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2 to establish affirmative defenses to pay-discrimination claims under  
3 federal and state laws: the Equal Pay Act, 29 U.S.C. § 206(d), (“EPA”)  
4 and New York Labor Law § 194(1). Plaintiff Anita Eisenhower alleges  
5 that defendant Culinary Institute of America violated these equal-pay  
6 laws by compensating her less than a male colleague. The Culinary  
7 Institute responds that a “factor other than sex”—its sex-neutral  
8 compensation plan, which incorporates a collective bargaining  
9 agreement—justifies the pay disparity. Eisenhower argues that the  
10 compensation plan cannot qualify as a “factor other than sex” because  
11 it creates a pay disparity unconnected to differences between her job  
12 and her colleague’s job.

13           Eisenhower’s position that a “factor other than sex” must be job  
14 related is incorrect as to the EPA. The plain meaning of the EPA  
15 indicates the opposite. We hold that to establish the EPA’s “factor  
16 other than sex” defense, a defendant must prove only that the pay  
17 disparity in question results from a differential based on any factor  
18 except for sex. But Eisenhower’s position is correct as to New York  
19 Labor Law § 194(1). A recent amendment to § 194(1) explicitly added  
20 a job-relatedness requirement. We thus hold that to establish § 194(1)’s  
21 “factor other than sex” or “status” defense, a defendant must prove  
22 that the pay disparity in question results from a differential based on  
23 a job-related factor. The District Court did not consider the divergent  
24 requirements imposed by the EPA and § 194(1) when assessing  
25 Eisenhower’s claims and the Culinary Institute’s defense.



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2 JOSÉ A. CABRANES, *Circuit Judge*:

3       This case presents the questions of what a defendant must prove  
4 to establish affirmative defenses to pay-discrimination claims under  
5 federal and state laws: the Equal Pay Act, 29 U.S.C. § 206(d), (“EPA”)<sup>1</sup>  
6 and New York Labor Law § 194(1).<sup>2</sup> Plaintiff Anita Eisenhower alleges  
7 that defendant Culinary Institute of America violated these equal-pay  
8 laws by compensating her less than a male colleague. The Culinary  
9 Institute responds that a “factor other than sex”—its sex-neutral  
10 compensation plan, which incorporates a collective bargaining  
11 agreement (“CBA”)—justifies the pay disparity. Eisenhower argues  
12 that the compensation plan cannot qualify as a “factor other than sex”  
13 because it creates a pay disparity unconnected to differences between  
14 her job and her colleague’s job.

15       Eisenhower’s position that a “factor other than sex” must be job  
16 related is incorrect as to the EPA. The plain meaning of the EPA  
17 indicates the opposite. We hold that to establish the EPA’s “factor  
18 other than sex” defense, a defendant must prove only that the pay  
19 disparity in question results from a differential based on any factor

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<sup>1</sup> See text accompanying notes 16–17, *post*, for the text of 29 U.S.C. § 206(d)(1).

<sup>2</sup> See text accompanying notes 89–94, *post*, for the text of New York Labor Law § 194(1).



1 except for sex.<sup>3</sup> But Eisenhower’s position is correct as to New York  
 2 Labor Law § 194(1). A recent amendment to § 194(1) explicitly added  
 3 a job-relatedness requirement. We thus hold that to establish § 194(1)’s  
 4 “factor other than sex” or “status” defense, a defendant must prove  
 5 that the pay disparity in question results from a differential based on  
 6 a job-related factor. The District Court did not consider the divergent  
 7 requirements imposed by the EPA and § 194(1) when assessing  
 8 Eisenhower’s claims and the Culinary Institute’s defense.

9 Accordingly, we **AFFIRM IN PART** insofar as the United States  
 10 District Court for the Southern District of New York (Paul E. Davison,  
 11 *Magistrate Judge*) granted summary judgment for the defendant on the  
 12 EPA claim. We **VACATE IN PART** and **REMAND** insofar as the  
 13 District Court granted summary judgment for the defendant on the  
 14 § 194(1) claim.<sup>4</sup>

## 15 I. BACKGROUND

### 16 A. Factual Background

17 Anita Eisenhower, a female professor at the Culinary Institute,  
 18 alleges that she is a victim of pay discrimination in violation of the EPA  
 19 and New York Labor Law § 194(1). Since 2017, the Culinary Institute—  
 20 a private, non-profit college and culinary school—has paid Eisenhower

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<sup>3</sup> If the pay disparity results from the employer’s job-classification system, the job-classification system must also serve a “legitimate business-related” purpose. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992).

<sup>4</sup> Magistrate Judge Davison conducted all proceedings and ordered the entry of a final judgment with the parties’ consent. *See* 28 U.S.C. § 636(c).

1 a lower salary than it has paid Robert Perillo, a male professor carrying  
 2 a similar course load.<sup>5</sup> In 2019, for example, Eisenhower's salary was  
 3 \$111,263, while Perillo's was \$118,080.

4 The Culinary Institute pays Eisenhower and Perillo according to  
 5 the sex-neutral terms of a CBA and employee handbook (together,  
 6 "compensation plan").<sup>6</sup> The compensation plan requires fixed pay  
 7 increases triggered by time, promotion, and degree completion. It does  
 8 not provide for "equity" adjustments.<sup>7</sup> Each year, in accordance with  
 9 the compensation plan, all faculty members receive the same  
 10 percentage increase in their salaries. As a result, the pay disparity  
 11 between Eisenhower and Perillo continues to grow.

12 The pay disparity between Eisenhower and Perillo exists because  
 13 their salaries differed when they were hired and have formulaically  
 14 increased over time. When the Culinary Institute hired Eisenhower and

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<sup>5</sup> The Culinary Institute also paid Eisenhower a lower salary in 2011 and 2012. We use the terms "salary" and "pay" interchangeably, excluding consideration of any overtime, stipend, or tuition-reimbursement payments that Eisenhower and Perillo may have received.

<sup>6</sup> The CBA is a contract between the Culinary Institute and the Culinary Teachers Association, the union to which Eisenhower and Perillo belong. The Culinary Institute has recognized the Culinary Teachers Association as the exclusive representative and bargaining agent of its Hyde Park, New York faculty. The CBA governs faculty members' wages, hours, and other terms and conditions of employment.

<sup>7</sup> Under the CBA, the Culinary Institute may not diverge from the terms of the CBA absent a written agreement between it and the Culinary Teachers Association.

