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Gender Pay Disparity, the COVID-19 Pandemic, and the Need for Reform

Amy H. Soled[†]

*A comedian once opined, “The wage gap isn’t real. Men . . . go for higher paying jobs, like doctor, engineer, CEO. Whereas women [pick] lower paying jobs like female doctor, female engineer, and female CEO.”*¹

INTRODUCTION

While the punch line of many jokes, pay disparity is no laughing matter. A woman earns approximately eighty-two cents for every dollar earned by her male counterpart,² and after the COVID-19 pandemic, there is every reason to anticipate that she will earn even less. This difference in wages between men and women—the so-called “pay gap”—has existed since women entered this country’s commercial labor market.³ Pay disparity exploits more than half the

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¹ The Female Lead (@the_female_lead), TWITTER (July 16, 2020, 1:01 PM), https://twitter.com/the_female_lead/status/1283808866321539075?lang=en (last visited Apr. 11, 2022).

² Sonam Sheath et al., *These 8 Charts Show the Glaring Gap Between Men’s and Women’s Salaries in the U.S.*, BUS. INSIDER (Mar. 15, 2022, 11:01 AM), <https://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3> [<https://perma.cc/CE4R-9BCU>]. The wage gap is even larger for Black women, who earn sixty-two cents for every dollar earned by her male counterpart. Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/> [<https://perma.cc/XS8S-LAA3>]. This article focuses on the gender wage gap between women and men, but it recognizes that there is a racial pay gap, with Black workers earning less than their white counterparts even when they have equivalent performance ratings. See Stephen Miller, *Black Workers Still Earn Less than Their White Counterparts*, SOC’Y FOR HUM. RES. MGMT. (June 11, 2020), <https://bit.ly/3LXOr0j> [<https://perma.cc/SM6Q-3PJQ>].

³ See Claudia Swain, *The First Treasury Girls*, BOUNDARY STONES (Mar. 1, 2016), <https://boundarystones.weta.org/2016/03/01/first-treasury-girls> [<https://perma.cc/C78Z-3UC8>] (noting the prevailing attitude during the Civil War was that the federal government could save money by offering women lower wages); see also Lydia Dishman, *The Long and Frustrating History of the Gender Wage Gap*, FAST CO. (Mar. 8, 2021), <https://www.fastcompany.com/90609641/the-long-and-frustrating-history-of-the-gender-wage-gap> [<https://perma.cc/7K9G-L79T>].

population and stunts economic growth.⁴ While the pay gap somewhat narrowed during the 1980s, it has remained constant for the last fifteen years.⁵ Unfortunately, in the wake of the COVID-19 pandemic, the pay gap will worsen,⁶ and if commentators' predictions are correct,⁷ the pay gap, which had been predicted to close in one hundred years,⁸ will continue for another three decades.⁹

Iceland is the first country to require employers of twenty-five or more employees “to prove that they pay men and women equally for” the same job.¹⁰ By presuming gender discrimination until proven otherwise, this novel legislation can combat inequities in the labor market in a way that current US law cannot. The

⁴ See Joanna Wolszczak-Derlacz, *The Impact of Gender Wage Gap on Sectorial Economic Growth?—Cross Country Approach*, 8 EQUILIBRIUM: Q.J. ECON. & ECON. POL'Y, no. 3, at 103, 118 (2013) (showing that the gender wage gap is negatively correlated with economic growth).

⁵ Amanda Barroso & Anna Brown, *Gender Pay Gap in U.S. Held Steady in 2020*, PEW RSCH. CTR. (May 25, 2021), <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/> [<https://perma.cc/A5EC-WW8P>]; see also Francine Blau & Lawrence Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSPS. 7, 8 (2007) (noting that the pay gap narrowed by seventeen percentage points between 1981 and 2001); Bilma Canales, Comment, *Closing the Federal Gender Pay Gap Through Wage Transparency*, 55 HOUS. L. REV. 969, 971 (2018).

⁶ Ben Thompson, *The Gender Pay Gap Is Getting Worse. You Can Blame COVID-19.*, WCNC (Mar. 24, 2021, 10:38 PM), <https://www.wcnc.com/article/money/equal-pay-day-united-states-gender-pay-gap-equality/275-ef985f30-6b7e-4ca7-b285-19d53714cece> [<https://perma.cc/KM7K-6S9P>]; see also Ian Goldin & Robert Muggah, *COVID-19 Is Increasing Multiple Kinds of Inequality. Here's What We Can Do About It*, WORLD ECON. F. (Oct. 9, 2020), <https://www.weforum.org/agenda/2020/10/covid-19-is-increasing-multiple-kinds-of-inequality-here-s-what-we-can-do-about-it/> [<https://perma.cc/5N96-QT7U>]. During the pandemic, “four times as many women” left the workforce at as men, “account[ing] for 55 percent of all jobs lost, even though [women constitute] under half of the total workforce.” See Julie Kashen et al., *How COVID-19 Sent Women's Workforce Progress Backward*, CTR. FOR AM. PROGRESS (Oct. 30, 2020, 9:04 AM), <https://www.americanprogress.org/article/covid-19-sent-womens-workforce-progress-backward/> [<https://perma.cc/75BQ-Q8J8>]; *Increasing Multiple Kinds of Inequality. Here's What We Can Do About It*, WORLD ECON. F. (Oct. 9, 2020), <https://www.weforum.org/agenda/2020/10/covid-19-is-increasing-multiple-kinds-of-inequality-here-s-what-we-can-do-about-it/> [<https://perma.cc/5N96-QT7U>].

⁷ See, e.g., Thompson, *supra* note 6 (noting that the gender pay gap is getting worse).

⁸ *Pay Equity and Discrimination*, INST. FOR WOMEN'S POL'Y & RSCH., <https://iwpr.org/equal-pay/about/> [<https://perma.cc/MWH8-7B58>]; see also Kate Duffy, *Closing the Global Gender Gap Will Take an Extra 36 Years Due to the Impact of the Pandemic, the World Economic Forum Said*, BUS. INSIDER (Mar. 31, 2021, 7:18 AM), <https://www.businessinsider.com/gender-pay-gap-extra-36-years-close-covid-pandemic-wef-2021-3> [<https://perma.cc/Z32J-2VG6>].

⁹ Duffy, *supra* note 8; see Hannah Mitchell, *It Will Now Take 135+ Years to Close Gender Pay Gap Because of Pandemic*, BECKER'S HOSP. REV. (Apr. 1, 2021), <https://www.beckershospitalreview.com/compensation-issues/it-will-now-take-135-years-to-close-gender-pay-gap-because-of-pandemic.html> [<https://perma.cc/AQ9S-GD48>]; Kashen et al., *supra* note 6; see also Sara Savat, *Mothers May Face Increased Workplace Discrimination Post-pandemic, Research Warns*, WASH. UNIV. IN ST. LOUIS (July 20, 2021), <https://source.wustl.edu/2021/07/mothers-may-face-increased-workplace-discrimination-post-pandemic-research-warns/> [<https://perma.cc/3DZJ-F6ZU>].

¹⁰ Ines Wagner, *How Iceland Is Closing the Gender Wage Gap*, HARV. BUS. REV. (Jan. 8, 2021), <https://hbr.org/2021/01/how-iceland-is-closing-the-gender-wage-gap> [<https://perma.cc/9W97-FSRS>].

pandemic's exacerbation of the pay gap makes this an ideal time for Congress to act.¹¹ By emulating Iceland's example and placing the responsibility on the employer to demonstrate compliance with antidiscrimination laws, Congress would address the problems inherent in existing law—implicit biases and unfair burdens of proof—and help close the pay gap. Specifically, this article proposes the following legislative reform measures: (1) shift the burden of proof from the employee to the employer, (2) mandate pay transparency, and (3) eliminate pay history inquiries. Federal legislation that encompasses these simple measures would narrow, if not eliminate, the pay gap, and consequently strengthen the national economy.

Part I of this article explains what the pay gap is and why it exists. Part II discusses the consequences of the pay gap and the effect of COVID-19. Part III reviews past attempts to address the pay gap and why those attempts have proven ineffectual. Part IV proposes legislative reforms to address pay disparity.

I. THE WHAT AND WHY OF PAY DISPARITY

Pay disparity, also known as the gender pay gap, is “the difference between men’s and women’s average gross earnings, divided by the average of men’s gross earnings.”¹² The United States does not have a monopoly on pay disparity; rather, every industrialized nation exhibits pay disparity in nearly every line of work.¹³ Regardless of which gender dominates an industry, across the industrial spectrum, men earn more than women.¹⁴

The size of the pay gap depends on the field of work. In general, the largest pay gap appears in high-paying occupations.¹⁵ For example, there is almost a 42 percent pay gap between female personal financial advisors and their male counterparts.¹⁶ The

¹¹ Work disruptions are a major reason for reduced wages and chances for promotions; among other things, they severely diminish retirement savings. *See infra* Parts II, III.

¹² Jarrod Tudor, *Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee Across the Member States*, 92 N.D. L. REV. 415, 418 (2017).

¹³ *See* Kaitlin Holmes & Danielle Corley, *International Approaches to Closing the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Apr. 4, 2017), <http://www.americanprogress.org/issues/women/reports/2017/04/04/429825/international-approaches-closing-gender-wage-gap/> [<https://perma.cc/TL3N-9QFZ>] (noting that there are gender gaps in all thirty-five member countries of the Organization for Economic Co-operation and Development).

¹⁴ *The Negative Consequences of Unfair Gender Pay Gaps*, SELECTONE BLOG (Mar. 1, 2019), <http://selectonellc.com/blog/the-negative-consequences-of-unfair-gender-pay-gaps> [<https://perma.cc/QX6V-ARSB>].

