NO. ALB-22-01

IN THE SUPREME COURT OF THE UNITED STATES

SHANIQUA DAVIS,

PETITIONER

v.

SBK CONSULTING, INC. AND BUBBA R. CHOI,

RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

I. Whether the Fourteenth Circuit correctly dismissed Davis's Equal Pay Act claim because SBK's consideration of prior pay is justified as a factor other than sex.

II. Whether the Fourteenth Circuit correctly quashed Davis's subpoena because Choi's journal is a personal document and Choi held it in a personal capacity.

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On March 30, 2020, Petitioner Shaniqua Davis brought an Equal Pay Act ("EPA") claim against her employer, Respondent SBK Consulting, Inc. ("SBK"), seeking monetary damages in the United States District Court for the District of Albers. [R. 7]. During discovery, Davis deposed Respondent Bubba Choi, a former SBK employee. [R. 5, 6]. On April 16, 2020, Davis subpoenaed Choi, requiring him to produce his red journal and all contents therein. [R. 7]. Choi moved to quash that subpoena, on the grounds that the act of producing the requested documents and their contents would violate his Fifth Amendment privilege against self-incrimination. [R. 7].

The district court granted Choi's motion to quash. [R. 1]. Davis filed an interlocutory appeal to the Fourteenth Circuit. [R. 1]. While the appeal was pending, the district court granted SBK's motion for summary judgment and dismissed Davis's EPA claim. [R. 1]. Davis appealed that decision to the Fourteenth Circuit. [R. 1]. The Fourteenth Circuit consolidated the EPA and Fifth Amendment issues for appeal. [R. 7].

On July 7, 2021, the Fourteenth Circuit, Paradiso, Rome, and Zablocki, JJ., presiding, affirmed the district court's decision granting summary judgment for SBK. [R. 12, 18]. The court likewise affirmed Choi's motion to quash Davis's subpoena. [R. 17, 18].

On January 25, 2022, the Supreme Court granted Petitioner a writ of certiorari to consider all issues raised below. [R. 18].

CONSTITUTIONAL PROVISION

U.S. Const. amend. V.

No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

STATUTORY PROVISIONS

1 U.S.C.S. § 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

. . .

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . . .

18 U.S.C. § 1621. Perjury generally.

Whoever–

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

29 U.S.C. § 206(d)(1). Prohibition of sex discrimination.

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, 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 establishment 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: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

STATEMENT OF THE FACTS

1. SBK's IT Risk Specialists

SBK provides consulting services for technology companies. [R. 2]. The company employs fifteen Information Technology ("IT") specialists, including four Senior IT Risk Specialists. [R. 2]. SBK pays its employees an annual salary based on a company pay scale with seven levels of salary ranges. See [R. 2]; Appendix A. Applicants for IT positions are reviewed holistically by a Hiring Committee. [R. 2]. Among many factors–including education, relevant work experience, and required skills–the Hiring Committee also considers the applicant's prior pay when it makes an initial salary offer. See [R. 2]; Appendix B. SBK gives all employees a standard, 2% annual raise for cost-of-living increases. [R. 2]. Employees typically receive additional raises when they are promoted. [R. 4].

Davis applied for the Senior IT Risk Specialist position in October 2016. [R. 2]. Davis has a Bachelor's Degree in Computer Science from Stanford University. [R. 2]. Prior to SBK, Davis worked as an IT Technician at a small management consulting firm for five years, then as a Junior IT Risk Specialist at a similar firm for six years. [R. 2-3]. When she applied to SBK, Davis's salary was $90,000, which she disclosed to SBK. [R. 3]. After three rounds of interviews, SBK's Hiring Committee evaluated all the applicants for the position. [R. 3]. The committee offered Davis the position in December 2016, along with a higher starting salary of $92,000, designating her as a Level 5 employee. [R. 3]. Davis accepted the initial offer without negotiating. [R. 3]. Since then, SBK has given Davis annual raises of 2%, and thus, Davis's salary was $97,631 when she filed her complaint. [R. 3].

Davis has three male colleagues that work as Senior IT Risk Specialists: Connor Patterson, Carlos Martinez, and Li Min. [R. 3]. Patterson has a Bachelor's Degree in Marketing and a Master's Degree in Marketing, both from the University of Massachusetts Amherst. [R. 4].

After completing his graduate degree, Patterson worked in marketing for four years at Shoogle, an international technology company known for its search engine, where he was earning $95,000 per year. [R. 4]. In 2013, Patterson interviewed for the Junior IT Risk Specialist Position, and was offered the position, along with an equivalent starting salary of $95,000. [R. 4]. Patterson countered with $105,000, stating that he would not leave Shoogle unless SBK offered a higher salary. [R. 4]. After further negotiations, SBK offered Patterson the position at $98,000 per year and classification as a Level 5 employee, and Patterson accepted. [R. 4]. In 2015, Patterson likewise received the standard 2% raises, and was earning $101,959 before he was promoted in 2015. [R. 4]. After his promotion, Patterson was classified as a Level 6 employee, and was earning $113,720 per year when Davis filed her complaint. [R. 4].

Martinez has a Bachelor's Degree in Software Engineering and a Master's Degree in software engineering, both from Northeastern University. [R. 4]. Martinez worked as a Data Analyst for five years in the IT Department of GooseGooseStop, a mid-size technology firm known for its search engine. [R. 4-5]. Afterwards, Martinez worked as an IT Risk Specialist for three years at Peach, an international technology company known for its computer software. [R. 5]. SBK hired Martinez in 2016 as a Level 6 employee with a starting salary of $100,000. [R. 5]. Martinez received the standard 2% raises and was earning $108,243 when Davis filed her complaint. [R. 5].

