No. 16-15372

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AILEEN RIZO,

Plaintiff-Appellee,

v.

JIM YOVINO, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California
Civil Action No. 1:14-CV-00423-MJS

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE ON REHEARING *EN BANC* IN SUPPORT OF DEFENDANTS-APPELLANTS

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Pursuant to Fed. R. App. P. 26.1 and 29(c), *Amicus Curiae* Center for Workplace Compliance makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

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The Center for Workplace Compliance respectfully submits this brief *amicus curiae* contingent upon granting of the accompanying motion for leave to file.[1]

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

CWC's members are employers subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended by the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and other federal employment laws and regulations. As

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[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel contributed money that was intended to fund the preparation or submission of this brief.

representatives of potential defendants to EPA compensation discrimination charges and lawsuits, CWC's members have a substantial interest in the issue presented in this matter regarding the proper scope of the statute's "any other factor other than sex" affirmative defense. 29 U.S.C. § 206(d)(1). The district court erroneously held that a pay disparity resulting from application of a system that considers prior salary in setting initial pay is not a "factor other than sex" under the EPA. *Rizo v. Yovino*, No. 14-423, 2015 WL 9260587 (E.D. Cal. Dec. 17, 2015), *vacated*, 854 F.3d 1161 (9th Cir. 2017), *reh'g en banc granted*, __ F.3d __, 2017 WL 3720748 (9th Cir. Aug. 29, 2017).

As national representative of many professionals and businesses responsible for compliance with equal employment opportunity laws and regulations, CWC has perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, CWC has participated as *amicus curiae* in hundreds of cases before the U.S. Supreme Court, this Court, and every other federal court of appeals involving significant issues of employment law. Because of its practical experience in these matters, CWC is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

After relocating to the area from Maricopa County, Arizona, Plaintiff-Appellee Aileen Rizo was hired in 2009 to serve as a math consultant for the Fresno County, California Office of Education (the "County") at an annual salary of $62,733. *Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017), *vacated and reh'g en banc granted*, __ F.3d __, 2017 WL 3720748 (9th Cir. Aug. 29, 2017). Her initial pay was determined using the County's standardized salary schedule known as "standard operation procedure 1440" (SOP 1440), under which management-level employees are placed in the salary level that most closely corresponds to their prior salary, increased by 5 percent. *Id.* SOP 1440 is entirely gender-neutral and has been applied in a nondiscriminatory manner, which has resulted in some men, and some women, being paid more than their similarly situated peers. Appellant's Opening Brief (App. Br.) at 7-8.

After learning that a male math consultant who had recently been hired had started at a higher salary level than her, Rizo lobbied the County for a pay adjustment. 854 F.3d at 1164. The County refused after conducting an extensive pay analysis of current management employees hired over the past 25 years in the same or similar position as Rizo. *Id.* The review confirmed that SOP 1440 has been applied consistently and in a nondiscriminatory manner, and that it has not resulted in an adverse impact on female employees. App. Br. at 10. Dissatisfied,

Rizo brought the instant action in federal court, claiming that she was paid less than her similarly situated male peers, in violation of the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. 854 F.3d at 1163-64.

The County moved for summary judgment, arguing that Rizo's salary, though admittedly less than her male colleagues, was set based on her prior salary and in accordance with SOP 1440, and thus was based on "any other factor other than sex." *Id.* at 1165. The County pointed out that its policy of relying on prior salary was rooted in four sound business reasons: it (1) was objective; (2) encouraged candidates to leave their current jobs by providing a 5 percent pay increase over their current salary; (3) prevented favoritism and ensured consistency; and (4) was a "judicious use of taxpayer dollars." *Id.*

In denying the County's motion for summary judgment, the district court concluded that prior salary alone can never be a factor other than sex under the EPA. *Id.* at 1164. It observed that "a pay structure based exclusively on prior wages is so inherently fraught with the risk … that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate nondiscriminatory business purpose." *Id.* Recognizing its apparently direct conflict with binding Circuit Court precedent, however, the district court certified its ruling for interlocutory appeal. *Id.* at 1163.

