

NEW YORK LAW SCHOOL
50TH ANNUAL ROBERT F. WAGNER NATIONAL
LABOR AND EMPLOYMENT LAW MOOT COURT COMPETITION

In the
Supreme Court
of the United States

MARCH TERM, 2026 CASE No. 55-2026

ALAYA KADEB

Petitioner,

-against-

LOVE ISLAND, LLC.

Respondent.

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

THE RECORD

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

MARCH TERM, 2026

ARGUED: OCTOBER 1, 2025
DECIDED: NOVEMBER 1, 2025
No. 55-2026

ALAYA KADEB
Appellant,

v.

LOVE ISLAND, LLC
Appellee.

On Appeal from the
United States District Court for the Northern District of Wagner
55-2026 – GREENBERG, Chief Judge.

Before: GRABOWSKI and NGUYEN, Circuit Judges.
Opinion for the Court by: Chief Judge, GREENBERG, and Circuit Judge, NGUYEN.
Dissent by: Circuit Judge, GRABOWSKI.

GREENBERG, Chief Judge:

BACKGROUND

This case involves Season 8 of Love Island, a reality dating competition television show produced by Love Island, LLC (“Love Island”) on which eight contestants¹ (four men and four women) live together in a Hawaiian villa for ten weeks to build romantic connections. The show is broadcast live, and the winning contestant, who is selected by viewer votes, is awarded \$100,000 at the conclusion of the season. Season 8 was set to begin on June 1, 2022, and finish on July 16, 2022. To address declining ratings during recent seasons of the show, producers of Season 8 cast contestants who were social media influencers and featured on previous seasons of other reality television shows.

Pay Rate Determinations

During prior seasons of Love Island, producers utilized a uniform pay structure that compensated all contestants equally. Producers believed this would maintain fairness among contestants. However, beginning with Season 8, producers reconsidered their compensation system to reflect the cast’s influencer and reality TV experience.

After internal deliberation regarding the pay structure to be used for Season 8, Love Island producers concluded that the most equitable way to determine pay was to base it solely on prior earnings from comparable television appearances. In doing so, they expressly rejected reliance on any other considerations. The producers developed a pay policy, which stated:

“Compensation for Season 8 contestants shall be based solely on prior pay rates earned from a contestant’s most recent reality television appearance. No other factor shall be considered. Season 8 contestants’ pay rate shall be 120% of their most recent reality television pay rate, as reflected from their W-2.”

The producers also changed the contract terms to include a “no pay discussion” clause, which reads as follows: “No contestant shall discuss their pay rate for Love Island Season 8 with any other contestant(s) or Love Island crew member(s), on-camera or off-camera, until the season’s completion or July 16, 2022, whichever date is later.”

Among the contestants selected to participate on Love Island was Alaya Kadeb (“Kadeb”), a female fashion influencer from New York City with prior appearances on Love Is Deaf (Season 4) and Too Sexy to Seclude (Season 2). Henry Jones (“Jones”), another contestant, was a male influencer with prior appearances on Love Is Deaf (Season 3) and Spring House (Season 1). Three additional female influencers and three additional male influencers rounded out the cast, each with

¹The parties have stipulated that the contestants were employees of Love Island.

varying levels of social media presence and television experience. Under the pay policy discussed above, the following pay rates were established for Jones and Kadeb:

- **Henry Jones:** \$216,000 (previously \$180,000 on Love Is Deaf Season 4)
- **Alaya Kadeb:** \$168,000 (previously \$140,000 on Love Is Deaf Season 3)

Love Island Season 8

On June 1, 2022, Season 8 of Love Island commenced. On June 4, Jones and Kadeb had an off-camera discussion during which Jones disclosed that he was earning \$216,000 for the season. Kadeb ended the conversation without disclosing her own salary and shared Jones's salary with the other female contestants. Kadeb then disclosed her own salary of \$168,000, leading the other three female contestants to realize that Jones was making more than all the women because Kadeb was the highest earning female contestant. Displeased by the pay disparity, the female contestants conspired to engage in a concerted partial work stoppage.

From June 5 to June 13, the female contestants refused to participate in romantic dates, challenges, dramatic interactions, or other key planned activities for the contestants. Instead, they limited their activities to sunbathing, taking selfies, and casual meals. When pressed by producers, Kadeb remarked: "I did not know how much more the boys were making than the women when I agreed to be on Love Island. This is unfair!" At this point, the producers became frustrated that the contestants had violated the no salary discussion clause in the contracts, which had been designed to prevent such disputes.

Termination of the Female Contestants

On June 14, 2022, 13 days into the season, the producers informed all four female contestants, including Kadeb, that they would be terminated from the season and removed from the Love Island villa. According to the producers, the female contestants' lack of participation and sudden disengagement disrupted the show's central format, depressed viewer interest, and led to a noticeable decline in ratings. Viewers expressed confusion on social media platforms, questioning the sudden change in the female contestants' behavior, and demanded explanations from the production team. The producers concluded that the continued presence of the female contestants was detrimental to the show's commercial viability and opted to replace them with four new female influencer contestants, who were also paid 20% more than their most recent reality television appearance.

The producers told Kadeb and the other female contestants that they were being terminated because they were "failing to perform [their] Love Island duties," referencing their refusal to participate in romantic pairings, challenges, and other scripted or unscripted interactions designed to drive the show's narrative. The producers emphasized that the continued lack of engagement negatively affected the program's entertainment value, audience engagement, and ratings. The

female contestants expressed surprise and dissatisfaction with the decision, noting that their work stoppage was motivated by concerns regarding substantial pay disparities. Nevertheless, the producers maintained that the removal was necessary to preserve the integrity of the show and to restore audience interest.

The producers publicly framed the decision as a creative choice necessary to preserve the entertainment value of the program. However, the female contestants maintained that their removal was punitive and directly tied to their decision to discuss and protest disparities in pay. On June 20, after returning to mainland United States, Kadeb posted a TikTok elaborating on why Love Island terminated her and the other three women from the show. Kadeb informed her followers that the female contestants were terminated because they protested their salaries, and that their salaries were lower than their male counterparts.

Post-Termination Developments

After the female contestants were terminated and replaced with other contestants, Love Island experienced immediate shifts in audience engagement and public perception. Ratings declined even further as viewers reacted poorly to the sudden exit of four high-profile participants, expressing confusion and frustration across social media platforms. Fans created videos, posts, and commentaries questioning the circumstances under which the women were terminated and the basis of pay rates for the contestants. Several viewers directly contacted producers through official channels to seek clarification regarding how the pay rate was determined and why the female contestants were paid less.

Following their exit from Love Island, Kadeb experienced a temporary boost in social media engagement, but suffered significant personal and professional consequences, including strained relationships with brand sponsors and a decline in popularity. Kadeb also suffered financial consequences. Kadeb reported that the companies that had contracted with her for influencer and brand promotion services, including Lewis Vuitton, Bhode Beauty, and MUCK Cosmetic, canceled their contracts after she was terminated from the show. Kadeb's brand deal with Lewis Vuitton had included a \$10,000 payment per Instagram or TikTok post, an annual influencer brand trip to Barbados valued at \$20,000, and the option of choosing two handbags per year, valued up to \$12,000 per bag. Kadeb's brand deal with Bhode Beauty had included a \$5,000 payment per social media post, and semi-annual PR packages valued at \$500 per package. The MUCK Cosmetic contract had included two video campaigns valued at \$25,000 per video, and an annual influencer brand trip to Europe valued at approximately \$20,000. However, her increased viewership post-termination increased her monthly TikTok fund salary by \$3,000 per month.²

² TikTok Creator's Fund is a program offered by the app TikTok which was designed to pay creators for their content if they meet a certain follower and engagement threshold.