Min has a Bachelor's Degree in Computer Science from Georgetown University. [R. 5]. Min worked as a Junior Risk Specialist for eight years in the IT Department of a local management consulting firm. [R. 5]. SBK hired Min as a Junior IT Risk Specialist in 2012. [R. 5]. Min was initially classified as a Level 5 employee, earning $100,000 per year. [R. 5]. Min received the standard 2% raises, and was earning $104,040 before he was promoted in 2014. [R.

5]. After his promotion, Min was classified as a Level 6 employee, and was earning $105,000 per year. [R. 5]. When Davis filed her complaint, Min was earning $118,247 per year. [R. 5].

Davis identifies as female. [R. 3]. In early 2020, Davis learned of her male colleagues' salaries. [R. 3]. On March 30, 2020, Davis filed an Equal Pay Act Claim against SBK. [R. 7].

2. Choi's Journal

Choi worked at SBK for over ten years before resigning in December 2020 to pursue his passion for pastry. [R. 5]. Prior to leaving SBK, Choi was a senior employee and sat on SBK's Hiring Committee. [R. 5]. As a member of SBK's Hiring Committee, Choi attended meetings in which the committee decided salary offers for prospective employees. [R. 5]. However, Choi sometimes missed these meetings due to other work commitments. [R. 5]. Specifically, during a deposition for this case, Choi testified that he did not attend the final meeting to determine Davis's salary terms. [R. 5].

During his time with SBK, Choi was known for carrying around his red journal with him everywhere he went. [R. 5]. Choi predominantly used his notebook for personal matters, like creating to-do lists, creating grocery lists, and writing down thoughts he intended to keep in confidence. [R. 5-6, 14]. Because his journal contained his private thoughts, Choi took efforts to safeguard its contents, including always carrying it on his person and occasionally locking it with the lock attached to his journal. [R. 5-6]. Choi never allowed any of his colleagues to read his journal, not even his own secretary. [R. 6]. Although Choi also used his journal to jot down informal notes during Hiring Committee meetings, Choi never wrote official corporate memos in his journal. [R. 6]. At most, Choi would refer back to his journal notes when drafting the official corporate memos on his SBK-provided tablet. [R. 6]. In contrast to the tablet, Choi purchased his journal himself. [R. 6].

On April 16, 2020, Davis filed a subpoena duces tecum requiring Choi to produce his journal [R. 7]. Davis alleges that Choi's journal will show that Choi attended the final meeting that decided Davis's salary terms. [R. 7]. If Choi's journal does tend to show that he was at this meeting, then Choi could face prosecution for perjury based on his statements during his deposition. [R. 6]. Therefore, Choi moved to quash Davis's subpoena because it violates his Fifth Amendment privilege against self-incrimination. [R. 7]. Both the United States District Court for the District of Albers and the United States Court of Appeals for the Fourteenth Circuit correctly granted Choi's motion. [R. 1-2].

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's holdings that SBK's pay practice is justified as a factor other than sex and that Choi properly asserted his Fifth Amendment privilege against self-incrimination. The EPA's plain text unambiguously establishes a broad exception for pay practices based on any gender-neutral factor. This exception reflects deliberate compromises that Congress made to balance the goals of equal pay for equal work against non-discriminatory business interests. Therefore, this Court should enforce the law as written and according to its plain meaning. To hold otherwise would undermine Congressional intent.

Because the EPA's exception includes consideration of prior pay, SBK has proved its affirmative defense. Even under unduly limiting interpretations of the EPA's affirmative defense, SBK prevails because its pay practices are related to the legitimate business interests of attracting educated and experienced workers for highly-technical positions. Accordingly, the Fourteenth Circuit properly dismissed Davis's EPA claim, and this Court should affirm.

Additionally, this Court should affirm the Fourteenth Circuit's quashal of Davis's subpoena. The Fifth Amendment protects Choi from producing his journal because it is a personal document. Choi's journal is a personal document because he retained exclusive possession of the journal and used it for predominantly personal purposes.

The Fifth Amendment likewise protects Choi from producing his journal as a corporate document because the collective entity rule is unconstitutional. The rule violates the Fifth Amendment's text and the Court's precedent on corporate personhood. The Fifth Amendment also protects Choi from producing his journal as a corporate document because Choi is a former employee who does not represent and owes no fiduciary duties to SBK. Because the collective entity rule rests on agency principles that do not apply to Choi as a former employee, the

collective entity rule cannot extend to him. Thus, the Fourteenth Circuit correctly granted Choi's motion to quash, and this Court should affirm.

ARGUMENT

I. THE FOURTEENTH CIRCUIT CORRECTLY DISMISSED DAVIS'S EPA CLAIM BECAUSE SBK'S CONSIDERATION OF PRIOR PAY IS JUSTIFIED AS A FACTOR OTHER THAN SEX.

This Court should affirm the Fourteenth Circuit's holding that SBK's consideration of prior pay is justified under the EPA's broad affirmative defense for a factor other than sex. Whether the EPA exempts consideration of prior pay is a question of law that this Court reviews de novo. See Pierce v. Underwood, 487 U.S. 552, 558 (1988).

The EPA accommodates non-discriminatory business practices by carving out four exceptions to the general prohibition on pay differentials on the basis of sex. 29 U.S.C. § 206(d)(1). Employers' pay practices may include: "(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." Id. Thus, an employer's affirmative defense to an EPA claim must prevail if their pay practice falls under one of the four exceptions. See Washington County v. Gunther, 452 U.S. 161, 168 (1981). In evaluating an affirmative defense brought under the fourth exception, courts defer to the employer's judgment when pay differentials are based on a factor other than sex. Id. at 170-71. Yet, this Court has never determined whether the fourth affirmative defense includes employers' common practice of considering prior pay.