¹⁵ Rosa Cho & Abigail Kramer, *Everything You Need to Know About the Equal Pay Act*, INT'L CTR. FOR RSCH. ON WOMEN 7–8 (2016), <https://www.icrw.org/wp-content/uploads/2016/11/Everything-You-Need-to-Know-about-the-Equal-Pay-Act.pdf> [<https://perma.cc/5ZTL-PGUC>].

¹⁶ *Id.* at 8.

pay gap for female and male medical professionals is 29 percent, and the pay gap for female and male chief executives is 28 percent.¹⁷ Female supervisors and managers made 74 percent of what their male peers made, and female accountants/auditors made 75 percent of what their male colleagues made.¹⁸ Conversely, among low-paying occupations, although the gender pay gap tends to be smaller, women still earn less than men.¹⁹

For years, the reasons for pay disparity have been the subject of interdisciplinary scholarly dialogue, and there is no one answer as to why pay disparity exists. Economists tend to agree that there are two equally contributing causes: (1) occupational gender segregation, and (2) discrimination.²⁰

“Occupational gender segregation [is] the tendency for [men] and [women] to work in different occupations.”²¹ While occupations dominated by women pay less than occupations dominated by men, less is known as to why this is the case. Some theorists rely on the human capital theory, which suggests that individual characteristics—including age, education, training, and work experience—cause female-dominated occupations to pay less than those dominated by males.²² That is, occupations that require less-specialized skills pay less. The human capital theory also posits that women’s wages tend to be lower than their male counterpart’s wages because they work fewer hours due to family and childcare responsibilities, choosing occupations that offer lower wages but greater job flexibility.²³

Discrimination theory suggests that explicit and implicit biases cause the gap.²⁴ It posits that workplace prejudices—including biased assessments, expectations on productivity, and evaluations—cause the wage differential between men and women.²⁵ Evidence for the discrimination theory is that, despite strides in women entering “male-dominated” fields, the gap has remained stubbornly constant.²⁶

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 7.

²⁰ Blau & Kahn, *supra* note 5, at 14–15.

²¹ Robert M. Blackburn et al., *Explaining Gender Segregation*, 53 BRIT. J. SOCIO. 513, 513 (2002).

²² *See id.* at 515.

²³ *Id.* at 515–16.

²⁴ *See* Blau & Kahn, *supra* note 5, at 10–11.

²⁵ *See id.*

²⁶ *See id.* at 8–9.

II. CONSEQUENCES OF THE PAY GAP

The consequences associated with the pay gap manifest in a variety of forms, including, but not limited to, (1) psychological harm to women, (2) reinforcement of traditional divisions of labor, and (3) obstruction of the nation's economy.²⁷ As such, the United States risks its economic preeminence among nations if it allows pay disparities to persist.

First, because of the pay gap, the labor market disenfranchises under half of its population. This takes a significant mental toll on women and, by extension, their families.²⁸ By negatively affecting feelings of self-worth and diminishing self-reliance, unequal pay demoralizes women. Self-worth is how one values oneself as a person.²⁹ As a result, in a market economy, if a person earns less, the person deems oneself as not valuable, affecting feelings of worthiness and lowering one's self-esteem.³⁰ Moreover, women internalize negative workplace experiences, such as an inability to be promoted or increase their wages, which in turn harms their mental health³¹ and increases the risk of depression and anxiety.³² Given the fact that income is a major correlate of mental health,³³ it is not

²⁷ See generally Josh Bivens, *Inequality Is Slowing U.S. Economic Growth*, ECON. POL'Y INST. (Dec. 12, 2017), <http://epi.org/publication/secular-stagnation> [<https://perma.cc/8DYZ-DQYJ>] (positing that income inequality suppresses demand, which prevents economic growth).

²⁸ Specifically, the gender wage gap contributes to women experiencing more depression and anxiety compared to men. *Gender Pay Gap Contributes to Increased Rates of Depression and Anxiety Among Women*, CTR. FOR WORKPLACE MENTAL HEALTH, <https://bit.ly/3rjuNvo> [<https://perma.cc/RW6X-RQM7>]. A mother's mental depression influences the health and wellbeing of her children; children of depressed mothers are at an increased risk for developmental delays, behavioral problems, asthma morbidity, and injuries. Robert S. Kahn et al., *Combined Effect of Mothers' and Fathers' Mental Health Symptoms on Children's Behavioral and Emotional Well-being*, 158 ARCHIVES PEDIATRIC ADOLESCENTS MED. 721, 721 (2004).

²⁹ While self-worth and self-esteem are often used interchangeably, psychologists recognize the difference between the two as self-worth is when a person recognizes her value, and self-esteem is what a person thinks about herself. Courtney E. Ackerman, *What Is Self-Worth and How Do We Increase It?*, POSITIVEPSYCHOLOGY.COM (Nov. 25, 2021), <https://www.positivepsychology.com/self-worth> [<https://perma.cc/E5N2-Z5AY>]. Self-worth is the most vital concept as to how we feel about ourselves. *Id.*

³⁰ Cori Stieg, *How the Gender Pay Gap Affects Women's Mental Health*, CNBC (Mar. 31, 2020, 10:08 AM), <http://cnbc.com/2020/03/31/how-the-gender-pay-gap-affects-womens-mental-health.html> [<https://perma.cc/KA94-6KJZ>].

³¹ *Id.*

³² Jonathan Platt et al., *Unequal Depression for Equal Work? How the Wage Gap Explains Gendered Disparities in Mood Disorders*, 149 SOC. SCI. MED. 1, 8 (2016). One study revealed that when women earn less than their male counterparts, they are "2.4 times more likely to experience depression and four times more likely to have anxiety." Stieg, *supra* note 30.

³³ Naomi Gerstel et al., *Explaining the Symptomatology of Separated and Divorced Women and Men: The Role of Material Conditions and Social Networks*, 64 SOC. FORCES 84, 85, 93 (1985).

surprising that financial strain is associated with depression and loss of self-esteem.³⁴

Second, pay disparity denies heterosexual couples the freedom to choose how to distribute their household labor, coercing them to follow traditional divisions of labor—where men work and women stay home. In essence, the lower wages earned by women dictate family decision-making. Because women earn less, their careers become secondary to those of their spouses. Due to women's lower income and lack of affordable or available childcare, mothers, not fathers, tend to interrupt their careers for their children.³⁵ Over the lifetime of most women, the disruption to their work due to child rearing diminishes their earnings and, correspondingly, reduces their retirement contributions.³⁶ Further, lower wages make it difficult for women, especially those with dependent children, to be self-reliant, forcing them to rely on either their spouse or public assistance to help make ends meet.³⁷ This dependency is demoralizing and associated with more interpersonal problems.³⁸

Finally, pay inequality harms the nation's economy,³⁹ hindering business profitability and hampering economic growth. It is shortsighted to ignore the long-lasting effects of discriminatory pay differentials—consequences that are intergenerational. This inequality restricts consumer spending, impedes worker utility, and decreases productivity, thereby preventing businesses from maximizing profits and obstructing the national economy from ever reaching its full potential.⁴⁰

³⁴ Ronald J. Angel et al., *Financial Strain and Health Among Elderly Mexican-Origin Individuals*, 44 J. HEALTH & SOC. BEHAV. 536, 536–37 (2003).

³⁵ See JESSICA SCHIEDER & ELISE GOULD, ECON. POL'Y INST., "WOMEN'S WORK" AND THE GENDER PAY GAP: HOW DISCRIMINATION, SOCIETAL NORMS AND OTHER FORCES AFFECT WOMEN'S OCCUPATIONAL CHOICES—AND THEIR PAY 6–7 (July 20, 2016), <https://bit.ly/3KzDSb1> [<https://perma.cc/29J7-R7M7>]. A study conducted by the New Hampshire Bar Association revealed that women attorneys are "more likely to interrupt their legal careers to . . . have or raise children," and they are more likely to choose practice areas that historically bill less. Joni N. Esperian et al., *The Glass Ceiling Reinforced: Ten Years Later—Pay Disparity Continues*, 51 N.H. BAR J. 60, 60–61 (2010). Men are more likely to attain status of partner, and women hold more part-time positions than men in law firms. See Ann J. Gellis, *Great Expectations: Women in the Legal Profession: A Commentary on State Studies*, 66 IND. L.J. 941, 943, 945 (1991).

³⁶ Ariane Hegewisch & Janet C. Gornick, *The Impact of Work-Family Policies On Women's Employment: A Review of Research From OECD Countries*, 14 CMTY. WORK & FAM. 119, 124 (2011).

³⁷ Rebecca M. Blank & Patricia Ruggles, *When Do Women Use Aid to Families with Dependent Children and Food Stamps? The Dynamics of Eligibility Versus Participation*, 31 J. HUM. RES. 57, 58–59 (1996); see also Ulrike Dinger et al., *Interpersonal Problems, Dependency, and Self-Criticism in Major Depressive Disorder*, 71 J. CLINICAL PSYCH. 93, 93–94 (2015).

³⁸ Dinger et al., *supra* note 37, at 93–94.

³⁹ Wolszczak-Derlacz, *supra* note 4, at 104.

⁴⁰ See *id.* Manifestations of this phenomenon include, but are not limited to, greater absenteeism, community division, and resentment. Emily Breza et al., *The Morale Effects of Pay*

As a result of pay disparities, women have fewer resources to spend on goods and services,⁴¹ negatively affecting businesses and curtailing economic growth.⁴² Indeed, if women had more to spend, studies indicate that they would do so to bolster their children's education, which would "create [a] more productive and efficient labor force for the future."⁴³ Further, consider the long-term consequences of women's stunted wages: by earning less, women contribute less to their retirement accounts and receive less in employer contributions.⁴⁴ Given the fact that women have an almost 8 percent longer life span than men,⁴⁵ women have far less to spend during the latter period of their lives.