Furthermore, the producers had encouraged participants to acquire new wardrobes and accessories for the season, resulting in significant out-of-pocket expenditures. Kadeb spent approximately \$15,000 on new clothes for the show, most of which went unused because she was terminated after only a few episodes. Collectively, these financial and professional impacts formed a material component of Kadeb's claims in her subsequent lawsuit against Love Island, LLC—the media company behind Love Island—alleging unfair termination and labor violations under the National Labor Relations Act.

Leak of Love Island Producer Emails / Public Backlash

After the female contestants were terminated from the show, internal emails among various Love Island producers were leaked to the public. These emails were produced during discovery and became part of the case record. The emails revealed that compensation decisions for Season 8 were tied to contestants' prior television salaries. The leaks sparked public backlash, with critics characterizing the system as "baseless" and "sexist." Hashtags such as #DiscriminationIsland trended across platforms, drawing celebrity commentary and political attention, including a public condemnation by U.S. Congressman Richard White, who labeled the practice, "misogyny at its finest." Former female contestants amplified the controversy through media appearances on popular podcasts such as *The Viall Files* and *Call Her Daddy*, while celebrities and influencers further fueled the discussion.

Allegations of Sex-Based Pay Discrimination in Love Is Deaf

Following the controversy surrounding Love Island Season 8, the producers of Love Is Deaf, another reality dating program in which Kadeb and Jones previously appeared, also received scrutiny. On June 25, 2022, a former producer of Love Is Deaf alleged that contestant compensation on Kadeb's season was determined in part by sex-based considerations. According to the emails, which were obtained through third-party discovery, the producers purportedly discussed reducing female contestants' salaries on the basis that the women were "not hot enough to be paid the same as the men." Love Is Deaf aired in April and May 2020, and these emails were dated during March 2020 when pay discussions for Season 3, in which Kadeb appeared, were ongoing.

Internal Investigation by Love Is Deaf Network

In response to the allegations, ABD, the network on which Love Is Deaf aired, conducted an internal investigation to evaluate the veracity of the claims. The investigation included a review of email records, text message exchanges, and testimony from current and former production staff. These investigation materials were also obtained through third-party discovery. The investigation was conducted by a private third-party investigator who was hired and paid for by ABD.

On July 1, 2022, the third-party investigators conducted interviews with the accused producers, in which the investigators asked the producers to turn in their work cell phones for further review. ABD conducted a probe of text messages and emails on cell phones and found one text chain about compensation. The text messages occurred on March 15, 2020, two weeks prior to the start of Love Is Deaf Season 3, during the ongoing pay scale discussion for Season 3. After reviewing the text messages with the investigation committee, the network found that the texts were in jest and therefore did not rise to the level of sexual discrimination. The text chain discussed Kadeb's pay rate determination prior to her start on Love Is Deaf. The text chain read:

Producer 1: "Can you believe we cast Alaya Kadeb? She hasn't been relevant since her season on Too Sexy to Seclude six years ago."

Producer 2: "LOL ikr. She's gained a ton of weight. We shouldn't be wasting all that money on her."

Producer 1: "Preach! IDK what we were thinking bro. She's going to bring down the ratings at this point."

The pay structure for Season 3 contestants of Love Is Deaf was solidified on or around March 18, 2020. Kadeb earned the 4th highest salary that season, at \$140,000. Meanwhile, the three higher earners were all male contestants. The male contestants earned \$160,000, \$157,000, and \$150,000. The network asserted that contestant compensation had been determined by objective factors, such as social media following, prior on-screen experience, and marketability. On July 31, 2022, ABD released a public statement declaring that the discrimination allegations were "meritless" and that no evidence substantiated claims of discriminatory pay practices. On August 1, 2022, the third-party investigators closed the investigation into Love Is Deaf Season 3.

Having suffered reputational harm and financial loss, Kadeb filed suit against Love Island, LLC alleging a violation of the Equal Pay Act. Moreover, based on similar injuries, Kadeb also filed an unfair labor practice charge with the National Labor Relations Board alleging a violation of Section 8(a)(1) of the National Labor Relations Act for unfair termination. These two claims proceeded through their respective proceedings on dual tracks.

PROCEDURAL HISTORY

Proceedings Before the National Labor Relations Board

On January 3, 2023, Kadeb filed an unfair labor practice charge with Region 14 of the National Labor Relations Board ("NLRB") alleging that Love Island violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 158(a)(1). Specifically, Kadeb claimed that Love Island interfered with her rights under Section 7 of the NLRA, 29 U.S.C. § 157, by terminating her employment after she discussed contestant compensation with others on

set—a protected form of concerted activity. Kadeb also challenged the employment agreement provision prohibiting contestants from discussing pay as an unlawful restraint on collective action pursuant to Section 8(a)(1) of the NLRA.

After investigating, the Regional Director found merit in Kadeb’s claim and issued a complaint alleging that Love Island violated Section 8(a)(1) by discharging her for engaging in protected concerted activity and maintaining the unlawful no-discussion rule. A hearing was held before an Administrative Law Judge (“ALJ”), where the NLRB’s general counsel (supported by Kadeb) and counsel for Love Island presented documentary evidence and offered testimony of witnesses through direct- and cross-examination. Both parties submitted post-hearing briefs.

The ALJ issued a Decision sustaining the complaint and concluding that Love Island violated Section 8(a)(1) by terminating Kadeb for discussing wages with fellow contestants and maintaining a rule that chilled such discussions. As a remedy, the ALJ ordered Love Island to rescind the rule prohibiting discussion of employee compensation, cease and desist from similar conduct, and compensate Kadeb for losses directly resulting from her unlawful termination. The order awarded lost wages limited to the remaining amount owed under her employment contract at the time of termination, with interest, and compensatory damages for identifiable losses, including approximately \$15,000 in unreimbursed wardrobe expenses, \$50,000 lost MUCK Cosmetic video campaign, \$20,000 cancelled brand trip with Lewis Vuitton, and \$70,000 from Rhode Beauty and Lewis Vuitton from lost sponsored social media posts attributable to reputational harm following her dismissal. The ALJ also ordered the customary remedies that accompany a finding of an NLRA violation, including notice posting and injunctive relief.

Love Island appealed the ALJ’s Decision to the NLRB. In a 3–2 decision, the Board issued a Decision and Order that affirmed the ALJ’s findings and remedies under Section 10(c) of the NLRA, 29 U.S.C. § 160(c), directing Love Island to make Kadeb whole, post notice of employee rights, and rescind the offending rule.

Love Island filed a timely appeal of the NLRB’s Decision and Order to this Court pursuant to 29 U.S.C. § 160(f), arguing that the Board exceeded its remedial authority.

Separately, Kadeb filed suit in the U.S. District Court for the District of Wagner on January 3, 2023, alleging sex-based wage discrimination under the Equal Pay Act (“EPA”), pursuant to 29 U.S.C. § 206(d).

Simultaneous Litigation Under the EPA

Kadeb alleged that she was paid less than her male counterpart for substantially equal work and that the employer’s justification for relying on prior salary was not a permissible “factor other than sex” under the statute.

After the parties exchanged written discovery and conducted depositions, Love Island moved for summary judgment pursuant to Fed. R. Civ. P. 56, asserting that contestants' prior pay from their last reality tv show was a legitimate basis for wage differences.

On March 7, 2024, the District Court granted summary judgment, holding that prior pay alone could justify the differential, and that Kadeb's prior pay amount was not tainted by sex discrimination. The court held that Love Island's compensation was determined by neutral and objective factors such as the contestants' prior pay. The court further cited Love Is Deaf's internal investigation, which found similar sex discrimination claims unsubstantiated.

Kadeb filed a timely appeal of the District Court's award of summary judgment to this Court.

Joinder of the Cases on Appeal

At Kadeb's request and on the consent of all parties, this Court joined the appeals of the NLRB's Decision and Order and the grant of summary judgment in favor of Love Island. Given that the dispute under the NLRA, as well as Kadeb's claims under the EPA, were properly and timely appealed to this Court around the same time, this Court exercised its discretion and joined the two similar cases together, pursuant to Fed. R. App. P. 18, for purposes of judicial economy and given the factual overlap surrounding both claims.

