

No. 18-\_\_\_\_\_

---

**In the Supreme Court of the United States**

---

MARIE CONFORTO,

*Petitioner,*

—v—

RICHARD V. SPENCER,  
SECRETARY, DEPARTMENT OF THE NAVY;  
DEPARTMENT OF THE NAVY,

*Respondents.*

---

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

---

**PETITION FOR WRIT OF CERTIORARI**

---

DENNIS M. GRADY  
*COUNSEL FOR PETITIONER*  
GRADY & ASSOCIATES  
3517 CAMINO DEL RIO SOUTH,  
SUITE 400  
SAN DIEGO, CA 92108  
(619) 528-2530  
LAWGRADY@HOTMAIL.COM

JUNE 29, 2018

---

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

## QUESTIONS PRESENTED

1. Whether an appeals court deciding a case *sua sponte*, without hearing or any other chance for the Appellant to respond, is a violation of due process.
2. Whether, as a policy question, it is proper for courts to raise dispositive issues *sua sponte* in favor of the federal government.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iii
PETITION FOR WRIT OF CERTIORARI .....	1
OPINION BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	2
REASON FOR GRANTING THE PETITION .....	3
1. THE NINTH CIRCUIT ERRED IN RAISING TIMELINESS AS AN ISSUE AND DECIDING THE CASE ON IT <i>SUA SPONTE</i> WITHOUT GIVING PETITIONER NOTICE OR A CHANCE TO RESPOND. ....	3
2. COURTS SHOULD NOT BE RAISING ISSUES <i>SUA SPONTE</i> IN FAVOR OF THE FEDERAL GOVERNMENT GIVEN ITS TREMENDOUS RESOURCES AND LEGIONS OF ATTORNEYS. ....	4
CONCLUSION .....	6

## APPENDIX TABLE OF CONTENTS

Memorandum Opinion of the Ninth Circuit Court of Appeals (February 16, 2018) .....	1a
Order of the Ninth Circuit Denying Petition for Rehearing (April 3, 2018) .....	4a

**TABLE OF AUTHORITIES**

	Page
<b>CASES</b>	
<i>Day v. McDonough</i> , 547 U.S. 198 (2006) .....	3
<i>Singleton v. Wuff</i> , 428 U.S. 106 (1976) .....	3
<b>CONSTITUTIONAL PROVISIONS</b>	
U.S. Const. amend. V .....	2
<b>STATUTES</b>	
28 U.S.C. § 1254(1) .....	1
29 U.S.C. § 621 .....	2
42 U.S.C. § 2000e .....	2
<b>JUDICIAL RULES</b>	
Fed. R. Civ. P. 50(b) .....	2
Fed. R. Civ. P. 58 .....	2, 4
Sup. Ct. R. 13.1 .....	1
Sup. Ct. R. 29.2 .....	1

**TABLE OF AUTHORITIES—Continued**

	Page
<b>OTHER AUTHORITIES</b>	
Barry A. Miller, <i>Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard,</i> 39 San Diego L. Rev. 1253 (2002) .....	3
R. Martineau, <i>Considering New Issues on Appeal: The General Rule and the Gorilla Rule,</i> 40 Vand. L. Rev. 1023 (1987) .....	5



## **PETITION FOR WRIT OF CERTIORARI**

Petitioner, Marie Conforto, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 16, 2018.



## **OPINION BELOW**

The opinion of the Ninth Circuit, which was unpublished, was issued on February 16, 2018, and is attached at App.1a. The Ninth Circuit's one-page order denying review, filed April 3, 2018, is attached at App.4a.



## **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Ninth Circuit Court of Appeals for which petitioner seeks review was issued on February 16, 2018. A petition for rehearing was denied on April 3, 2018. This petition is filed within 90 days of the Ninth Circuit's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.



## CONSTITUTIONAL PROVISIONS INVOLVED

- **U.S. Const. amend. V**, provides in pertinent part:  
No person shall . . . be deprived of life, liberty, or property, without due process of law.



## STATEMENT OF THE CASE

Petitioner sued her employer, the Department of the Navy, for discrimination and retaliation under Title VII, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § 621. The jury in the trial court returned a verdict for the Navy. On appeal, petitioner argued whether substantial evidence supported the jury's finding that the denial of her request to attend a training symposium was not an adverse employment action.