* * * *

The COVID-19 pandemic has only made a bad situation worse. The pandemic began in the winter of 2020, and state and local governments ordered "non-essential businesses to close and people to stay at home."⁴⁶ Schools closed and virtual learning took their place.⁴⁷ Between February 2020 and March 2021, over 1.1 million women left the workplace.⁴⁸ The primary cause of this exodus was that women assume most household responsibilities,⁴⁹

Inequality, 133 Q.J. ECON. 611, 612 (2018). Contrastingly, pay equality propels worker productivity. Researchers compared profits of discriminating and nondiscriminatory firms; the nondiscriminatory firms had a greater profit margin. See Wolszczak-Derlacz, *supra* note 4, at 104. Further, from a macroeconomic perspective, when overeducated workers are not earning what they should, they are a waste of scarce human capital, depressing the long-term growth prospects of an economy. CHRISTIAN BOLL ET AL., EUR. COMM'N, MAGNITUDE AND IMPACT FACTORS OF THE GENDER PAY GAP IN EU COUNTRIES 21 (2016), <https://bit.ly/3Jxi1PR> [<https://perma.cc/YC6G-FULB>].

⁴¹ See Bivens, *supra* note 27, at 3.

⁴² Wolszczak-Derlacz, *supra* note 4, at 104.

⁴³ *Id.* at 105.

⁴⁴ See Natelegé Whaley, *3 Long-term Effects the Gender Pay Gap Has on Women*, INST. FOR WOMEN'S POL'Y RSCH. (Apr. 10, 2018), <http://www.iwpr.org/media/press-hits/3-long-term-effects-gender-pay-gap-women> [<https://perma.cc/T8XL-DVLL>]; Tanza Loudenback, *The Gender Pay Gap Might Hold Women Back During Their Careers—But in Retirement, It Gets Even Worse*, BUS. INSIDER (Nov. 8, 2019, 10:35 AM), archived at <https://perma.cc/MCT8-FX7V>.

⁴⁵ Zlatica Hoke, *New Study Looks into Why Females Live Longer than Males*, VOA (Mar. 25, 2020, 12:07 AM), <https://bit.ly/3O1I5WW> [<https://perma.cc/H2AJ-WJSA>]. Eighty-five percent of surviving spouses are women, and women can expect an average widowhood of eleven years. Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-term Care Policy Trends*, 12 J.L. & POL. 195, 218 (1996).

⁴⁶ Amy H. Soled, *Family Law Reform: A Needed Cure for the Effects of a Pandemic*, 72 RUTGERS L. REV. 1435, 1436 (2020).

⁴⁷ *Id.*

⁴⁸ Shelley Zalis, *Moms Are Less Likely to Return to the Workforce Post-Covid—Here's How Employers Can Help*, FORBES (Sept. 9, 2021, 8:00 AM), <https://www.forbes.com/sites/shelleyzalis/2021/09/09/moms-are-less-likely-to-return-to-the-workforce-post-covid-heres-how-employers-can-help/?sh=59aa0c6a4d72> (last visited Apr. 11, 2022).

⁴⁹ Maggie Germano, *Women Are Working More than Ever, But They Still Take on Most Household Responsibilities*, FORBES (Mar. 27, 2019, 12:20 PM), <https://bit.ly/3jAhdIA> [<https://perma.cc/3NVD-KLS7>].

and the pandemic forced them to leave work in record numbers to care for sick family members or children who could not be in school or in daycare.⁵⁰ School and daycare closures are the reason that women “have borne the brunt of the fallout from the pandemic.”⁵¹ Additionally, the pandemic caused a seismic shift of workforce from the office to the home⁵² where women’s careers were more likely to be interrupted compared to the careers of men⁵³ because working mothers assume the majority of family caregiving responsibilities.⁵⁴ Indeed, during the COVID-19 pandemic, as a means of family preservation and necessity, women left the workforce in record numbers.⁵⁵ This career interruption prevents women from contributing to their retirements and halts their work experience, both of which will affect their lifetime earnings, exacerbating the wage differential between the sexes. In fact, economists predict that the pandemic has prolonged the closing of the wage gap by decades.⁵⁶

At least by some estimates, closing the pay gap would be equivalent to “inject[ing half a trillion dollars] into the economy”—money available for home purchases, travel, consumer goods, and the like.⁵⁷ While the government could bolster the economy through entitlement payments or infrastructure spending, economists claim that this would undermine economic growth by “impos[ing] heavy extraction and displacement costs on the productive sector.”⁵⁸ This result can be avoided by Congress choosing a different course to help the economy—closing the pay gap. By doing so, Congress would infuse money into the economy, boosting it more than any stimulus relief package could and with no increase to the deficit and no need to raise taxes.

⁵⁰ Nicole Bateman & Martha Ross, *Why Has COVID-19 Been Especially Harmful for Working Women?*, BROOKINGS INST. (Oct. 2020), <https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/> [<https://perma.cc/MZP4-A4F8>].

⁵¹ Goldin & Muggah, *supra* note 6.

⁵² Kim Parker et al., *How the Coronavirus Outbreak Has—and Hasn’t—Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://pewrsr.ch/3xidsXr> [<https://perma.cc/BT9U-4SAH>].

⁵³ Goldin & Muggah, *supra* note 6.

⁵⁴ Bateman & Ross, *supra* note 50 (stating that “between February and August mothers of children 12 years old and younger lost 2.2 million jobs”).

⁵⁵ See Goldin & Muggah, *supra* note 6 (noting that during the pandemic, women left the workforce at double the rate of men, accounting for 55 percent of all jobs lost, even though they constitute under half the total workforce).

⁵⁶ Duffy, *supra* note 8.

⁵⁷ *The Negative Consequences of Unfair Gender Pay Gaps*, *supra* note 14.

⁵⁸ Daniel J. Mitchell, *The Impact of Government Spending on Economic Growth*, THE HERITAGE FOUND.: BACKGROUND, Mar. 15, 2005, at 3, 3, 4–6; Daniel J. Mitchell, *Executive Summary: The Impact of Government Spending on Economic Growth*, THE HERITAGE FOUND. (Mar. 15, 2005), <http://heritage.org/budget-and-spending/report/executive-summary-the-impact-government-spending-economicgrowth> [<https://perma.cc/FL8D-STQP>] (noting that government spending is “economically destructive” whether financed by taxes or borrowing money).

III. WHY EXISTING LEGISLATION HAS FAILED TO CLOSE THE PAY GAP

In 1963, President John F. Kennedy signed the Equal Pay Act into law,⁵⁹ which was the first federal antidiscrimination statute that addressed wage differences based on gender. The Act made it illegal for employers to pay different salaries to men and women working in the same place and doing similar work.⁶⁰ In 1964, the Civil Rights Act prohibited discrimination on the basis of sex, further strengthening the law for gender equality.⁶¹

There was no new federal legislation regarding gender pay differentials until 2009 when Congress passed the Lilly Ledbetter Fair Pay Act.⁶² This legislation was the product of Congress's desire to curtail the holding found in *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*⁶³ In *Ledbetter*, the US Supreme Court restricted the time in which an employee could sue for wage discrimination. The Court held that a wage discrimination lawsuit had to be filed within 180 days of when the employer decided to pay the female worker less than male workers doing the same job, even if the worker did not learn about the unfair pay until years after the discrimination began.⁶⁴ In most instances, the *Ledbetter* opinion erected an insurmountable hurdle for employees to challenge pay discrimination within relevant time periods, as most employees generally do not know the salaries of their coworkers.⁶⁵

⁵⁹ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206). This Act provides no remedial power; therefore, it lacks the ability to foster pay parity. See Canales, *supra* note 5, at 974 (citing Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 21 (2010)).

⁶⁰ 29 U.S.C. § 206(d); see Canales, *supra* note 5, at 973; see also *Equal Pay/Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/equal-pay/compensation-discrimination#:~:text=The%20Equal%20Pay%20Act%20requires,whether%20jobs%20are%20substantially%20equal> [https://perma.cc/R99N-ZRQG].

⁶¹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–56 (codified at 42 U.S.C. § 2000(e-2)).

⁶² Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e-5(e)).

⁶³ *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). In this case, plaintiff Lily Ledbetter worked at a Goodyear plant. *Id.* at 621. Workers were given or denied raises based on performance evaluations. *Id.* After nineteen years with the company, Ledbetter retired and sued, alleging that she earned less than her male colleagues. *Id.* at 621–22. While the jury found for Ledbetter, on appeal, the Eleventh Circuit ruled that the jury could only examine evidence of discrimination as far back as the last annual salary review, rather than her entire career. *Id.* at 622–23. The Supreme Court affirmed the ruling finding that the later effects of past discrimination did not restart the clock for filing an EEOC charge. *Id.* at 637, 643.

⁶⁴ *Id.* at 641–42. The Court found that each paycheck was not a continuing discriminatory practice; rather only the initial decision of what the pay would be. *Id.* at 633–36.

⁶⁵ See *infra* Sections III.B, V.B (discussing pay secrecy agreements and the social taboo against salary discussions).

