are equally subject to this test as private employers.⁷⁹ In *Boyer*, the female plaintiff was paid GS-12, Step 7 wages, while a male coworker engaged in the same work was paid GS-12, Step 12 wages, in part because of their prior salaries.⁸⁰ The plaintiff alleged the government relied on the employee’s prior salary alone in determining their current pay.⁸¹ The Federal Circuit reversed summary judgment for the defendant and established its new balancing test.⁸²

The Federal Circuit focused on federal rulemaking that prospectively codified the consideration of prior non-Federal wages when setting salary

72. *See id.*

73. *Id.*

74. *Id.* at 1571 (finding that the Seventh Circuit’s use of prior salary alone relies on the infamous “market force theory” that has been rejected by the Supreme Court).

75. *See id.* at 1569–70 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974)).

76. *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

77. *See id.* (explaining how another factor, along with prior salary, can make the consideration reasonable); *Glenn*, 841 F.2d at 1571 n.9 (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982)) (finding that *Kouba* is consistent with their opinion that only “relevant considerations” can be used in conjunction with an employee’s prior pay).

78. *See Irby*, 44 F.3d at 954.

79. *See Boyer v. United States*, 97 F.4th 834, 843–44, 846–47 (Fed. Cir.), *reh’g denied*, 98 F.4th 1073 (Fed. Cir. 2024).

80. *Id.* at 838 (describing how the plaintiff made \$115,364 based on her prior salary of \$115,003 and her male coworker made \$126,123 based on his prior salary of \$130,000).

81. *Id.* at 849.

82. *Id.*

for new workers.⁸³ The court’s examination of the EPA did not center around the legislative intent of the phrase “factor other than sex”; instead, it granted more weight to the overall intent of the EPA—“to eliminate gender discrimination in compensation.”⁸⁴ Unlike the Eleventh Circuit, the Federal Circuit did not analyze legislative documents and congressional reports regarding the EPA.⁸⁵

The Federal Circuit balancing test requires a “legitimate” reason to consider an employee’s prior salary impact due to the pervasiveness of the gender pay gap.⁸⁶ The court placed the burden squarely on the employers to establish that their proffered reasons for pay disparity are the actual reasons, and not pretextual.⁸⁷

The Federal Circuit then conducted in-depth legislative intent analysis to determine whether there is any indication that Congress wanted to apply different standards between the government and private business.⁸⁸ Finding extensive legislative documentation to suggest the same standard application, and no persuasive arguments to the contrary, the court determined the EPA applies one standard to all businesses.⁸⁹

E. *The Arsenal: The Supreme Court’s Judicial Canons of Choice*

In the famous words of Justice Elena Kagan, “we’re all textualists now.”⁹⁰ The first step in a textualist analysis is to determine whether the ordinary, plain meaning of a statute’s terms settles the controversy at hand.⁹¹ Justices use dictionaries to guide the Court’s definitions of

83. See *Boyer*, 97 F.4th at 843 (citing Advancing Pay Equity in Governmentwide Pay Systems, 89 Fed. Reg. 5737, 5754–57 (Jan. 30, 2024) (to be codified at 5 C.F.R. pts. 531–32, 534 & 930)).

84. *Id.* (stating how “relying on prior compensation alone as an affirmative defense to the EPA risks thwarting the Act’s most fundamental goal—equal pay for equal work”).

85. Compare *id.* (describing the Federal Circuit’s examination of the rulemaking procedure), with *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (analyzing the legislative history of the EPA).

86. *Boyer*, 97 F.4th at 843–44 (using “the ability to hire and retain skilled workers” as an example for what may qualify as a legitimate reason to consider prior salary).

87. *Id.* (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)) (clarifying Supreme Court precedent that “the employer bears the burden of establishing the factual premises underlying the affirmative defense”).

88. See *id.* at 845–49; see also 119 CONG. REC. 18159 (1973) (statement of Rep. Barbara Jordan).

89. See *Boyer*, 97 F.4th at 847 (rejecting the government’s arguments that pay-setting statutes imply a separate standard for the government because the statutes can be reasonably understood together without conflict, and stating “the principle of the . . . Fair Labor Standards Act . . . is that the same rules ought to apply to both government and private employees”).

90. Harv. L. Sch., *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:30 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> [<https://perma.cc/E728-CGQA>].

91. *Bostock v. Clayton County*, 590 U.S. 644, 673–74 (2020) (stating that courts should adhere to plain text meaning of statutes for the sake of transparency and consistency).

statutory terms.⁹² Textualism largely ignores legislative history, especially when a statute's language is unambiguous.⁹³ Even when terms are unambiguous by themselves, there still may be ambiguity in the statutory phrase where the term is found.⁹⁴ Courts have applied the canons of *ejusdem generis* and *noscitur a sociis* by contextualizing the term with the rest of the statute, which provide logical conclusions for how to interpret a statutory term.⁹⁵ *Noscitur a sociis* is the canon dictating that "words are given meaning by their context"⁹⁶ Justice Scalia wrote on the topic of *ejusdem generis*: "When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage. . . . And second, when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous."⁹⁷ This canon implies "similar" after the word "other."⁹⁸ He clarifies that courts need not enumerate the category that links the enumerated specifics with the general term, but that such a category would come into "the reasonable person's mind."⁹⁹

Justice Scalia rebuffed attempts to interpret the text of a statute through legislative intent not explicitly written, stating that the "interpreter's mission should be not to divine the *ignis fatuus* known as 'drafter's intention,' but instead to determine what the drafter has actually said."¹⁰⁰

Textualist judicial canons also consider "legislating from the bench" as improper deviations from the words of the statute, meaning court

92. See *id.* at 657–58 (citing *Discriminate*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 745 (2d ed. 1954)); *id.* at 686, 703 (Alito, J., dissenting) (using Webster's Dictionary as well); see also *United States v. Hansen*, 599 U.S. 762, 774 (2023) (noting Chief Justice Robert's use of Webster's Dictionary to define "induce" and "encourage").

