No. 19-1176

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CAMILLE A. OLSON
Counsel of Record
RICHARD B. LAPP
DAVID D. KADUE
SEYFARTH SHAW LLP
2029 Century Park East
Los Angeles, California 90067
(310) 277-7200
colson@seyfarth.com

Counsel for Amicus Curiae Society for Human Resource Management

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

The Society for Human Resource Management ("SHRM") respectfully submits this *amicus curiae* brief in support of the petition for certiorari.[1]

SHRM requests that the Court resolve a long-standing, now cavernous, split among the Circuit Courts of Appeal on whether the Equal Pay Act ever permits employers to use prior salary[2] as a "factor other than sex" to help explain a pay difference. The Ninth Circuit, by a 6-5 vote, reached out to reverse its own long-standing precedent and to adopt the novel interpretation that prior salary can *never* be a factor other than sex. This unique contribution to EPA jurisprudence, coming more than 50 years after enactment, upset settled expectations that employers could, in appropriate circumstances, consider prior salary as a factor in setting pay.

SHRM, in opposing this new rule, supports a rule that would permit employers to consider prior salary when the surrounding circumstances make it reasonable to do so, and where the employer is not simply relying on market forces that have permitted employers to pay women less because they are women. *Cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974) (wage differential "arose simply because men

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[1] Pursuant to Rule 37.2, amicus represents that the parties consented in writing to the filing of this brief, and confirms that no party to this case authored any part of this brief. No entity other than amicus or its counsel financed this brief's preparation or submission.

[2] While described by the Ninth Circuit and other courts as an applicant's prior salary, the factor considered by employers in pay decisions typically is the applicant's *current* salary at another employer.

would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work").[3]

SHRM thus joins the Petitioner in asking the Court to grant certiorari to resolve a significant circuit split and to create a sensible, uniform view on whether employers, consistent with the Equal Pay Act, can ever consider prior salary in setting pay.

INTEREST OF *AMICUS CURIAE*

As the world's largest association devoted to human resource ("HR") management, SHRM aims to create better workplaces where employers and employees thrive together. SHRM serves as the foremost expert, convener, and thought leader on issues affecting today's evolving workplaces. With over 300,000 Human Resources and business executive members in 165 countries, SHRM enhances the lives of more than 115 million workers and families globally.

Because human resource professionals sit at the intersection of work, workers, and the workplace, they have a unique perspective on implementing pay philosophies to recruit and retain top talent in the twenty-first century workforce. A key aspect of talent management includes creating an effective total rewards strategy to recruit and retain employees with a combination of compensation, fringe benefits, financial rewards, personal growth opportunities, and, increasingly, workplace flexibility options.

In developing a total rewards strategy, HR seeks to provide an approach for compensating employees that is compatible with the organization's mission, strat-

[3] Should the Court grant certiorari, SHRM will seek consent to file an amicus curiae brief on the merits.

egy, and culture, that is appropriate for the specific workforce, and that is internally and externally equitable.

The degree of market competition, the level of product demand, and industry characteristics all influence compensation and benefits philosophy. An organization is likely to use various strategies in approaching pay. For example, for critical jobs and competencies, the organization may decide to lead the competition in compensation, while in other areas the organization may decide simply to match what competitors are paying their employees. A well-designed compensation system not only helps attract employees but also plays an important role in motivating and retaining employees.

SHRM's expertise in human resources practices provides it with perspectives on hiring and pay-setting practices and insights into why employers sometimes do—and sometimes don't—consider an applicant or employee's prior salary. These kinds of practical business realities are what the Ninth Circuit's academic analysis studiously ignores.

SUMMARY OF ARGUMENT

SHRM requests that the Court resolve a long-standing split among Circuit Courts of Appeal on a critical issue under the EPA: whether prior salary can ever be a factor other than sex. A narrow Ninth Circuit majority has widened that split into a wide chasm.

Congress enacted the EPA in 1963, to prohibit sex discrimination in paying wages. The EPA accomplishes that goal by making an employer liable, regardless of its intent, if it pays different wages to employees of opposite sexes for equal work in jobs requiring equal skill, effort, and responsibility, per-

formed under similar working conditions, unless the employer can show that its payments reflect a (1) a seniority system, (2) a merit system, (3) a system measuring quantity or quality of production, or (4) "any other factor other than sex." 29 U.S.C. § 206(d)(1).