Having been fully briefed and argued before a three-judge panel of this Court, these matters are now ripe for decision.

DISCUSSION

I. STANDARD OF REVIEW

This Court reviews the NLRB's decision under the substantial evidence standard. *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 98 n.2 (3d Cir. 2024). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and it requires more than a mere scintilla but less than a preponderance. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The reviewing court retains the duty to set aside the Board's decision when, after examining the entire record, including evidence contrary to the Board's findings, it cannot conscientiously conclude that the evidence supporting the decision is substantial. *New Concepts for Living, Inc. v Natl. Labor Relations Bd.*, 94 F.4th 272, 280 (3d Cir. 2024).

This Court reviews the EPA issues *de novo*. *See Rizo v. Yovino*, 950 F.3d 1217, 1221 (9th Cir. 2020) (grant of summary judgment motion is subject to *de novo* review); *see also Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995) (circuit courts review lower court's summary judgment rulings on *de novo* basis).

II. NATIONAL LABOR RELATIONS ACT

A. Background on the NLRB and the NLRA

Congress enacted the National Labor Relations Act in 1935 to safeguard employees' rights to organize, bargain collectively, and engage in concerted activities for mutual aid or protection. 29 U.S.C. §§ 151–169. To administer the Act, Congress created the National Labor Relations Board, an independent federal agency vested with adjudicatory and remedial powers. *See* 29 U.S.C. § 153.

Section 10(c) of the NLRA empowers the Board—upon finding an unfair labor practice—to order the offending party “to cease and desist” and to take such affirmative action, “including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.” 29 U.S.C. § 160(c). Historically, the Supreme Court has recognized that these powers are equitable in nature, designed to restore the *status quo ante* and eliminate the effects of unlawful conduct, but not to create punitive or compensatory awards akin to those available in a court of law. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235–36 (1938).

Over time, the Board has tested the limits of its remedial authority, adopting expansive interpretations of section 10(c) that would permit it to award “make-whole” relief for foreseeable economic consequences, including reputational harm, emotional distress, and collateral losses. *See Thryv, Inc.*, 372 NLRB No. 22 (2022). Such innovations have prompted significant pushbacks from federal appellate courts, which have emphasized the distinction between equitable restoration and general legal damages. *See Thryv, Inc. v. NLRB*, 102 F.4th 727, 740–42 (5th Cir. 2024); *NLRB v. Starbucks Corp.*, No. 23-1953, 2024 WL 5231549, at *7–8 (3d Cir. Dec. 27, 2024).

B. The NLRA Limits the Board's Remedial Power

While the Board's concern for remedying alleged unfair labor practices is legitimate, the scope of its order here oversteps statutory bounds. The NLRA's text and the Supreme Court's remedial jurisprudence foreclose any claim that Congress vested the Board with plenary damages authority. Section 10(c) empowers the Board to order affirmative action that “will effectuate the policies of this Act,” but from the outset the Supreme Court has read that clause narrowly to mean restorative, equitable relief—not penal or free-wheeling compensation. *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–36 (1938) (Board's powers are “essentially remedial” and may not be used punitively); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–13 (1940) (invalidating a payment order untethered to making employees whole and warning that §10(c) “does not go so far as to confer a punitive jurisdiction”); *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 433–37 (1941) (remedies must be tailored to violations found; the Board cannot issue roving “obey-the-law” injunctions); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257–61 (1939) (denying reinstatement that would “condone” serious unlawful conduct, underscoring limits on remedial

reach); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103–09 (1970) (Board may not compel agreement to substantive contract terms—its role is to police the process, not dictate outcomes).

Although the Supreme Court has recognized that the Board has some latitude in how it calculates classic make-whole relief, such as the remedial discretion reviewed for abuse in *ABF Freight Systems, Inc. v. NLRB* and backpay formulas in *NLRB v. Seven-Up Bottling Co.*, that discretion remains cabined to undoing the specific unfair labor practice and restoring the *status quo ante*. 510 U.S. 317, 324–26 (1994); 344 U.S. 344, 346–48 (1953). Similarly, appellate courts have drawn a sharp distinction between equitable restoration and the kind of consequential damages the Board has recently attempted to impose. See *Thryv, Inc.*, 102 F.4th at 741–42 (rejecting damages for “all direct or foreseeable pecuniary harms” as beyond the Board’s mandate); *Hiran Mgmt., Inc. v. NLRB*, No. 24-60608, slip op. at 13–14 (5th Cir. Oct. 31, 2025) (holding that § 10(c) authorizes only equitable remedies such as reinstatement and backpay, and declaring that the Board “lacks statutory authority to award full compensatory damages”); *Starbucks Corp.*, 2024 WL 5231549 at *7–8 (holding that the Board exceeded its authority by awarding compensatory damages for emotional distress and reputational harm, reasoning that such consequential losses fall within the province of Article III courts, not administrative agencies). Read together, these decisions establish a through-line: section 10(c) authorizes targeted, equitable measures such as reinstatement, back pay, cessation of unlawful practices, but withholds the power to award consequential damages, restructure substantive economic terms, or impose preventive mandates disconnected from the conduct at issue.

C. The NLRB Overreached Its Remedial Power

Here, the Board’s order went far beyond the restoration permitted under section 10(c). It required Love Island not only to rescind the unlawful no-pay-discussion clause and cease from implementing similar policies, but also to award extensive monetary relief. Adopting the ALJ’s recommendations in full, the Board ordered Love Island to make Kadeb whole through backpay limited to the remainder of her contract, with interest, and consequential damages for losses tied to her termination, including \$15,000 in unreimbursed wardrobe expenses and approximately \$140,000 in lost brand sponsorships. While the ALJ also imposed standard equitable remedies such as notice posting and injunctive relief, the Board’s decision to include speculative brand and reputational damages exceeded the limits of section 10(c). These awards go beyond restoring Kadeb to her prior position and instead compensate her for collateral harms akin to tort damages.

Supreme Court precedent limiting the Board’s remedial reach underscores why the order here cannot stand. In *Republic Steel*, the Court struck down a payment order to the U.S. Treasury because it imposed a financial penalty untethered to employee restoration. 311 U.S. at 11–13. The same untethered penalty exists here: compensating Kadeb for brand and reputational losses amounts to tort-like relief rather than restoration of employment conditions. Likewise, in *Express Publishing Co.*, the Court held that remedies must be tailored to the specific violation proved. 312

U.S. at 433–37. The Board here did not limit its order to rescission of the unlawful clause and backpay but went further by awarding damages unrelated to the section 8(a)(1) violation. This award represents the precise overreach *Express Publishing* forbids.

The Supreme Court has repeatedly warned against expansive measures. In *Fansteel Metallurgical Corp.*, the Court emphasized that the Board’s authority must remain remedial, not punitive. 306 U.S. at 257–58. Additionally, the Court in *H.K. Porter Co.* held that the Board cannot impose substantive economic terms. 397 U.S. at 103–09. Here, while the Board properly directed Love Island to rescind its unlawful clause and compensate Kadeb for contractual wages, the additional award of speculative damages exceeded section 10(c)’s boundaries.

Modern appellate courts have reinforced this limitation. In *Thryv*, the Fifth Circuit rejected the Board’s attempt to award damages for “all direct or foreseeable pecuniary harms,” explaining that Section 10(c) does not empower the agency to adjudicate tort-like claims. 102 F.4th at 741–42. Recent Fifth Circuit precedent reaffirmed this limit on the NLRB’s remedial power, where the court declared unequivocally that “[s]ection 10(c) does not transform the Board into a court of general jurisdiction empowered to award legal damages,” and emphasized that its remedial jurisdiction is “equitable in nature.” *Hiran Mgmt, Inc.*, slip op. at 13–14. Similarly, in *Starbucks Corp.*, the Third Circuit held that compensatory damages for emotional distress and reputational harm belong to Article III courts, not the NLRB. 2024 WL 5231549, at *7–8. By awarding Kadeb damages for brand sponsorships, wardrobe costs, and alleged reputational harm, the Board replicated the same defect condemned in *Thryv*, *Hiran*, and *Starbucks*—stretching section 10(c)’s equitable framework into an unauthorized compensatory one.