The Ledbetter Fair Pay Act overturned the *Ledbetter* decision. It extended the statute of limitations for an employee such that every paycheck received by an employee would reset the clock for the employee to make a claim of wage discrimination. More specifically, the Act provides that employees have 180 days to file a claim from the latest of the following three times: (1) the employer decides salary, (2) the employee receives a paycheck, or (3) the pay decision injures the employee.⁶⁶

While all existing federal legislation unequivocally prohibits gender pay disparity, it does not produce the results intended.⁶⁷ Under the Equal Pay Act, from 2000 to 2009, circuit courts affirmed employers' summary judgment motions, denying an employee her day in court 92 percent of the time.⁶⁸ At the trial stage, just 2 percent of Title VII⁶⁹ plaintiffs have prevailed on gender discrimination claims.⁷⁰ That percentage includes both pay discrimination and sexual harassment cases.⁷¹ These alarming statistics suggest that either gender discrimination in the labor market does not exist, or the law is not doing what it was intended to do. The undisputed and persistent pay gap supports the latter.

Existing legislation is unable to eliminate wage discrimination because not one statute addresses the systemic sexism that exists in the labor market, enabling gender discrimination to thrive. Specifically, current legislation has three inherent weaknesses: first, it condones employers making pay decisions influenced by implicit biases;⁷² second, it places the burden of proof on the party who lacks the evidence necessary to prove the claim;⁷³ and third, it establishes bureaucratic hurdles that many

⁶⁶ Lilly Ledbetter Fair Pay Act § 706(e)(3)(A).

⁶⁷ See Cho & Kramer, *supra* note 15 (discussing that despite existing laws, the gender pay gap is still a big problem). In 1963, when the Equal Pay Act was signed, "women earned on average [59 percent] of what men were paid—that is, [fifty-nine] cents for every dollar men made." *Id.* at 5. Today, "women earn on average [77 percent] of what men are paid, or [seventy-seven] cents for every dollar men make," an increase of less than a nickel per decade. *Id.*

⁶⁸ Carrie Perras, *Moving Towards Equal Pay for Professional Female Athletes: What We Can Learn from Equal Pay Legislation in Iceland*, 30 IND. INT'L & COMPAR. L. REV. 319, 332 (2019) (citing Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 34 (2010)). When the EEOC represents plaintiffs, the success rate is 73 percent, but for private plaintiffs the success rate is only 44 percent. *Id.* (citing Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 36 (2010)).

⁶⁹ A provision of the Civil Rights Act, Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-15).

⁷⁰ Perras, *supra* note 68, at 336.

⁷¹ *Id.*

⁷² Implicit biases describe when people unconsciously have preconceived ideas about others or associate stereotypes with them. See *infra* Section III.A.

⁷³ See *infra* Sections III.A.2, III.B; see also 29 U.S.C. § 206(d); 42 U.S.C. § 2000(e).

employees simply cannot jump.⁷⁴ Until Congress addresses these problems inherent in the existing legislation,⁷⁵ the legislative intent behind these statutes—to end gender discrimination in the workplace—will not be realized.

A. *Implicit Biases and Gender Discrimination*

While current laws are designed to eradicate explicit biases, they are not designed to address implicit ones.⁷⁶ Implicit biases are “attitudes or stereotypes that affect our understanding, decision making and behavior, without our even realizing it.”⁷⁷ Implicit biases enable prejudices and stereotypes to subconsciously drive people’s actions.⁷⁸ Human beings subliminally reach conclusions about others based on stereotypic assumptions and cultural stereotypes, both of which can give rise to unconscious gender bias.⁷⁹ Research shows that implicit biases not only exist, but they have real-world effects, like reducing women’s wages.⁸⁰ When employers have discretion regarding decisions affecting employees, implicit biases operate and translate into unintentional discriminatory behavior.⁸¹

Indeed, when employers make remuneration decisions, subconscious prejudices often function to ensure that women earn less than men. By way of example, in *Hill v. City of Pine Bluff*, a company replaced a retired male supervisor with a female supervisor.⁸² Despite her responsibilities being the same as those held by the male supervisor, male management paid her approximately \$6,000 less, claiming that she did not have as much

⁷⁴ See *infra* Section III.C.

⁷⁵ Currently, Congress is considering the Paycheck Fairness Act, a bill designed to help close the pay gap by eliminating loopholes in the Equal Pay Act. See H.R. 7, 116th Cong. (2019). But, like existing legislation, the Act enables employers to base salary on criteria such as seniority, production levels, and merit. *Id.* Consequently, pay differentials can exist and employers can legally discriminate, hiding behind the mask of subjective evaluations. See *infra* Section III.A.1.

⁷⁶ See Alexandra N. Phillips, Comment, *Promulgating Parity: An Argument for a States-Based Approach to Valuing Women’s Work and Ensuring Pay Equity in the United States*, 92 TUL. L. REV. 719, 729 (2018).

⁷⁷ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012).

⁷⁸ *Implicit Bias*, STANFORD ENCYC. OF PHIL. (July 31, 2019), <https://plato.stanford.edu/entries/implicit-bias/> [<https://perma.cc/S48G-R4Y2>].

⁷⁹ See Amarette Filut et al., *The Impact of Unconscious Bias on Women’s Career Advancement*, SASAKAWA PEACE FOUND. 3, 5, 10 (2017), https://www.spf.org/publication/upload/Unconscious%20Bias%20and%20Womens%20Careers_2017_en.pdf [<https://perma.cc/8JW7-E9CY>].

⁸⁰ Kang et al., *supra* note 77, at 1153–55.

⁸¹ *Id.* at 1153–56; see also Gregory Mitchell, *An Implicit Bias Primer*, 25 VA. J. SOC. POL’Y & L. 28, 28–29, 54 (2018).

⁸² *Hill v. City of Pine Bluff*, 696 F.3d 709, 712 (8th Cir. 2012).

experience as her predecessor.⁸³ Perhaps the male management thought that a female supervisor would not devote the same energy and time to her position as a male or, alternatively, that since the woman's spouse earns money, she did not need the same salary as the man she was replacing.⁸⁴ While management may not have vocalized these thoughts or even been aware of them, these prejudices affected how management determined her salary. The court ultimately upheld the management's decision because the employee did not present evidence that the disparity was "the product of purposeful gender discrimination."⁸⁵

In addition to the prejudices illustrated in the *Hill* case, the implicit bias known as the "mothering effect" also contaminates pay decisions. The "mothering effect" is when employers assume that a female employee—whether a mother or not—will eventually become a parent and her job will have secondary importance to her.⁸⁶ The mothering effect leads employers to pass over women for promotion, providing it instead to their male counterparts whom they believe will be there for longer and will be more invested in their work.⁸⁷

Market forces⁸⁸ often reflect implicit biases,⁸⁹ and many circuit courts permit market forces to excuse the employer from paying female workers less than their male counterparts.⁹⁰ Market force theory explains that women are paid less than men as result of supply and demand.⁹¹ That is, wages simply reflect the job market.⁹²

⁸³ *Id.* The plaintiff female employee worked for the city. *Id.* She sued under Title VII, which required that she show the unequal pay "was motivated by a discriminatory animus." *Id.* The court found that plaintiff did not prove her prima facie case, but even if she had, plaintiff failed to present evidence that the disparity was the product of purposeful gender discriminatory. *Id.* at 713.

⁸⁴ In *Kellogg v. Ball State University*, 984 F.3d 525, 527–28 (7th Cir. 2021), *reh'g denied* (Jan. 28, 2021), the teacher employee alleged that in salary negotiations, her director, who set salary, told her that she did not need any more money because her husband worked at the school.

⁸⁵ *Hill*, 696 F.3d at 713–14.

⁸⁶ Phillips, *supra* note 76, at 727–28.

⁸⁷ *Id.* at 728.

⁸⁸ Market forces are factors that can affect the exchange of goods or services. See Jason Donev et al., *Market Force*, ENERGY EDUC. (Sept. 17, 2016), https://energyeducation.ca/encyclopedia/Market_force [<https://perma.cc/ARY6-92Q2>]. Market forces "impact prices and the behaviors of producers and consumers" in an economy. Caroline Banton, *Market Dynamics*, INVESTOPEDIA (Jan. 27, 2021), <https://www.investopedia.com/terms/m/market-dynamics.asp> [<https://perma.cc/2DEM-DKQL>].

⁸⁹ Implicit biases describe when people unconsciously have preconceived ideas about others or associate stereotypes with them. See *supra* Section III.A.

⁹⁰ But the Fifth and Eleventh Circuits rejected this reasoning finding that the "market force theory" is exactly what equal pay laws were designed to eradicate. See *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1570 (11th Cir. 1988); *Brennan v. Victoria Bank & Tr. Co.*, 493 F.2d 896, 901–02 (5th Cir. 1974).

⁹¹ See *Glenn*, 841 F.2d at 1570.

⁹² See *id.*

To illustrate, in *Covington v. Southern Illinois University*,⁹³ the Seventh Circuit found no wage discrimination when women earned less than their male colleagues, noting that market forces caused the differential.⁹⁴ The court neither discussed nor addressed that these market forces were the product of gender biases.

Legislation passed to combat pay disparities embraces implicit biases.⁹⁵ Both the Equal Pay Act and Title VII permit such biases to foster pay inequities, making it difficult for an employee to defend against an employer's subjective reasons for determining a lower pay. By providing escape hatches to employers who pay men and women differently for the same work, both statutes perpetuate gender discrimination rather than eradicate it.

