

No. 17-A-\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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JIM YOVINO, Fresno County Superintendent of Schools

*Petitioner,*

v.

AILEEN RIZO,

*Respondent.*

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**APPLICATION FOR EXTENSION OF TIME  
TO FILE PETITION FOR A WRIT OF CERTIORARI**

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**TO THE HONORABLE ANTHONY KENNEDY, ASSOCIATE JUSTICE OF  
THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE  
FOR THE NINTH CIRCUIT:**

Pursuant to Supreme Court Rules 13.5, 22, and 30, Jim Yovino respectfully requests a 45-day extension of time, to and including August 23, 2018, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit issued its opinion on April 9, 2018, 2017. *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc) (attached as Exhibit A). Unless extended, the time within which to file a petition for a writ of certiorari will expire July 9, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

1. The Equal Pay Act provides that no covered employer “shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to ... a differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1). The circuit courts are deeply divided over an important question of federal law at the heart of this provision: whether and under what circumstances a salary differential based on an employee’s pay at a prior job is one “based on any other factor other than sex” for purposes of the Act.

At one end of the spectrum, the Seventh Circuit has held that prior salary is a factor other than sex unless the employee can demonstrate that her prior salary was itself a product of intentional sex discrimination. *See Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466 (7th Cir. 2005) (Easterbrook, J.); *see also Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003). At the other end of the spectrum, the decision below held that “prior salary, either alone or in combination with other factors,” can never “justify a wage differential.” *Rizo*, 887 F.3d at 456.

In between, courts have adopted a hodgepodge of approaches. Two circuits have allowed employers to use prior pay to explain a wage differential, but only in conjunction with other factors. *See Riser v. QEP Energy, Inc.*, 776 F.3d 1191, 1199 (10th Cir. 2015) (while “an individual’s former salary can be considered in determining whether pay disparity is based on a factor other than sex,” an employer may not “rely[] solely upon a prior salary to justify pay disparity”); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) (although “prior salary alone cannot justify pay disparity under the EPA,” a defendant may prevail if it proves that it “relied on prior salary *and*” some other factor such as “experience”). The Second Circuit, by contrast, allows employers to rely solely upon prior pay, but only if they prove they have a “legitimate business reason” for doing so. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992). There should not be entrenched disagreement about this important, frequently recurring question about the Equal Pay Act.

3. There is good cause for an extension of the time to file the petition for a writ of certiorari. *First*, petitioner and respondent are currently attempting to resolve

their dispute through settlement. However, because any settlement is unlikely to be finalized before the petition's current due date, without an extension petitioner would be forced to file—and the Court required to consider—a petition that might ultimately become moot. With an extension, however, the parties may be able to spare this Court of the need to consider the petition.

*Second*, an extension is justified because of counsel's other significant commitments between now and the existing deadline. Counsel has an opening merits brief due in this Court on July 9 in *Air & Liquid Systems Corp. v. DeVries*, No. 17-1104 (U.S.). He has three other briefs due in other appellate courts around the same time: one on July 3 in *Ad Hoc Committee v. Peabody Energy Corp.*, No. 18-1302 (8th Cir.); one on July 5 in *Diamond v. Benson Kasowitz*, No. 18-SP-0218 (D.C. Ct. App.); and one on July 11 in *Andrews v. Sirius XM Radio Inc.*, No. 18-55169 (9th Cir.).

Accordingly, petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 45 days, up to and including August 23, 2018.

Respectfully submitted,

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