1 Perillo as learning instructors—at starting salaries of \$50,000 in 2002  
2 and \$70,000 in 2008, respectively—they had different experience and  
3 education levels. Eisenhower had fifteen years of culinary experience  
4 and had served as the executive chef in two New York City  
5 restaurants. Perillo had twenty-three years of culinary experience,  
6 previous teaching experience, and an associate’s degree. He had also  
7 received higher scores on the cooking- and lecture-demonstration  
8 components of his job application. Eisenhower does not contend that  
9 her starting salary was the product of sex-based pay discrimination.

10 Over the years, both Eisenhower and Perillo received  
11 promotions and attained further education. Each earned the titles of  
12 assistant professor; associate professor; and, ultimately, full  
13 professor—she in 2013 and he in 2017. Along the way, Eisenhower and  
14 Perillo also received their bachelor’s and master’s degrees—she in  
15 2009 and 2016, and he in 2012 and 2015. Each of these achievements  
16 prompted a fixed-dollar increase in compensation.<sup>8</sup> The amounts of  
17 the increases differed somewhat because the precise raises required by  
18 the compensation plan changed over time. For example, Eisenhower’s  
19 salary increased by \$4,000 upon her promotion to assistant professor  
20 in 2008, while Perillo’s rose by \$4,410 upon his promotion in 2016.

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<sup>8</sup> Under the CBA, the Culinary Institute partially reimburses full-time faculty members for tuition. Both Eisenhower and Perillo took advantage of the tuition reimbursement program. Under the terms of the employee handbook, faculty members benefiting from the tuition reimbursement program are eligible for a pay increase upon earning their degrees.

## B. Procedural Background

Eisenhauer filed suit against the Culinary Institute on November 26, 2019, alleging sex-based pay discrimination in violation of both federal and state law: the EPA, 29 U.S.C. § 206(d), and New York’s equal-pay law, New York Labor Law § 194(1). The District Court evaluated her federal- and state-law claims “under the same standard”<sup>9</sup> and granted summary judgment for the Culinary Institute on November 3, 2021.<sup>10</sup> It concluded, as a matter of law, that (1) although Eisenhauer had established a *prima facie* case of sex-based pay discrimination, (2) the Culinary Institute had justified the pay disparity with its compensation plan, a “factor other than sex” that (3) Eisenhauer failed to show was a pretext for discrimination. This appeal followed.<sup>11</sup>

## II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>12</sup> A dispute as to any “material fact is genuine ‘if

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<sup>9</sup> J.A. 270 (quoting *Moccio v. Cornell Univ.*, 889 F. Supp. 2d 539, 570 (S.D.N.Y. 2012), *aff’d*, 526 F. App’x 124 (2d Cir. 2013)).

<sup>10</sup> In doing so, the District Court also denied Eisenhauer’s motion for summary judgment.

<sup>11</sup> We have jurisdiction to adjudicate this appeal of a final decision by the District Court under 28 U.S.C. § 1291.

<sup>12</sup> Fed. R. Civ. P. 56(a).

1 the evidence is such that a reasonable jury could return a verdict for  
 2 the nonmoving party.’”<sup>13</sup> We review *de novo* a district court’s order  
 3 granting summary judgment.<sup>14</sup> In conducting our review, we must  
 4 resolve all ambiguities and draw all inferences in favor the nonmoving  
 5 party.<sup>15</sup>

### 6 III. DISCUSSION

7 We consider in turn the requirements for establishing  
 8 affirmative defenses to claims under the EPA, 29 U.S.C. § 206(d), and  
 9 New York Labor Law § 194(1). As to the EPA, we hold that to establish  
 10 a “factor other than sex” defense, a defendant must prove that the pay  
 11 disparity in question results from a differential based on any factor  
 12 except for sex. As to New York Labor Law § 194(1), we hold that to  
 13 establish a “factor other than sex” or “status” defense, a defendant  
 14 must prove that the pay disparity in question results from a  
 15 differential based on a job-related factor.

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<sup>13</sup> *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

<sup>14</sup> See, e.g., *Republic Nat’l Bank of N.Y. v. Delta Air Lines*, 263 F.3d 42, 46 (2d Cir. 2001).

<sup>15</sup> See, e.g., *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1223 (2d Cir. 1994).

1           **A. The Equal Pay Act’s “Factor Other Than Sex” Defense**

2                           **1. 29 U.S.C. § 206(d)(1)**

3           The EPA prohibits pay discrimination on the basis of sex. It  
4 provides that

5           [n]o employer . . . shall discriminate . . . between  
6 employees on the basis of sex by paying wages to  
7 employees . . . at a rate less than the rate at which [it] pays  
8 wages to employees of the opposite sex . . . for equal work  
9 on jobs the performance of which requires equal skill,  
10 effort, and responsibility, and which are performed under  
11 similar working conditions.<sup>16</sup>

12 It also sets forth four exceptions to this prohibition, for pay disparities  
13 resulting from “(i) a seniority system; (ii) a merit system; (iii) a system  
14 which measures earnings by quantity or quality of production; or  
15 (iv) a differential based on *any other factor other than sex*.”<sup>17</sup> Each  
16 exception operates as an affirmative defense.<sup>18</sup> The meaning of the  
17 fourth exception—“a differential based on *any other factor other than*  
18 *sex*,” which is often truncated to “factor other than sex”—is the focus  
19 of our inquiry.

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<sup>16</sup> 29 U.S.C. § 206(d)(1).

<sup>17</sup> *Id.* § 206(d)(1)(i)–(iv) (emphasis added).

<sup>18</sup> See *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 142 (2d Cir. 2000).  
“The burden of establishing one of the four affirmative defenses is ‘a heavy one.’”  
*Id.* at 143 (quoting *Timmer v. Mich. Dep’t of Com.*, 104 F.3d 833, 843 (6th Cir. 1997)).

1     **2. Job-Classification Systems Under *Aldrich v. Randolph Central***  
 2                                   ***School District***

3             Arguing that a “factor other than sex” must be job related,  
 4     Eisenhauer relies on *Aldrich v. Randolph Central School District*, decided  
 5     more than thirty years ago.<sup>19</sup> There, we faced the novel question of the  
 6     circumstances under which a job-classification system qualifies as a  
 7     “factor other than sex.”<sup>20</sup> We held that a facially sex-neutral job-  
 8     classification system alone is insufficient to constitute a “factor other  
 9     than sex,” citing concern over potential pretexts for discrimination.<sup>21</sup>

10            The defendant in *Aldrich* had sought to justify the pay disparity  
 11    between the plaintiff, a female “cleaner,” and two male “custodians”  
 12    by invoking its sex-neutral job-classification system.<sup>22</sup> The system  
 13    classified as “custodians” those required to take a civil-service  
 14    examination; “cleaners” faced no such requirement, and the defendant  
 15    paid them less.<sup>23</sup> We rejected the invocation of a sex-neutral job-  
 16    classification system “without more,” observing that

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<sup>19</sup> 963 F.2d 520 (2d Cir. 1992).