Our holding aligns with *Hiran* and *Starbucks*, which closes the door on any interpretation of section 10(c) that would allow consequential or compensatory relief. Section 10(c) authorizes equitable remedies that restore the *status quo ante*: to make whole, not to make new.

D. Distinguishing Restorative from Punitive Remedies

The dissent relies on precedent materially distinguishable from this case. In *Kava Holdings v. NLRB* for example, the Ninth Circuit affirmed broad relief, including reinstatement, back pay, and cessation of unilateral changes, because each measure directly restored employees to the position they would have occupied absent the unfair labor practices. 85 F.4th 479 (9th Cir. 2023). Similarly, in *IUOE, Local 39 v. NLRB*, the Ninth Circuit approved remedial measures closely tied to undoing specific, demonstrable harm caused by the employer’s conduct. NLRB No. 20-CA-270047, 127 F.4th 58, 78–79 (9th Cir. Jan. 21, 2025). Those remedies included reinstating unlawfully discharged employees and striking down policies that had directly chilled organizing activity. *Id.*

By contrast, the Board’s order here goes far beyond restoring Kadeb to the *status quo ante*. The record shows that Love Island producers expressly terminated Kadeb and the other female contestants for “failing to perform [their] Love Island duties” after they refused to participate in romantic pairings, challenges, and other program segments central to the show’s format. The Board found this removal unlawful under section 8(a)(1), yet its remedy does not focus on undoing that specific violation. Instead of limiting relief to rescission of the unlawful no-pay-discussion clause, and backpay tied to Kadeb’s contract, the Board awarded consequential damages for brand sponsorships, wardrobe expenses, and reputational harm. These tangential losses do not relate to the unfair labor practices.

The Board’s remedies stand in sharp contrast to the Ninth Circuit’s reasoning, where the remedies directly restored the parties to their pre-violation positions. *See Kava Holdings v. NLRB*, 85 F.4th 479 (9th Cir. 2023); *IUOE, Local 39 v. NLRB*, 127 F.4th 58, 78–79 (9th Cir. Jan. 21, 2025). There, the Board’s remedies related to the proven violations such as: reinstating unlawfully discharged employees, restoring bargaining rights, and rescinding discrete policies. *Kava Holdings*, 85 F.4th at 479; *IUOE, Local 39*, 127 F.4th at 78–79. However, here, the Board’s order compensates for collateral economic harms that fall outside section 10(c)’s restorative framework. Consequential and policy-driven measures resemble the overreach rejected by the Fifth and Third Circuits, which have emphasized that section 10(c) authorizes only equitable relief designed to restore, not to expand, employee entitlements.

The Supreme Court has long recognized that administrative agencies are creatures of statute, limited to the powers Congress expressly conferred. *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (agencies “literally have no power to act ... unless and until Congress confers power upon them”). Permitting the NLRB to adjudicate consequential damages, such as speculative reputational harm or lost brand partnerships, as in this case, would blur the distinction between the Board’s restorative, equitable role and the judiciary’s constitutional function to decide common-law claims for legal relief.

Restricting the Board to traditional equitable remedies also serves important practical purposes. Predicable, cabined, and tailored equitable relief such as reinstatement, cessation of unlawful practices, and back pay tailors the redress to the specific unfair labor practices. Expanding the Board’s authority into open-ended damages risks inconsistent, unpredictable awards untethered to measurable losses, undermining employer confidence in labor regulation and destabilizing collective bargaining relationships. *See Republic Steel Corp.*, 311 U.S. at 7, 11–13 (warning against remedies that functioned as penalties rather than restoration). Moreover, by respecting the boundaries Congress struck in 1935, courts ensure that the Board’s remedial role remains complementary to, rather than competitive with, the judiciaries. The Act envisioned a specialized agency to police unfair labor practices through equitable relief, not a damages tribunal substituting its judgment for that of courts and juries. Limiting the Board to restorative powers

therefore preserves its institutional role, maintains constitutional safeguards, and sustains predictability in labor relations.

Section 10(c) of the NLRA authorizes the Board to provide only equitable relief necessary to undo the effects of an unfair labor practice, not to impose compensatory or punitive awards. Extending that authority beyond restoration would alter the careful limits Congress placed on administrative power.

III. EQUAL PAY ACT

A. The EPA’s “Catch-All Defense”

The EPA provides that employers subject to the Act shall not discriminate between employees of the opposite sex for equal work that requires “equal skill, effort, and responsibility, and which are performed under similar working conditions,” unless the differential is based on one of four enumerated affirmative defenses. 29 U.S.C. § 206(d)(1). Once a plaintiff shows a *prima facie* case of wage disparity between men and women performing substantially equal work, the burden shifts to the employer to prove that the differential falls within one of four affirmative defenses: “(1) a seniority system, (2) a merit system, (3) a system measuring earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex.” *Id.*

The first three are structured, formalized systems that apply evenly to all employees, while the fourth is a broad “catch-all” that allows an employer to justify a wage difference by showing it is rooted in a legitimate, non-sex-based reason—such as education, experience, or, in some circuits, prior salary history—rather than discriminatory intent. *See* 29 U.S.C. § 206(d)(1); *Spencer v. Va. State Univ.*, 919 F.3d 199, 206–07 (4th Cir. 2019) (recognizing prior salary as a permissible “factor other than sex” where based on legitimate market considerations). These defenses are affirmative in nature, meaning the employer bears both the burden of production and the burden of persuasion to prove that one applies. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974) (explaining that once a wage disparity is shown, “the burden shifts to the employer to show that the differential is justified under one of the Act’s four exceptions”).

Courts have split on whether prior salary history may qualify under this catch-all defense. The Fourth and Seventh Circuits permit prior pay alone to justify a wage differential so long as it is not itself the product of sex discrimination, emphasizing the statute’s plain language and the legitimate business purpose of using market-based pay data. *See Wernsing v. Dep’t of Human Servs., State of Illinois*, 427 F.3d 466 (7th Cir. 2005); *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019), as amended (Mar. 26, 2019). The Ninth Circuit categorically rejects prior pay as a defense, reasoning that it risks perpetuating historical disparities. *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (en banc). The Sixth, Tenth, and Eleventh Circuits have taken middle-ground approaches, permitting reliance on prior pay only when combined with other legitimate factors

such as experience or credentials. *See Balmer v. HCA, Inc.*, 423 F.3d 606 (6th Cir. 2005); *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015); *Angove v. Williams-Sonoma, Inc.*, 70 F.App'x 500 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995). The Federal Circuit also adopted the middle approach but took a step further by requiring proof that the prior pay itself was free from discriminatory origin. *Boyer v. United States*, 97 F.4th 834 (Fed. Cir. 2024).

B. The Fourth and Seventh Circuits Abide by the EPA's Neutral Text

We adopt the Fourth and Seventh Circuit approach because it most faithfully adheres to the statutory text of the EPA, which places no express limitation on the “factor other than sex” defense beyond requiring that the factor be bona fide and not a proxy for discrimination. *See Wernsing*, 427 F.3d at 469–70 (rejecting efforts to narrow the catch-all clause because “Congress chose expansive language” and courts may not rewrite the statute to add restrictions not found in the text); *Spencer*, 919 F.3d at 207–08 (emphasizing that the statute “contains no words of limitation” on what constitutes a permissible factor other than sex and holding that reliance on market forces is valid). These courts properly ground their analysis in statutory language, recognizing that the catch-all is meant to be broad and flexible, not artificially cabined.