The circuit courts are sharply divided on their treatment of prior pay, following roughly four approaches. The first approach holds that the statute's plain meaning categorically justifies consideration of prior pay. Wernsing v. Dep't of Human Services, 427 F.3d 466, 470 (7th Cir. 2005). The second approach evaluates consideration of prior pay case-by-case, prohibiting only two specific instances where the practice may not be gender-neutral. Drum v. Leeson Elec. Corp., 565 F.3d 1071, 1073 (8th Cir. 2009). The third approach, using curated legislative history, requires consideration of prior pay to stem from a legitimate business need. E.g., Aldrich v.

Randolph Cent. Sch. Dist., 963 F.2d 520, 525-26 (2d Cir. 1992). Finally, the fourth approach redefines the exception as "any job-related factors," excluding consideration of prior pay from the affirmative defense. Rizo v. Yovino, 950 F.3d 1217, 1228-29 (9th Cir. 2020), cert. denied, 141 S. Ct. 189 (2020).

This Court should adhere to the plain meaning of the EPA and allow employers to consider prior pay under the statute's fourth affirmative defense. Because prior pay informed SBK's starting wages, the Fourteenth Circuit's grant of summary judgment should be affirmed.

A. The EPA's plain language supports SBK's consideration of prior pay.

This Court should construe the EPA's fourth exception broadly, allowing SBK and other employers to justify consideration of prior pay as a factor other than sex, because this approach (1) is consistent with the EPA's unambiguous text and (2) limits judicial overreach.

1. The plain text creates a broad affirmative defense.

Statutory interpretation must begin with the act's text. Caminetti v. United States, 242 U.S. 470, 485 (1917). If the language is unambiguous and the statute is constitutional, then "the sole function of the courts is to enforce it according to its terms." Id. This plain language approach requires interpreting the statute's words in their ordinary sense. Id.

The EPA prohibits differential pay "between employees on the basis of sex . . . for equal work . . . except where such payment is made pursuant to . . . a differential based on *any* other factor other than sex." 29 U.S.C. § 206(d)(1) (emphasis added). The plain meaning of "any" is "indiscriminately of whatever kind" or "unlimited in amount, number, or extent." Any, Merriam-Webster, https://www.merriam-webster.com/dictionary/any (last visited Feb. 13, 2022). Thus, the EPA unambiguously establishes a "general catchall provision" for any gender-neutral factor. See Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974).

Most circuit courts that have limited the EPA's fourth affirmative defense skirted the statute's plain text, turning instead to legislative history for support. E.g., Aldrich, 963 F.2d at 524 (framing analysis by "tracing the evolution of the EPA through the legislative process"). However, the Ninth Circuit's attempt at statutory interpretation highlights the tension between the plain text and these unsupported approaches. See Rizo, 950 F.3d at 1224. After an elaborate process, the court construed the exception as limited to "job-related factors." Id. at 1224-25 (ignoring plain meaning of "any," considering fourth exception in relation to preceding three, and employing two canons of statutory interpretation). However, in no dictionary does "any" mean "job-related." See e.g., Any, supra. Similarly, "any" does not mean "rooted in legitimate business-related differences." See id.; Aldrich, 963 F.2d at 525.

If Congress intended to constrain the EPA's fourth affirmative defense to job-related factors or legitimate business reasons, it would have used such language instead of "any." See Wernsing, 427 F.3d at 468 ("Section 206(d) does not authorize federal courts to set their own standards of 'acceptable' business practices. The statute asks whether the employer has a reason other than sex—not whether it has a 'good' reason."). Therefore, the EPA's fourth affirmative defense allows employers to consider prior pay, a gender-neutral factor, regardless of its connection to job or business considerations. See id. at 470.

2. The plain text limits judicial overreach.

Because the legislative record contains both statements that support and statements that reject a broad reading of the EPA's fourth affirmative defense, departing from the plain text risks judicial overreach. This Court has recognized that the EPA's legislative history is "not unambiguous" and provides "conflicting statements." See Corning Glass Works, 417 U.S. at 198-99; Gunther, 452 U.S. at 168. Thus, courts have limitless discretion to interpret the EPA when they couch their holdings in the guise of legislative history. Compare Taylor v. White, 321

F.3d 710, 718-19 (8th Cir. 2003) ("The legislative history supports a broad interpretation of the catch-all exception . . . ."), with Rizo, 950 F.3d at 1226 ("The County's suggestion that the EPA's legislative history supports an expansive reading of the fourth exception is unavailing.").

However, Congressional purpose divined from legislative history cannot prevail over a statute's plain text, and this Court should emphasize the distinction as applied to the EPA. See W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079. Much of the confusion among circuit courts stems from this Court's overuse of legislative history. In both Corning Glass Works and Gunther, this Court emphasized the Congressional record without much discussion of the EPA's plain text. See 417 U.S. at 201; 452 U.S. at 170. Both cases held that employers must use a "bona fide" factor other than sex, language plucked not from the statute but from legislative history. See Corning Glass Works, 417 U.S. at 201 (quoting H.R. Rep. No. 309, at 3 (1963)) ("'Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.'"); Gunther, 452 U.S. at 170 (repeating "bona fide" language and highlighting survey of legislative record in Corning Glass Works). Circuit courts that have unduly limited the affirmative defense justified their holdings by replacing "any" with "bona fide." E.g., Aldrich, 963 F.2d at 525 (citing same Congressional report as Corning Glass Works). Therefore, this Court should clarify that the EPA's plain text is the law, not selected excerpts from the legislative history.

Furthermore, policy and purpose arguments cannot be used to rewrite statutes because the legislative process may have intentionally accommodated one interest over another to achieve compromise. Artuz v. Bennett, 531 U.S. 4, 10 (2000). Although the EPA's purpose is "broadly remedial," Congress balanced the goal of equal pay for equal work against workable language for non-discriminatory business practices. See Corning Glass Works, 417 U.S. at 198-99, 208.