<sup>20</sup> *See id.* at 524 (“We have not yet faced the question under what circumstances a civil service classification system qualifies as a factor-other-than-sex.”).

<sup>21</sup> *See id.* at 525–26.

<sup>22</sup> *Id.* at 522.

<sup>23</sup> *Id.* After taking the civil-service examination, candidates for a custodian position appeared on a ranked eligibility list. *See id.* The employer could hire as a custodian only those candidates ranked among the top three on that list. *See id.*

1 Congress intended for a job classification system to serve  
 2 as a factor-other-than-sex defense to sex-based wage  
 3 discrimination claims only when the employer proves  
 4 that the job classification system resulting in differential  
 5 pay is rooted in legitimate business-related *differences in*  
 6 *work responsibilities and qualifications for the particular*  
 7 *positions at issue.*<sup>24</sup>

8 Eisenhower draws on this observation to argue that the Culinary  
 9 Institute's compensation plan cannot justify the pay disparity at issue  
 10 here. She does not contend that the compensation plan is a job-  
 11 classification system.<sup>25</sup> She nevertheless maintains that the observation  
 12 applies. In her view, the compensation plan cannot qualify as a "factor  
 13 other than sex" because it results in a pay disparity unconnected to  
 14 "differences in work responsibilities and qualifications."<sup>26</sup> In  
 15 opposition, the Culinary Institute argues that *Aldrich* requires *only* job-  
 16 classification systems, not *all* "factor[s] other than sex," to be connected  
 17 to such differences.<sup>27</sup> We agree with the Culinary Institute.

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Plaintiff Cora Aldrich had never earned a top-three score and had never been offered a custodian position. *See id.*

<sup>24</sup> *Id.* at 525 (emphasis added).

<sup>25</sup> We therefore do not consider any such argument. *See Britt v. Garcia*, 457 F.3d 264, 268 n.2 (2d Cir. 2006) (declining to decide an issue because a party did not raise it below or before us).

<sup>26</sup> *Aldrich*, 963 F.2d at 525.

<sup>27</sup> The Culinary Institute does not contend that its compensation plan falls within one of the EPA's exceptions for seniority, merit, or productivity systems. *See*



1 Eisenhauer, like others, misconstrues *Aldrich*.<sup>28</sup> Considering the  
 2 EPA’s legislative history, we reasoned that a *job*-relatedness  
 3 requirement is necessary to ensure that a *job*-classification system is  
 4 not a pretext for sex discrimination.<sup>29</sup> *Jobs* are, after all, the principal  
 5 feature of *job*-classification systems. We did not hold that all “factor[s]  
 6 other than sex” must be job related.<sup>30</sup> Nor do we do so today. *Aldrich*’s  
 7 underlying suggestion is that we should interpret “factor other than  
 8 sex” so as to guard against pay disparities intentionally or  
 9 unintentionally based on sex.<sup>31</sup>

### 10 3. Statutory Interpretation

11 Basic principles of statutory interpretation demonstrate that the  
 12 term “any other factor other than sex” refers to any factor except for  
 13 those based on sex. The term has sowed needless uncertainty and

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29 U.S.C. § 206(d)(1)(i)–(iii). We therefore do not consider any such argument. *See Britt*, 457 F.3d at 268 n.2.

<sup>28</sup> *See, e.g., Rizo v. Yovino*, 950 F.3d 1217, 1226 (9th Cir. 2020) (*en banc*) (incorrectly interpreting *Aldrich* as holding that “only job-related factors provide affirmative defenses to EPA claims”).

<sup>29</sup> *Aldrich*, 963 F.2d at 524–26.

<sup>30</sup> As noted, in *Aldrich*, we faced the novel question of the circumstances under which a *job-classification system* qualifies as a “factor other than sex.” *See id.* at 524; note 20 and accompanying text, *ante*. Thus, we read *Aldrich* to bear *only* on job-classification systems. *See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 261 (2d Cir. 2001) (observing that we must interpret a case “in context, not in a vacuum”).

<sup>31</sup> *Id.* at 525; note 30, *ante*.

1 confusion among our sister circuits.<sup>32</sup> Its meaning, we think, is about  
2 as simple as it sounds.

3 “Our starting point in statutory interpretation is the statute’s  
4 plain meaning, if it has one.”<sup>33</sup> To identify a statute’s plain meaning,  
5 we afford words “their ordinary, common-sense meaning”<sup>34</sup> and  
6 “draw[ ] on ‘the specific context in which that language is used.’”<sup>35</sup> The  
7 words “differential based on *any other factor other than sex*” appear in  
8 the context of three preceding exceptions to the EPA’s prohibition: pay  
9 disparities resulting from “(i) a seniority system; (ii) a merit system;

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<sup>32</sup> The circuits are split in numerous directions on the meaning of “factor other than sex.” *Compare Fallon v. Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989) (“The fourth affirmative defense . . . is a broad ‘catch-all’ exception and embraces an almost limitless number of factors, so long as they do not involve sex.”), *with Rizo*, 950 F.3d at 1224 (“[W]e conclude that the fourth affirmative defense comprises only job-related factors, not sex.”), *with Equal Emp. Opportunity Comm’n v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (“[T]he ‘factor other than sex’ defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.”), *with Riser v. QEP Energy*, 776 F.3d 1191, 1198 (10th Cir. 2015) (noting that pay-classification systems are only an affirmative defense when pay differences are “rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue.” (quoting *Aldrich*, 963 F.2d at 525)), *with Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (“[T]he ‘factor other than sex’ exception applies when the disparity results from unique characteristics of the same job; from an individual’s experience, training, or ability; or from special exigent circumstances connected with the business.”).

<sup>33</sup> *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000).

<sup>34</sup> *Id.*

<sup>35</sup> *Williams v. MTA Bus Co.*, 44 F.4th 115, 127 (2d Cir. 2022) (quoting *United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016)).

1 [or] (iii) a system which measures earnings by quantity or quality of  
2 production.”<sup>36</sup>

3 Upon reflection, we conclude that the meaning of “any other  
4 factor other than sex” is unambiguous:

5 We begin with the first half of the term “*any other factor* other  
6 than sex.” “Any” means “every”;<sup>37</sup> its meaning is “expansive” rather  
7 than restrictive.<sup>38</sup> “Other” means “additional.”<sup>39</sup> And read in context,  
8 “any other factor” refers to “every”<sup>40</sup> “additional”<sup>41</sup> factor, beyond a  
9 seniority, merit, and productivity system,<sup>42</sup> “other than sex.”