For the more than 50 years after the EPA's enactment, courts have held that employers could, in appropriate circumstances, treat prior salary as a factor other than sex, while forbidding employers to pay women less simply because market forces would permit the employers to get away with it. No circuit court during all these years held that the EPA categorically bars employers from *ever* relying on prior salary. Yet here the Ninth Circuit reached out to overturn its precedent in favor of an extreme rule that offends common sense and business realities, while undermining employers' reliance on 50 years of EPA jurisprudence. Hence SHRM's interest in this case.

ARGUMENT

I. The Ninth Circuit's Radical Rule Deepens A Circuit Split and Upsets Employer Reliance on 50 Years of EPA Jurisprudence

Petitioner ably describes four distinct ways in which the Circuit Courts of Appeal have interpreted a "factor other than sex" in cases where EPA defendants have cited prior salary to explain pay differentials, and opines on how each of the four interpretations could affect the outcome in this case. Petitioner's brief at 9–16. SHRM, not being a party, cares more about the rightness of the rule than the correctness of the result. Its purpose here, therefore, is simply to illustrate the wide range of appellate views on how to interpret the same statutory phrase ("factor other than sex") and to highlight how the existing diversity among those

views undermines employers that want consistent, correct guidance on how to comply with the law.

While deferring to the precision of Petitioner's descriptions, SHRM provides a simplified description of the wide range of opinion on whether prior salary is a factor other than sex under the EPA:

1. By one view, prior salary is *always* a factor other than sex under the EPA. *See, e.g., Taylor v. White*, 321 F.3d 710, 714–15, 717 (8th Cir. 2003) (employer could pay plaintiff's male counterparts more because their salaries stemmed from a "non-statutory salary retention policy" that paid them more in light of prior earnings; "the EPA does not suggest any limitations to the broad catchall 'factor other than sex' affirmative defense").

2. By another view, while prior salary *alone* is not a factor other than sex (as it might reflect the endemic pay bias that the EPA aims to correct), prior salary *can* be such a factor, depending on the circumstances. *See, e.g.*, *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525, 527 (2d Cir. 1992) (employers may rely on prior pay if it "is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue" and "has some grounding in legitimate business considerations"); *Beck-Wilson v. Principi*, 441 F.3d 353, 365, 366 (6th Cir. 2006) ("any other factor" exception includes factors "adopted for a legitimate business reason"; employers can rely on a sex-neutral system such as prior pay if there are "business-related" reasons to do so).

The EEOC, the federal agency empowered to enforce the EPA as of 1978, has, since at least 1997, agreed that prior salary can be a factor other than sex. *See, e.g.*, EEOC Notice Number 915.002 (Oct. 29, 1997),

Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions (advising further inquiries in cases where a defendant employer has asserted prior salary as a factor other than sex).

The Ninth Circuit itself once recognized the wisdom of a "pragmatic standard, which protects against abuse yet accommodates employer discretion," by requiring that an employer use prior salary as a "factor reasonably in light of the employer's stated purpose as well as its other practices." *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982). This "pragmatic standard" necessarily recognized that the EPA "does not impose a strict prohibition against the use of prior salary." *Id.* at 878. Yet a "pragmatic standard" was what the Ninth Circuit abruptly abandoned here in favor of a radical view that prior salary can never be a "factor other than sex."

3. The Ninth Circuit thus has created a category all its own. The en banc panel, through a 6-5 vote, created a categorical rule that prior salary can *never* be a factor other than sex. Five concurring judges agreed with the majority that prior salary *alone* can never be a factor other than sex. But the concurring judges were equally emphatic that the majority erred in insisting that prior salary can *never* be a factor other than sex.

Meanwhile, employers in the Ninth Circuit have, for decades, utilized prior salary in setting pay rates. An initial pay rate continues to influence pay levels set thereafter, as many employers adjust pay as a percentage of current pay. Accordingly, employers now face unexpected liability for current pay rates of employees that were once based, in part, on the then-lawful factor of prior salary. If the Ninth Circuit's new guidance is correct, then hundreds of thousands of employers

arguably must somehow root out remnants of reliance on prior salary that lurk within their pay systems. Employers that materially relied on prior salary, consistent with *Kouba* and EEOC guidance, thus now find themselves in legal jeopardy because the Ninth Circuit reached out to reverse its own precedent in order to adopt a radical interpretation of a 50-year-old statute.