93. *Bostock*, 590 U.S. at 674 (stating "legislative history can never defeat unambiguous statutory text"). But see *Bostock*, 590 U.S. at 674 (allowing for legislative history to inform the Court of the ordinary meaning of the text at the time it was written).

94. See generally SCALIA & GARNER, *supra* note 41 (describing canons of construction for analyzing statutes).

95. See *Fischer v. United States*, 603 U.S. 480, 487–88 (2024) (defining *noscitur a sociis* as when a word is given more precise content by the neighboring words with which it is associated and *ejusdem generis* as when a general term at the end of a list of specific items is typically defined by reference to the specific classes that precede it); see also *Muldrow v. City of St. Louis*, 601 U.S. 346, 356–57 (2024) (describing how the *ejusdem generis* fits in the context of Title VII's anti-discrimination provision).

96. SCALIA & GARNER, *supra* note 41, at 166.

97. *Id.* at 169.

98. *Id.*

99. *Id.* at 175.

100. See *id.* at 173 (focusing on the text that is present in the statute and not to interpret beyond the text).

opinions that are not grounded in the text of a statute are generally disfavored.¹⁰¹

Textualism prescribes employing the “but-for” causation test as the standard for a burden-shifting framework.¹⁰² A court that identifies causal language in a statute should then make the determination of whether an outcome was caused “because of” an action.¹⁰³ The Court clarified in *Gross v. FBL Financial Services, Inc.*,¹⁰⁴ that where a statute uses “because-of” language, the plaintiff bears the burden of persuasion and must prove by a “preponderance of the evidence” that the protected characteristic was the but-for cause of the challenged action.¹⁰⁵

F. Title VII and the EPA

Although the Supreme Court has yet to substantively interpret the EPA, it has extensively interpreted Title VII’s prohibition on sex discrimination.¹⁰⁶ Like the EPA, Title VII outlaws sex-based discrimination in compensation,¹⁰⁷ though Title VII exclusively applies to employers of fifteen or more employees while the EPA applies to all employers.¹⁰⁸ Most importantly, Title VII incorporates the EPA’s affirmative defenses.¹⁰⁹

101. See, e.g., *Bostock v. Clayton Cnty.*, 590 U.S. 644, 684–85 (2020) (Alito, J., dissenting) (“[T]here is only one word for what the Court has done today: legislation.”); *id.* at 780 (Kavanaugh, J., dissenting) (“[W]e are judges, not Members of Congress Our role is not to make or amend the law.”); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 247 (2015) (Scalia, J., dissenting) (describing the majority as waiving the “Supreme Wand” to magically “[p]oof” the majority’s desired interpretation of the Pregnancy Discrimination Act); *Muldrow v. City of St. Louis*, 601 U.S. 346, 348 (2024) (“This Court will not add words to the statute . . .”).

102. See, e.g., *Bostock*, 590 U.S. at 656.

103. See *id.* (describing the “language of the law” as interpreting causal phrases like “because of,” “by reason of,” or “on account of,” as incorporating the traditional but-for causation test—“whenever a particular outcome would not have happened ‘but for’ the purported cause”).

104. 557 U.S. 167 (2009).

105. *Id.* at 177–80 (analyzing the *Price Waterhouse* burden-shifting framework in an age discrimination case).

106. See, e.g., *Bostock*, 590 U.S. at 644.

107. See 42 U.S.C. § 2000e-2.

108. See 29 U.S.C. § 206(d)(1); see also U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY (2021), <https://web.archive.org/web/20260518155555/https://web.archive.org/web/20240229102838/https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender> [https://perma.cc/A8YX-ZGWZ].

109. 42 U.S.C. § 2000e-2(h).

II. THE GENERAL EXCEPTION STRUGGLES TO FIND A BRIGHT LINE

Textualist judicial canons are friendly to expanding the protections for employees against sex discrimination.¹¹⁰ Textualism demands that courts draw a distinction between permissible, reasonable, gender-neutral business practices and impermissible, unreasonable proxies for sex discrimination.¹¹¹ The next step is to apply these canons to the various circuit court tests and see how they pass muster.

A. *Applying the Judicial Canons to the EPA*

First, the EPA should be analyzed through various credible sources, including dictionaries commonly used in Supreme Court opinions, judicial scholarship on textualist canons, and analogous Title VII cases where similar text may lead to similar outcomes.¹¹² As Title VII incorporates the affirmative defenses of the EPA, the Court's interpretations of the defenses affect both statutes.¹¹³ This analysis is then applied to each circuit split, highlighting where the circuit court deviated.

Beginning with the ordinary, plain meaning of the EPA, the key phrase of the statute is “[n]o employer . . . shall discriminate . . . *between* employees *on the basis of* sex”¹¹⁴ This phrase appears slightly differently in Title VII, which states that an employer cannot “discriminate against” an employee “because of” their sex.¹¹⁵ Taking apart these phrases, the Court defined “discriminate” using a 1954 Webster’s dictionary, and it concluded that “against,” based on precedent, meant treating those worse than others in similar situations.¹¹⁶ Although the Court has never directly defined the phrase “discriminate between,” the justices have often used the phrase interchangeably with

110. See generally *Bostock*, 590 U.S. at 644 (expanding the definition of sex discrimination in Title VII to include discrimination based on sexual orientation).