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<sup>36</sup> 29 U.S.C. § 206(d)(1).

<sup>37</sup> *Webster’s Third New International Dictionary* 97 (1963).

<sup>38</sup> *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster’s Third New International Dictionary* 97 (1976)); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (interpreting the word “any” expansively); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–89 (1980) (same).

“Of course, other circumstances may counteract the effect of expansive modifiers[,]” including the modifier “any.” *Ali*, 522 U.S. at 220 n.4. The Supreme Court has construed such modifiers narrowly when they “included a term of art that compelled that result[,] . . . when another term in the provision made sense only under a narrow reading[,] . . . and when a broad reading would have implicated sovereignty concerns.” *Id.* (citations omitted). None of the circumstances that required these narrow constructions is present here.

<sup>39</sup> *Webster’s Third New International Dictionary* 1598 (1963).

<sup>40</sup> *Id.* at 97.

<sup>41</sup> *Id.* at 1598.

<sup>42</sup> *See* 29 U.S.C. § 206(d)(1)(i)–(iii).

1       The meaning of the second half of the term “any other factor  
 2 *other than sex*” is also plain. “Other than” means “except for.”<sup>43</sup>  
 3 Together, then, “any other factor other than sex” means “every”<sup>44</sup>  
 4 “additional”<sup>45</sup> factor “except for”<sup>46</sup> those based (intentionally or  
 5 unintentionally<sup>47</sup>) on sex. Accordingly, to establish the EPA’s “factor  
 6 other than sex” defense, a defendant must prove that the pay disparity  
 7 in question results from a differential based on any factor except for  
 8 sex.<sup>48</sup>

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<sup>43</sup> *Other Than*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/other%20than> (last visited June 28, 2023); *see also* Theodore M. Bernstein, *The Careful Writer: A Modern Guide to English Usage* 320–21 (1965) (equating “other than” with the preposition “except”).

<sup>44</sup> *Webster’s Third New International Dictionary*, note 37, *ante*.

<sup>45</sup> *Webster’s Third New International Dictionary*, note 39, *ante*.

<sup>46</sup> *Other Than*, note 43, *ante*; *see also* Bernstein, note 43, *ante*.

<sup>47</sup> *See Ryduchowski*, 203 F.3d at 142 (“[T]he EPA does not require a plaintiff to establish an employer’s discriminatory intent.”).

<sup>48</sup> A variety of factors *are* based on sex and thus *cannot* constitute an affirmative defense. Among those factors are (1) pretexts for sex-based pay discrimination or factors that otherwise intentionally or unintentionally mask such discrimination, *cf. Ryduchowski*, 203 F.3d at 142 (observing that a plaintiff may counter a defendant’s affirmative defense to an EPA claim with evidence of pretext and that the plaintiff need not establish an intent to discriminate); (2) factors that are not sex neutral; (3) differentials that “perpetuate the effects” of historic sex-based pay discrimination by an employer, *Corning Glass Works v. Brennan*, 417 U.S. 188, 209 (1974); (4) “claimed differences between the average cost of employing workers” of different sexes as groups, 29 C.F.R. § 1620.22; and (5) collective bargaining agreements to “unequal rates of pay,” 29 C.F.R. § 1620.23, meaning agreements to rates established on the basis of sex, *see* The Equal Pay Act;

1           The requirement that a “factor other than sex” be job related  
 2 appears nowhere in the EPA’s text and, in our view, conflicts with the  
 3 statute’s plain meaning. If Congress had intended all “factor[s] other  
 4 than sex” to be job related, it would have said so. As discussed below,  
 5 New York State’s legislature did say so.<sup>49</sup> And Congress explicitly  
 6 referenced job relatedness in the provision of Title VII of the Civil  
 7 Rights Act of 1964<sup>50</sup> prohibiting employment practices that disparately  
 8 impact protected classes. Under that provision, which New York’s  
 9 equal-pay law emulates,<sup>51</sup> a plaintiff establishes a disparate-impact  
 10 claim “only if . . . the respondent fails to demonstrate that the  
 11 challenged practice is *job related* for the position in question and  
 12 consistent with business necessity.”<sup>52</sup> Yet Congress “could not have

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Interpretations, 51 Fed. Reg. 29818 (Aug. 20, 1986) (explaining that 29 C.F.R. § 1620.23 “make[s] clear that an employer or labor organization cannot escape the requirements of the EPA merely by including allegedly negotiated unequal rates of pay in a collective bargaining agreement”). This list is not necessarily exhaustive. The key, as *Aldrich* suggests, is that we must interpret “factor other than sex” to avoid “loopholes” that would sanction sex-based pay discrimination. *Aldrich*, 963 F.2d at 525. A job-relatedness requirement for all “factor[s] other than sex” is not necessary to avoid such “loopholes.”

<sup>49</sup> See Section III.B, *post*.

<sup>50</sup> 42 U.S.C. § 2000e–2(k)(1)(A)(i).

<sup>51</sup> See New York Sponsors Memorandum, 2015 S.B. 1, 238th Leg., Reg. Sess. (Mar. 26, 2015) (“[A] factor [other than sex] could not be based on a sex-based differential, and must be job-related and consistent with business necessity. This standard would mirror the current defense afforded to employers in disparate impact cases under Title VII of the Civil Rights Act.”).

<sup>52</sup> 42 U.S.C. § 2000e–2(k)(1)(A)(i) (emphasis added).

1 chosen a more all-encompassing phrase”<sup>53</sup> than “any other factor other  
 2 than sex” when it passed the EPA. As the Supreme Court has  
 3 described it, the exception for “any other factor other than sex” is a  
 4 “catch-all exception”<sup>54</sup>: it catches all remaining factors that are not  
 5 based on sex.

6 Although the plain meaning of the “catch-all exception”<sup>55</sup>  
 7 “trumps any resort to legislative history,” the legislative history  
 8 “strongly supports our interpretation.”<sup>56</sup> According to the Senate  
 9 Report on the EPA bill,<sup>57</sup> the statute was “designed to eliminate any

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<sup>53</sup> *Ali*, 552 U.S. at 221.

<sup>54</sup> *Corning Glass Works*, 417 U.S. at 204 (emphasis added).

<sup>55</sup> *Id.*

<sup>56</sup> *Lawrence + Mem’l Hosp. v. Burwell*, 812 F.3d 257, 266 (2d Cir. 2016); *see also*, *e.g.*, *Gonzales*, 520 U.S. at 6 (“Given the straightforward statutory command, there is no reason to resort to legislative history.”); *United States v. Oregon*, 366 U.S. 643, 648 (1961) (observing that if a provision is “clear and unequivocal on [its] face,” there is “no need to resort to . . . legislative history”).