This deep Circuit split requires resolution by this Court. And this case presents an opportunity to provide guidance for employers on an important issue—guidance needed now more than ever because of the radical divergence now existing among several distinct interpretations of the same statutory phrase: "factor other than sex."

II. The Court Should Grant Certiorari to Create Uniformity on an Important National Issue

The current split in authority undermines the obvious desirability of a nationwide interpretation of a federal law, the EPA. The current fractured state of the law—rendered further asunder by the Ninth Circuit's activism—frustrates that purpose. The Court should take this opportunity to resolve the circuit split and bring order to the current chaotic state of law. It makes precious little sense for a national employer that appropriately relies on prior salary in most of America to find itself stymied in that respect when it sets pay in states covered by the Ninth Circuit.[4]

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[4] The Ninth Circuit majority insists that its decision does not "prohibit[] any consideration of prior pay." App. 28a. The majority thus offers the assurance that employers can rely on prior pay so long as they disclaim any such reliance in defending an EPA case. This refusal to recognize the practical effect of a judicial decision

National employers already are unduly burdened by a patchwork of state laws impeding various business freedoms, but that is no justification for imposing federal patchworks, when that could not have been the congressional intent.

As the two Ninth Circuit concurring opinions observe, and as SHRM's own experience confirms, employers making business decisions have many valid reasons to consider prior salary. Any proper interpretation of "factor other than sex" would adopt a nuanced view. That view—while *not* endorsing any blind reliance on wage patterns that reflect societal biases undervaluing the worth of women workers because of perceived societal roles—would recognize that employers may fairly consider prior salary in appropriate circumstances.

By contrast, the Ninth Circuit's dogmatic view that prior salary can *never* be considered amounts to a cavalier command that businesses must disregard the economic realities that confront them. No court should so interpret a statute unless the statutory language compels that result. The EPA's language is not so compelling, as a half-century of American jurisprudence has confirmed.

The Ninth Circuit's dogmatic rule sacrifices reason on an altar of (faulty) academic logic. The Ninth Circuit concludes that because the EPA was enacted to combat endemic pay discrimination against women, prior salary therefore can never be a factor other than sex, because prior salary presumably incorporates the

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is emblematic of the majority's overall academic approach, which blithely disregards the business realities that prompted Congress to enact the "factor other than sex" exception in the first place.

very bias that the EPA was designed to correct.[5] This simplistic logic, with its unproven premise, dismisses the wisdom of a half-century of practical EPA interpretations. There is no good reason to suppose that the Ninth Circuit discovered, 50+ years after the fact, what everyone else somehow missed: the one true divination of what Congress really meant in 1963 when it carved out a space for business freedom by enacting the "factor other than sex" defense.

A. Employers Routinely Use Prior Salary Data for Legitimate Business Purposes

Employers making business decisions consider the prior salaries of applicants and employees in various scenarios that do not involve any pay discrimination because of sex. Examples of various legitimate business purposes that those considerations have achieved are set forth below.

Assessing skills and ability. Knowledge of an applicant's salary history can inform hiring decisions. Salary, when considered with other data, provides a holistic measure of a candidate's relative skill, responsibility, and job performance.

Assessing interest and motivation. Prior salary information can streamline the hiring process. Many employers ask about prior salary because they don't want to waste the time of a candidate who's seeking a higher salary than the employer would pay. Yuki Noguchi, Nat. Pub. Radio, *Proposals Aim to Combat*

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[5] Of course, any such presumption of continuing universal sex discrimination is dubious: "Wage patterns in some lines of work could be discriminatory, but this is something to be proved rather than assumed." *Wernsing v. Dep't of Human Servs.,* 427 F.3d 466, 470 (7th Cir. 2005).

Discrimination Based on Salary History (May 30, 2017), https://tinyurl.com/ya67hrua. Asking about current salary thus can save time and resources by enabling employers to determine whether applicants could work within salary guidelines.