111. See *Muldrow v. City of St. Louis*, 601 U.S. 346, 357–58 (2024).

112. See *id.* at 350; 29 U.S.C. § 206(d)(1); e.g., *Bostock*, 590 U.S. at 654–55 (conducting a thorough textualist analysis of Title VII in order to resolve a circuit split between the Seventh and Eleventh Circuits that disputes whether sexual orientation discrimination qualifies as sex discrimination as written in the statute).

113. 42 U.S.C. § 2000e-2(h) (“It shall not be an unlawful employment practice . . . to differentiate upon the basis of sex . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29.”).

114. 29 U.S.C. § 206(d)(1).

115. 42 U.S.C. § 2000e-2(a)(1).

116. See *Bostock*, 590 U.S. at 657–58 (citing *Against*, WEBSTER’S NEW INTERNATIONAL DICTIONARY 745 (2d ed. 1954)) (applying the definition of “against” as, “[t]o make a difference in treatment or favor (of one as compared with others)”).

“discriminate against.”¹¹⁷ The statutory language, thus far, does not indicate any substantive differences in interpretation.¹¹⁸

“On the basis of” has largely the same meaning as “because of,” and Title VII uses both phrases.¹¹⁹ Justice Gorsuch listed many examples of similar phrases of “on the basis of.” Although he did not include “because of” on that list, he used the phrases interchangeably throughout his opinion in *Bostock*.¹²⁰

In the EPA’s “factor other than sex” phrase, the operative word to define is “factor.”¹²¹ A factor is defined as “a person or thing that actively contributes to the production of a result.”¹²² Other definitions are substantively the same—an element contributing to the result.¹²³ This definition provides some objective boundary to what business practices qualify under the EPA’s affirmative defenses—the “factor other than sex” must contribute to the salary the employee earned.

With this definition in mind, it is appropriate to then apply the canons of *ejusdem generis* and *noscitur a sociis* to continue to clarify the boundaries of what a “factor” can be.¹²⁴ *Ejusdem generis*, or “of the same kind,” is a canon which dictates that general words following a list of specific things apply only to persons or things of the same kind.¹²⁵

117. See generally *Granholm v. Heald*, 544 U.S. 460, 505 (2005) (Thomas, J., dissenting) (using “discriminate against” and “discriminate between” almost interchangeably and without clarification, and identifying an old Supreme Court decision, *Scott v. Donald*, 165 U.S. 107, 108–109 (1897), that used the terms interchangeably within the same paragraph); *Rainey v. Chever*, 527 U.S. 1044, 1044 (1999) (Thomas, J., dissenting) (criticizing the plurality opinion’s conclusion that a classification “does not discriminate against” and later describing the Court’s holdings as the statute not “distinguishing between”).

118. 42 U.S.C. § 2000e(k).

119. 42 U.S.C. §§ 2000e-2(a)–(d), (h), (j), (k)(C)(3) (using “because of”); 42 U.S.C. §§ 2000e-2(b), (e), (h), (k)(1)(A)(i), (l) (using “basis of”).

120. See *Bostock*, 590 U.S. at 663 (describing Title VII anti-discrimination clause as “on the basis of” even though it is “because of”); see also *id.*, 590 U.S. at 686 (Alito, J., dissenting) (describing the Title VII prohibition on sex discrimination as “on the basis of” and going so far as to quote the statute at the end of the same paragraph that states the standard is “because of,” which impliedly suggests the phrases can be used interchangeably).

121. 29 U.S.C. § 206(d)(1).

122. *Factor*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/factor> [<https://perma.cc/83GS-E2CR>] (last visited May 18, 2026).

123. See *Factor*, OXFORD ENG. DICTIONARY, <https://doi.org/10.1093/OED/1635161020> [<https://perma.cc/G3LB-7LF5>] (June 12, 2026) (“An element which enters into the composition of something; a circumstance, fact, or influence which contributes to a result.”).

124. See *Fischer v. United States*, 603 U.S. 480, 487 (2024) (stating that the usage of *ejusdem generis* and *noscitur a sociis* “track the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it”).

125. SCALIA & GARNER, *supra* note 41, at 171.

Noscitur a sociis, or “it is known by its associates,” is a canon which dictates that “words are given meaning by their context.”¹²⁶

The interpretation of a general catchall exception should include elements that are reasonably similar to the enumerated factors, but not all-encompassing to ensure the enumerated factors are not rendered redundant.¹²⁷ Justice Scalia wrote extensively on these textualist judicial canons.¹²⁸ These writings give some conflicting advice, but two concepts are crystalized: (1) the EPA general exception can be read as “any other *reasonably similar* factor other than sex;” and (2) this “reasonably similar factor” must not be interpreted so broadly as to render the previously enumerated statutory exceptions redundant.¹²⁹ These concepts are best demonstrated in Justice Scalia’s statement on the topic of *ejusdem generis*: “When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage. . . . And second, when the tagalong general term is given its broadest application, it renders the prior enumeration superfluous.”¹³⁰ Accordingly, only factors that are reasonably similar to wage-setting business practices that factor in “seniority,” “merit,” or “quantity or quality of production” qualify for the general exception.¹³¹

It is important to not only acknowledge what is present in both Title VII and the EPA but also identify what appears in one statute that does not appear in the other.¹³² Comparing the two statutes and applying the textualist judicial canons, it can be concluded that the EPA should not include disparate impact claims because these claims were expressly authorized in Title VII but not in the EPA.¹³³ Both statutes explicitly prohibit disparate treatment, which the Court has found must be an

126. *Id.* at 166.