That the legislative history supports our interpretation is unsurprising. “[I]f the language of a rule plainly appears to address a specific problem, one *naturally* would expect legislative history (if it exists) to confirm this plain meaning.” *Bourjaily v. United States*, 483 U.S. 171, 187 (1987) (Blackmun, J., dissenting).

<sup>57</sup> “[T]he authoritative source [within legislative history] for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.’” *Garcia v. United States*, 469 U.S. 70, 76 (1984) (third alteration in original) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)); *see also* Charles Tiefer, *Congressional Practice and Procedure* 181 (1989) (“Externally, the committee report serves . . . as the central guide for courts and agencies looking into the ‘legislative history’ of a bill for clues on interpreting it.”).

1 wage rate differentials which are based on sex. Neither the committee  
 2 nor anyone proposing equal-pay legislation intend[ed] that other  
 3 factors [could not] be used to justify a wage differential.”<sup>58</sup> And, as  
 4 noted in the House Report, “the broad general exclusion [was] . . .  
 5 included” because “it [was] impossible to list each and every  
 6 exception.”<sup>59</sup>

7 Statements made during congressional debate further reinforce  
 8 our interpretation. A colloquy between two members of the House  
 9 committee that reported the EPA bill<sup>60</sup>—Representative Charles  
 10 Goodell of New York, a primary sponsor of the bill, and  
 11 Representative Robert Griffin of Michigan—is representative:

12 Mr. Goodell. . . . [W]e want the private enterprise system,  
 13 employer and employees and a union, if there is a union, and  
 14 the employers and employees if there is not a union, to have a  
 15 maximum degree of discretion in working out . . . how much  
 16 [employees] should be paid for [their work].

17 Mr. Griffin. So long as pay differentials are not based on sex.<sup>61</sup>

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<sup>58</sup> S. Rep. No. 88-176, at 4 (1963).

<sup>59</sup> H.R. Rep. No. 88-309, at 3 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 687, 689.

<sup>60</sup> *See generally United States v. United Mine Workers of Am.*, 330 U.S. 258, 276–  
 77 (1947) (suggesting that the statements of members of a committee that reports a  
 bill carry more weight than those of members who were not part of the committee).

<sup>61</sup> *See also, e.g.*, 109 Cong. Rec. 9203 (1963) (statement of Rep. Griffin)  
 (“[R]oman numeral iv . . . makes clear and explicitly states that a differential based  
 on any factor or factors other than sex would not violate this legislation.”); *id.*  
 (statement of Rep. Griffin) (“Roman numeral iv is a broad principle, and those

1           Mr. Goodell. Yes, as long as it is not based on sex. That is the *sole*  
2           factor that we are inserting here as a restriction.<sup>62</sup>

3           The EPA's legislative history is more than merely compatible  
4           with our interpretation. It confirms that to establish the "factor other  
5           than sex" defense, a defendant must prove only that a pay disparity in  
6           question results from a differential based on any factor except for sex.  
7           Nothing in the legislative history suggests that a "factor other than  
8           sex" must be job related. Nor is there anything to suggest that the term  
9           must be limited in in any other way.<sup>63</sup>

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preceding it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production.").

<sup>62</sup> 109 Cong. Rec. 9198 (1963) (emphasis added).

<sup>63</sup> The Supreme Court's observations about the EPA in *County of Washington v. Gunther* support our view that the term "any other factor other than sex" really means *any* such factor. 452 U.S. 161 (1981). Repeated references to the exception do not suggest any limiting principle. *See id.* at 168 ("[T]he Act's four affirmative defenses exempt any wage differentials attributable to seniority, merit, quantity or quality of production, or 'any other factor other than sex.'"); *id.* at 170 ("The fourth affirmative defense of the Equal Pay Act . . . was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination."); *id.* at 170–71 ("Under the Equal Pay Act, the courts and administrative agencies are not permitted to 'substitute their judgment for the judgment of the employer . . . who [has] established and applied a *bona fide* job rating system,' so long as it does not discriminate on the basis of sex." (alteration and omission in original) (emphasis added) (quoting 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell))); *id.* at 171 n.11 (noting Representative Griffin's statement that the "factor other than sex" defense "is a 'broad principle,' which 'makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation'" (quoting 109 Cong. Rec. 9203 (1963))).



1 **a. Ambiguity**

2 Our interpretation would remain unchanged even if the term  
3 “factor other than sex” were ambiguous, requiring our resort to canons  
4 of statutory interpretation to discern its meaning.<sup>64</sup>

5 Beyond *Aldrich*, Eisenhower’s argument that every “factor other  
6 than sex” must be job related relies on *Rizo v. Yovino*, in which the  
7 Ninth Circuit resorted to interpretive canons to discern the term’s  
8 meaning.<sup>65</sup> The Ninth Circuit did not assert that the term “factor other  
9 than sex” is ambiguous, much less explain why. Yet it resolved some  
10 assumed ambiguity by applying the canons of *ejusdem generis* and  
11 *noscitur a sociis*.<sup>66</sup> The canon of *ejusdem generis* dictates that we should

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<sup>64</sup> See *Spadaro v. U.S. Customs & Border Prot.*, 978 F.3d 34, 47 (2d Cir. 2020) (“[W]e rely upon canons of construction only if the language of the statute is ambiguous . . . .”); cf. *Rubin v. United States*, 449 U.S. 424, 430 (1981) (“When we find the terms of a statute unambiguous, judicial inquiry is complete, except ‘in rare and exceptional circumstances.’” (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 187 n.33 (1978))); *In re Price*, 353 F.3d 1135, 1141 (9th Cir. 2004) (“If the statutory language is unambiguous, then our ‘judicial inquiry is complete.’” (quoting *Rubin*, 449 U.S. at 430)).

<sup>65</sup> See *Rizo*, 950 F.3d at 1224–25 (discussing canons of statutory interpretation).

<sup>66</sup> See *id.*

Resort to these canons is anomalous because the Supreme Court has instructed that they are useful only for resolving ambiguity. See *Harrison*, 446 U.S. 578, 588 (1980) (“The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.” (quoting *United States v. Powell*, 423 U.S. 87, 91 (1975))); *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923) (“‘*Noscitur a sociis*’ is a well-

1 interpret a general term that follows specific ones to refer only to items  
 2 of the same “class” as the specific ones.<sup>67</sup> And the canon of *noscitur a*  
 3 *sociis* instructs that “a word is known by the company it keeps.”<sup>68</sup> In

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established and useful rule of construction, where words are of obscure or doubtful meaning, and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words.” (emphasis added)).