The Fourth and Seventh Circuits’ approach also aligns with Supreme Court precedent interpreting the EPA. In *Corning Glass Works v. Brennan*, the Court underscored that once a plaintiff establishes a *prima facie* claim of wage disparity, the employer bears the burden of proving that the differential results from one of the four enumerated exceptions, including “any other factor other than sex.” 417 U.S. 188, 196–97 (1974). Nothing in *Corning Glass* suggests that courts may graft additional restrictions onto the catch-all defense; to the contrary, the Court recognized that the defense is broad but requires a genuine, nondiscriminatory justification. The Fourth and Seventh Circuit view honors that structure, leaving it to plaintiffs to rebut the defense by showing that the proffered factor is a pretext for sex discrimination.

Here, Love Island’s written policy, basing Kadeb’s Season 8 salary exclusively on her most recent appearance pay plus a uniform 20 percent increase, falls squarely within the EPA’s catch-all defense. The policy is objective and mechanical: it applies a fixed percentage increase to a documented prior rate, without regard to the contestant’s sex, appearance, or any subjective characteristic. Like the pay system upheld in *Spencer*, which validated reliance on prior salary because it reflected legitimate market forces rather than discriminatory animus, Love Island relied on Kadeb’s established contractual history in the reality television marketplace. 919 F.3d at 207–08. Likewise, in *Wernsing*, the Seventh Circuit rejected arguments that reliance on prior pay should be disallowed simply because it could correlate with existing disparities, holding instead that the statutory text authorizes any bona fide factor other than sex. 427 F.3d at 470–71. The uniform 20 percent increase applied in Love Island mirrors the reasoning in *Wernsing*; even if prior market contracts produced differences between men and women, applying the same neutral formula across the board is a permissible business decision under the Act. *Id.*

This approach stands in contrast to systems where prior pay is used selectively or as a pretext for sex discrimination. For example, in *Brennan*, the Court found an EPA violation where men and women were compensated differently for the same work under the guise of a shift differential. 417 U.S. at 204. There, prior pay functioned as a proxy for sex. By contrast, Love Island’s Season 8 policy did not adjust salaries differently for Kadeb and Jones—it increased each contestant’s last appearance rate by the same percentage. Nor was the policy tainted by discretionary, subjective judgments that could mask bias. Every contestant, male and female, received the same treatment, and the only disparity that emerged was the pre-existing difference in their market rates. The catch-all defense protects precisely this kind of neutral, consistently applied business judgment. The policy at issue here mirrors that reasoning; it ties pay solely to a prior contractual benchmark, not to subjective judgments or sex-based criteria.

C. Lack of a Clear Standard for Proving Discriminatory Origins of Prior Pay

The Federal Circuit did not articulate a clear evidentiary standard for how the employer may establish that prior pay was not tainted by sex discrimination. In *Boyer*, the court required employers to prove that prior salary was not the product of discrimination but offered little guidance on what evidence would suffice for a plaintiff to rebut that showing. 97 F.4th at 849. The opinion left open whether a plaintiff must rely on a prior adjudication of discrimination, credible documentary evidence of bias, or something less—creating uncertainty about the quantum of proof necessary to challenge prior pay as discriminatory. Additionally, the Federal Circuit recently acknowledged this ambiguity in *Urban v. United States*, noting that the absence of a consistent evidentiary framework has “left it to future cases to consider what evidentiary standard is needed to carry this burden” regarding what qualifies as proof that salary history was discriminatory in origin. No. 2023-2096, 2025 WL 184001, at *483 (Fed. Cir. Jan. 14, 2025).

The same uncertainty exists in the Seventh Circuit’s decision in *Wernsing*. There, the court held that the “factor other than sex” defense is broad enough to include reliance on prior pay but declined to specify what kind of showing an employee must make to prove that such prior pay was the result of sex-based discrimination. 427 F.3d at 470–71. By omitting a clear standard for how employers may meet their burden, *Boyer*, *Urban*, and *Wernsing* collectively leave employers with the benefit of a broad defense unless employees can present substantiated, adjudicated, or otherwise credible evidence demonstrating that their previous salaries were rooted in sex-based bias.

Today we decide that some level of adjudication is necessary to establish that prior pay was not the product of sex discrimination. Mere allegations, leaked communications, or unsubstantiated suspicions cannot suffice; otherwise, employers would face perpetual uncertainty in relying on prior salary as a legitimate benchmark. As the Supreme Court observed in *Corning Glass*, the EPA shifts the burden to the employer only after a plaintiff has made a *prima facie*

showing of unequal pay for equal work. 417 U.S. at 196–97 (1974). This framework presumes a concrete evidentiary basis for finding discrimination, not conjecture. Requiring an adjudicative finding—or a similarly robust determination, such as a documented internal investigation by the employer—strikes the appropriate balance. This standard prevents employers from using prior pay as a shield for bias while still protecting neutral, market-based compensation systems from disruption by unsubstantiated or speculative claims.

D. The Federal Circuit’s Approach Produces the Same Outcome

Even if we were to adopt the Federal Circuit’s “enhanced middle-ground” approach, as articulated in *Boyer v. United States*, the result here would be the same. Under *Boyer*, the standard that an employer may rely on prior salary alone only if it can affirmatively prove that the prior pay itself was not the product of sex discrimination. 97 F.4th at 849. The record here satisfies this requirement. Love Island’s policy was mechanical and objective; each contestant’s pay for Season 8 was set at exactly 20 percent above their most recent reality-television or influencer earnings, as verified by W-2 documentation, and the formula was applied uniformly to all contestants, including Kadeb and Jones. Although Kadeb points to leaked emails from a former Love Is Deaf producer suggesting gender bias in that show’s pay practices, those claims were expressly denied by management and investigated by the network, which concluded that the allegations were “meritless.”

The record here compares favorably to the circumstances in *Boyer*. In *Boyer*, the court did not find that the government had met the standard to prove the affirmative defense. *Boyer* remanded for a factual determination on whether the employer relied solely on prior pay or on prior pay combined with other legitimate factors. *Id.* at 849. Nonetheless, Love Island based Kadeb’s Season 8 salary exclusively on her prior reality-television earnings, and unlike in *Boyer*, where the factual record was incomplete, the evidence here affirmatively demonstrates that the underlying pay history was not tainted by sex-based bias. ABD commissioned an independent investigation into allegations of sex discrimination and concluded that the purportedly discriminatory messages were taken out of context, found in jest, and did not reflect the actual pay determinations. The investigation verified that compensation for Love Is Deaf contestants, including Kadeb, was determined using neutral, objective criteria such as social media following, prior on-screen experience, and marketability. By grounding its Season 8 pay policy in those verified figures and applying a uniform 20 percent increase across all contestants, Love Island satisfied even the *Boyer* standard by showing that the prior pay it relied upon was the product of nondiscriminatory decision making. The completeness and neutrality of this record make Love Island’s reliance on prior pay an even stronger fit within the “factor other than sex” defense than the circumstances in *Boyer*, where the Federal Circuit required—but did not yet find—such proof.

E. The Ninth Circuit Inappropriately Reads a Policy Preference into the EPA’s Text

By contrast, the Ninth Circuit in *Rizo v. Yovino* categorically excluded prior pay from the catch-all defense, which reflects a policy preference that is not grounded in the text of the EPA. 950 F.3d 1217, 1224–27 (9th Cir. 2020) (en banc). The statute provides that an employer may defend a differential based on “any other factor other than sex,” which is language that is both broad and unqualified.

The Supreme Court has repeatedly cautioned against judicially rewriting or narrowing such statutory language. In *Corning Glass*, the Court stressed that the EPA places the burden on employers to prove that a wage differential rests on a bona fide factor other than sex, but it did not authorize courts to limit which factors may qualify beyond those enumerated by Congress. 417 U.S. 188, 196–97 (1974). Likewise, in *Oncale v. Sundowner Offshore Services, Inc.*, the Court underscored that courts may not create “extra-textual limitations” on broad remedial statutes merely because of policy concerns about how the law might operate in particular contexts. 523 U.S. 75, 79–80 (1998). Additionally, in *Bostock v. Clayton County*, 590 U.S. 644, 657–58 (2020), the Court reaffirmed that when Congress uses sweeping language like “because of sex,” courts must apply it as written, even if the result is broader than Congress may have anticipated.

