No. 18-272

IN THE

Supreme Court of the United States

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,

Petitioner,

v.

AILEEN RIZO,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Once a plaintiff has shown that she is paid less than her male counterparts who do the same work, is it an affirmative defense under the Equal Pay Act, 29 U.S.C. § 206(d), that her employer set the pay for her current job solely on the basis of her prior salary?

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INTRODUCTION

The Equal Pay Act requires that employers pay women and men the same salary for "equal work on jobs the performance of which requires equal skill, effort, and responsibility." 29 U.S.C. § 206(d)(1). Petitioner concedes that it paid respondent Aileen Rizo over $10,000 less per year than it paid male math consultants who performed exactly the same job. Its sole defense is that it set her lower salary based on the wages she earned, for a different job, before it hired her.

Contrary to petitioner's argument, there is not a single circuit in the Nation that would accept this bare-bones justification as an affirmative defense to an Equal Pay Act claim. And going forward, it is unclear why even petitioner cares about the legality of setting an employee's pay based entirely on her salary at a prior job. Intervening developments in state law prohibit California employers like petitioner from using this practice in the future, regardless of how this Court answers petitioner's first question presented.

Petitioner's second question presented would not warrant this Court's time under any circumstances.

STATEMENT OF THE CASE

1. In the years following World War II, the Nation faced a "serious and endemic" problem: a "wage structure" in which men were "paid more" than women although their "duties [were] the same." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)). Both as a "matter of simple justice" and as a matter of economics, the results of this disparity were

unacceptable. 109 Cong. Rec. H9213 (daily ed. May 23, 1963) (statement of Rep. Matsunaga). Women were not taking the jobs where they were "most needed" even though many of them had "advanced education and training." *Id.* Further, women's depressed wages harmed their ability to "earn a living" and "support [their] families." 109 Cong. Rec. S8916-17 (daily ed. May 17, 1963) (statement of Sen. Hart).

To "correct" this problem, Congress passed the Equal Pay Act. Equal Pay Act, § 2(b), Pub. L. No. 88-33, 77 Stat. 56 (1963). The objective of the Act is "simple in principle: to require that 'equal work will be rewarded by equal wages.'" *Corning Glass*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963)).

Under the Act, a plaintiff can recover damages if she shows that she was paid less than a colleague of the opposite sex who performed "equal work." 29 U.S.C. § 206(d)(1), (3). To constitute "equal work," a job must "require[] equal skill, effort, and responsibility." *Id.* § 206(d)(1). Petitioner does not contest that Aileen Rizo and her male counterparts were engaged in equal work. *See* Pet. 5.

"[T]he EPA does not require" plaintiffs to provide "proof of intentional discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007). Instead, an employer becomes presumptively liable once the plaintiff has established the existence of a pay gap in which he or she is paid less than workers of the opposite sex. *Corning Glass*, 417 U.S. at 195. Petitioner no longer contests the existence of such a gap here. *See* Pet. 6; *see also* Pet. App. 78a.

The Act also creates an affirmative defense for employers who can prove that an otherwise illegal pay

gap is due to "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1). Only the fourth affirmative defense is at issue in this case.

2. Petitioner is Jim Yovino, Fresno County Superintendent of Schools, sued in his official capacity. The Fresno County Office of Education, led by the Fresno County Superintendent of Schools, provides services and technical assistance to thirty-two school districts and charter schools within the County. The Ninth Circuit accordingly referred to petitioner as "the County." Pet. App. 3a.