Framing salary offers. Employers may need to meet offers or raises an applicant has received from competing employers. *See, e.g.*, Amy Gallo, Harv. Bus. Rev. Online, *Setting the Record Straight: Using an Outside Offer to Get a Raise* (July 5, 2016) (outside offers "a legitimate way to get . . . higher compensation"), https://tinyurl.com/jhm2eub; *see also* Jen Hubley Luckwaldt, PayScale, *When Should You Use an Outside Offer to Negotiate Salary?* (July 11, 2016) (offering applicants strategic advice), https://tinyurl.com/ybsf6n3l; *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980) (EPA defendant could hire a male teacher at $9,000 while hiring a female teacher at $7,500 because the male commanded $9,000 elsewhere; "an employer may consider the market place value of the skills of a particular individual when determining his or her salary").

A recent SHRM survey of 616 employer-member respondents confirms these points.[6] Respondents report using prior salary for one or more legitimate business purposes, such as framing an attractive offer, screening out those they cannot afford, or increasing an offer to attract a candidate away from a current job:

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[6] These results are from a poll taken April 16–20, 2020, with 616 SHRM member respondents. "Data Snapshot: How Employers Use Prior Pay in Decision-Making," (April 20, 2020), https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/ Data-Snapshot-How-Employers-Use-Prio-Pay-in-Decision-Making.aspx.

Landing candidates:

- 65.3% of respondents report screening out candidates whose salary demands are too high.
- 64.6% of respondents report framing an offer that would be attractive to the applicant.
- 51.9% of respondents report inducing a candidate to leave a current job.
- 37.8% of respondents report gauging candidate's likely interest in an open position.
- 32.6% of respondents report obtaining important negotiation information.
- 24.2% of respondents report negotiating a higher rate of pay with an applicant who has opportunities for higher-paid jobs with other employers.

Evaluating candidates:

- 14.1% of respondents report ensuring the candidate has the desired experience, ability, etc.
- 13.6% of respondents report learning about a candidate's prior performance, education, skill or experience.

Improving internal pay structures:

- 58.4% of respondents report gathering market data to compare against employer's own pay structure.
- 25.3% of respondents report inducing an existing employee to reject a competitive offer from another employer.

B. Stifling Use of Prior Salary Would Hurt Women as Well as Men

Some specific examples illustrate how employers can consider prior salary without blindly accepting any socially biased market forces creating endemic pay discrimination.

1. A software development company is filling two positions in a new role involving highly specialized software engineering. No salary surveys are on point. The employer offers both successful candidates—one man and one woman—a starting rate of $150,000, in line with what the company pays its incumbent software engineers. The man accepts the offer but the woman, having a better understanding of the highly specialized arcane knowledge that her specialized role requires, demands $185,000. The company meets her demand because no other candidate is available and because the need for her specialized talent is urgent.

2. An engineering firm is recruiting two engineers, with an onboarding date of July 1. The recruiting process identifies the two most qualified applicants: one man and one woman. Each is offered a starting salary of $87,000. The man accepts the offer. The woman thinks the $87,000 offer is fair, but asks for a sign-on bonus, explaining that the $10,000 annual retention bonus she expects at her current employer will not come due until October 1. The man, too, had a $10,000 annual retention bonus at his company, but that bonus was already paid, on April 1. Animated by a sense of equity and fairness, and wanting to hire the woman quickly, the firm pays her (but not the man) a $10,000 sign-on bonus.

3. A supermarket store must quickly replace two junior managers just as a global pandemic erupts.

Store management knows that competing stores have a pandemic premium pay program for store managers, but does not know the amounts being paid. Store management identifies two candidates of equal skill and experience—one a man, one a woman, and both working at competing stores. In hiring these individuals, the store pays them the store's base annual pay for a junior manager plus whatever pandemic premium pay the manager was earning elsewhere. The male candidate is thus hired at $135,000 and the woman at $140,000.

4. A professional services company, in recruiting for a vice president to lead a region, identifies a highly qualified woman working as an executive at another firm. The company's standard executive contract includes base pay, bonus, and stock options. During contract negotiations, the female executive outlines the three-year vesting schedule for her stock options at her current firm, which she expects to yield her a value of $200,000. The employer confirms that analysis and raises its salary offer to make the woman whole (for the predicted value of her loss in stock options) over the next three years. Meanwhile, the salary for an incumbent male vice president leading a different region, while performing a job requiring equal skill, experience, and responsibility, would be $200,000 less over the three years in question.