The Ninth Circuit’s categorical ban on prior pay runs afoul of these principles. It removes from the statute’s scope a factor of salary history that Congress chose to leave within the catch-all. The Ninth Circuit does so not because the text compels it, but because of a judicial policy judgment about potential inequities. This reasoning may be appealing as a matter of social policy, but it is inconsistent with the Court’s repeated admonition that remedial statutes must be enforced according to their terms, not reshaped to reflect judicial preferences. Moreover, the Ninth Circuit’s rule disregards the fact that prior pay can often be the most objective and nondiscriminatory measure of market value, particularly in industries like reality television, where contestants’ earning power is determined almost entirely by past contracts and audience reach. Love Island’s Season 8 policy illustrated this point: each contestant, male or female, received a uniform 20 percent increase over their most recent appearance fee, applied without discretion or subjective adjustment. To exclude such a neutral and mechanical policy from the catch-all defense is to graft onto the statute a limitation that Congress did not enact and that the Supreme Court has consistently warned against. Thus, while *Rizo* reflects a judicial attempt to address policy concerns about pay equity, it does so by imposing a categorical bar that conflicts with both the text of the EPA and the Supreme Court’s interpretive guidance.

F. Adhering to Statutory Text While Preserving Market Practices

Adopting the Fourth/Seventh Circuit approach to the EPA’s “factor other than sex” defense recognizes that not all wage differentials rooted in prior pay are discriminatory. The EPA is aimed at eliminating sex-based disparities, but it does not require employers to disregard legitimate, nondiscriminatory factors that explain differences in compensation. Employers frequently use prior salary as a neutral, objective benchmark because it reflects the value that the

market has already assigned to an employee's skill, reputation, and audience reach. In industries such as entertainment and reality television, prior pay is often the most reliable measure of a contestant's market value.

Imposing categorical or hybrid restrictions on such policies risk judicially rewriting the statute and penalizing legitimate business practices without clear congressional authorization. Concerns about perpetuating inequality are concerns for Congress to address through amendment, not for courts to impose by narrowing the catch-all defense.

As such, the Fourth and Seventh Circuit approach provides clarity and predictability. Employers know they may rely on prior salary so long as it is bona fide and not a proxy for sex discrimination. This approach not only aligns with the statutory text but also avoids unnecessary intrusion into the competitive marketplace. It ensures that industries where pay is largely determined by prior contracts and audience draw, such as reality television, can operate with consistency while still protecting workers against sex-based pay inequities. In this way, the Fourth/Seventh Circuit framework preserves the EPA's core purpose of eliminating sex-based wage discrimination without overstepping judicial bounds or distorting legitimate market-based compensation practices.

CONCLUSION

For the foregoing reasons, we hold that, with respect to the unfair labor practice claim, the decision of the National Labor Relations Board is **REVERSED** as to the relief awarded. While Love Island's inclusion of a confidentiality clause and termination of Kadeb constitutes a violation of section 8(a)(1), the Board lacked authority under section 10(c) of the NLRA to impose the expansive remedies it ordered. The Board is limited to restorative, equitable relief.

With respect to the EPA claim, the judgment of the District Court granting summary judgment to Love Island is **AFFIRMED**. Love Island's compensation policy, which based Kadeb's Season 8 salary solely on contestants' most recent appearance pay plus a uniform twenty percent increase, constitutes a bona fide "factor other than sex" under 29 U.S.C. § 206(d)(1). The record contains no competent evidence that the prior pay itself was the product of sex-based discrimination, and as such, Love Island has established a complete defense to liability under the Act.

Accordingly, the Board's decision is **REVERSED**, the District Court's judgment is **AFFIRMED**, and judgment is entered for Respondent Love Island, LLC on both claims.

* * * *

GRABOWSKI, *Circuit Judge*, dissenting:

The Board’s remedial order requiring Love Island to provide expansive remedies including an order for Love Island to rescind the unlawful contract provision, cease and desist from similar conduct, notice of posting and injunctive relief, and retroactive relief including backpay, front pay, interest, and consequential damages to fully redress the violations, was well within its statutory discretion and, indeed, essential to vindicating the core purposes of the National Labor Relations Act. I cannot join the majority’s conclusion that Love Island’s reliance on prior salary alone provides a lawful justification for the stark pay disparities between male and female contestants. That conclusion misapprehends the breadth of the Board’s remedial authority, misapplies circuit precedent, and disregards the factual record, which demonstrates that reliance on prior pay in this context perpetuated sex-based discrimination. I respectfully DISSENT.

I. NATIONAL LABOR RELATIONS ACT

A. The Board’s Authority Under § 160(c) Is Broad and Remedial

Section 10(c) of the NLRA, empowers the Board to order “affirmative action” that will “effectuate the policies” of the Act. 29 U.S.C. § 160(c). The Supreme Court has long emphasized that this language grants the Board flexibility to craft remedies tailored to the context of a violation. In *American National Insurance Co. v. NLRB*, the Supreme Court underscored that Congress vested the Board—not courts—with expertise in shaping remedies to secure industrial peace. 343 U.S. 395, 401 (1952).

The Board exercised that discretion here. In *International Union of Operating Engineers, Stationary Engineers, Loc. 39 v. National Labor Relations Board*, the Board clarified that make-whole relief can include not only lost wages but also other foreseeable pecuniary harms flowing from the employer’s unlawful conduct. 127 F.4th 58, 79 (9th Cir. 2025). Likewise, the Ninth Circuit has upheld the Board’s broad remedial authority, deferring to its judgment where employer discrimination distorted the workplace. *Kava Holdings, LLC v. NLRB*, 85 F.4th 479, 487 (9th Cir. 2023).

Both *International Union* and *Kava Holdings* illustrate that the Board’s remedial discretion is not narrow—it is capacious. 372 NLRB No. 22; 85 F.4th at 487. Applying that principle here, the Board was entitled to order full backpay for Kadeb. She lost tens of thousands in wages, as well as reputation and sponsorship opportunities, because her pay was set lower from the outset. Kadeb spent over \$15,000 on her wardrobe for the show and limited herself to other reality television show opportunities by appearing on Love Island Season 8. Additionally, Kadeb lost brand deals with notable sponsors due to the drama surrounding her termination. While Kadeb may have recuperated some losses through additional social media followings and views, it has not brought her to where she once was or would have been if she had not been terminated. Kadeb missed out not only on brand trips, media deals, and sponsored products, but also on potential increased viewership and a stable wage through the social media posting deals with Lewis Vuitton and Bhode Beauty. In today’s modern age, influencers rely on their image to continue generating income. While perhaps shocking, the amount of income influencers receive from just one social

media post has the potential to be a primary source of income. Despite this fact, the majority does not see past the sheer dollar amount of the NLRB’s relief to understand the reality of the impact the show’s removal had on Kadeb and her livelihood. A narrower remedy would not restore her to the rightful position had Kadeb not lost these partnerships, nor deter the recurrence of similar practices in future productions.

B. The Board’s Expansive Relief Is Equitable and Therefore Consistent with Supreme Court Precedent

The majority’s reading of the Board’s remedial authority cannot coincide with the Supreme Court’s repeated recognition that the Board possesses broad discretion to apply remedies that effectuate the Act’s central policies. Section 10(c) of the NLRA authorizes the Board to require an employer “to cease and desist” and “to take such affirmative action ... as will effectuate the policies of this Act.” 29 U.S.C. § 160(c). The Court has emphasized that the “relation of remedy to policy is peculiarly a matter for administrative competence.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Consistent with that principle, the Board has long been empowered to craft remedies that do more than restore employees’ immediate wages—they must “undo the effects of unfair labor practices.” *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944).