127. *See id.* at 169.

128. *See, e.g.,* *Bostock v. Clayton Cnty.*, 590 U.S. 644, 674 (2020) (using SCALIA & GARNER, *supra* note 41, to justify the Court’s unexpected analysis of Title VII); *see also id.* at 685 (Alito, J., dissenting) (using SCALIA & GARNER, *supra* note 41, to explain the need for interpretation of the statute at the time it was written).

129. *See* SCALIA & GARNER, *supra* note 41, at 169, 174–75 (applying the canon to the EPA statute).

130. *Id.* at 169.

131. 29 U.S.C. § 206(d)(1); *see* SCALIA & GARNER, *supra* note 41, at 169.

132. SCALIA & GARNER, *supra* note 41, at 99–102 (discussing the negative-implication canon).

133. *Compare* 42 U.S.C. § 2000e-2 (using language such as “deprive or tend to deprive[.]” which implies an impact analysis, or specifically enumerating a subsection authorizing disparate impact claims), *with* 29 U.S.C. § 206(d)(1) (having no language that expresses a broader or more flexible interpretation, nor an explicit authorization for courts to examine disparate impacts). *See also* SCALIA & GARNER, *supra* note 41, at 99–102 (discussing the negative-implication canon, where the more specific of an enumeration results in a stronger exclusion of other considerations).

intentional act.¹³⁴ This means the EPA and Title VII both prohibit intentional acts of sex discrimination; however, the EPA does not actually reference “disparate impact” where Title VII explicitly does.¹³⁵ More specifically, Title VII has language establishing standards of review for the burden of proof in disparate impact cases.¹³⁶ The EPA contains no such language.¹³⁷

Reasonably assuming the Court reads “on the basis of” and “because of” interchangeably, the standard applied to the EPA should similarly follow a but-for causation.¹³⁸ The burden of persuasion in a but-for causation scheme lies with the plaintiff, the employee alleging sex discrimination in this case, to prove by a “preponderance of the evidence” the discriminatory action.¹³⁹ The *McDonnell-Douglas* burden-shifting framework is therefore inapplicable to EPA cases, similar to the Court’s rejection of the *Price Waterhouse* burden shifting framework in *Gross*.¹⁴⁰ The Court rejected burden shifting in general, and posited that the burden to establish a factual basis to allege sex discrimination has always been on the employee.¹⁴¹ As the EPA’s statutory standard is “on the basis of,” which is substantively the same as “because of,” plaintiffs under the EPA will bear the burden of proving, by a preponderance of the evidence, that “but-for” their sex they would have earned a higher salary.¹⁴²

There remains one outstanding issue, yet it may not prove to be significant enough to alter the final outcome. Justice Gorsuch expansively described Title VII as a statute focused on individuals.¹⁴³ In contrast, the EPA at no point refers to individuals, which suggests that the statute may consider sex discrimination based on class.¹⁴⁴ This distinction may prove to be irrelevant as the EPA exceptions are incorporated in Title VII, and the Court may still use Title VII standards. However, the possibility remains that the Court may consider the use of prior salary to be

134. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657–58 (2020) (“In . . . ‘disparate treatment’ cases like today’s, this Court has also held that the difference in treatment based on sex must be intentional”); *see also* *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466, 469 (7th Cir. 2005) (acknowledging litigation under the EPA follows an intentional, disparate treatment scheme).

135. *Compare* 42 U.S.C. § 2000e-2 (authorizing disparate impact claims), *with* 29 U.S.C. § 206(d)(1) (having no language that explicitly authorizes courts to examine disparate impacts).

136. *See* 42 U.S.C. § 2000e-2.

137. *See* 29 U.S.C. § 206(d)(1).

138. *See Bostock*, 590 U.S. at 656.

139. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–80 (2009).

140. *See id.* at 178–79 (calling the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), burden-shifting framework from plaintiff to defendant, deficient, not doctrinally sound, and difficult to apply).

141. *See id.* at 180.

142. *See id.* at 177–78; *Bostock*, 590 U.S. at 656.

143. *See Bostock*, 590 U.S. at 657–59.

144. *See* 29 U.S.C. § 206(d)(1).

discriminatory to women as a class.¹⁴⁵ Should the Court come to that determination, then Title VII is not analogous to the EPA when business practices impact women as a class, as opposed to as individuals.¹⁴⁶ Despite this caveat, the relevant language of Title VII is largely the same as the EPA; therefore, the Court's Title VII cases have probative value in determining how the Court may eventually resolve this circuit split.

B. *How the Various Circuit Tests Withstand Textualist Scrutiny*

1. The Ninth Circuit's Overstep

The Ninth Circuit, in *Rizo*, started off on the textualist path, as they analyzed the “factor other than sex” exception in conjunction with the three enumerated exceptions.¹⁴⁷ The Ninth Circuit cleverly relied on Justice Scalia's writings in bolstering their arguments, and it determined the general term “other” referred only to principles that are similar to the specifically enumerated.¹⁴⁸ The court concluded that the “obvious” category to apply to the general exception must be limited to “job related factors,” as that is the similar thread between the three enumerated exceptions.¹⁴⁹ This category is a reasonable application of textualist principles—it would be absurd for the statute to permit salary disparities based on irrelevant factors, such as a preference for the color blue or allegiance to a rival sports team.¹⁵⁰ However, this category is not helpful—it is equally as absurd to claim that the pay earned for the job has no relation at all to the job itself.¹⁵¹ Yet, despite conceding a slight relatedness, the court maintained its claim that prior pay is not “obvious” enough of a factor related to an employee's work to qualify for the general exception.¹⁵²

145. See 42 U.S.C. § 2000e-2.

146. See generally *Rizo v. Yovino*, 950 F.3d 1217, 1225 (9th Cir. 2020) (meaning in the case where the EPA protects women as a class, then business practices that negatively impact women as a class do not qualify as an affirmative defense).