1. The Equal Pay Act

In an action filed under the Equal Pay Act, a female employee must demonstrate that her earnings are less than those of her male counterpart for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”⁹⁶ If the female employee successfully makes her case, the employer then bears the burden of justifying the pay differential on the basis of one of the four affirmative defenses: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any . . . factor other than sex.”⁹⁷

This last defense has proven the most problematic and has opened the door to discriminatory practices. While some circuit courts broadly interpret the catch-all defense of any “factor other than sex,” to mean that any gender-neutral reason is sufficient to justify pay differentials between male and female employees,⁹⁸ other

⁹³ *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

⁹⁴ *Id.* at 322, 325. In this case, a female professor sued the employer University because she was paid less than the male she was replacing. *Id.* at 317. The University explained that it followed its policy of “retaining the salary of employees who change assignments.” *Id.* at 321. The court accepted the University's defense, refusing to consider whether those original salaries were the result of unfair market factors. *Id.* at 322.

⁹⁵ Implicit biases describe when people unconsciously have preconceived ideas about others or associate stereotypes with them. *See supra* Section III.A.

⁹⁶ Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENV. U. L. REV. 873, 882 (2014) (quoting 29 U.S.C. § 206(d)(1)).

⁹⁷ Jeffrey K. Brown, Note, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other than Sex" Defense*, 13 HOFSTRA LAB. & EMP. L.J. 181, 182 (1995) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974)).

⁹⁸ *Id.* at 183. The Fourth, Seventh, and Eighth Circuits allow any gender-neutral reason to justify pay disparity. *See id.* at 182–83; Jack Friedman, *Real Gender Neutrality for the Factor-Other-than-Sex Defense*, 11 N.Y.L. SCH. J. HUM. RTS. 241, 242 (1994).

circuits limit the “factor other than sex” to “stem from a . . . business[-related] need.”⁹⁹ Regardless of these differences, this defense enables employers to pay

women less than men based on such things as the employe[e]’s prior [experience or] starting salary[,] . . . effectively allow[ing] employers to continue paying women less . . . because other employers have paid women less than men, even though the women workers are doing the same work as men.¹⁰⁰

When employers invoke the “factor other than sex” defense, they often prevail,¹⁰¹ hiding behind the mask of subjective evaluations.¹⁰² For example, consider professors in academia, where female professors earn 88 percent of what their male colleagues earn.¹⁰³ Universities base professors’ salaries on subjective criteria—how the professor excels in service, teaching, and scholarship.¹⁰⁴ Yet, despite women professors’ achievements in these areas, they usually earn less than their male colleagues.¹⁰⁵ For example, in *Mullenix v. University of Texas at Austin*, a female professor sued for pay disparity when she was paid \$134,449 less than her male colleagues who had fewer publications, honors, and experience.¹⁰⁶ And in

⁹⁹ *Id.* at 183. The Second, Sixth, Ninth, and Eleventh Circuits have found that the “factor other than sex” must be related to a business need. *Id.* at 183–84.

¹⁰⁰ Phillips, *supra* note 76, at 733.

¹⁰¹ See Hart, *supra* note 96, at 874.

¹⁰² See *id.* at 882.

¹⁰³ *Id.* at 876 (noting a 2006 study of salaries by American Association of University Professors found the average salary for female faculty was less than their male peers).

¹⁰⁴ *Id.* at 879.

¹⁰⁵ See Laura W. Perna, *Sex Differences in Faculty Salaries: A Cohort Analysis*, 24 REV. HIGHER EDUC. 283, 297 (2001); see also Kristen K. Tiscione & Melissa H. Weresh, *Building Bridges Across Curricular and Status Lines: Gender Inequity Throughout the Legal Academy*, 69 J. LEGAL EDUC. 3, 5–6 (2019) (noting that at the 2015 Annual Meeting of the Association of American Law Schools a discussion group addressed concerns that male law professors earn higher salaries than female colleagues and females are judged more harshly on their scholarship and that implicit biases enabled male authors to be favored in the publication selection process).

¹⁰⁶ Plaintiff’s Original Complaint & Jury Demand at 1, *Mullenix v. Univ. of Tex. at Austin*, No. 1-19-CV-1203 (W.D. Tex. filed Dec. 12, 2019), ECF No. 1. At the time of this writing, a magistrate judge had recommended that the district court grant the University’s motion for summary judgment on the Equal Pay Act claim because the University’s reliance on teaching, service, and scholarship to evaluate faculty was an acceptable “factor[] other than sex.” *Mullenix v. Univ. of Tex. at Austin*, Civ. No. 1-19-CV-0123-LY, 2021 WL 5881690, at *16 (W.D. Tex. Dec. 13, 2021) (order and report and recommendation of the magistrate judge). Additionally, consider the case of Professor Lucy Marsh who sued the University of Denver Sturm College of Law where the annual median salary for female full professors was approximately \$11,000 year less than males, and the annual mean salary for female full professors was nearly \$16,000 year less than for males. Kathleen Foody, *Female Law Professors Hope Settlement Leads to Changes*, AP NEWS (May 17, 2018), <https://apnews.com/article/cd3780b7761a4ba184548eadc12eb3e8> (last visited Apr. 6, 2022). The Dean admitted that this difference was due to the subjective factors of teaching, service, and publications. Debra Cassens Weiss, *EEOC Sues University of Denver Law School for Alleged Pay Discrimination*, A.B.A. J. (Oct. 3, 2016, 9:55 AM), https://www.abajournal.com/news/article/eec_sues_university_of_denver_law_school_for_alleged_pay_discrimination [https://perma.cc/7PA2-R7KA].

Covington, the Seventh Circuit affirmed the district court's denial of a female professor's equal pay claim, finding that experience and education accounted for the pay differential between the female professor's salary and that of her male counterpart.¹⁰⁷ Because the Equal Pay Act embraces the any "factor other than sex" defense, it fails to stop implicit biases from influencing wage determinations.

2. Title VII

In a discrimination suit brought under Title VII, an employee needs to prove intentional discrimination.¹⁰⁸ Because implicit biases are unintentional, they are simply not actionable under Title VII. Case law supports this point. By way of example, consider again *Hill v. City of Pine Bluff*.¹⁰⁹ In *Hill*, the court rejected a pay disparity claim when an employer paid a woman less than the male colleague whom she was replacing, finding that the employer's seniority system, employee experience, and supervisory responsibilities explained the wage differential and no evidence showed "purposeful gender discrimination."¹¹⁰

An employee can rely on either direct or indirect evidence to show intentional discrimination.¹¹¹ An employer, however, is at liberty to defend its pay decisions based upon legitimate reasons,¹¹² including experience and merit, both of which implicit biases influence.¹¹³ Accordingly, an employer's "legitimate reasons," which encompass employer subjectivity, provide employers a set and satisfactory justification for their pay discrimination. Summary judgment outcomes reveal that courts readily accept this type of employer rationale.¹¹⁴

¹⁰⁷ *Covington v. S. Ill. Univ.*, 816 F.2d 317, 321–25 (7th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

¹⁰⁸ Hart, *supra* note 96, at 886.

¹⁰⁹ *Hill v. City of Pine Bluff*, 696 F.3d 709, 711 (8th Cir. 2012).

¹¹⁰ *Id.* at 712–13.

¹¹¹ See Section VI *Proving Discrimination—Intentional Discrimination* of the Title VI Legal Manual, U.S. DEPT OF JUST., <https://www.justice.gov/crt/fcs/T6Manual6#PID> [<https://perma.cc/A4JR-MFWA>]; see also Denny Chin & Jodi Golinsky, *Employment Discrimination: Moving Beyond McDonnell-Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 662 (1998).

¹¹² See Chin & Golinsky, *supra* note 111, at 662–65.

¹¹³ See *id.* at 665 (noting that any reason can satisfy employer's burden of production, making this step a "mechanical formality").

¹¹⁴ Hart, *supra* note 96, at 883–85 (indicating that in academic settings plaintiffs lose 65 percent of the time at the summary judgment stage, and that courts defer to the school's evaluation of teaching ability and scholarship as well as the market demand. "[P]laintiffs in non-standardized jobs have a difficult time showing that they can even compare themselves to their peers.' . . . [The law] was really designed for standardized jobs" (quoting Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 31 (2010))).

B. *Burden of Proof Is on the Wrong Party*

Under both the Equal Pay Act and Title VII, the burden of proving discrimination lies with the employee. To sue, an employee needs to know the discrepancy in her wages and those of her male colleagues. But wage secrecy—caused by both employers and social norms—prevents such knowledge. And, while the Ledbetter Fair Pay Act extended the time to bring an employment discrimination claim, the Act only helps those employees who learn of pay disparities.¹¹⁵ Given the fact that an employer, not the employee, holds the evidence concerning salaries—vital information to make a claim—employees shoulder an unfair burden.¹¹⁶

Consider the case of *Rivera-Rivera v. Medina & Medina, Inc.*¹¹⁷ In *Rivera-Rivera*, the First Circuit granted summary judgment in favor of the employer finding that the employee could not show that she was paid less than her male coworkers.¹¹⁸ Why did the plaintiff fail to meet her evidentiary burden of proof? Because she lacked direct evidence of what her male colleagues earned.¹¹⁹

And when it comes to pay disparity cases, this lack of evidence is commonplace. As a matter of cultural taboos and corporate policy, most workers never discuss their salaries,¹²⁰ making it difficult, if not impossible, for employees to know that pay disparities exist in their workplace. Furthermore, most private employers contractually forbid or strongly discourage their employees from discussing pay with colleagues.¹²¹ The goals of the Equal Pay Act, Title VII, and Ledbetter Fair Pay Act,¹²² are all thus subverted by corporate policy and social norms, which promote and encourage pay secrecy.¹²³

Approximately half of all workers that participated in a national survey reported that their employers have pay secrecy policies, which are “rules imposed by employers on employees

¹¹⁵ See *supra* notes 62–66 and accompanying text.

¹¹⁶ Perras, *supra* note 68, at 335.