Therefore, the EPA's purpose is best reflected in the "text adopted by both Houses of Congress and submitted to the President." Casey, 499 U.S. at 98. That Congress perhaps created too broad an affirmative defense, conflicting with the EPA's remedial goal, has no bearing on enforcing the statute "according to its terms." See Caminetti, 242 U.S. at 485. Therefore, prior pay is a legitimate, nondiscriminatory justification for a pay differential under the EPA's fourth affirmative defense. Wernsing, 427 F.3d at 470.

Here, Davis was earning $90,000 per year at her prior job. [R. 3]. Among other factors, SBK considered Davis's prior pay and offered her a higher starting salary of $92,000, which Davis accepted without negotiating. [R. 2-3]. Accordingly, SBK's pay practice is justified as a factor other than sex. See 29 U.S.C. § 206(d)(1); Wernsing, 427 F.3d at 470.

B. This Court's precedent supports an employer's gender-neutral consideration of prior pay, and thus, SBK prevails.

Because the EPA's fourth exception creates a broad affirmative defense, this Court's precedent does not limit gender-neutral consideration of prior pay, and thus SBK prevails. However, two specific situations may fall outside of the EPA's affirmative defense. First, an employee may have suffered discriminatory pay in their prior job. Wernsing, 427 F.3d at 470. A subsequent employer using prior pay to set starting wages would thus violate the EPA by perpetuating the initial discrimination. See Corning Glass Works, 417 U.S. at 205 (holding that employer's practices perpetuated pay differential originating from state laws prohibiting women from working night shift). However, because EPA plaintiffs bear the initial burden of persuasion, the employee must prove the prior discrimination. See Rizo, 950 F.3d at 1223, 1228 (contrasting EPA's burden shifting framework with Title VII's and concluding that "EPA does not require employers to prove that the wages paid to their employees at prior jobs were unaffected by wage discrimination.").

Second, prior pay may not be gender-neutral when employers rely on market forces. This Court rejected the market force theory, the idea that supply and demand in the labor market result in different wages for different genders, nearly five decades ago. See Corning Glass Works, 417 U.S. at 205; Taylor, 321 F.3d at 718. However, the resulting assumption that market forces always result in discriminatory pay is not tenable more than two generations after the EPA and Title VII were enacted. Wernsing, 427 F.3d at 471. Recent empirical studies show that unequal division of childcare and home responsibilities account for nearly all of the remaining gender pay gap. Claire Cain Miller, The Gender Pay Gap Is Largely Because of Motherhood, N.Y. Times, (May 13, 2017), https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html?smid=url-share (explaining that women's pay suffers due to unequal division of labor at home, particularly when both partners work full-time). However, the EPA specifically addresses discrimination in the workplace, not at home. Wernsing, 427 F.3d at 470 ("That many women spend more years in child-rearing than do men thus implies that women's market wages will be lower on average, but such a difference does not show [pay] discrimination . . . ."). Furthermore, judicial advocacy should not be used to correct such public policy considerations for the reasons previously discussed. Therefore, this Court should allow employers to set wages based on market forces, unless there is specific evidence of prior discrimination. See id.; Corning Glass Works, 417 U.S. at 205.

However, if this Court continues to reject the market force theory, then the Eighth Circuit's approach strikes the best compromise between this Court's precedent and the statutory text. Rather than adopting a per se rule, courts must examine the record on a case-by-case basis. Taylor, 321 F.3d at 718. Where an employer either perpetuated a proven past discrimination or blindly relied on potentially discriminatory market forces, the employer has not used prior pay as a gender-neutral factor. Id. In these limited situations, prior pay is not a factor "other than sex."

29 U.S.C. §206(d)(1). Employers demonstrate that they did not rely on market forces by offering any additional gender-neutral justification for the pay differential. Drum, 565 F.3d at 1073.

Here, Davis does not contend and offers no proof that her prior employer set discriminatory wages. See [R. 2-3]. Therefore, SBK did not perpetuate an existing sex-based disparity. See Taylor, 321 F.3d at 718. If this Court allows employers to rely on market wages, then SBK's pay practices need no examination because there is no evidence on the record of previous discrimination. See Wernsing, 427 F.3d at 470.

Nevertheless, SBK justifies the pay differentials based on factors other than market forces. See Taylor, 321 F.3d at 718. While Davis only has a Bachelor's degree, Patterson and Martinez both hold Master's degrees. [R. 3-5]. When she applied for the position, Davis had six years of work experience as an IT Risk Consultant; by contrast, Min had eight. [R. 3-5]. Because education and experience are key factors for the Senior IT Risk Specialist position, pay disparities between Davis and her male colleagues reflect more than blind reliance on market forces. See Appendix B; Drum, 565 F.3d at 1073. Therefore, SBK's pay practice is justified as a factor other than sex. See Taylor, 321 F.3d at 718.

C. Even under unsupported limitations to the EPA's fourth affirmative defense, SBK prevails because its pay practice stems from legitimate business needs.

Although the EPA's plain text does not support limiting the fourth affirmative defense, SBK should prevail because its pay practice stems from legitimate business needs. See Aldrich, 963 F.2d at 525. Under this approach, an employer prevails by proving the use of a factor other than sex and then tying that factor to a legitimate business need. Id. at 525 (holding that school district's affirmative defense failed because it did not show how top civil service exam scores, factor other than sex, were related to job performance for custodial position). Where the employer asserts prior pay as a factor other than sex, they must provide an additional, business-

related justification. Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015). However, an employer offering a higher starting salary to an applicant after they rejected a lower offer qualifies as a legitimate business need, and thus, constitutes a factor other than sex. Id.