On the County's appeal, a three-judge panel reversed, relying principally on the Court's 1982 decision in *Kouba v. Allstate Insurance Co*., 691 F.2d 873 (9th Cir. 1982). *Id.* There, it held that a pay differential based on use of prior salary can be a permissible "factor other than sex," so long as it "effectuate[s] some business policy," *id.* at 1165, and is used "reasonably in light of the employer's stated purpose as well as its other practices." *Id.* The panel concluded that *Kouba* is dispositive to resolution of this case, pointing out, "We do not agree with the district court that *Kouba* left open the question of whether a salary differential based solely on prior earnings violates the Equal Pay Act. To the contrary, that was exactly the question presented and answered in *Kouba.*" *Id.* at 1166. It thus reversed the district court's ruling and remanded the case for a determination on whether the County used prior salary "reasonably in light of its stated purpose." *Id.*

Rizo filed a petition for rehearing *en banc*, which this Court granted on August 29, 2017, thus vacating the panel's decision. *Rizo v. Yovino*, __ F.3d __, 2017 WL 3720748 (9th Cir. Aug. 29, 2017).

SUMMARY OF ARGUMENT

In this case, the district court below held that when an employer bases a pay structure exclusively on prior salary, any resulting pay differential between men and women is not based on a "factor other than sex" under the Equal Pay Act (EPA). That holding is incorrect. Since prior salary is not a proxy for sex, it falls squarely within the scope of the EPA's "factor other than sex" affirmative defense.

This Court has ruled directly on this question, holding that a pay differential based on use of prior salary may be a permissible "factor other than sex" if it is applied reasonably for a legitimate business purpose. *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982). Because it stands in direct conflict with this Court's well-reasoned precedent and contravenes the plain text of the EPA as interpreted by the U.S. Supreme Court, the district court's decision should be reversed.

The Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), prohibits employers from paying men and women working at the same establishment and in the same job different rates of pay because of sex. The statute contains four affirmative defenses to employer liability, including that a pay differential is justified by "any other factor other than sex." 29 U.S.C. § 206(d)(1). Thus, on its face, the EPA makes gender-based pay differentials unlawful, while expressly permitting those that are based on any other factor other than sex.

Consistent with those legal requirements, Defendant-Appellant Fresno County set employee compensation based on a facially-neutral system (SOP 1440) that guaranteed every management hire a five percent increase over their prior salary. SOP 1440 was applied consistently to all management employees, from math consultants to school superintendent, regardless of gender. Because any resulting differential between Rizo's pay and that of other male math consultants was based on "any other factor other than sex," the differentials do not implicate the EPA.

Nevertheless, Rizo contends that because SOP 1440 – in addition to instituting a five percent pay increase for all new employees – also considered an individual's prior salary in determining initial pay in a new job, it was not a legitimate basis for any gender pay differentials that may have resulted. Essentially, she argues women are likely to have lower prior salaries than men, and thus any reliance on prior salary is inherently discriminatory. In other words, Rizo would have this Court conclude that use of prior salary alone, where doing so results in any gender pay disparity, always equates to an impermissible sex-based decision that violates the EPA.

Yet employers are under no legal obligation to ensure across-the-board pay parity among employees under the EPA. In addition, mandating sex-based equity adjustments in the manner urged by Rizo defies logic and would undermine sound

and proven business practices. It also is contrary to well-established legal principles outlined by this Court in *Kouba*.

ARGUMENT

I. THE USE OF PRIOR SALARY AS PART OF A GENDER-NEUTRAL COMPENSATION POLICY IS A LEGITIMATE JUSTIFICATION FOR A PAY DISPARITY UNDER THE EQUAL PAY ACT

Rizo's argument rests on a legally flawed premise – that employers, the County included, have an affirmative obligation under the Equal Pay Act to eliminate disparities in pay that are caused by gender-neutral compensation policies. No such obligation exists. Rather, legitimate, business-justified compensation policies that are applied without regard to gender satisfy the Equal Pay Act's "factor other than sex" affirmative defense. Because use of prior salary is not sex-based, it is not unlawful. Accordingly, the district court's decision to the contrary is erroneous, and should be reversed.