¹¹⁷ *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77 (1st Cir. 2018).

¹¹⁸ *Id.* at 90.

¹¹⁹ *Id.*

¹²⁰ Sarah Lyons, Note, *Why the Law Should Intervene to Disrupt Pay Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 380, 380 n.109 (2013).

¹²¹ Ariane Hegewisch, *Pay Secrecy and Wage Discrimination*, INST. FOR WOMEN'S POLY RSCH. (Jan. 2014), <https://iwpr.org/wp-content/uploads/2020/09/Q016.pdf> [<https://perma.cc/45QP-KDX5>].

¹²² While the Ledbetter Fair Pay Act extended an employee's time to bring a claim, this extension only benefits the employee who learns of the pay disparity. See *supra* notes 62–66 and accompanying text.

¹²³ Lyons, *supra* note 120, at 380.

that forbid discussion of an employee's wages."¹²⁴ Sixty-six percent of private sector workers said they were subject to a pay secrecy policy of some kind.¹²⁵ By preventing employees from learning whether there is wage discrimination, pay secrecy rules contribute to pay disparity. Such agreements chill the air, freezing workers from discussing their salaries.¹²⁶ Absent information regarding the earnings of coworkers, employees may never become aware of gaps¹²⁷ and lack the information needed to bring legitimate discrimination claims.

Relying on Section 7 of the National Labor Relations Act (NLRA),¹²⁸ some courts prohibit pay secrecy agreements, but employers commonly violate the law due to loopholes, weak enforcement, and minimal penalties.¹²⁹ Additionally, while a few states plus the District of Columbia have adopted legislation banning pay secrecy rules in the workplace,¹³⁰ "results suggest that state-level action has been only marginally effective."¹³¹ When employers do not formally prohibit wage discussion, they informally discourage any type

¹²⁴ Canales, *supra* note 5, at 974 (citing Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 43 (2005)) (noting that employers defend "these policies by arguing that they are necessary to: (1) protect privacy concerns regarding compensation; (2) avoid workplace conflict . . . ; (3) prevent labor mobility . . . ; and (4) allow employers to non-disruptively reward employee investments and help maintain internal labor markets" (footnotes omitted)).

¹²⁵ Jake Rosenfeld, *Don't Ask or Tell: Pay Secrecy Policies in U.S. Workplaces*, 65 SOC. SCI. RSCH. 1, 7, 8 tbl.2 (2017) (noting that private sector and nonunionized workers are more likely to work under such policies).

¹²⁶ Canales, *supra* note 5, at 984–85.

¹²⁷ See *infra* Section V.B. Being aware of wages is only one part of the problem. The second part of the problem is being able to successfully challenge the disparity.

¹²⁸ National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169). Section 7 of the NLRA guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Courts have found wage discussions to be concerted activity, protected against employer interference. See *Jeannette Corp. v. Nat'l Lab. Rel. Bd.*, 532 F.2d 916, 917, 920 (3d. Cir. 1976) (holding that wage discussion is concerted activity, protected under 29 U.S.C. § 157).

¹²⁹ The law permits employers with a legitimate and substantial business justification to institute secrecy policies. See *Int'l Bus. Mach. Corp.*, 265 N.L.R.B. 638, 638 (1982).

¹³⁰ The states that have banned pay secrecy agreements in the workplace are California, Illinois, Colorado, Louisiana, Maine, Michigan, Minnesota, New Hampshire, New Jersey, and Vermont. Shengwei Sun et al., Policy Brief: *On the Books, Off the Record: Examining the Effectiveness of Pay Secrecy Laws in the U.S.*, INST. FOR WOMEN'S POLY RSCH. 4 (Jan. 2021), <https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf> [<https://perma.cc/A7Q7-JY3K>]. The scope of the legislation barring pay secrecy, however, varies across the states, but all state legislations prohibit employers from mandating that their employees waive their right to discuss pay, and they ban retaliation against those employees who do discuss pay. *Id.* at 3; see also Zoë B. Cullen & Ricardo Perez-Truglia, *The Salary Taboo: Privacy Norms and the Diffusion of Information* 2–7 (Nat'l Bureau Econ. Rsch., Working Paper No. 25145, 2018), https://www.nber.org/system/files/working_papers/w25145/revisions/w25145.rev1.pdf [<https://perma.cc/D5DY-X8Z9>] (providing an overview of state pay secrecy statutes and their relevant texts).

¹³¹ Sun et al., *supra* note 130, at 5.

of wage transparency, where employers make salary information visible.¹³²

Finally, pay secrecy policies reinforce what social scientists call the “salary taboo”¹³³—the “social norm that discussing salary information in public is taboo.”¹³⁴ The basis of the taboo is that people assume that salary reflects the worker’s worth, and rather than expose vulnerabilities, concealment is the answer.¹³⁵ But even if an employee earns a high salary, it is unlikely for said employee to share his earnings for fear of resentment or hurting any future salary negotiations.¹³⁶ Therefore, the social taboo against sharing salary information works even without pay secrecy agreements, and it affects the labor market in terms of wage discrimination because workers cannot negotiate or challenge pay if they do not know what their colleagues earn.¹³⁷ The salary taboo especially harms women “because the secrecy around earnings undermines their awareness of wage discrimination, thus allowing the discrepancies to persist.”¹³⁸

C. *Bureaucratic Hurdles*

Title VII created the Equal Employment Opportunity Commission (EEOC), a federal agency that enforces discrimination laws in the workplace.¹³⁹ The EEOC has also been charged with enforcing the Equal Pay Act.¹⁴⁰ The EEOC is overburdened and not user friendly, as evidenced by the fact that “less than one percent of employees who believe they were discriminated against actually file charges with the EEOC.”¹⁴¹

To file a Title VII claim, an employee must jump over many bureaucratic hurdles. The employee must first file with the EEOC, who will then notify the employer of the claim and investigate the complaint within 180 days of the

¹³² For further discussion of wage transparency, see *infra* Section V.B.

¹³³ Cullen & Perez-Truglia, *supra* note 130, at 2 (defining the salary taboo as “a social norm around salary privacy that discourages coworkers from revealing or inquiring about salary information”).

¹³⁴ Canales, *supra* note 5, at 986.

¹³⁵ *Id.* at 984–86. Employees believe this information reflects their self-worth. *Id.* at 986.

¹³⁶ A study of 752 employees from a large commercial bank that employs thousands revealed that those who perceived themselves to be higher on the pay scale were less willing to reveal their salaries to peers. Cullen & Perez-Truglia, *supra* note 130, at 3–5.

¹³⁷ See Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. STATE L.J. 951, 959 (2011).

¹³⁸ Canales, *supra* note 5, at 986.

¹³⁹ 42 U.S.C. § 2000e-4.

¹⁴⁰ *Id.*

¹⁴¹ Perras, *supra* note 68, at 336.

discrimination.¹⁴² Only after the EEOC decides there is merit to the claim can the employee sue the employer.¹⁴³

Moreover, the EEOC “has failed to prosecute [many] gender-based compensation discrimination claims causing the onus of pursuing pay equity to fall on the individual woman to fight for her rights.”¹⁴⁴ And “the [heavy] burden of proof placed on the plaintiff . . . results in many . . . plaintiffs abandoning their claims.”¹⁴⁵

IV. ICELANDIC LAW

Like the United States, Iceland has laws that make it illegal to pay women less than men for work of equal value.¹⁴⁶ And despite these laws, like the United States, Iceland has had a persistent gender pay gap across all occupational groups.¹⁴⁷ But, in 2018, Iceland enacted legislation specifically designed to address this pay gap.¹⁴⁸ The new Icelandic law requires public and private companies of twenty-five or more “employees to prove [to the government] that they pay men and women equally for” the same job.¹⁴⁹ Beginning in 2020, any Icelandic company that cannot so certify will receive a government-imposed fine for every day of noncompliance.¹⁵⁰ If the company can prove equal wages for equal jobs, the government provides a certification.¹⁵¹ Every three years, employers must renew the certification to ensure that they are maintaining their policies.¹⁵²

¹⁴² *Id.* at 334.

¹⁴³ *What You Can Expect After a Charge Is Filed*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed> [<https://perma.cc/EJJC6-UJHR>].

¹⁴⁴ Canales, *supra* note 5, at 974 (citing Kimberly J. Houghton, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 LAB. L. 155, 159 (1999)).

¹⁴⁵ *Id.* (citing Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 ME. L. REV. 23, 31 (2003)).

¹⁴⁶ In 1961, Iceland passed its first legislation that guaranteed equal pay for men and women for the same work. *Looking for Information About Equal Pay in Iceland?*, KVENRETTINDAFELAG ISLANDS (Apr. 1, 2018), <https://bit.ly/3KCrJSC> [<https://perma.cc/C8JS-4CZT>].

¹⁴⁷ Camila Domonoske, *Companies in Iceland Now Required to Demonstrate They Pay Men, Women Fairly*, NPR (Jan. 3, 2018, 5:51 PM), <https://www.npr.org/sections/the-two-way/2018/01/03/575403863/companies-in-iceland-now-required-to-demonstrate-they-pay-men-women-fairly> [<https://perma.cc/Y5YS-LCG2>].

¹⁴⁸ *Id.*

¹⁴⁹ *Equal Pay Certification*, GOV’T OF ICE., <https://www.government.is/topics/human-rights-and-equality/equality/equal-pay-certification/> [<https://perma.cc/F9LC-5W9P>]; see also Wagner, *supra* note 10. Interestingly, this law was passed a year after an election that gave nearly half of parliament’s seats to women. Domonoske, *supra* note 147.

¹⁵⁰ Wagner, *supra* note 10.