The Supreme Court has long recognized backpay as an equitable remedy designed to restore wronged employees to the *status quo ante*. *Curtis v. Loether*, 415 U.S. 189, 196–197 (1974). In *Curtis*, the Supreme Court explained that backpay under civil rights statutes operates as equitable restitution, ensuring victims are compensated for amounts wrongfully withheld. *Id.* at 197.

The remedies ordered here, including rescission of an unlawful no-pay-discussion clause, backpay, front pay, consequential losses, and notice posting, directly advance those statutory goals. Kadeb was a reality television contestant performing the same work as her male counterparts—participating in pairings, challenges, and dramatic interactions. Yet she was paid less solely because of reliance on a tainted prior salary. The Board’s order of backpay simply restores what was unlawfully denied. The record demonstrates that Love Island’s unlawful conduct had consequences far beyond lost wages. By terminating four women after they discussed and protested pay disparities, producers inflicted reputational and economic harm that predictably extended to Kadeb’s lost brand deals worth roughly \$500,000, wardrobe costs of \$15,000, and lasting damage to her career in a profession where visibility and reputation are of the utmost importance to her relevance. To treat such harms as “speculative” is to ignore the reality of the influencer media industry, where brand deals and endorsements are their primary source of income. The Board’s award of consequential damages is not punitive as the majority suggests, but rather essential to effectuate the Act’s guarantee that employees remain free to engage in concerted activity “for mutual aid or protection.” 29 U.S.C. § 157.

Additionally, the majority’s concern that the Board strayed into “punitive” or “policy-driven” relief misunderstands the relationship between restoration and deterrence. The Board’s

role is not limited to reinstating employees in the narrowest sense but to “effectuate the policies of the Act” by removing the chilling effects of unfair labor practices. *Phelps Dodge*, 313 U.S. at 194. Here, Love Island’s actions targeted employees for engaging in the core protected activity of discussing compensation and work stoppage, and therefore the remedies provided must be broad enough to ensure the right to discuss pay are protected and prioritized for both past and future employees.

II. EQUAL PAY ACT

A. Prior Pay Alone Cannot Justify Wage Disparities

The Ninth Circuit’s *en banc* decision in *Rizo v. Yovino* provides a definitive answer. 950 F.3d 1217 (9th Cir. 2020). In *Rizo*, a female math consultant discovered she was paid thousands less than male colleagues. *Id.* at 1220. The county defended the disparity by pointing to her lower prior salary. *Id.* at 1225. The *en banc* court rejected that justification outright, holding that “prior pay, alone or in combination with other factors, cannot justify a wage differential” under the EPA. *Id.* at 1228. To hold otherwise, the court explained, would perpetuate historic discrimination and gut the statute’s core purpose. *Id.*

The same logic governs here. Kadeb’s salary of \$168,000 was set lower than Jones’s \$216,000 solely because her prior compensation on the reality show Love Is Deaf had been lower. As *Rizo* makes clear, prior pay cannot serve as a legitimate justification because it imports past inequities into the present. *Id.* at 1228. That is especially troubling here, where evidence shows that Kadeb’s prior salary itself was set under discriminatory conditions on Love Is Deaf.

Kadeb argues that the allegations of sex-based discrimination on Love Is Deaf directly relate to her compensation on Love Island. According to Kadeb, the producers of Love Island expressly based contestant pay on prior reality television salaries, which in her case were established during her season of Love Is Deaf. Kadeb contends that her Love Island salary of \$168,000 was similarly infected by sex-based discrimination because her Love Is Deaf compensation was determined through a discriminatory pay structure that undervalued female participants in relation to male participants. In her view, the reliance on prior pay perpetuated the discriminatory practices of earlier shows, embedding them into her most recent contract. Kadeb further disputes the credibility of ABD’s internal investigation. She asserts that the inquiry was conducted not by an independent third party but by a private investigative firm retained and compensated by the network itself. Kadeb maintains that the findings are inherently biased and lack persuasive weight because the investigators were hired and paid by the same entity accused of discrimination. She argues that the investigation’s conclusion—that the allegations were “meritless”—serves primarily to shield the network from liability rather than to uncover the truth. In her lawsuit against the producers of Love Island, Kadeb points to this pattern as evidence that her compensation was the product of a discriminatory pay scale rooted in the practices of Love Is Deaf.

Additionally, the Tenth and Eleventh Circuits have barred reliance on prior salary alone. In *Riser v. QEP Energy*, the employer set salaries based on prior pay but also considered the employees' education and experience. 776 F.3d 1191 (10th Cir. 2015). The Tenth Circuit allowed this multi-factor approach but emphasized that prior pay standing alone would not suffice. *Id.* Similarly, in *Irby v. Bittick*, the Eleventh Circuit upheld pay differences only where prior salary was used alongside factors such as performance and qualifications. 44 F.3d 949 (11th Cir. 1995).

Love Island did the opposite. It codified a policy that “no other factor shall be considered” beyond prior salary. Contestants' social media reach, professional credentials, and even prior roles on identical shows were ignored. Under the Tenth and Eleventh Circuit approaches, Love Island's policy fails.

The Federal Circuit even imposed limits on the ever-lenient approach of allowing prior pay to be the sole factor in determining salary. In *Boyer v. United States*, the court upheld reliance on prior salary only because the employer proved that the prior pay was not the product of discrimination. 97 F.4th 834 (Fed. Cir. 2024). But in *Urban v. United States*, the court rejected a prior-pay justification where the employer could not establish the neutrality of the baseline. U.S. Claims LEXIS 1076 (2025). That standard, too, defeats Love Island's position. The producers made no inquiry into whether prior salaries were tainted—and in fact, leaked emails from Love Is Deaf confirmed they were.

B. The Evidentiary Standard for Determining Whether the Prior Pay Was a Product of Discrimination Has Been Unclear

As noted by the majority, The Federal Circuit did not articulate a clear evidentiary standard for how a plaintiff may establish that prior pay was tainted by discrimination. In *Boyer*, the court found that an employer could rely on prior pay as an affirmative defense for paying similarly situated male employees more than female employees only by demonstrating that prior pay was unaffected by sex-based pay differentials or prior pay was considered together with other, non-sex-based factors. 97 F.4th at 844. The court remanded the inquiry of whether prior pay was discriminatory because there were facts on both sides. *Id.* at 849. In *Boyer*, the female doctor presented emails where the hiring manager “told Dr. Boyer that salary could be ‘based on education, residency, published articles’ in addition to salary matching.” *Id.* However, the employer testified that it “boarded everybody exactly the same without regards to anything special other than their current pay stubs.” *Id.* The court did not opine whether either side was able to prove or disprove that prior pay was based on discrimination.

While the court found the employer was required to prove that prior pay was not based on discrimination, the court did not articulate an evidentiary standard for determining this. Nor has the Federal Circuit indicated what facts can be used to support or refute the claim that prior pay was based on sex discrimination.

It is the duty of this court to set a precedent that reflects the laws that govern the issue at hand. The EPA of 1963 was enacted as an amendment to the Fair Labor Standards Act of 1938 in response to widespread disparities in wages between men and women performing substantially equal work. The Act intended to make it unlawful for employers to discriminate “between employees on the basis of sex by paying wages to employees...at a rate less than the rate at which he pays wages to employees of the opposite sex...for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d)(1). Its passage reflected the broader goals to advance civil rights and women’s rights in the workplace and was a steppingstone for continued progress towards nondiscriminatory workplaces.

The purpose of the EPA was to eliminate entrenched wage discrimination and promote economic justice by ensuring that women received equal pay for equal work. The Supreme Court has recognized the EPA’s broad remedial purpose, emphasizing that the statute “was designed to rectify what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of many segments of American industry had been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.” *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). By targeting pay inequality directly, the EPA laid the foundation for subsequent legal and social reforms aimed at achieving greater gender equity in the workplace.