A. Mandating Pay Parity Despite Gender-Neutral Compensation Practices Is Inconsistent With The EPA's Text And Legislative History

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended by the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d), prohibits employers from differentiating in pay on the basis of sex. It provides:

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

> such establishments for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex.*

29 U.S.C. § 206(d)(1) (emphasis added). The EPA thus "prohibits differential payments between male and female employees doing equal work except when made pursuant to any of three specific compensation systems or 'any other factor other than sex.'" *Kouba v. Allstate Ins. Co*., 691 F.2d 873, 875 (9th Cir. 1982).

> [Essentially, t]he Equal Pay Act is divided into two parts: a definition of the violation, followed by four affirmative defenses. The first part can hardly be said to "authorize" anything at all: it is purely prohibitory. The second part, however, in essence "authorizes" employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act.

County of Washington v. Gunther, 452 U.S. 161, 169 (1981).

While appearing to concede that her initial pay was set pursuant to legitimate, nondiscriminatory factors, Rizo nonetheless contends that the County's reliance on prior salary should itself give rise to an EPA violation. In essence, Rizo argues for a form of disparate impact liability, under which application of a gender-neutral policy based on a factor (prior pay) that may (but has not conclusively been shown to) have an adverse impact on women's future pay violates the EPA.

Neither the EPA's text nor legislative history, as interpreted by the U.S. Supreme Court and this Court, supports such a contention, however. To the contrary, as any unintended pay differential that existed between Rizo and other male math consultants was the result of starting salaries that were set using legitimate, non-sex factors, the EPA makes clear that the differential is permissible.

1. The U.S. Supreme Court has held that only pay differentials that discriminate based on sex are unlawful under the EPA

In *County of Washington v. Gunther*, the U.S. Supreme Court held that the Bennett Amendment to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, incorporates the EPA's four affirmative defenses, including the defense for differentials based on "any other factor other than sex." 452 U.S. 161 (1981). At the same time, the Court intimated that the "factor other than sex" defense was inconsistent with the disparate impact doctrine established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), suggesting that it was meant primarily to limit the application of the EPA to disparate treatment claims. *Gunther*, 452 U.S. at 170.

In particular, the *Gunther* Court noted that Title VII was designed not only to prohibit "overt discrimination," but also to proscribe "practices that are fair in form, but discriminatory in operation." *Id.* (citation omitted). The EPA's "any other factor other than sex" defense, however, "was designed differently, to

confine the application of the act to wage differentials attributable to sex discrimination." *Id.* (citation and footnote omitted) (emphasis added). It found that "Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" *Id.* (footnote omitted); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) ("Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry. … The solution adopted was quite simple in principle: to require that 'equal work will be rewarded by equal wages'" (citation omitted)).

Consistent with those principles, this Court has observed that the EPA's "factor other than sex" affirmative defense is a "'broad general exception,'" *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986) (quoting *EEOC v. Maricopa Cnty. Comm. Coll. Dist.*, 736 F.2d 510, 514 (9th Cir. 1984)), which Congress intended would allow employers to use any number of legitimate, nondiscriminatory pay-setting procedures including "bona fide gender-neutral job evaluation and classification systems." *Id.* As this Court affirmed in *Kouba*, the EPA "does not impose a strict prohibition against the use of prior salary." 691 F.2d at 878. Other courts of appeals agree with that interpretation. *See Taylor v.*

White, 321 F.3d 710, 717 (8th Cir. 2003) ("On its face, the EPA does not suggest any limitations to the broad catch-all "factor other than sex" affirmative defense").

2. Ensuring nondiscrimination in compensation does not equate to ensuring that all employees are paid the same

Accordingly, and contrary to Rizo's assertions, the mere fact that there was a disparity in pay between male and female math consultants does not, in itself, constitute an EPA violation. Rather, the Act obligates employers to ensure that pay decisions are made for nondiscriminatory reasons, in other words, without regard to sex; it does not require they ensure across-the-board pay parity between all men and all women. Indeed, the EPA is "not the 'Pay Everyone Exactly the Same Act.'" *Behm v. U.S.*, 68 Fed. Cl. 395, 405 (2005) (citations omitted).