¹⁵¹ *Equal Pay Certification*, *supra* note 149; Domonoske, *supra* note 147.

¹⁵² *Equal Pay in Iceland: Setting a New Standard*, INT’L ALL. OF WOMEN, <https://bit.ly/3jvKE5v> [<https://perma.cc/T9Q3-6YGG>].

The policy is implemented through a job evaluation tool called Equal Wage Management Standard.¹⁵³

In essence, the Icelandic law “shift[s] the burden of proof . . . to [the] employer”: the law’s distinctiveness is that it presumes unequal pay unless the employer proves otherwise.¹⁵⁴ Plaintiffs are relieved of the heavy burden of proving discrimination. This mandatory certification policy provides the means to enforce Icelandic legislation. It helps ensure that “women and men, working for the same employer, [are] paid equal wages and enjoy[] equal terms of employment for the same jobs or jobs of equal value.”¹⁵⁵ More than two years after enactment, there is evidence that suggests that this legislation has been successful in achieving its objectives.¹⁵⁶

V. CONGRESS HAS THE POWER TO ACT TO PREVENT A WIDENING OF THE PAY GAP

Congress should follow the Icelandic example and require companies to either show that their pay practices are nondiscriminatory or pay a penalty. Now is the time for Congress to proactively prevent the inevitable post-pandemic widening of the pay gap. Rather than rely on how it has treated pay disparity in the past, Congress should follow Iceland’s unique example of how to effectively address wage discrimination.¹⁵⁷ It should amend existing law to address the statutes’ inherent weaknesses—weaknesses that compel unfair burdens of proof and permit implicit biases to justify wage determinations. Congress can resolve these issues in a straightforward, threefold manner: (1) shift the burden of proof to the employer, (2) mandate wage transparency, and (3) ban pay history inquiries. Through federal legislation, Congress could create consistency among the states and help narrow and possibly close the pay gap.

¹⁵³ The Equal Wage Management Standard is commonly called “the system.” Wagner, *supra* note 10. “The standard is a set of rules and guidelines which analyze the pay structure within a company, and show whether . . . men and women are paid equal[ly] for the same . . . work.” *Looking for Information About Equal Pay in Iceland?*, *supra* note 146. The standard determines how to value work, highlighting “expertise, responsibility, effort and work environment.” INES WAGNER, INST. FOR SOC. RSCH., REP. 2018-11, CERTIFIED EQUALITY: THE ICELANDIC EQUAL PAY STANDARD 24, https://www.researchgate.net/publication/329371051_Certified_Equality_The_Icelandic_Equal_Pay_Standard (last visited Apr. 12, 2022). While companies may arrive at their respective job classification criteria differently, top management should support the design of the classification system. *Id.* at 25. Equal pay certification performed by accredited auditors that companies base their pay decisions on relevant considerations. *Id.*

¹⁵⁴ Wagner, *supra* note 10.

¹⁵⁵ WAGNER, *supra* note 153, at 9.

¹⁵⁶ *See id.* at 28–29, 31, 35–36.

¹⁵⁷ Perras, *supra* note 68, at 321, 340–42.

A. *Shift the Burden of Proof*

Existing law and policies place the burden of proving pay discrimination on the employee, the person who lacks access to critical information—information that is readily available to the employer.¹⁵⁸ Congress could eradicate this problem if employers were mandated to both reveal their employees' wages and show how they were determined.

Such a policy would not be novel. Consider the mechanisms used when the Internal Revenue Service (IRS) wants to enforce tax laws. When the IRS audits taxpayers, taxpayers bear the burden to show compliance with the tax code because they hold the evidence.¹⁵⁹ Similarly, employers possess the necessary evidence to show compliance with pay equity, therefore, they should be the ones to show that they are obeying antidiscrimination laws. Shifting the burden to the one who holds the evidence makes practical sense. Moreover, the fear of an audit compels many taxpayers to comply with the tax code. Similarly, requiring employers to certify that they do not discriminate forces them to be vigilant about their behavior and scrutinize outcomes for possible group-based disparities.¹⁶⁰ Enforcing discrimination laws should not differ from enforcing tax laws; therefore, the burden of proof should be on the employer.

Another positive byproduct of shifting the burden of proof would be to diminish the effect of implicit biases on pay determinations.¹⁶¹ Consider what would happen if an employer attempted to show that it paid female supervisors less than it paid its male supervisors based on subjective factors. The employer's analysis would be subject to heightened scrutiny.¹⁶² By shifting

¹⁵⁸ *Id.* at 335.

¹⁵⁹ *See* I.R.C. § 7491.

¹⁶⁰ Mitchell, *supra* note 81, at 53.

¹⁶¹ *See* Hart, *supra* note 96, at 887; *see also* Kang et al., *supra* note 77, at 1154.

¹⁶² *See infra* Section V.B. Additionally, the pay data rule—an executive rule that requires the EEOC to collect pay data of employers of one hundred or more employees and supply information by breaking down worker pay by race and gender—can help employees obtain pay information. Jocelyn Frye, *Why Pay Data Matter in the Fight for Equal Pay*, CTR. FOR AM. PROGRESS (Mar. 2, 2020), <https://ampr.gs/300z8gJ> [<https://perma.cc/2GDS-VPG5>]. But this rule is at the whim of the existing President and only applies to employers of large companies. *See id.* Former President Trump suspended this rule, but a federal judge reinstated it. *Id.* On March 31, 2021, California enacted its own pay data reporting that requires employers of one hundred or more employees to submit data regarding pay and hours worked by job category, race, ethnicity, and sex to California's Department of Fair Employment and Housing. CAL. GOV'T CODE § 12999 (West, Westlaw through ch. 14 of 2022 Reg. Sess.). Even pending legislation designed to narrow the pay gap does not address the problem of the employee's herculean task of proving the discrimination. Consider the Paycheck Fairness Act. H.R. 7, 117th Cong. (1st Sess. 2021). While the bill's goal is to help close the pay gap, it does not require employers to show that they pay workers equally; rather, the Act only recognizes excellence in pay practices and assists businesses that seek help in paying equitably. *See id.*

the burden of proof from the employee to the employer, Congress could better achieve its goal of prohibiting discriminatory practices based on gender.

Some scholars have averred that the United States is unlikely to adopt legislation like Iceland's for two reasons. First, the population of the United States is much larger than Iceland's, making it exponentially harder to obtain equal pay certification.¹⁶³ But the size of the United States is irrelevant if enforcement mechanisms are in place, and Congress has the power to establish an agency to effectuate legislation.¹⁶⁴ Rather than assign more responsibility to the EEOC,¹⁶⁵ an already overloaded agency, Congress should establish a new body with the sole mission to implement the pay certification policy, review information submitted by companies, and issue the certifications. This agency would alleviate much of the burden on the EEOC.¹⁶⁶ Congress could also possibly tap the IRS to utilize tax return information salary verification, obviating the need to create a separate agency.

Second, as a capitalist government,¹⁶⁷ it is argued that the United States is less likely to readily adopt federal government intervention in private businesses.¹⁶⁸ Nevertheless, it is more apropos to describe the United States as a modified capitalist country given its social legislation (e.g., Social Security, Medicare, and Medicaid). The most recent evidence that the United States is not purely a capitalist country is that during the pandemic, under both Republican and Democratic administrations, the government

¹⁶³ Perras, *supra* note 68, at 343.

¹⁶⁴ For example, the EEOC was created when Congress passed Title VII. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 705(a), 78 Stat. 241, 258 (codified as amended at 42 U.S.C. § 2000e-4(a)).

¹⁶⁵ The Paycheck Fairness Act pending legislation assigns monitoring to the EEOC, an agency that is already overburdened. *See* H.R. 7, § 2; *supra* Section III.C.

¹⁶⁶ "The EEOC's caseload is so heavily burdened that the commission ranks cases based on the likelihood of their success and the evidence that is immediately available (without further investigation)." Perras, *supra* note 68, at 347 (citing Juliet Linderman, *At the EEOC, Harassment Cases Can Languish for Years*, FED. TIMES (Apr. 9, 2018), <https://www.federaltimes.com/federal-oversight/watchdogs/2018/04/09/at-the-eeoc-harassment-cases-can-languish-for-years/> [<https://perma.cc/9MCT-B8F3>]). In 2000, after passing a new gender equity law, the Icelandic government established the Center for Gender Equality, a national bureau in charge of administering the 2008 Act on the Equal Status and Equal Rights of Women and Men. *See Center for Gender Equality*, UN WOMEN GLOB. DATABASE ON VIOLENCE AGAINST WOMEN, <https://evaw-global-database.unwomen.org/en/countries/europe/iceland/2000/center-for-gender-equality> [<https://perma.cc/MC42-DDWB>].

¹⁶⁷ Iceland and other Nordic countries are social democracies. Andrew McCay, *Scandinavian 'Socialism': The Truth of the Nordic Model*, LIFE IN NORWAY (Aug. 3, 2020), <https://www.lifeinnorway.net/scandinavian-socialism/> [<https://perma.cc/4WDZ-XKYL>]. A social democracy is "a system of political thought and action that calls upon the government to provide certain social and economic rights or entitlements necessary to the well-being of all members of the community." *Social Democracy*, ANNENBERG CLASSROOM, https://www.annenbergclassroom.org/glossary_term/social-democracy/ [<https://perma.cc/9HF9-5NU3>].

¹⁶⁸ *See, e.g.*, Perras, *supra* note 68, at 343-44.

distributed stimulus checks to individual families and businesses.¹⁶⁹ Furthermore, government oversight of business is not uncharted territory: there exists a wide variety of discrimination laws that make it illegal for companies to discriminate based on sex, race, or religion; and antitrust laws, child labor laws, and minimum wage requirements are all examples of Congress stepping in and regulating corporate America.