Here, SBK emphasized the educational and experience requirements of the highly-technical Senior IT Risk Specialist position in its job posting. Appendix B. At the time she was hired, Davis held a Bachelor's degree and six years of relevant work experience. [R. 2-3]. By contrast, Martinez held a Master's degree and Min had eight years of relevant work experience. [R. 4-5]. Thus, SBK's pay practice is rooted in consideration of relevant education and experience, both necessary for job performance, demonstrating a legitimate business need. See Aldrich, 963 F.2d at 525. Although Patterson has less education and work experience than his three colleagues, Patterson's starting salary was higher than Davis's because he rejected SBK's initial offer, forcing SBK to counter or risk losing a valuable applicant. [R. 4]. By contrast, Davis did not negotiate her starting salary. [R. 3]. The pay disparity widened when, after observing his performance for two years, SBK decided to promote Patterson. [R. 4]. Thus, the differential between Davis's pay and Patterson's is likewise justified under a legitimate business need. See Riser, 776 F.3d at 1199. Therefore, SBK's pay practice constitutes a factor other than sex. See Aldrich, 963 F.2d at 525; id.

Accordingly, this Court should affirm the Fourteenth Circuit's dismissal of Davis's EPA claim because the statute's plain text creates a broad affirmative defense that encompasses SBK's consideration of prior pay.

II. THE FOURTEENTH CIRCUIT CORRECTLY QUASHED THE SUBPOENA FOR CHOI'S JOURNAL BECAUSE CHOI'S JOURNAL IS A PERSONAL DOCUMENT WHICH CHOI HELD IN A PERSONAL CAPACITY.

This Court should affirm the Fourteenth Circuit's quashal of Davis's subpoena because Choi's journal is a personal document which Choi held in a personal capacity. Whether the collective entity rule is constitutional and applies to former employees, like Choi, is a mixed question of law and fact that this Court reviews de novo. See Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020); Ornelas v. United States, 517 U.S. 690, 696-97 (1996).

The Fifth Amendment guarantees that "no person shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege from self-incrimination extends to civil litigants when their testimony could result in criminal prosecution. See McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). The Fifth Amendment's broad protections are motivated by the desire to "preserv[e] the integrity of the judicial system in which even the guilty are not to be convicted unless the prosecution shoulder the entire load." Tehan v. United States ex rel. Shott, 382 U.S. 406, 415 (1966).

A court must quash a subpoena duces tecum when the act of producing the document is compelled by the government, testimonial, and has a tendency to incriminate its author. See Fisher v. United States, 425 U.S. 391, 410 (1976). This privilege is most expansive when the document sought is a personal document. See Bellis v. United States, 417 U.S. 85, 85 (1974); United States v. White, 322 U.S. 694, 701 (1944). But, the privilege's application to corporate documents is less clear. Presently, *current* corporate employees cannot invoke the Fifth Amendment to refuse disclosure of a corporate document. Braswell v. United States, 487 U.S. 99, 108-09 (1988) (finding that because corporations cannot assert Fifth Amendment, individuals serving in representative capacity for corporations are prevented from asserting their own rights). The excessive comingling of a corporation's rights with those of its employees is called the

collective entity rule. Id. at 104. However, the circuit courts disagree on whether the collective entity rule prevents *former* corporate employees from asserting their Fifth Amendment rights.

A plurality of circuit courts have correctly articulated that the collective entity doctrine does not extend to former employees because such individuals no longer serve in a representative capacity for their previous employers. See United States v. Doe (In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999), 191 F.3d 173, 177 (2d Cir. 1999) (hereinafter In re Grand Jury 1999); United States v. McLaughlin, 126 F.3d 130, 133 n.2 (3d Cir. 1997); In re Grand Jury Proceedings, 71 F.3d 723, 724 (9th Cir. 1995). In contrast, a minority of courts have extended Braswell to supersede the Fifth Amendment rights of former employees. See In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 807, 810-13 (11th Cir. 1992); In re Sealed Case (Government Records), 950 F.2d 736, 740 (D.C. Cir. 1991).

This Court should affirm the Fourteenth Circuit's grant of Choi's motion to quash because: (A) Choi's journal is a personal document and producing it is compelled by the government, testimonial, and incriminating; (B) the Fifth Amendment protects the journal regardless of whether it is a personal or corporate document because the collective entity rule is unconstitutional; and (C) the collective entity rule does not extend to former employees who no longer represent their previous employers nor owe a continuing fiduciary duty to them.

A. The Fifth Amendment protects Choi's journal because it is a personal document.

This Court should quash Davis's subpoena because Choi's journal is a personal document. Because personal documents do not belong to a corporation, they cannot be held in a representative capacity on behalf of a corporation. See Bellis, 417 U.S. at 85; see also Braswell, 487 U.S. at 109-110. Therefore, the collective entity rule does not extend to personal documents. See Braswell, 487 U.S. at 109-110.

The party seeking to prevent production bears the burden of establishing that the document is a personal document. See United States v. Wujkowski, 929 F.2d 981, 984 (4th Cir. 1991). A document's nature and function determine whether it is a personal or corporate document. See Wilson v. United States, 221 U.S 361, 377-80 (1911). To properly categorize a document, this Court examines (i) who has an ownership interest in the document, (ii) what purposes the document could be used for, and (iii) who has access to the document. See Bellis, 417 U.S. at 98-99; White, 322 U.S. at 699-700; Wilson, 221 U.S at 377-79. In particular, this Court has emphasized the last factor. See White, 322 U.S at 699-700 (stating hallmark of corporate document is that "they are open to inspection by the [corporation's employees] and this right may be enforced on appropriate occasions by available legal procedures.").