147. See *id.* at 1224 (citing NORMAN J. SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2016)) (determining a too broad interpretation of the general exception would render the three enumerated exceptions “meaningless”).

148. See *id.* at 1225 (citing SCALIA & GARNER, *supra* note 41, at 199) (understanding the relatively liberal Ninth Circuit relied on Justice Scalia's writings as an olive branch to curry the favor of hardline textualists on the Court).

149. See *id.* (citing SCALIA & GARNER, *supra* note 41, at 199).

150. SCALIA & GARNER, *supra* note 41, at 208 (describing the category must be such that it would come to a reasonable person's mind).

151. See *Rizo*, 950 F.3d at 1227 (describing the use of prior salary as a mere “proxy” without itself being a factor related to work); SCALIA & GARNER, *supra* note 41, at 169, 174–75 (applying the canon to the EPA statute).

152. See *Rizo*, 950 F.3d at 1228.

The Ninth Circuit stated that the Supreme Court's precedent in *Corning Glass Works* supports their conclusion.¹⁵³ However, *Corning Glass Works* is distinguishable, as the Court in that case had specifically found wage discrimination was based on the employee's sex within a *specific* industry—not as a *general* principle of market economics.¹⁵⁴ The Ninth Circuit echoed the idea expressed in *Corning Glass Works* that the EPA's interpretation should be construed with the legislative history that preceded it.¹⁵⁵ The court also quoted several statistics that demonstrated how banning prior salary consideration from the general exception can improve the effectiveness of the EPA to meet its goal of wage parity between the sexes.¹⁵⁶ However, these altruistic intentions cannot be reconciled under strict textualist canons.¹⁵⁷ An employee's prior salary can reasonably relate to an employee's job without taking into consideration the employee's sex, and there is no textual justification to institute a ban on prior salary because of its disparate impacts without explicit statutory authorization.¹⁵⁸ The Ninth Circuit derived a statutory solution outside of the expressly written text of the EPA and focused more on the observable disparate impacts prior salary has on gendered wage disparities.¹⁵⁹ The Ninth Circuit's test—without specific congressional authorization to exclude factors that create disparate

153. *Id.*

154. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 191, 203 (1974) (defining the scope of investigation into the employer's alleged violation of the EPA as limited to their own job classification system—men got higher pay for doing “female work,” not because the market in general discriminates against women).

155. *See id.* at 198 (“[R]egard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning.”) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222, (1952)).

156. *See id.* (citing Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 790, 852–55 (2017)) (explaining how women of all races and ethnicities earn less than men of the same group); *Rizo*, 950 F.3d at 1229 (citing U.S. BUREAU OF LAB. STAT., REP. 1075: HIGHLIGHTS OF WOMEN'S EARNINGS IN 2017 1–2 (Aug. 2018)), <https://www.bls.gov/opub/reports/womens-earnings/2017/pdf/home.pdf>. [<https://perma.cc/C66P-RU9V>] (demonstrating how women on average earned 82% of men's earnings).

157. *See Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 247 (2015) (Scalia, J., dissenting) (describing the majority as waiving the “Supreme Wand” to magically “[p]roof” the majority's desired interpretation of the Pregnancy Discrimination Act); *Muldrow v. City of St. Louis*, 601 U.S. 346, 348 (2024) (“This Court will not add words to the statute . . .”).

158. *Compare* 29 U.S.C. § 206(d)(1) (lacking a disparate impact subsection), *with* 42 U.S.C. § 2000e-2(k) (providing criteria to prove a violation of Title VII for disparate impact cases).

159. *See Rizo*, 950 F.3d at 1229; *see also Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) (acknowledging prevailing wage disparities for women).

impacts—thus falls into the specter of all textualism, legislating from the bench.¹⁶⁰

2. The Seventh Circuit's Overgeneralization

The Seventh Circuit's interpretation at first blush seems like the obvious choice to a textualist; the court reads the statute plainly, takes its meaning at face value, and does not impart any legislative purpose that is not expressly in the statute.¹⁶¹ This approach is absolutely textualist-friendly to statutory interpretation.¹⁶² However, the Seventh Circuit goes too far, and it runs afoul of *ejusdem generis*.¹⁶³ The court's interpretation allows for nearly *all* non-discriminatory interpretations to qualify for the general exception, which results in the enumerated exceptions becoming "superfluous."¹⁶⁴ If an employer can discriminate against an employee for liking the color blue, then of course, legitimate reasons—like experience, merit, and quality of work—would qualify as exceptions.¹⁶⁵ Any enumerated exception is meaningless in the face of an unreasonably broad interpretation.¹⁶⁶ Therefore, the Seventh Circuit's interpretation cannot set the boundary for what business practices qualify for the general exception.

3. The Middle Ground—From Pole to Pole

The Eighth Circuit's case-by-case test diligently followed the canons of textualism. The Eighth Circuit aligned with the Seventh Circuit's opinion, reading the legislative intent of the EPA with a broad interpretation of the "factor other than sex."¹⁶⁷ However, the court emphasized a case-by-case approach, differing from the overstepping interpretation of the Seventh Circuit.¹⁶⁸

160. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 685 (2020) (Alito, J., dissenting) (stating his disagreement with the majority's opinion as legislation that had no basis in the text or meaning of the statute as written by Congress).