Rizo fails to point to any binding legal authority that reasonably can be read as supporting the notion that employers must disregard prior salary in setting initial pay, even though not all women earn less than all men and not all gender pay disparities can be attributed to sex discrimination.

For example, suppose a female teacher earning $35,000 a year leaves her job for five years to start a family, while her male co-worker continues working and is earning $43,000 five years later. If both teachers were hired by a school district with a pay system similar to the County's, the male would be paid an initial salary of $45,150 – which represents his most recent prior salary plus five percent – whereas the female would be offered $36,750. There is nothing intentionally or

inherently discriminatory about that resulting pay disparity, or about application of a pay setting system that ignores the underlying cause or causes of each individual's prior salary.

In this case, Rizo relocated to Fresno County, California from Maricopa County, Arizona. On February 7, 2017, the average salary of employees in the Education, Training and Library fields was $38,480 in Maricopa County and $52,960 in Fresno County – reflecting a 37 percent geographic difference. *See* Amy K. Glasmeier, Ph.D. & Massachusetts Institute of Technology (MIT), *Living Wage Calculator* (2017).[2] Rizo's starting salary with the County was $62,733 – fully 63 percent higher than what education professionals typically would be paid today in Maricopa County, *id.*, and over 20 percent more than her actual prior salary of $50,630. *See* App. Br. at 9. The market conditions affecting teacher pay in Arizona, as well as Rizo's decision to relocate to Fresno County, California – where the market conditions for teachers are far more favorable – were well beyond the County's control. All it could do was to ensure that its process for setting initial pay – SOP 1440 – was nondiscriminatory in design and application. That is all the law required.

The County's application of SOP 1440 was nondiscriminatory. It resulted in women sometimes earning less than men, but also men sometimes earning less

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[2] *Available at* http://livingwage.mit.edu/counties/04013.

than women. The differential was based on prior salary, which is not and cannot be considered a proxy for sex. Neither the EPA nor Title VII requires any employer to redress pay differentials that are caused by something other than its own discriminatory employment practices. Any suggestion to the contrary has no basis in the law.

It also is nonsensical as a practical matter. As the Seventh Circuit aptly explained:

> Most large employers, even if their work force is not unionized, find it impracticable to match each employee's pay with the employee's work. Instead they use a pay grade system …. Each employee within a given grade receives the same or a similar salary; there are salary jumps between grades rather than a smooth progression; and promotion from grade to grade may be based in part on seniority, in part on credentials, and in part on competition in the labor market. In such a situation, it is inevitable that some workers will receive different pay for the same work, and the fact that the lower-paid worker is a woman is so likely to reflect the operation of accidental, noninvidious factors that we do not think an inference of violation of the Equal Pay Act can be drawn from the mere difference. If the woman were hired first at the higher wage and the man later at a lower wage yet he zoomed past her even though their work was identical in kind and quality, this would be enough evidence of a violation to carry the case into jury-land. But a mere failure of catch up is not by itself enough evidence.

Lindale v. Tokheim Corp., 145 F.3d 953, 958 (7th Cir. 1998). This Court accordingly should squarely reject the notion that an employer's reliance on prior salary in setting starting pay is enough, without more, to give rise to unlawful discrimination *on the basis of sex*.

This Court has made clear that the EPA's factor-other-than-sex affirmative defense "enables the employer to determine legitimate organizational needs and accomplish necessary organizational changes." *Maxwell*, 803 F.2d at 447. It follows that a "factor used to effectuate some business policy is not prohibited simply because a wage differential results." *Kouba*, 691 F.2d at 876.

The County's well-documented, gender-neutral compensation procedure, which was applied consistently to all employees – including Rizo's male comparators – provides a complete explanation for the disparity at issue. That procedure is based on sound and common business practice, and thus constituted a factor other than sex. In the absence of proof of sex-based discrimination, there is no basis for invoking the EPA or Title VII.