Beyond resorting to the canons of *ejusdem generis* and *noscitur a sociis*, the Ninth Circuit relied on the principle that we must give effect to every part of a statute. It reasoned that “any other factor other than sex” must be job related because “[i]f *any* factor other than sex could defeat an EPA claim, the first ‘other’” and the three enumerated exceptions “would be rendered meaningless.” *Rizo*, 950 F.3d 1224. We disagree. “Other” has a meaning even though *any* “factor other than sex” defeats an EPA claim: It refers to the fact that “*bona fide*,” *Gunther*, 452 U.S. at 170 (emphasis added), seniority, merit, and productivity systems are “additional,” *Webster’s Third New International Dictionary*, note 39, *ante*, “factor[s] other than sex.” The three enumerated exceptions also have meanings even though *any* “factor other than sex” defeats an EPA claim: They refer to “specifically contemplated” factors that defeat an EPA claim. *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009); *see also id.* (“[T]he whole value of a generally phrased residual clause . . . is that it serves as a catchall for matters not specifically contemplated—known unknowns . . . .”); H.R. Rep. No. 88-309, at 3 (“[T]he broad general exclusion [was] . . . included” because “it [was] impossible to list each and every exception . . . .”). “In any event, we do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase.” *Ali*, 552 U.S. at 227. Nor do we use interpretive principles to introduce ambiguity where there is none. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” (quoting *Rubin*, 449 U.S. at 430)).

<sup>67</sup> *Cleveland v. United States*, 329 U.S. 14, 18 (1946).

<sup>68</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 694 (1995).

1 the Ninth Circuit’s view, “any other factor other than sex,” a general  
 2 term, kept company with three specific terms—seniority, merit, and  
 3 productivity systems—and should be interpreted to refer only to job-  
 4 related factors.<sup>69</sup> Job relatedness, it declared, is “obvious[ly]”<sup>70</sup> the  
 5 relevant “class.”<sup>71</sup>

6 It is not at all “obvious” to us that the three specific exceptions  
 7 are job related.<sup>72</sup> Seniority systems are not necessarily job related,  
 8 regardless of whether merit and productivity systems deserve such a  
 9 descriptor. Seniority systems afford employees rights and benefits  
 10 according to the length of their employment, not necessarily their  
 11 employment in a particular job.<sup>73</sup> Any pay disparity resulting from a  
 12 seniority system could therefore be unrelated to differences in two  
 13 employees’ “work responsibilities and qualifications.”<sup>74</sup> For example,  
 14 Employee A could earn more than Employee B, who has served twice  
 15 as long in the position that Employee A also holds, merely because

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<sup>69</sup> See *Rizo*, 950 F.3d at 1224–25 (applying the canons of *ejusdem generis* and *noscitur a sociis*).

<sup>70</sup> *Id.* at 1225.

<sup>71</sup> *Cleveland*, 329 U.S. at 18.

<sup>72</sup> *Rizo*, 950 F.3d at 1225.

<sup>73</sup> See *Cal. Brewers Ass’n v. Bryant*, 444 U.S. 598, 605–06 (1980) (“A ‘seniority system’ is a scheme that . . . allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase.”).

<sup>74</sup> *Aldrich*, 963 F.2d at 525.

1 Employee A has worked for her employer in different capacities for  
2 twice as long as Employee B.

3 We cannot think of a fitting “class”<sup>75</sup> or unifying descriptor  
4 beyond the one the plain meaning of the EPA provides: “factor[s] other  
5 than sex.” The most commonsensical assessment of the EPA’s  
6 exceptions, in our view, is that no such “class” or descriptor exists.<sup>76</sup>  
7 To shoehorn seniority, merit, and productivity systems into a  
8 manufactured label or category would be to overinterpret the EPA and  
9 distort Congress’s intent. The canons of statutory interpretation are  
10 merely tools to aid our understanding.<sup>77</sup> When the tools prove  
11 “unhelpful,” we may abandon them.<sup>78</sup>

12 The canons prove “unhelpful” here.<sup>79</sup> Even if we were to  
13 determine that the term “factor other than sex” is ambiguous, we  
14 would then turn to the EPA’s legislative history as our remaining

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<sup>75</sup> *Cleveland*, 329 U.S. at 18.

<sup>76</sup> *Id.*

<sup>77</sup> See *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (“[C]anons are not mandatory rules. They are guides that ‘need not be conclusive.’” (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001))).

<sup>78</sup> *Snell Island SNF LLC v. Nat’l Lab. Rels. Bd.*, 568 F.3d 410, 420 (2d Cir. 2009), vacated on other grounds, 561 U.S. 1021 (2010), and abrogated on other grounds by *New Process Steel, L.P. v. Nat’l Lab. Rels. Bd.*, 560 U.S. 674 (2010); see also *Ali*, 552 U.S. at 225 (declining to apply the canons of *ejusdem generis* and *noscitur a sociis* where “it [was] not apparent what common attribute connect[ed] the specific items”).

<sup>79</sup> *Snell Island*, 568 F.3d at 420.

1 interpretive guide.<sup>80</sup> As discussed above, that legislative history  
 2 “strongly supports” our interpretation.<sup>81</sup> All routes lead us to the same  
 3 conclusion: To establish the EPA’s “factor other than sex” defense, a  
 4 defendant must prove only that the pay disparity in question results  
 5 from a differential based on any factor except for sex.

#### 6                   **4. The Culinary Institute’s Compensation Plan**

7           We return, at last, to the compensation plan to determine  
 8 whether the Culinary Institute was entitled to summary judgment on  
 9 Eisenhower’s EPA claim. We conclude that it was.

10          The EPA’s “basic structure and operation are . . .  
 11 straightforward.”<sup>82</sup> A plaintiff must establish a *prima facie* EPA case by  
 12 demonstrating that “i) the employer pays different wages to  
 13 employees of the opposite sex; ii) the employees perform equal work  
 14 on jobs requiring equal skill, effort, and responsibility; and iii) the jobs

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<sup>80</sup> See *Blum v. Stenson*, 465 U.S. 886, 896 (1984) (“Where . . . resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.”); *Dauray*, 215 F.3d at 264. (“When the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, we will resort to legislative history.”).

<sup>81</sup> *Lawrence + Mem’l Hosp.*, 812 F.3d at 266; see text accompanying notes 55–62, *ante*.

<sup>82</sup> *Corning Glass Works*, 417 U.S. at 195.

- 1 are performed under similar working conditions.”<sup>83</sup> If the plaintiff has  
 2 established a *prima facie* case, the burden of persuasion shifts to the

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<sup>83</sup> *Belfi v. Prendergast*, 191 F.3d 129, 135 (2d Cir. 1999) (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *accord Corning Glass Works*, 417 U.S. at 195.