It is thus within this country's fabric to create mechanisms by which it can enforce antidiscrimination laws, such as requiring employers to show that their wage framework complies with gender equality. It would be an extension of laws already in place to ensure equity in the workplace.

B. *Mandate Wage Transparency*

Pay secrecy—when employers and social taboos prevent employees from discussing salaries—contributes to pay disparity,¹⁷⁰ enabling wage discrimination to flourish even in the absence of malice.¹⁷¹ Permitting wage discussion has benefitted workers, which is evidenced by the smaller pay gap in those few states that have outlawed pay secrecy.¹⁷² While there are some states that have laws prohibiting pay secrecy agreements, the laws vary tremendously in substance.¹⁷³

Some scholars have advocated that the way to address this problem is for each state to enact transparency laws,¹⁷⁴ and while fourteen out of fifty states have legislation that punishes employers

¹⁶⁹ The American Rescue Plan Act of 2021 provided \$1,400 Economic Impact Payments. See *Advance Child Tax Credit and Economic Impact Payments—Stimulus Checks*, USA.GOV, <https://www.usa.gov/covid-stimulus-checks> [<https://perma.cc/4KKT-BA2F>]; see also *2020 and 2021 Economic Impact Payments (Stimulus Checks)*, TAXSLAYER, <https://bit.ly/3JxdAob> (last visited Apr. 12, 2022).

¹⁷⁰ Eisenberg, *supra* note 137, at 958–59.

¹⁷¹ *Id.* at 952.

¹⁷² Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, 54 INDUS. REL. 648, 656 (2015). A California study published in April 2020 revealed that when pay secrecy was prohibited, married women with children saw the greatest earnings increase, highlighting the wage penalty for caregivers with young children. Robin Bleiweis, *Why Salary History Bans Matter to Securing Equal Pay*, CTR. FOR AM. PROGRESS (Mar. 24, 2021, 12:01 AM), <https://www.americanprogress.org/issues/women/reports/2021/03/24/497475/salary-history-bans-matter-securing-equal-pay/> [<https://perma.cc/K5Z3-3TPA>]. Such policies work. See *id.*

¹⁷³ Different laws help explain why there are drastic differences in wage disparity across state lines. Phillips, *supra* note 76, at 723. For example, California, Michigan, and Colorado rely on labor laws to ban pay secrecy and include only private sector workers; Colorado excludes supervisors and managers from protection. Kim, *supra* note 172, at 653–54. The equal employment laws of Illinois, New Jersey, and Maine prohibit pay secrecy and apply to workers in both the public and private sector investigating unequal pay claims. *Id.* at 654. By contrast, Vermont law does not limit its coverage of private and public sector workers to only those investigating unequal pay claims. *Id.*

¹⁷⁴ See, e.g., Phillips, *supra* note 76, at 740 (advocating for state-level laws mandating wage disclosures).

who retaliate against workers who discuss wages with coworkers,¹⁷⁵ this legislation does not address the dissemination of salary information. That is, no states have legislatively mandated wage disclosures even though employers have little incentive to provide salary information on their own “because any differences between salaries would become obvious,” requiring employers to explain.¹⁷⁶

Studies show that when there is wage transparency, there is less of a wage gap¹⁷⁷ and increased market efficiency.¹⁷⁸ Employees desire more transparency, especially when their performance is measured subjectively.¹⁷⁹ Consequently, increased pay transparency positively affects employee behavior and satisfaction.¹⁸⁰ Pay transparency could alert workers to unfair pay practices, and it could deter supervisors from discriminating in the first place.¹⁸¹ It also enables the public to see which companies are equitable, allowing for public shaming. Wage transparency “would help prevent, root out, and correct the discrimination in the first place.”¹⁸² Evidence shows that wage transparency works as there is wage transparency for employees in the federal government,¹⁸³ and there is a smaller pay gap between male and female federal employees.¹⁸⁴

This is a cue for Congress to act. Congress should prohibit employers from having wage privacy agreements and require them to reveal information regarding salaries in a federal database associated with the US Department of Labor. Current and prospective employees should have access to this database, making companies accountable not just to their workers but to the outside world as well. Such public shaming might coerce companies to close the pay gap because evidence reveals that consumers are less willing to support companies that have large pay gaps.¹⁸⁵

By explicitly prohibiting employers from having wage privacy agreements and requiring them to reveal information

¹⁷⁵ See Phillips, *supra* note 76, at 741.

¹⁷⁶ Canales, *supra* note 5, at 985–86.

¹⁷⁷ *Id.* at 969. Federal workers enjoy wage transparency, which has resulted in a lower wage gap amongst these workers. *Id.* at 993; see also Sun et al., *supra* note 130, at 13.

¹⁷⁸ Eisenberg, *supra* note 137, at 959.

¹⁷⁹ Jaime Potter, *Pay Secrecy vs. Pay Transparency: When Is One Better than the Other?*, FORBES (Feb. 27, 2020, 10:18 PM), <https://www.forbes.com/sites/jaimepotter/2020/02/27/pay-secrecy-vs-pay-transparency-when-is-one-better-than-the-other/?sh=32e37fa147d5> (last visited Apr. 12, 2022).

¹⁸⁰ Cullen & Perez-Truglia, *supra* note 130, at 8.

¹⁸¹ Gowri Ramachandran, *Pay Transparency*, 116 PENN STATE L. REV. 1043, 1055–65 (2012).

¹⁸² *Id.* at 1043.

¹⁸³ Canales, *supra* note 5, at 983 (citing Ramachandran, *supra* note 181, at 1063).

¹⁸⁴ *Id.* at 983 (indicating that women make 11 percent less than men compared to women in the private sector who make 23 percent less than men).

¹⁸⁵ Tobias Schlager et al., *Consumers—Especially Women—Avoid Buying from Firms with Higher Gender Pay Gaps*, 31 J. CONSUMER PSYCH. 518, 519 (2021).

regarding salaries,¹⁸⁶ Congress would not only help workers access information to gauge the legitimacy of their salaries, but it would also counteract the social taboo of discussing wages because workers would no longer have to ask others about their earnings as the information would be readily available. By enacting a federal law that mandates wage transparency, Congress could resolve inconsistencies among the states, ensuring equity for all workers, not just some.

C. *Ban on Pay History Inquiries*

Employers can ask job applicants about their prior salary and rely on this history to determine wages, preserving pay disparities.¹⁸⁷ This past reliance consigns women to a lower salary, one that may have been previously determined by discrimination. In relying on past salary, an employer presumes that salary correlates with worker and market value;¹⁸⁸ but a worker's pay history does not objectively reflect a worker's value. Additionally, an employee's "salary history . . . provide[s] a convenient rationale for employers . . . to justify pay disparities or depress wages."¹⁸⁹ When employers rely on prior salary history to determine earnings, they perpetuate pay disparity between men and women and continue the cycle of discrimination.¹⁹⁰

Like bans on pay secrecy, there is no federal policy prohibiting inquiry of pay history, leading to national inconsistencies. Currently, there are twenty-one states as well as the District of Columbia and Puerto Rico that have some version of a salary history ban, including a few states that explicitly prohibit employers from relying on past pay to determine salary.¹⁹¹ To protect all women and create uniformity, there needs to be federal legislation that proscribes inquiries and reliance on potential employees' past salaries. Such salary history bans are needed to help close the gender wage gap.

¹⁸⁶ Congress should determine how and to whom companies reveal salaries. There could be a federal database; companies with over twenty-five employees would need to register and record compensation information that can be accessed by the public. Alternatively, each company could have a database accessible to current and prospective employees.

¹⁸⁷ Bleiweis, *supra* note 172.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Consider when a law school dean attributed the median salary difference between male and female professors to different starting salaries, essentially carrying forward rather than correcting pay differentials between men and women professors. Paula A. Monopoli, *The Market Myth and Pay Disparity in Legal Academia*, 52 IDAHO L. REV. 867, 874–75 (2016).

¹⁹¹ See *Salary History Bans*, HR DIVE (July 30, 2021), <https://www.hrdiver.com/news/salary-history-ban-states-list/516662/> [<https://perma.cc/4GJK-Y32V>]. An April 2020 California study found that when employers could not inquire about a job candidate's prior salary, women earned more money, narrowing the gender wage gap. Bleiweis, *supra* note 172.

CONCLUSION

The COVID-19 pandemic has wreaked havoc in the employment market and widened the gender pay gap. Like a public health crisis, the gender pay gap requires immediate congressional attention.¹⁹² Closing the gap would benefit employers and employees alike, fostering a healthier economy, a stronger workforce, and greater productivity.¹⁹³

Congress should, therefore, implement policies that make the intent of antidiscrimination laws a reality. In particular, via federal legislation that resembles Iceland's successful law, companies should demonstrate that they pay male and female employees equally; no longer should there be an assumption of equal pay, but rather there should be a presumption that pay is unequal until proven otherwise. Congress should establish an agency whose sole purpose is to conduct pay equality analyses and ensure compliance, certifying companies that practice fairness and equality. Additionally, Congress should mandate wage transparency, making pay secrecy a thing of yesteryear, and declare past salary history irrelevant to current salary determinations. The pandemic should compel Congress to recognize the gravity of this issue and seek to resolve it, ultimately driving the nation's economy forward and making gender pay discrimination a relic of the past.

¹⁹² Ramachandran, *supra* note 181, at 1046.

¹⁹³ *The Negative Consequences of Unfair Gender Pay Gaps*, *supra* note 14.