B. Congress Repeatedly Has Declined To Enact Legislation That Would Incorporate The Extra-Statutory Standard Being Advocated By *Amicus* EEOC

In its briefs below, *amicus* EEOC asserts that reliance on prior salary alone cannot justify a gender pay disparity under the EPA, because doing so "institutionalizes the disparity between what men and women earn on average," a practice which it claims "undermines the purpose of the EPA." EEOC Br. at 10-11. The agency urges an interpretation of the "any other factor other than sex" affirmative defense contained in the EPA that requires the employer to show the

factor in question (here, prior salary) "is related to job requirements or otherwise is beneficial to the employer's business." EEOC Br. at 13 (citation omitted).

Yet neither Congress nor any court has ever purported to narrow the scope of the EPA's affirmative defenses in that manner. To the contrary, and as noted above, the Supreme Court and this Court have confirmed the broad scope of the "factor other than sex" defense. In addition, legislative efforts over the past two decades to narrow the defense have yet to gain traction.

Specifically, the unenacted Paycheck Fairness Act (PFA), S. 862 & H.R. 1619, 114th Cong. (Mar. 25, 2015), is the legislative centerpiece of a broad-based campaign dating back to the late 1990's aimed at significantly amending the EPA. Among other things and as most relevant here, the PFA would replace the current "any other factor other than sex" with a so-called "bona fide factor other than sex" affirmative defense, under which an employer seeking to defend a pay differential would be required not only to show that the factor causing the disparity is not based on sex, but also that it is job-related and consistent with business necessity. *Id.*

An employer still would face liability even after making that showing if the plaintiff can demonstrate that a less discriminatory alternative existed that the employer refused to adopt. The proposed "bona fide factor" defense is strikingly

similar to the "business necessity" test applicable to *disparate impact* claims brought under Title VII.

The obvious aim of the proposed revisions to the EPA's "any other factor" affirmative defense is to make it more difficult for employers to avoid liability for pay differentials cause by legitimate, non-sex based factors that currently are allowed under existing law. For instance, employees legitimately may get paid differently based on what shift they work, their hours of work, or other differences based on experience, training and ability. Any of those presently lawful business justifications for pay differentials would be impermissible under the PFA, unless the employer could provide, under the bona fide test, that they are "job-related with respect to the position in question." Paycheck Fairness Act, S. 862 & H.R. 1619, 114th Cong. (Mar. 25, 2015) (Sec. 3(a)(3)(B)).

The effect of requiring employers to meet each of these separate burdens under the fourth affirmative defense would be to severely limit the contexts in which the defense may be asserted. For example, common factors influencing pay – such as market rates or prior salary history – most likely would not pass muster under the bona fide factor test. Such a change would sharply limit, or eliminate entirely, an employer's ability to vary pay based on factors that in its sound business judgment contribute to increased productivity, employee satisfaction, and the like.

One example is the common practice of differentiating pay based on work hours, i.e., paying more for second- or third- shift work. While such a factor easily is considered to be any other factor other than sex under the current EPA, the proposed PFA would render it illegal – except for those businesses that could plausibly argue that shift work is "significantly related to," not simply good for, the "employment in question." In effect, that is the standard that the EEOC asks this Court to apply to this case.

The Paycheck Fairness Act thus would reflect a dramatic (and damaging) shift in the law, which is perhaps one reason that Congress has not passed it. Yet the EEOC is arguing for effectively the same result by imposing extra-statutory restrictions on an employer's right to assert the "any other factor" defense. Of course, the EEOC lacks the authority to modify a statute where Congress has declined to do so.

In this case, *amicus* EEOC's grievance essentially is that reliance on prior salary cannot be a "factor other than sex" because doing so "simply institutionalizes the gender pay gap that studies confirm still exists." EEOC Br. at 10. In other words, the EEOC assumes that the sole cause of the gender pay gap is sex discrimination and, as a result, women's prior salaries *always* will be lower than similarly situated males because of sex. Accordingly, the argument goes, because prior salary is influenced by the gender pay gap, its use is always sex-

based. Even assuming that some women's prior salaries are lower than that of similarly situated males consistent with the wage gap generally, it does not follow that use of prior salary itself is inherently discriminatory.