The Culinary Institute argues that the District Court erred in concluding that Eisenhower established a *prima facie* case of sex-based pay discrimination. It contends that she could not have established a *prima facie* case by identifying a single male-comparator employee who earns more than her while ignoring all other employees who perform substantially equal work. In support of its argument, the Culinary Institute identifies five other comparators that it claims illustrate that no sex-based pay disparity exists.

The question of how many comparators are necessary to establish a *prima facie* EPA case is a source of disagreement among our sister circuits. *Compare Equal Emp. Opportunity Comm’n v. Md. Ins. Admin.*, 879 F.3d 114, 122 (4th Cir. 2018) (holding that one comparator is sufficient), and *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1505 (11th Cir. 1988) (same), with *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983) (holding that, in a professional setting such as a college, the proper comparison is to the average of wages paid to all similarly situated employees of the opposite sex). And it is a question that we need not answer today because we affirm the order granting summary judgment for the Culinary Institute on Eisenhower’s EPA claim on other “grounds supported in the record.” *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006); *see text* accompanying notes 85–88, *post*.

The *separate* question of how many comparators are necessary to establish a *prima facie* case under New York Labor Law § 194(1) is one that the District Court did not consider. As we explain in Section III.B, the District Court improperly assessed Eisenhower’s § 194(1) claim “under the same standard” as her EPA claim. J.A. 270; *see text* accompanying notes 95–101, *post*. “Ordinarily, we ‘will not review an issue the district court did not decide.’” *Colavito v. N.Y. Organ Donor Network, Inc.*, 486 F.3d 78, 80 (2d Cir. 2007) (quoting *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 88 (2d Cir. 1996)). Thus, should the District Court decide to invoke its supplemental jurisdiction over Eisenhower’s § 194(1) claim on remand, it must

1 employer to show that one of the EPA’s affirmative defenses justifies  
 2 the pay disparity.<sup>84</sup> To establish the EPA’s “factor other than sex”  
 3 defense, a defendant must prove only that the pay disparity in  
 4 question results from a differential based on any factor except for sex.

5 We assume without deciding that Eisenhower has established a  
 6 *prima facie* EPA case and that the Culinary Institute consequently had  
 7 the burden to establish its affirmative defense. We may affirm the

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determine whether a single male comparator is sufficient to establish a *prima facie* case under § 194(1). See text accompanying notes 98–101, *post*.

<sup>84</sup> See *Corning Glass*, 417 U.S. at 196; *Belfi*, 191 F.3d at 136.

The Equal Employment Opportunity Commission, as *amicus curiae*, argues that the District Court improperly conflated the burdens imposed by the EPA with those imposed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which applies to disparate-treatment claims under Title VII. The burden-shifting framework applicable to such claims does differ from the one applicable to EPA claims. See *Littlejohn v. City of New York*, 795 F.3d 297, 309 n.7 (2d Cir. 2015) (recognizing the distinction); *Md. Ins. Admin.*, 879 F.3d at 120 n.6 (same); *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003) (same). Under the *McDonnell Douglas* burden-shifting framework, a plaintiff must first establish a *prima facie* case of disparate treatment. See *Texas Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981). If the plaintiff establishes the *prima facie* case, “the burden shifts to the employer ‘to articulate some legitimate, nondiscriminatory reason for the employee’s’” disparate treatment. *Id.* (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802). If the employer carries its burden, “the plaintiff must then come forward with evidence that the defendants proffered, non-discriminatory reason is a mere pretext for actual discrimination.” *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000).

Even if the District Court arguably conflated the burdens imposed by the EPA with those imposed by *McDonnell Douglas*, the “record” demonstrates that the Culinary Institute carried its burden under the EPA. *Thyroff*, 460 F.3d at 405; see text accompanying notes 85–88, *post*.

1 order granting summary judgment for the Culinary Institute if it  
2 showed that there is no “genuine factual dispute” that the pay  
3 disparity was based on any factor except for sex.<sup>85</sup> We conclude that  
4 the Culinary Institute made such a showing.

5       The Culinary Institute’s records regarding compensation leave  
6 no room for “genuine factual dispute.”<sup>86</sup> As both parties agree, the pay  
7 disparity resulted entirely from (1) disparate starting salaries and (2)  
8 the formulaic application of the compensation plan, which it also  
9 applied uniformly to other faculty members, male and female. The  
10 terms of the compensation plan are sex neutral. In addition, the  
11 Culinary Institute provided undisputed explanations for its fixed-  
12 dollar pay increases: The raises recognized the skill, experience, or  
13 added value associated with additional degrees or academic  
14 promotions. The Culinary Institute’s justification produces neither a  
15 whiff of pretext nor anything else to raise a jury’s doubt or suspicion.  
16 As it happens, Eisenhower never even argues that the compensation  
17 has any basis in sex. Her appeal rests entirely on a misinterpretation  
18 of the term “factor other than sex.”

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<sup>85</sup> *Anderson*, 477 U.S. at 248.

<sup>86</sup> *Id.*



1 In short, no “reasonable jury”<sup>87</sup> could find that the pay disparity  
 2 was based on sex, intentionally or otherwise.<sup>88</sup> Accordingly, we affirm  
 3 the decision of the District Court as to Eisenhower’s EPA claim.

4 **B. New York Labor Law’s “Factor Other Than Sex” Or “Status”**  
 5 **Defense**

6 Turning next to New York’s equal-pay law, New York Labor  
 7 Law § 194(1), we consider whether its catch-all exception includes a  
 8 job-relatedness requirement. We conclude that it does.

9 In some respects, the EPA and § 194(1) are similar. Like the  
 10 EPA, § 194(1) prohibits pay discrimination on the basis of sex. Until  
 11 October 2019, it provided that

12 [n]o employee [would] be paid a wage at a rate less than  
 13 the rate at which an employee of the opposite sex in the  
 14 same establishment [was] paid for equal work on a job  
 15 the performance of which require[d] equal skill, effort  
 16 and responsibility, and which [was] performed under  
 17 similar working conditions.<sup>89</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> See *Ryduchowski*, 203 F.3d at 142 (“[T]he EPA does not require a plaintiff to establish an employer’s discriminatory intent.”).

<sup>89</sup> N.Y. Lab. Law § 194(1) (2016) (effective until Oct. 8, 2019).