The Ninth Circuit Court of Appeals denied oral argument and concluded, *sua sponte*, that the petitioner failed to renew her motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), and had therefore waived any challenge to the sufficiency of the evidence.<sup>1</sup> The Ninth Circuit declined a petition for rehearing.

---

<sup>1</sup> Petitioner had argued that there was no judgment below because the district court did not enter judgment as required by FRCP 58, the Ninth Circuit stated that judgment was deemed



## REASON FOR GRANTING THE PETITION

### 1. THE NINTH CIRCUIT ERRED IN RAISING TIMELINESS AS AN ISSUE AND DECIDING THE CASE ON IT *SUA SPONTE* WITHOUT GIVING PETITIONER NOTICE OR A CHANCE TO RESPOND.

While the petitioner does not deny that the appellate courts have discretion in when to raise issues *sua sponte*, *Singleton v. Wuff*, 428 U.S. 106, 121 (1976), doing so without giving the losing party a chance to respond is a violation of due process. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 San Diego L. Rev. 1253, 1288-90 (2002). Arguments not raised in the briefs are supposed to be treated as waived, *Id.* at 1266, and this should be even more strictly enforced against the Federal Government given its enormous resources.

This Court’s ruling in *Day v. McDonough*, 547 U.S. 198 (2006) is also extraordinarily applicable here. While in that case this Court held that district courts are permitted, but not obligated, to consider timeliness *sua sponte*, *Id* at 209, it also ruled that “before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions”. *Id* at 210.

The petitioner here received no such notice and opportunity, and her petition for rehearing was denied

---

entered 150 days after entry of the jury’s verdict on the civil docket.

by the Ninth Circuit without explanation. Further, the Ninth Circuit affirmed the District Court's ruling by raising timeliness *sua sponte* when there were already procedural errors made by the District Court, as it had not entered judgment on a separate document as required by FRCP 58. The petitioner was thus held to the rules strictly even when the District Court itself made confusing errors affecting the appeal's timelines, and then was not even afforded the opportunity to respond. Therefore, for all of the above reasons, the Ninth Circuit's decision should be reversed on procedural due process grounds.

## **2. COURTS SHOULD NOT BE RAISING ISSUES *SUA SPONTE* IN FAVOR OF THE FEDERAL GOVERNMENT GIVEN ITS TREMENDOUS RESOURCES AND LEGIONS OF ATTORNEYS.**

When someone approaches this Court *in forma pauperis*, they are afforded a much more forgiving set of rules in addition to having the typical fees waived. The logic behind this is that the interests of justice demand that indigent people should not have their potential claims silenced due to their lacking the legal knowledge or funds to file a proper Petition for a Writ of Certiorari. In this matter, the petitioner argues a scenario involving exactly the opposite set of facts: should the federal government, with its effectively unlimited resources and legion of Attorneys, be allowed to prevail based on an argument it did not itself raise? The U.S. government already has enormous advantages in litigation, and certainly the courts should not give it even more by assisting it with raising issues *sua sponte* that should have been waived when the government failed to raise the issues itself.

A number of prominent law review articles have been written on the subject of *sua sponte* appellate decision making, with Professor Martineau famously commenting that there's a "general rule" that appellate courts should not decide issues not raised by the parties, and then there's the exception, known as the "gorilla rule," "that is, unless they do", because the 800-pound gorilla that is the appellate court system may ultimately sit wherever it pleases. R. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023 (1987).

The petitioner already has to contend with one "800 pound gorilla", must it also contend with another (the vast resources of the mighty federal government) at the same time? This Court should grant certiorari because lower courts raising and deciding dispositive issues *sua sponte* without providing the parties with notice and an opportunity to respond violates due process, especially when it is done in favor of the gargantuan and resourceful federal government, which should have raised the issues on its own.



## CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

DENNIS M. GRADY  
*COUNSEL FOR PETITIONER*  
GRADY & ASSOCIATES  
3517 CAMINO DEL RIO SOUTH,  
SUITE 400  
SAN DIEGO, CA 92108  
(619) 528-2530  
LAWGRADY@HOTMAIL.COM

JUNE 29, 2018