The EEOC's position would amount to a requirement that all employers eliminate any pay disparity between genders, even those created by a gender-neutral policy – a requirement that simply is not contained in existing law. As the Supreme Court in *Smith v. City of Jackson* observed, "in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based 'on any other factor' - *reasonable or unreasonable* - 'other than sex.'" 544 U.S. 228, 239 n.11 (2005) (emphasis added).

Accordingly, any notion that employers must guarantee gender pay parity in the absence of any evidence of sex-based discrimination or face liability under the EPA should be soundly rejected by this Court. In fact, forcing employers to adjust pay based on sex where no evidence of actual discrimination exists could expose employers to claims that such adjustments themselves violate Title VII. *See Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (concluding that intentional discrimination under Title VII that is carried out to avoid or remedy unintentional discrimination under that same statute is permissible only when the employer has a "strong basis in evidence" to believe that the intentionally discriminatory action is necessary to avoid liability for the unintentional discrimination); *Rudebusch v. Hughes*, 313

F.3d 506 (9th Cir. 2002) (ruling that by adjusting the salaries of women and minority employees in an effort to achieve "pay equity" in compliance with its federal affirmative action obligations, the university may have incurred liability to those employees' white male colleagues by making pay adjustments that were larger than necessary to remedy discrimination).

II. EMPLOYERS COMPENSATE THEIR EMPLOYEES IN MYRIAD WAYS FOR LEGITIMATE, NONDISCRIMINATORY BUSINESS REASONS

Defendant-Appellant Fresno County finds itself in an unusual and frankly unenviable position. Having already developed a compensation system that eliminates discretion in pay-setting decisions—and with it, the potential for gender bias—the County now faces challenges to this gender-neutral policy from not only Rizo, but *amicus* EEOC as well. As the chief federal agency charged with eliminating gender-based compensation discrimination through the enforcement of the EPA and Title VII, the arguments advanced by *amicus* EEOC are troubling for a number of reasons. Perhaps most disturbing, the agency appears to be advocating that employers nationwide adopt gender-based or, at the very least, "gender-conscious," compensation systems designed to achieve pay parity, regardless of any evidence of actual sex-based discrimination. As explained further below, the compensation theories advanced by the EEOC's two briefs before this Court, first at the panel stage and then in support of *en banc* review,

contain numerous assertions that simply are not supported by the record below or any reasonable construction of the law.

A. The County's Compensation System Neither Endorses, Nor Relies Upon, A "Market Forces" Theory

Amicus EEOC argues that the County's compensation system endorses and perpetuates a "market forces" theory of compensation discrimination. The "market forces" theory is a legal term of art, referring not to a legitimate market-based compensation system, but to a compensation practice in which women are intentionally offered *lower* compensation simply on the assumption that they are "willing to work for less," and men are offered *higher* compensation on the belief that they will not accept less. While such a practice is plainly sex-based and discriminatory, there is no evidence in the record below that Rizo's compensation was set at a lower rate than that of her male comparators based on what the County believed she, as a woman, would be willing to accept.

To the contrary, the County did not then, and does not now, pay less to employees based on an assumption that, because of their gender, they will be willing to work less. *All* employees were offered the same increase above their prior salary, regardless of their gender and their prior salary. Moreover, like hundreds of thousands of other employers, the County compensates its employees based on and within specified pay ranges. Where prior salary plus the mandatory 5 percent increase called for by SOP 1440 did not place a new hire within the

County's specified pay range, employees such as Rizo were provided an even greater increase to ensure that they were compensated within the pay range. That is the definition of an objective, gender-neutral compensation system.