The Fifth Amendment privileges personal documents when the act of producing the document is compelled by the government, testimonial, and has a tendency to incriminate. See Fisher, 425 U.S. at 410. First, this Court has explained that forcing a defendant to produce a document via a subpoena is akin to compelling the defendant to take the witness stand and testify that the document exists. See Hubbell, 530 U.S. at 36. Second, producing a document is testimonial because it communicates that: (i) the documents responsive to a given subpoena exist; (ii) the documents are in the possession or control of the subpoenaed party; (iii) the documents provided in response to the subpoena are authentic; and (iv) the responding party believes the documents produced are those described in the subpoena. See id.; United States v. Doe, 465; Fisher, 425 U.S. at 410. Third, the act of production has a tendency to incriminate if it "[d]emonstrat[es] or indicate[es] involvement in criminal activity." See Incriminating, Black's Law Dictionary (10th ed. 2014).

Here, Choi bears the burden of establishing that his journal is a personal document because he is the one seeking to prevent production. See [R. 13.]; see also Wujkowski, 929 F.2d

at 984. Choi purchased his red notebook himself, and as a result, SBK has no ownership interest over it. [R. 6]. SBK's lack of an ownership interest is a factor weighing heavily in favor of finding Choi's journal is a personal document. Bellis, 417 U.S. at 98. Although Choi occasionally used his journal to take informal notes at SBK meetings, overall, he used his journal for predominantly personal purposes. [R. 6, n.2]. For example, Choi regularly used his journal to create personal to-do lists, prepare grocery lists, and write down thoughts he intended to keep in confidence. Id. Choi's use of his journal distinguishes it from the ways corporate documents were used in the Court's previous cases. See Bellis, 417 U.S at 98-99 (finding partnership's financial books were business documents because Bellis had "no right to use this property other than for partnership purposes"); see also White, 322 U.S. at 702 (emphasizing documents sought were union's official books, not merely informal notes). Most importantly though, Choi exercised exclusive authority over the possession and access to his journal. See [R. 6]; see also White, 322 U.S. at 699-700. Choi routinely kept his journal on his person, and never allowed his colleagues to read its contents. [R. 6]. Choi even went so far as to occasionally lock the journal and prevented his own secretary from accessing it. Id. Choi's control over his personal journal again varies drastically from the Court's precedent on corporate documents. See Bellis, 417 U.S at 98-99 (finding partnership's financial books were business documents because defendant often left documents with other colleagues or open on his desk); see also White, 322 U.S at 699-700. Applying the factors historically given the most significance by this Court reveals that Choi's journal is a personal document because its nature and function is predominantly personal. Bellis, 417 U.S at 98-99; White, 322 U.S at 699-700; Wilson, 221 U.S at 377-80.

Additionally, here, Davis alleges that Choi's journal will show that Choi attended the final meeting concerning Davis's salary terms. [R. 7]. The subpoena forces Choi to communicate that the journal is still in Choi's possession, the journal is authentic, and most importantly, that

Choi believes the journal produced is the document that proves he attended those meetings. See Hubbell, 530 U.S. at 36; Doe, 465 U.S. at 613-14; Fisher, 425 U.S. at 410. Thus, producing Choi's journal is compelling and testimonial. See Hubbell, 530 U.S. at 36; Doe, 465 U.S. at 613-14. Furthermore, Choi denied that he attended the final meeting concerning Davis's salary terms while he was under oath during a deposition. [R. 5]. Therefore, producing the document could expose Choi to a prosecution for perjury. See 18 U.S.C. § 1621. Thus, producing Choi's journal is incriminating. Id. For the foregoing reasons, the act of producing Choi's journal is compelling, testimonial, and incriminating. See Hubbell, 530 U.S. at 36; Fisher, 425 U.S. at 410.

In sum, the Fifth Amendment privileges Choi from producing his journal because it is a personal document and its production would be compelling, testimonial, and incriminating. Hubbell, 530 U.S. at 36; Bellis, 417 U.S at 98-99.

B. The Fifth Amendment likewise protects Choi's journal as a corporate document because the collective entity rule is unconstitutional.

Although Choi's journal is a personal document, the Fifth Amendment likewise protects Choi's journal as a corporate document because the collective entity rule is unconstitutional. The rule cannot extend to former employees because that contradicts the Fifth Amendment's plain text and this Court's precedent on corporate personhood. See Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886); see also Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014).

The Fifth Amendment provides that no "person" shall be compelled to be a witness against himself. U.S. Const. amend. V. This Court maintains that corporations are such "persons" afforded constitutional protection. E.g., Santa Clara County, 118 U.S. at 396 (rejecting petitioner's argument that corporations were not "persons" entitled to Fourteenth Amendment protection). Congress also includes corporations within the meaning of "person." 1 U.S.C.S. § 1

(defining "person" to include corporations, companies, associations, and partnerships). Therefore, courts and the legislature unambiguously treat corporations as legal "persons," and thus, corporations enjoy the privilege against self-incrimination guaranteed to all persons by the Fifth Amendment. See U.S. Const. amend. V.

Moreover, denying corporations–and their employees–the privilege against self-incrimination contradicts this Court's vigorous defense of corporations' various constitutional rights. Among others, this Court has secured the corporation's First Amendment religious freedom rights, First Amendment free speech rights, Fourth Amendment search and seizure rights, and Fourteenth Amendment equal protection rights. See Burwell, 573 U.S. 682, 691 (2014) (religious freedom); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010) (free speech); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (search and seizure); Santa Clara County, 118 U.S. at 396 (equal protection). Burwell explicitly rejected the Department of Health and Human Service's argument that a corporation's owners forfeited their religious rights when they incorporated their business. 573 U.S. at 682. The collective entity rule directly contradicts this holding because it forces a corporation's owners and employees to relinquish their privilege against self-incrimination once the business is incorporated. The combination of the Fifth Amendment's text and this Court's doctrine on corporate personhood reveal that corporations and their employees are protected against self-incrimination. See Santa Clara County, 118 U.S. at 396; Burwell, 573 U.S. at 682.