161. See *Wernsing*, 427 F.3d at 469 (describing the Ninth and Eleventh Circuit opinions as "ukases" because they apply standards which are not found written in the statutory language of the EPA).

162. See *Bostock*, 590 U.S. at 780 (Kavanaugh, J., dissenting) ("[W]e are judges, not Members of Congress Our role is not to make or amend the law.").

163. See SCALIA & GARNER, *supra* note 41, at 169.

164. See *id.*; *Wernsing*, 427 F.3d at 469.

165. See SCALIA & GARNER, *supra* note 41, at 174–75.

166. *Id.*

167. *Taylor v. White*, 321 F.3d 710, 717–18 (8th Cir. 2003) (stating "the catch-all provision is necessary due to the impossibility of predicting and listing each and every exception").

168. *Id.* at 716 (differentiating itself from the Seventh Circuit by employing a case-by-case analysis that is sensitive to "market force theory," as well as not utilizing *McDonnell-Douglas* burden shifting analysis).

The Eighth Circuit expressed caution regarding the consideration of an employee's prior salary as the sole reason for disparate pay, but the court refused to outright reject it.¹⁶⁹ The reason for the EPA's general exception, the court argued, is to balance protecting the employee from sex discrimination with allowing businesses to conduct themselves in a manner that is not intended to illegally discriminate.¹⁷⁰ The Eighth Circuit rejected all *per se* limitations of the general exception and reluctantly excluded any precise non-gender based factors.¹⁷¹ In *Taylor*, a salary retention policy led to two workers of different sexes receiving higher wages for lesser work, with one worker paid more than the other based on their previous assignments.¹⁷² Salary retention policies can hardly be described as being a "proxy for sex discrimination" when their purpose is to continue to pay skilled workers (regardless of their sex) the same salary they received in previous positions despite workers moving to less intensive labor.¹⁷³ As such, and in keeping with the goal of the EPA to prevent the perpetuation of sex discrimination, the Eighth Circuit closely scrutinized the trial court record for reliance on "market force theory," which does not qualify as a "factor other than sex."¹⁷⁴

Note, the absence of "market force theory" from *Corning Glass Works* leaves open the question of whether Supreme Court precedent actually prohibits the consideration of so-called "market forces" in sex discrimination cases.¹⁷⁵ The Court established in *Corning Glass Works* that the EPA does protect employees from accepting abnormally low wages in certain industries where there is pervasive wage discrimination based on an employee's sex.¹⁷⁶ The Eighth Circuit's heightened scrutiny of employers who solely rely on an employee's prior salary to justify pay disparity for equal work allows for the general exception to remain flexible to business freedoms while maintaining the rigor of judicial

169. *See id.* at 720.

170. *See id.* ("[W]e believe a case-by-case analysis of reliance on prior salary or salary retention policies with careful attention to alleged gender-based practices preserves the business freedoms Congress intended to protect.").

171. *Id.* at 718 n.7 (citing H.R. REP. NO. 309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 689, which provides several instances of examples that qualify for the general exception, such as "hours worked" or "lifting or moving heavy objects," and expressly stating the need of some businesses to retain the pay of skilled workers for lesser jobs until they are needed once again for the former jobs).

172. *See Taylor*, 321 F.3d at 712.

173. *See id.*

174. *See Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073–74 (8th Cir. 2009) (vacating and remanding the lower court's grant of summary judgment for the employer because, after close inspection of the data used to prove the usage of prior pay was a "factor other than sex," the court found the data to be insufficient to uphold the decision).

175. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 206–07 (1974).

176. *See id.*

review for discrimination cases, especially in industries with pervasive sex discrimination.¹⁷⁷

The Federal Circuit’s approach does not fare as well as the Eighth Circuit’s middle ground test; namely, it uses the purpose-driven reasoning similar to the Ninth Circuit, instead of focusing primarily on the text of the statute.¹⁷⁸ The Federal Circuit’s Chief Judge Kimberly Moore offered the harshest critiques of the majority’s ruling, stating, “[t]he EPA itself says nothing explicitly about prior pay . . . the panel never meaningfully wrestles with the statutory and regulatory evolution of the use of prior pay in salary setting.”¹⁷⁹ According to Judge Moore, the Federal Circuit never engaged with the text of the EPA, and it instead formulated arguments based on wanting to further the purpose of the EPA.¹⁸⁰ While the Federal Circuit’s opinion acknowledged the need for the general exception to “accommodate legitimate business interests,” it fell into the same trap as the Eleventh Circuit by asserting that prior pay can never stand alone as a “factor other than sex.”¹⁸¹ The canons of textualism do not point to a *per se* prohibition against prior pay without explicit statutory authorization, and a “plus one” test fares no better—either prior pay is a proxy for sex discrimination, or it is not and can therefore be a legitimate factor.¹⁸² By claiming prior pay can never be a “factor other than sex,” the Federal Circuit disregarded the facially gender-neutral business practice that set salary by considering an employee’s prior salary.¹⁸³

177. See *Taylor*, 321 F.3d at 718, 720 (stating that there is legislative history that supports “business freedoms” to have non-gender-based factors that create wage disparities); see also *Muldrow v. City of St. Louis*, 601 U.S. 346, 364 (2024) (Kavanaugh, J., concurring) (explaining that the majority’s opinion creates an unnecessary “some harm” test stating simply, “[t]he discrimination is harm,” but concurs due to the permissiveness of the test).