Applying the intentions of the EPA and the Supreme Court, it is clear that a plaintiff should not be required to prove concretely that there was discrimination within the prior pay scale. Instead, it should only be necessary for the plaintiff to raise a legitimate question of fact. A legitimate question of fact can be shown through evidence of unequal pay for equal work, discriminatory language by the employer, or any evidence that raises a legitimate question of whether the employee’s prior pay was equally set between men and women for equal roles.

While the majority argues that mere allegations, leaked communications, or unsubstantiated suspicions cannot suffice, such a high standard for the plaintiff to meet would create an undue burden. The majority relies on *Corning Glass*, where the court held that the EPA shifts the burden to the employer only after a plaintiff has made a *prima facie* showing of unequal pay for equal work. 417 U.S. at 196–97 (1974). However, the majority’s reliance on this holding is misguided. The holding in *Corning Glass* applies directly to the plaintiff’s burden of proof to show that the employer pays workers of one sex more than workers of the opposite sex for equal work. *Id.* This burden of proof is a substantially lower bar than expecting plaintiffs to affirmatively show discriminatory pay practices. It would be incredibly difficult to expect a plaintiff to obtain records from a previous employer that affirmatively shows discrimination, while they only need to show a difference in pay between male and female employees in their current employment. To have a higher burden of proof for the prior pay rate than the current pay rate at issue defies the logic of the EPA.

C. The Majority’s Reliance on the Fourth and Seventh Circuit Is Misplaced

By contrast, the Fourth and Seventh Circuits have permitted reliance on prior pay in limited contexts. The Fourth Circuit has upheld pay disparities because the plaintiff’s prior employment as a sociology professor was not comparable to the defendants’ administrative roles. *Spencer v. Va. State Univ.*, 919 F.3d 199 (4th Cir. 2019). In *Spencer*, the different pay rates between two male university administrators and a female sociology professor were justified because the prior employment and current roles were incomparable. *Id.* at 202. While the male administrators taught more advanced, graduate level classes, they also performed administrative work; in contrast, the female plaintiff’s work was almost exclusively teaching sociology courses to undergraduate students. *Id.* at 212. Courts have also found that despite a pay difference between male and female employees, the difference may be attributed to factors other than discrimination. *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466 (7th Cir. 2005). In *Wernsing*, the court found that the prior salary was not discriminatory because there was evidence suggesting the pay difference was a result of budgeting challenges by the employer. *Id.* at 475.

Those decisions are inapposite here. Unlike in *Spencer*, the male and female contestants’ roles were identical here — reality television influencers participating in romantic challenges in an effort to create a couple in hopes of winning the show. 919 F.3d at 202. Unlike in *Wernsing*, the prior salaries here were explicitly tainted by sex-based considerations. 27 F.3d at 475. Not only was the pay rate inapposite, but there is a question as to the sufficiency of the internal investigation. Indeed, Kadeb and Jones worked on the very same show, Love Is Deaf. To treat those prior salaries as “comparable” neutral baselines is to ignore the factual record. There are facts within the internal investigation which would indicate that Kadeb’s salary was discriminatory in nature. The text messages exchanged between producers raise a legitimate question of whether discriminatory tactics existed in the pay determinations of female Love Is Deaf contestants. This court should take these facts more seriously, given the purpose of the EPA. The Act intended to protect against future discrimination and to stop continued discrimination from previous pay scales. While courts have yet to establish a bright-line rule in determining whether prior pay was discriminatory, expecting plaintiffs to do a full historical analysis on their prior employers’ discriminatory practices is impractical. The question of fact as to the sufficiency of the internal investigation is strong enough evidentiary proof to ignore the Fourth and Seventh Circuits approach and adopt one that is more akin to the facts at hand.

The majority’s reliance on the Fourth and Seventh Circuits is misplaced. In the Seventh Circuit’s decision in *Wernsing v. Department of Human Services* and Fourth Circuit’s in *Spencer v. Virginia State University*, the courts upheld reliance on prior salary where the plaintiff’s prior employment was materially distinct from the comparators. That is not our case. Here, both male and female contestants were performing identical work, on the same show, in the same Season 8. To apply *Wernsing* and *Spencer* here is to ignore the factual comparability that makes the pay disparities indefensible.

D. There Is Evidence of Structural Discrimination Based on Love Island’s Pay Policy

The real-world consequences confirm the illegality of Love Island’s policy. Upon discovering the disparity, the female contestants collectively protested by disengaging from the show. The women decided to ignore the male contestants, not participate in challenges, and disregard any romantic activities and dates. Producers responded not by addressing the inequity, but by terminating the women outright, citing “failure to perform [their] Love Island duties.” This sequence—unequal pay, protest, and punitive removal—mirrors classic patterns of labor retaliation.

The harm was immediate and severe. Kadeb lost brand partnerships with Lewis Vuitton, Rhode Beauty, and MUCK Cosmetic. She incurred \$15,000 in wardrobe costs at the producers’ urging, only to be terminated before she could use them. Not only that, but Kadeb’s impending \$20,000 trip to Barbados, \$24,000 handbag allowance, and \$120,000 Love Island salary were stripped from her. These harms mirror those in *Kava Holdings*, where discriminatory practices undermined employees’ economic stability. The Board’s order is the only means of making Kadeb whole, as the NLRA intended to operate.

E. Policy Implications

The EPA’s promise is equality in compensation for equal work. To accept Love Island’s justification is to allow employers across industries to weaponize prior salary as a tool for perpetuating discrimination. Historical inequities would calcify, replicating contract after contract, until “neutral” reliance on past pay becomes a vehicle for institutional bias.

The risk is particularly acute in entertainment. Here, communications from Love Is Deaf suggest female contestants were underpaid because they were “not hot enough.” The Love is Deaf network, ABD, conducted an internal, unverified investigation in which two producers not only pitted a male and female contestant’s social status against each other but even discussed lowering a female contestants pay because of her looks. Given the question of fact regarding the discriminatory motives surrounding Kadeb’s prior pay, it should be found that Kadeb has met her burden of proving that prior pay was a result of discrimination.

As a result of the pay policy of Love Island, the discriminatory pay rates in Love Is Deaf were imported into its own structure. Kadeb’s salary is a direct result of the prior discrimination she experienced. The result was not neutrality but magnification of bias. If courts sanction such practices, they will license industries where image, publicity, and pay are inextricably linked to launder sexism into every future negotiation.

The EPA and the NLRA exist precisely to prevent such outcomes. As *Rizo* cautioned, reliance on prior pay “perpetuates the very disparities Congress sought to eradicate.” 950 F.3d at

1228. To hold otherwise would hollow out the statute and render the Board powerless against systemic wage inequality.

CONCLUSION

The Board's remedial order was not only permissible but necessary. Love Island's pay policy—based solely on prior salaries tainted by discrimination—violates the EPA. To deny a comprehensive remedy here is to condone structural inequity and weaken the very protections Congress enacted. I would affirm the Board's finding and enforce its remedy in full.

For these reasons, I respectfully **DISSENT**.

No. 55-2026

IN THE SUPREME COURT OF THE UNITED STATES

ALAYA KADEB

Petitioner,

v.

LOVE ISLAND, LLC

Respondent.

ORDER GRANTING PETITION OF CERTIORARI

The petition for *writ of certiorari* is **GRANTED**. The parties are directed to address only the following questions:

EQUAL PAY ACT

- I. What is the evidentiary showing required to establish that prior pay was not based on sex discrimination?
- II. Whether an employer's reliance on the salary paid by the employee's previous employer is a "factor other than sex" under the EPA that constitutes a permissible justification for a wage differential between male and female employees performing substantially equal work.

NATIONAL LABOR RELATIONS ACT

- III. Whether the National Labor Relations Board exceeded its statutory remedial authority under Section 10(c) of the National Labor Relations Act by ordering expanded compensatory damages, including backpay and other similar relief, retroactive to the inception of the employer's unlawful pay policy, rather than confining such relief to the period commencing after the filing of the unfair labor practice charge.