The EEOC contends that a compensation system that relies on prior salary perpetuates unlawful "market forces" pay discrimination. EEOC Second Br. at 7. It argues that when prior salary is used to establish future salary, it "undermines the purpose of the EPA," *id.* at 9, because those at the bottom of the pay scale "will likely be women." *Id.* Specifically, the EEOC asserts, because of the gender pay gap, "for the most part, women's earnings are lower than those of similarly-situated men." *Id.* at 7-8. As the agency well knows, however, a general acknowledgment that the pay gap exists, coupled with a broad assumption that women "for the most part" make less than men, *id.*, is insufficient to establish a prima facie case of sex discrimination under the EPA or Title VII. Were it otherwise, even objective, gender-neutral compensation practices could be challenged based on any incidental gender pay differences.

In both discretionary and non-discretionary compensation systems, sound business and policy reasons can exist for assigning employees different compensation. Here, those reasons were a combination of prior salary and the County's mandatory pay scale. Sometimes that system resulted in women, such as Rizo, receiving less compensation than other males, and in other instances, females

were actually paid more than certain males. In each instance, there were objective, nondiscriminatory reasons for the pay decisions, and the County was under no obligation to "cure" any incidental pay differences stemming from prior salary.

Rizo and *amicus* EEOC urge this Court to endorse the idea that any nondiscriminatory compensation system in which women are "likely" to fall to the bottom of a pay range categorically violates the EPA – even if the pay differential is not based on sex. As described above, employers are not obligated under *any* federal law to equalize their employees' pay over time. Such a notion runs directly counter to the principles of meritocracy that form the basis of most private sector employer compensation practices in the U.S. and should be squarely rejected by this Court.

B. The Equal Pay Act Does Not Create An Affirmative Obligation On Employers To Identify Or "Cure" The Effects Of The Gender Wage Gap

Amicus EEOC argues that prior salary alone cannot be a "factor other than sex" because it perpetuates the effects of past discrimination and what is commonly known as the "gender wage gap." Yet there is no legal support for the notion that employers can face EPA liability for basing compensation decisions on objective, gender-neutral factors simply because they might be, as the EEOC says, "perpetuating gender-based pay disparities." EEOC's argument fails generally, and here in particular, on a numbers of fronts.

First, the County's pay system was not based on prior salary "alone." The record demonstrates that new hires received a 5 percent increase over the prior salary, so long as that increase would place the employee within the County's pay scale. In cases such as Rizo, where the 5 percent increase did not place the employee within the County's pay scale, employees received an even larger increase over their prior pay to ensure that they were compensated within the County's pay scale. Thus, Rizo was not compensated based on prior salary "alone." To the contrary, had the County paid Rizo based on prior salary alone, she would have fallen outside of the County's pay scale.

Second, even assuming the County compensated its employees based on prior salary alone, the EPA does not prohibit the use of such gender-neutral factors in deciding compensation decisions. To the contrary, it commands that compensation decisions be made without regard to sex.

Third, the EEOC's argument rests on the unfounded assumption that the gender wage gap itself is "based on sex," and therefore is unlawful under the EPA. This assumption ignores the volumes of research to the contrary. While the existence of a persistent, global gender pay gap is undeniable, so too is the fact that there are numerous causes for the gap, and no research exists that can fully account for the disparity, much less pin the entire disparity on unlawful sex discrimination.

For example, in 2009 the CONSAD Research Corporation released a report, *An Analysis of Reasons for the Disparity in Wages Between Men and Women*,[3] commissioned by the Department of Labor, aimed at researching and quantifying the cause of the of the gender wage gap. The study identified numerous factors that were contributing to the gap, including career choice in occupation and industry, employment interruptions mid-career, and different decisions made by men and women in balancing their work, personal, and family lives. After conducting a statistical analysis of these and other factors, an "adjusted gender wage gap" remained, estimated between 4.8 and 7.1 percent. *Id.* at 1. Other studies have produced similar results. *See, e.g.*, Am. Ass'n of Univ. Women, *Graduating to a Pay Gap* vii (Oct. 2012) (concluding that "women's choices—college major, occupation, hours at work—do account for part of the pay gap," but also that "about one-third of the gap remains unexplained" and may be the product of other factors such as negotiations and even discrimination); Glassdoor, *Demystifying the Gender Pay Gap* (Mar. 2016) (concluding that the U.S. adjusted wage gap was 5.4% in base compensation and 7.4% in total compensation, after controlling for factors such as industry, experience, education and job title).