178. See *Boyer v. United States*, 97 F.4th 834, 842 (Fed. Cir.) (recognizing that “sex discrimination can be (but is not always) inherent in prior pay”), *reh’g denied*, 98 F.4th 1073 (Fed. Cir. 2024).

179. *Boyer v. United States*, 98 F.4th 1073, 1078 (Fed. Cir. 2024) (Moore, C.J., dissenting).

180. See generally *Boyer*, 97 F.4th at 841 (recounting the various tests amongst the different circuits and crafting its own decision for how the EPA should be interpreted).

181. *Id.* at 843 (claiming that prior pay may operate as a “proxy” to sex discrimination and, therefore, must have a separate factor or justification to prove it is not merely a proxy).

182. Cf. *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 247 (2015) (Scalia, J., dissenting) (describing the majority as waving the “Supreme Wand” to magically “[p]roof” the majority’s desired interpretation of the Pregnancy Discrimination Act); *Muldrow v. City of St. Louis*, 601 U.S. 346, 348 (2024) (“This Court will not add words to the statute . . .”).

183. See *Bostock v. Clayton Cnty.*, 590 U.S. 644, 657–58 (2020) (holding that disparate treatment requires an intent to do wrong, not that there were different outcomes to the same treatment); see also *Wernsing v. Dep’t of Hum. Servs.*, 427 F.3d 466, 469 (7th Cir. 2005) (stating that relying on markets does not manifest the requisite intent needed to be in violation of the EPA).

Additionally, the Federal Circuit’s approach of shifting the burden of persuasion to the defendant is at odds with the principles of textualism.¹⁸⁴ Simply alleging an employee’s prior salary was the sole factor other than sex does not establish by a preponderance of the evidence that “but-for” the plaintiff’s sex, they would have earned a higher salary.¹⁸⁵

The Eleventh Circuit ran afoul of several of the same textualist canons as the Federal Circuit, mainly focusing on congressional intent over the text of the statute.¹⁸⁶ The court focused on how companies “historically” hire women at lower salaries and therefore find prior pay, taken by itself, to be unpersuasive.¹⁸⁷ Although an exigent limitation on the general exception is a reasonable category to determine, it is not the *only* reasonable category, and it removes otherwise appropriate “business interests” that the broad interpretation of the general exception was supposed to protect.¹⁸⁸

III. BUSINESSES SHOULD KNOW THE REASON FOR CONSIDERING PRIOR SALARY

Businesses should anticipate a “factor other than sex” test that largely resembles the Eighth Circuit’s current approach when assessing their standards for establishing employee pay.¹⁸⁹ Although it is unclear when the Supreme Court will resolve this circuit split, when it does, the issue surrounding prior salary considerations will not simply and broadly pass muster through judicial review.¹⁹⁰ Businesses that use prior salary to

184. *Boyer*, 97 F.4th at 844–45 (shifting the burden of proving that the use of prior pay was not sex discrimination to the employer as a means of successfully asserting the affirmative defense of the general exception, rather than placing the burden on the employee to establish pretext); *cf.* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009) (holding that under the Age Discrimination in Employment Act, plaintiff must prove that age was the “but-for” cause of the adverse action and that the burden of persuasion does not shift to the employer, even if the plaintiff produces evidence that age was a motivating factor).

185. *Cf. Gross*, 557 U.S. at 177–80 (holding that under the Age Discrimination in Employment Act, plaintiff must prove that age was the “but-for” cause of the adverse action by a preponderance of the evidence, and evidence that age was a motivating factor is not enough to meet that standard).

186. *See Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (focusing on statements made in Congress that they suggest focuses the general exception to only exigent circumstances such as “experience” or “training”); *see also Young*, 575 U.S. at 247 (Scalia, J., dissenting) (describing the majority as waving the “Supreme Wand” to magically “[p]roof” the majority’s desired interpretation of the Pregnancy Discrimination Act).

187. *See Glenn*, 841 F.2d at 1571.

188. *See Boyer v. United States*, 98 F.4th 1073, 1078 (Fed. Cir. 2024) (Moore, C.J., dissenting); *see also SCALIA & GARNER, supra* note 41, at 199 (discussing how a general principle can be interpreted according to a reasonable person’s categorization in relation to the specific principles that immediately precede it).

189. *See supra* Part II.B.2–3.

190. *See Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073–74 (8th Cir. 2009) (enforcing a greater level of scrutiny when employers solely rely on prior pay as a “factor other than sex”).

determine new employees' wages will not violate the EPA *per se*, but they will not be able to defeat litigation through summary judgment by merely stating they relied on the employee's prior salary as a non-gender based "factor other than sex."¹⁹¹ Essentially, the exclusive use of an employee's prior salary in wage consideration, without a compelling business interest, increases the risk of costly litigation for a business that, in many cases, cannot be won through summary judgment.¹⁹²

Businesses should be prepared to rebut allegations that an employee's prior salary is, in fact, not based on wage sex discrimination by explaining the business reason behind the usage of prior salary, such as a salary retention policy.¹⁹³ Defendants have enjoyed a substantially higher grant of summary judgment in Title VII and employment cases.¹⁹⁴ Assuming no brightline rule will be applied to the prior salary defense, this could reduce this unusually high rate, as employer use of prior pay is insufficient on its face to determine the intent of the business to discriminate against the employer.¹⁹⁵ Businesses should therefore be cautious when setting salaries for female employees who enter their workforce at a wage rate significantly below market rates and should be especially vigilant if they are in industries prone to perpetuating sex discrimination.¹⁹⁶

To avoid expensive and protracted litigation, employers can always assume a court will apply the strictest interpretations to meet the burden

191. *See id.* at 1073 (finding that employment data provided by the employer that suggested a non-gender based factor did not include other relevant factors, such as the "education, experience, or other qualifications" of other employees compared to the plaintiff-employee's wages, and so was insufficient to decide on behalf of the employer as a matter of law); *Corning Glass Works v. Brennan*, 417 U.S. 188, 209 (1974) (finding that employers who continue perpetuating wage sex discrimination by taking advantage of markets depressing female wages to be in violation of the EPA); *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003) (restricting businesses from using "market force theory"); *Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) (finding that "wage patterns in some lines of work could be discriminatory," but that should be proved in court).