1 Since October 2019, it has prohibited pay discrimination on the basis  
 2 of “status within one or more protected class or classes” instead of  
 3 “sex.”<sup>90</sup>

4 Section 194(1) also similarly sets forth four exceptions to its  
 5 prohibition. Before January 2016, the statute excluded pay disparities  
 6 “made pursuant to a differential based on: (a) a seniority system; (b)  
 7 a merit system; (c) a system which measures earnings by quantity or  
 8 quality of production; or (d) *any other factor other than sex*.”<sup>91</sup> New  
 9 York State’s legislature then amended the fourth exception from “any  
 10 other factor other than sex” to “a *bona fide* factor other than sex,”<sup>92</sup>  
 11 and later, to “a *bona fide* factor other than status within one or more  
 12 protected class or classes.”<sup>93</sup>

13 Despite their similarities, the EPA and § 194(1) differ in at least  
 14 one key respect. Since January 2016, § 194(1) has required the “*bona*

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<sup>90</sup> *Id.* § 194(1) (2019) (effective Oct. 8, 2019). In addition, the provision now covers both “equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions” and “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.” *Id.*

<sup>91</sup> N.Y. Lab. Law § 194(1) (1966) (emphasis added) (effective until Aug. 18, 1980); *id.* § 194(1) (1980) (emphasis added) (effective until Jan. 19, 2016).

<sup>92</sup> 2015 N.Y. Laws 362 (emphasis added).

<sup>93</sup> 2019 N.Y. Laws 93 (emphasis added).

The recent amendments to § 194(1) are not retroactive. *See Thomas v. Bethlehem Steel Corp.*, 470 N.E.2d 831, 833 (N.Y. 1984) (“An amendment will in general have prospective effect only, unless its language indicates that it should receive a contrary interpretation.”).

1 *fide* factor other than sex” or “status” to “be *job-related* with respect to  
 2 the position in question.”<sup>94</sup> As we have explained, the EPA’s “factor  
 3 other than sex” defense imposes no such requirement. By contrast,  
 4 under New York Labor Law § 194(1), to establish the “factor other  
 5 than sex” or “status” defense, a defendant must prove that the pay  
 6 disparity in question results from a differential based on a job-related  
 7 factor.

8 The District Court evaluated Eisenhauer’s EPA and § 194(1)  
 9 claims “under the same standard.”<sup>95</sup> Until January 2016, this approach  
 10 may have been the proper one.<sup>96</sup> Since at least January 2016, however,  
 11 the relevant standards have differed at least because § 194(1) has  
 12 included a job-relatedness requirement. Neither Eisenhauer nor the  
 13 Culinary Institute identified or acknowledged this difference before  
 14 the District Court.<sup>97</sup> The District Court thus understandably

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<sup>94</sup> N.Y. Lab. Law § 194(1) (2016) (emphasis added) (effective until Oct. 8, 2019); *id.* § 194(1) (2019) (emphasis added) (effective Oct. 8, 2019).

<sup>95</sup> J.A. 270 (quoting *Moccio*, 889 F. Supp. 2d at 570).

<sup>96</sup> See *Talwar v. Staten Island Univ. Hosp.*, 610 F. App’x 28, 30 n.2 (2d Cir. 2015) (summary order) (“An equal pay claim under New York Labor Law § 194 is analyzed under the same standards applicable to the federal Equal Pay Act.” (quoting *Pfeiffer v. Lewis Cnty.*, 308 F. Supp. 2d 88, 98 n.8 (N.D.N.Y. 2004))).

<sup>97</sup> On appeal, Eisenhauer also fails to identify any difference between the EPA and New York’s equal-pay law. We may nevertheless exercise our discretion to consider the standard under which to evaluate § 194(1) claims. See generally *United States v. Gomez*, 877 F.3d 76, 92 (2d Cir. 2017) (“We are ‘more likely to exercise our discretion (1) where consideration of the issue is necessary to avoid manifest injustice or (2) where the issue is purely legal and there is no need for additional fact-finding.’” (quoting *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000))).

1 overlooked it. Nonetheless, we hold that the District Court did not  
 2 consider the divergent requirements imposed by the EPA and New  
 3 York Labor Law § 194(1) when assessing Eisenhower’s claims and the  
 4 Culinary Institute’s affirmative defense. The District Court should  
 5 have assessed Eisenhower’s § 194(1) claim as altogether distinct from  
 6 her EPA one.

7 We therefore vacate the order granting summary judgment as  
 8 to Eisenhower’s § 194(1) claim and remand the cause for the District  
 9 Court to decide whether to invoke its discretion to exercise  
 10 supplemental jurisdiction over that state-law claim.<sup>98</sup> If it decides to  
 11 exercise its supplemental jurisdiction, it must assess Eisenhower’s  
 12 § 194(1) claim anew. In doing so, it must consider whether  
 13 (1) Eisenhower established a *prima facie* case under § 194(1)<sup>99</sup> and  
 14 (2) the Culinary Institute showed that there is no “genuine factual  
 15 dispute”<sup>100</sup> that its compensation plan is job related.<sup>101</sup>

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<sup>98</sup> See generally 28 U.S.C. § 1367(c) (“The district courts may decline to exercise supplemental jurisdiction over a [state-law] claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction . . .”).

<sup>99</sup> See note 83, *ante*.

<sup>100</sup> *Anderson*, 477 U.S. at 248.

<sup>101</sup> A pay disparity between Eisenhower and Perillo existed in 2011 and 2012 and has persisted since 2017. See note 5 and accompanying text, *ante*. Since the New York State legislature only imposed a job-relatedness requirement in 2016, the District Court need not consider whether the compensation plan was job related in 2011 and 2012. The Culinary Institute has established its affirmative defense as to the pay disparities in 2011 and 2012.

1 **IV. CONCLUSION**

2 To summarize, we hold as follows:

3 (1) Under the Equal Pay Act, 29 U.S.C. § 206(d), to establish a  
4 “factor other than sex” defense, a defendant must prove  
5 only that the pay disparity in question results from a  
6 differential based on any factor except for sex.

7  
8 (2) The defendant showed that there is no genuine factual  
9 dispute that its sex-neutral compensation plan—which  
10 incorporates a collective bargaining agreement—is a “factor  
11 other than sex” that justifies the pay disparity between the  
12 plaintiff and her male colleague.

13 (3) Under New York Labor Law § 194(1), to establish the “factor  
14 other than sex” or “status” defense, a defendant must prove  
15 that the pay disparity in question results from a differential  
16 based on a job-related factor.

17 (4) The District Court did not consider the divergent  
18 requirements imposed by the EPA and § 194(1) when  
19 assessing the claims and affirmative defense presented.

20 For the foregoing reasons, we **AFFIRM IN PART** insofar as the  
21 District Court granted summary judgment for the defendant on the  
22 EPA claim. We **VACATE IN PART** and **REMAND** insofar as the  
23 District Court granted summary judgment for the defendant on the  
24 § 194(1) claim.