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[3] *Available at* https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/Gender%20Wage%20Gap%20Final%20Report.pdf.

The "adjusted gender wage gap," is what remains of the wage once quantifiable characteristics such as occupation, industry, experience, and other factors are controlled for in statistical studies. Also referred to as the "unexplained" wage gap, it is often suggested that this unexplained gap is caused by unlawful discrimination. While there is no question that unlawful, gender-based discrimination *may* account for portions of the adjusted gender wage gap, the fact remains that no research to date has been able to quantify which portion of the gap is attributable to discrimination. More importantly, the EPA simply does not impose an obligation on employers to become social scientists and make individual, gender-based compensation decisions based on the latest research regarding the existence of a wage gap and the degree to which this gap *may* be the product of discrimination.

Even setting aside for a moment the obvious legal flaws in the EEOC's position, numerous practical challenges remain. Imagine for a moment the impossible challenge employers would face if they were charged with "correcting" the national gender wage gap based on individual compensation decisions. Take this case as an example. In its *amicus* briefs, the EEOC simply assumes, without evidence, that Rizo's prior salary was based upon some prior discriminatory action, and even goes so far as to imply that the County now gets to "benefit" from that past discrimination. EEOC Second Br. at 10. In addition to the objectionable

nature of such an assumption, particularly given the lengths to which the County has gone to eliminate bias from its pay-setting process, it raises more questions than it resolves, such as:

1. How can employers know when use of prior salary perpetuates past discrimination, or was set using legitimate, non-discriminatory factors?

2. What criteria should be used in adjusting employee salary to "correct" the gender wage gap?

3. What proportion of the gender wage gap should employers correct? The entire gap? Only the portion attributable to discrimination?

4. What should employers do when a male employee's prior salary is less than a female employee's prior salary?

5. Are employers responsible for knowing and correcting other factors that may also contribute to the wage gap?

These questions have no obvious answers and thus cannot reasonably factor into any employer's compensation practices. Instead, the law requires that employers base their compensation decisions on objective, non-discriminatory criteria as the County has done here.

Employers are not obligated under any federal law to equalize their employees' starting pay to ensure perfect parity between people performing the same job. Such a notion runs directly counter to the principles of meritocracy that have driven private sector compensation practices for decades. Ensuring perfect parity in compensation among all employees in a particular job group would require, for instance, that every person promoted into a job be compensated at the

same rate of pay as the highest earner (likely the most experienced or best performer), thus disregarding differences in skills, knowledge, ability and/or time in job. Alternatively, employers would resort to compensating every employee at the *lowest* wage without regard to merit.

The former would increase payroll budgets exponentially, while the latter would severely impede efforts to attract the best talent and produce the highest quality product, thus ensuring a quick race to the bottom, rather than to the top. Under either scenario, American businesses would be placed at a significant and extremely damaging competitive disadvantage.

In the end, courts should defer to an employer's judgment in applying sex-neutral pay practices. As the Supreme Court instructed in *County of Washington v. Gunther,* "Under the Equal Pay Act, the courts and administrative agencies are not permitted to 'substitute their judgment for the judgment of the employer … who [has] established and applied a bona fide job rating system,' so long as it does not discriminate on the basis of sex." 452 U.S. at 170-71 (citation omitted); *accord Kouba,* 691 F.2d at 876 ("The Equal Pay Act entrusts employers, not judges, with making the often uncertain decision of how to accomplish business objectives"); *see also Wernsing v. Dept. of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) ("Congress has not authorized federal judges to serve as personnel managers for America's employers"); *Taylor v. White*, 321 F.3d at 719 (the Court should not "sit

as a super-personnel department that re-examines an entity's business decisions")

(citations omitted).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to reverse the district court's decision below.

Respectfully submitted,

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October 3, 2017

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