The collective entity rule offers two justifications for disregarding the Fifth Amendment's plain text and this Court's well-established doctrine of corporate personhood. First, it asserts that corporations relinquish their Fifth Amendment rights because they are voluntary creatures of the state. See Hale, 201 U.S. at 74. Second, it claims that affording corporations the privilege against self-incrimination would prevent effective enforcement of

white collar crime. See Bellis, 417 U.S. at 90-91. For the reasons explained above, this first justification fails after Burwell. See 573 U.S. at 682. The first justification also crumbles upon an analysis of how the collective entity doctrine has been applied. Although the doctrine once only applied to corporations, it has since been extended to general partnerships and labor unions as well as other business forms. See Bellis, 417 U.S. at 89-90 (partnerships); White, 322 U.S. at 701 (labor unions). These entities are not voluntarily incorporated creatures of the state like corporations. See Hale, 201 U.S. at 74. Thus, the collective entity rule's expansion over the past several decades has eroded any ties it once had to the "creature of the state" rationale. Id.

The doctrine's second justification is equally unconvincing. Allowing the desires of law enforcement to supercede a corporation's Fifth Amendment rights defies this Court's declaration that the privilege's purpose is to "preserv[e] the integrity of the judicial system in which . . . the prosecution shoulder the entire load." Tehan, 382 U.S. at 415. In fact, this Court has pronounced that the "potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." White, 322 U.S. at 698. Using the collective entity rule to prioritize the needs of law enforcement over the people's Fifth Amendment rights also contradicts the Court's position in Miranda v. Arizona. See 384 U.S. 436, 541 (1966) (securing individual's privilege from self-incrimination over Justice Harlan's critique that Miranda warnings would "measurably weaken" law enforcement). In our society, vigorous enforcement of the people's rights predominates the concerns of law enforcement. For these reasons, the collective entity rule's second justification also fails. See In re Grand Jury 1999, 191 F.3d at 183.

Here, once the collective entity rule is repealed, determining whether Choi's journal is a personal or corporate document becomes irrelevant. Even if the journal is SBK's corporate document, SBK could still assert its own Fifth Amendment rights because SBK is a legal person

protected by the Fifth Amendment. See Santa Clara County, 118 U.S. at 396. Likewise, SBK's employees, including Choi, also retain their privilege against self-incrimination. See Burwell, 573 U.S. at 682.

In sum, the collective entity rule is unconstitutional because corporations are persons under the text of the Fifth Amendment and this Court's precedent. As a result, Choi's journal is privileged regardless of whether it is a personal or corporate document.

C. The Fifth Amendment further privileges Choi's journal as a corporate document because the collective entity rule does not extend to former employees.

If the Court finds that Choi's journal is a corporate document and refuses to repeal the collective entity rule, Choi's journal is still privileged because Braswell does not extend to former employees. Former employees do not serve in a representative capacity for their previous employer. See In re Grand Jury 1999, 191 F.3d at 177. Likewise, former employees do not owe a continuing fiduciary duty to their previous employers. See id. Because the collective entity rule does not apply to corporate documents held by former employees, these documents are privileged under the act of production doctrine. See id.

1. Braswell does not extend to former employees who no longer serve in a representative capacity for their previous employer.

As discussed above, corporations have not yet been granted their Fifth Amendment privilege against self-incrimination. See Hale, 201 U.S. at 74. Therefore, corporations cannot refuse to produce a document in response to a subpoena. Braswell, 487 U.S. at 105. Thus, when an employee–acting in their official capacity as a representative for a corporation–produces a corporate document, the employee is not acting in their personal capacity but rather as the corporation itself. Id. at 109-10. This rationale underlying the collective entity rule is known as the agency principle. Id. at 109.

However, once the employment terminates, the former employee no longer has the agency to serve in a representative capacity for the corporation. See In re Grand Jury 1999, 191 F.3d at 181; In re Grand Jury Proceedings, 71 F.3d 723, 724 (9th Cir. 1995). For example, former corporate employees cannot lawfully bind their previous employers into contractual agreements. See Maine Products Co. v. Alexander, 115 A.D. 109, 111 (N.Y. App. Div. 1906). They cannot hire nor fire workers. See id. Nor can they withdraw funds from the corporation's account. See id. For Fifth Amendment purposes, former corporate employees act purely in their personal capacity; therefore, Braswell does not extend to them. See In re Grand Jury 1999, 191 F.3d at 181; McLaughlin, 126 F.3d at 133 n.2 (3d Cir. 1997).

2. Braswell does not extend to former employees who do not owe a continuing fiduciary duty to their previous employers.

At least one court of appeals has discussed extending Braswell to former officers who owe a continuing fiduciary duty to their previous employer. [R. 17]. Fiduciary duties affecting may stem from two authorities: contract law and corporate law. See In re Grand Jury 1999, 191 F.3d at 180 (dismissing argument that defendant contractually waived Fifth Amendment rights in severance agreement because no such waiver provision existed); see also Alice W. Yao, Former Corporate Officers and Employees in the Context of the Collective Entity and Act of Production Doctrines, 68 U. Chi. L. Rev. 1487, 1506 n.108 (2001) (recognizing corporate law may impose continuing fiduciary duties on former directors and officers). Contract law will not impose continuing fiduciary duties on a former employee absent an explicit contractual provision. See In re Grand Jury 1999, 191 F.3d at 180. Under corporate law, whether an employee constitutes an officer or director is a function of their job responsibilities, not their title. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Livingston, 566 F.2d 1119, 1121 (9th Cir. 1978) (hereinafter Merrill Lynch).