5. A manufacturer is recruiting two sales managers, one a man and one a woman. Each is offered a starting salary of $115,000. The man accepts the offer. The woman points out that her salary at her current employer is $125,000, and though she wants to accept the offer, because she is the sole financial support for her family of four, she cannot tolerate a $10,000 pay

cut. The company responds with an offer of $120,000, which she accepts.

6. A real estate brokerage is recruiting new residential sales agents. In deciding how much to offer new hires, the brokerage relies on a mix of factors, including years of experience, written recommendations, sales revenue, and current salary. It turns out that female agents in the relevant market generally earn higher salaries and among the brokerage's new hires it turns out that the women are paid more because they had been earning higher salaries at their former employers.

7. A smaller law firm merges into a bigger law firm. The bigger firm has a lock-step salary system for associates. The smaller firm had been paying associates smaller base salaries, while awarding widely varying performance bonuses, with the larger bonuses generally going to female associates because of their generally higher performance. Upon the merger, the larger firm integrates the smaller firm's associates into its lock-step payment system on the basis of their total pay earned during the prior year, with the result that women integrated into the bigger firm now have a higher salary than their male counterparts who have been integrated into the bigger firm.

8. A private high school, filling two teaching positions, considers two prime candidates—a man making $60,000 at his current school and a woman making $59,000 at her current school. During the interview process, the woman reveals she is considering an offer from a competing private school at $66,000. The man has no other prospects. The school hires both candidates, the man at $63,000 and the woman at $66,000 (matching her competing offer).

9. A photojournalist is enticed to leave her position at a major metropolitan daily in California when she receives an unsolicited offer to join another daily in Oregon that pays $10,000 more in annual salary. She informs her employer of her dilemma; her family could really use the additional $10,000. Concerned about losing this prize-winning journalist, the California daily matches her competitive offer, and she decides to stay put. In doing so, she now makes $10,000 annually more than any male photojournalist at the California newspaper.

These examples show various ways in which employers making real-world pay-setting decisions sometimes utilize an employee's or applicant's prior (or current) salary (or competitive future salary offer), as one factor among others, in setting pay. One might object that the examples show how *women* can benefit from consideration of prior salary. But that is the point. Considering prior salary (and in the example of a competitive offer, a market salary proposal) can benefit women as well as men.[7] And employers could not decide to consider prior salary *only* when the practice would benefit women, because any such practice would be unlawful. The Ninth Circuit's categorical ban on considering prior salary as a factor other than sex under the EPA thus would have the perverse effect

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[7] Indeed, limits on inquiries into applicants' current salaries can hurt rather than help women. A 2017 survey found that women refusing to disclose salary history were offered 1.8% less than women who did disclose, while men who refused to disclose salary history received offers 1.2% higher than men who did disclose. Mello, Jeffrey A. (2019) "Why the Equal Pay Act and Laws Which Prohibit Salary Inquiries of Job Applicants Can Not Adequately Address Gender-Based Pay Inequity," SAGE Pubs., https://journals.sagepub.com/doi/pdf/10.1177/2158244019.

of hurting women as well as men in their pay aspirations.

Considering prior salary in setting pay, as these examples demonstrate, is not a pretext for unlawful discrimination. As explained above, in numerous circumstances, that consideration reflects sound business decision-making to attract and to retain employees. The EPA allows employers, exercising their discretion, to decide when the use of prior salary is appropriate, and the EPA allows courts, exercising their judgment, to determine where employers have crossed the line from permissible use to impermissible use.

It is true, of course, that the EPA has not eliminated the entire wage gap perceived in 1963. And it may also be, of course, that amendments to the EPA could reduce the perceived wage gap further. But any amendment would be wholly within the province of Congress, not a court that 50+ years after the fact decides to rewrite the statute.

CONCLUSION

Accordingly, SHRM requests this Court to grant the petition for certiorari and create national uniformity to EPA law on this important issue.

Respectfully submitted,

CAMILLE A. OLSON
Counsel of Record
RICHARD B. LAPP
DAVID D. KADUE
SEYFARTH SHAW LLP
2029 Century Park East
Los Angeles, California 90067
(310) 277-7200
colson@seyfarth.com

Counsel for Amicus Curiae Society for Human Resource Management