192. *Wernsing*, 427 F.3d at 470 (stating that reliance on prior pay when the "feeder" jobs were in violation of the EPA constitutes perpetuating wage sex discrimination, therefore the current employer is also in violation).

193. *See Taylor*, 321 F.3d at 718, 720.

194. *See* Mark Fotohabadi, *Odds of Winning Summary Judgement*, ADR TIMES (Apr. 8, 2023), <https://adrtimes.com/odds-of-winning-summary-judgment> [<https://perma.cc/2VWL-NXET>] (stating how Title VII and employment cases result in summary judgment granted in whole by roughly 50% and in part for roughly 23%).

195. *Id.*

196. *See Wernsing*, 427 F.3d at 470 (stating that some industries can be proven to perpetuate wage sex discrimination); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073–74 (8th Cir. 2009) (finding that the plaintiff-employee's wage rate was an outlier because it was significantly below market rates for other employee's doing the same work, which required a valid explanation for why her wage did not constitute a violation of the EPA).

necessary to defeat an allegation of an EPA violation.¹⁹⁷ As opposed to merely stating prior salary as the only factor behind an employee's current pay, businesses could identify an employee's level of education or skill associated with their job that was taken in conjunction with their prior pay or identify how the policy positively impacts the employee's salary.¹⁹⁸ Although these are higher standards to reach, they would all generally pass muster in a case-by-case analysis.

It is also worth noting that the EPA does not prevent employers from considering an employee's prior salary when negotiating job offers, as even the most liberal interpretation of the EPA by the Ninth Circuit did not bar this practice.¹⁹⁹ Businesses should expect to maintain this practice, unless it is prohibited by relevant state law.²⁰⁰

CONCLUSION

The EPA's circuit split regarding the "factor other than sex" general exception can be solved by applying textualism judicial canons, which will likely produce a case-by-case test, not a brightline rule.²⁰¹ The plain meaning of the EPA reads a broad understanding of a "factor other than sex" and, using the canons of *ejusdem generis* and *noscitur a sociis*, results in the exclusion of only unreasonable factors to maintain the meaning of the first three enumerated exceptions.²⁰² The Ninth, Eleventh, and Federal Circuits add to the EPA what does not explicitly appear in the text of the statute and can be seen as improper legislating from the bench.²⁰³ The Seventh Circuit, which allowed for any "good or bad" reason to qualify under the general exception, therefore oversteps the bounds of textualism.²⁰⁴

A modified test, similar to the Eighth Circuit, is most in line with the textualism described in the prior Title VII cases.²⁰⁵ Although equal pay

197. *Supra* Part II.A–B.2.

198. *Supra* Part II.A–B.2.

199. *See Rizo v. Yovino*, 950 F.3d 1217, 1231 (9th Cir. 2020) (explaining that although considering prior pay while negotiating job offers is illegal by California law, it is not barred by the EPA).

200. *See id.*

201. *See supra* Part II.

202. *See Fischer v. United States*, 603 U.S. 480, 487 (2024) (stating that *ejusdem generis* and *noscitur a sociis* interpret general phrases at the ends of lists according to categories determined by the reasonable person and is not so overbroad as to negate the importance of its antecedents).

203. *See Rizo*, 950 F.3d at 1224–27 (reading into the general exception in the EPA that the "factor other than sex" must be job related and that prior pay is not related to an employee's work so it is not job related); *see also Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (suggesting that prior pay is not sufficient, standing alone, as being a "factor other than sex," and requires another factor in conjunction to be a valid consideration).

204. *See Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 469 (7th Cir. 2005) (expanding the general exception to all factors that are not sex).

205. *See supra* Part III.

advocates may be disappointed that they will be unable to prohibit businesses from considering an employee's prior salary through judicial means, textualist judicial canons remain sympathetic to sex discrimination litigation.²⁰⁶ Applying these principles will not entirely gut the EPA, but instead balance the need for flexibility in business practice while scrutinizing an employee's use of prior salary that may perpetuate sex discrimination.²⁰⁷ A case-by-case test can balance all concerns: promoting the goals of the EPA to reach wage parity among the sexes, maintaining "business freedoms" in business practices, and upholding judicial impartiality—leaving legislation to Congress.

206. *See* *Muldrow v. City of St. Louis*, 601 U.S. 346, 364 (2024) (Kavanaugh, J., concurring) (agreeing with Justice Ginsburg in a previous opinion that Title VII does not require a "significant harm" and claiming that the majority's "some harm" test is unwarranted by the text of Title VII but concurring due to the permissiveness of the test); *see generally* *Bostock v. Clayton Cnty.*, 590 U.S. 644, 663 (2020) (finding that sexual orientation is included in Title VII protections as it fits under the umbrella of sex, despite Congress perhaps not intending to extend Title VII protections to employees' sexual orientation).

207. *See* *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003) (describing the need for the general exception to remain broad).