3. Corporate documents held by former employees are privileged under the act of production doctrine.

Because Braswell does not extend to former employees, former employees are privileged from producing corporate documents if doing so is compelling, testimonial, and incriminating. See Doe, 465 U.S. at 613-14; Hubbell, 530 US at 45. Producing corporate documents is compelling and incriminating for the same reasons explained above regarding personal documents in argument (A). See Doe, 465 U.S. at 613-14. Additionally, because corporate documents do not belong to the individual, producing them could support an inference that the individual stole the documents. See In re Grand Jury 1999, 191 F.3d at 176. Therefore, producing corporate documents has a stronger tendency to incriminate than producing personal documents. See id.

Here, Choi resigned from his employment with SBK in 2020 to pursue his passion for baking. [R. 5]. As a former employee, Choi no longer acts as an agent or representative for SBK. See In re Grand Jury 1999, 191 F.3d at 181; In re Grand Jury Proceedings, 71 F.3d at 724. Davis implicitly recognized this when she subpoenaed Choi in his personal capacity rather than in an official capacity as an agent for SBK. See [R. 1]; see also In re Grand Jury 1999, 191 F.3d at 181. Given that Choi no longer serves in a representative capacity for SBK, Brawell's collective entity rule does not extend to him under the agency rationale. See In re Grand Jury 1999, 191 F.3d at 181.

Moreover, here, the record does not suggest that Choi contractually agreed to incur continuing fiduciary duties to SBK or that he waived his Fifth Amendment rights. See [R. 5]; see also In re Grand Jury 1999, 191 F.3d at 180. Additionally, although Choi was a senior employee and sat on SBK's hiring committee, Choi was not an officer of SBK. See [R. 5]; see also Merrill Lynch, 566 F.2d at 1121. The record does not indicate that Choi attended any SBK Board of

Directors meetings or that he had the ability to enact policy changes at SBK. See Merrill Lynch, 566 F.2d at 1121-23 (finding that despite Livingston's title of "Vice President," Livingston was nothing more than sales employee because Livingston could not attend board meetings, could not affect policy, and did not possess information unavailable to other employees). Because Choi does not owe SBK any continuing fiduciary duties–either contractual or implied under corporate law–Braswell does not apply to him. See In re Grand Jury 1999, 191 F.3d at 180-81.

Last, here, the act of producing the journal as a corporate document remains compelling and testimonial for the reasons set forth above in argument (A). See Hubbell, 530 US at 45; In re Grand Jury 1999, 191 F.3d at 176. If the journal is SBK's corporate document though, then producing it may support an inference that Choi stole it when his employment terminated. See In re Grand Jury 1999, 191 F.3d at 176. Therefore, producing the document as SBK's corporate document is more incriminating to Choi than producing it as his personal document. See id. Thus, the Fifth Amendment protects Choi from producing the journal as a corporate document because doing so is compelling, testimonial, and incriminating. See Hubbell, 530 US at 45; In re Grand Jury 1999, 191 F.3d at 174.

In sum, Braswell does not extend to Choi because he no longer serves in a representative capacity for and does not owe a continuing fiduciary duty to SBK. See In re Grand Jury 1999, 191 F.3d at 174. Therefore, the Fifth Amendment protects Choi because producing his journal is compelling, testimonial, and incriminating. See Doe, 465 U.S. at 613-14; In re Grand Jury 1999, 191 F.3d at 174-76.

Accordingly, this Court should affirm the Fourteenth Circuit's quashal of Davis's subpoena because Choi's journal is a personal document which he held in a personal capacity.

CONCLUSION

For all the foregoing reasons, Respondents request that this Court AFFIRM the judgment of the Fourteenth Circuit, where that court granted summary judgment for Respondent SBK and granted Respondent Choi's motion to quash Petitioner Davis's subpoena.

Respectfully Submitted,

SBK Consulting, Inc.

Bubba R. Choi

By their attorneys,

Attorney 1

Attorney 2

APPENDIX A

SBK Consulting, Inc. Pay Scale for Employee Annual Salaries

Level 1 Range = $50,000 to $65,000
Level 2 Range = $60,000 to $75,000
Level 3 Range = $70,000 to $85,000
Level 4 Range = $80,000 to $95,000
Level 5 Range = $90,000 to $105,000
Level 6 Range = $100,000 to $115,000
Level 7 Range = $110,000 to $125,000

APPENDIX B

Senior Information Technology Risk Specialist
SBK Consulting, Inc.

Job Description:
SBK Consulting is seeking a passionate and experienced professional to join its Information Technology team. As a Senior Information Technology Risk Specialist, you will support our technology programs, manage risk strategies and protocols, and monitor the company's software systems.

Responsibilities:
- Repairing client environments, taking forensic images, containing threats, and restoring services both on-site and remotely.
- Managing our client networks, servers, and endpoints on-site and remotely.
- Monitoring for issues and improvements, auditing, and documenting frequently.
- Provide support for Mac and Windows integrated with Cloud technologies from Microsoft Azure, Dropbox, Office 365, Google, and many more.

Education and Experience:
- A Bachelor's degree is required, with a concentration in computer science, engineering, business management, finance, or accounting preferred.
- Minimum of 6 years of experience in the information technology industry or other similar industry.

Desirable Knowledge and Skills:
- Advanced knowledge of risk management programs, measurement tools, models, control frameworks, and risk indicators used to make decisions on operational or enterprise risks for an organization.
- Capabilities to evaluate a broad range of an institutions' operational framework, including: risk management and compliance programs, payment processing activities, custody services, investment management and servicing utilities, and resiliency of operations.
- Experience leading information technology risk strategies and briefing senior management on findings and recommendations.
- Proficient technical knowledge of IMAP, LDAP, Microsoft ActiveSync, Active Directory and group policies, data recovery tools, Microsoft Exchange, WINS, DHCP, DNS, and TCP/IP.