The County employs a number of "math consultants." These employees train high school math teachers on curricular standards. Fresno County Office of Education, *Consultant – Mathematics* (May 31, 2012), https://perma.cc/9XQL-WCNA. The County classifies them as managerial employees because, unlike classroom teachers, they coordinate curricular standards across multiple school districts in Fresno County. *See id.*

When the County posts an opening for a managerial job like math consultant, it includes the responsibilities, required qualifications, and salary range. Pet. App. 67a. It does not, however, explain how a new employee's actual salary will be set. *See id.*

From 2004 to 2015, when an applicant accepted the County's offer, the County set the individual's salary using an internal policy known as Standard Operation Procedure #1440 (SOP 1440). Pet. App. 66a. SOP 1440 eliminated the County's previous practice of considering prospective hires' experience and

qualifications in setting salaries. *Id.* The County has since abandoned SOP 1440.[1]

Under SOP 1440, the County instead calculated new employees' wages by taking their most recent salaries, adding five percent, and then placing them on the nearest step in a ten-step salary scheme. Pet. App. 66a. The only adjustment to that salary was a $600 stipend for a master's degree or a $1,200 stipend for a doctorate. RE 448.[2] Under SOP 1440, the average female employee hired into a management position was placed more than two steps below the average male employee.[3]

Aileen Rizo is a career educator. Pl. Br. in Opp'n to Summ. J. at 7. She holds a bachelor's degree in math education and master's degrees in both math education and educational technology. Pet. App. 4a. Prior to becoming a math consultant with Fresno County, she was a classroom teacher in Maricopa County, Arizona. *Id.* As part of her thirteen years'

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[1] Counsel for petitioner explained that SOP 1440 "was in effect through December 31, 2015." Mackenzie Mays, *Fresno Woman Wins Major Court Decision in Her Quest for Equal Pay for Equal Work*, Fresno Bee (Apr. 10, 2018) (quoting Michael Woods), https://perma.cc/ADH4-MAAW; *see also infra* pages 20-21 (explaining the current legal status of prior salary-only pay formulas under California law).

[2] "RE" refers to petitioner's Excerpts of Record in the court of appeals (Doc. No. BL-12).

[3] The County's own data show that the average female management employee was placed at step 6.3 on the salary scale while the average male employee was placed at step 8.8. *See* Pl. Br. in Opp'n to Summ. J. at 10. In 2009, the year respondent was hired, this gap corresponded to at least a $5,000 salary difference on the County's salary scale. *See* RE 544-54; Pl. Br. in Opp'n to Summ. J. at 10; *see also* Rizo Decl. ¶ 11.

experience in education, she had gained extensive expertise in curricular development and served as a department head. Pl. Br. in Opp'n to Summ. J. at 7.

In 2009, Ms. Rizo moved her young family to Fresno in search of the opportunity to "grow as a professional." Tr. Rizo Dep. 13. She successfully applied for the position of math consultant. The starting salary range for that position went from $62,133 for employees placed on Step 1 to $81,461 for employees placed on Step 10. RE 448. Relying solely on Ms. Rizo's salary as a classroom teacher in Maricopa County, petitioner placed her on Step 1 of its pay scale for math consultants – the lowest step – and informed her of the salary she would be paid. Pet. App. 70a-71a.

3. In 2012, Ms. Rizo discovered over lunch that her three male colleagues – who performed the same work that she did – had been initially placed on Steps 7, 7, and 9 of the County's ten-step scale. Pet. App. 71a, 77a. This had entitled each of them to starting salaries over $10,000 higher than Ms. Rizo's. *See* RE 448.

Ms. Rizo filed a formal internal challenge to the pay disparity. Pet. App. 5a. In response, the County compiled a report analyzing the demographics and pay of employees who held similar positions and used it to assert that SOP 1440 did not produce a gender disparity. Pet. App. 72a.[4]

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[4] The County's data showed that women were twice as likely as men to be placed on the lower half of the salary scale. Pl. Br. in Opp'n to Summ. J. at 10. The County's conclusion that SOP 1440 did not produce a pay disparity rests on a mistake. The County thought there was no problem because the policy had

Having failed to receive a remedy from the County, Ms. Rizo filed suit in state court against the Fresno County Superintendent of Schools, Jim Yovino, in his official capacity. Pet. App. 5a. She sought damages for violations of the Equal Pay Act, Title VII, and California anti-discrimination statutes. *See id* at 5a-6a. Petitioner removed the case to federal court. *Id.* at 64a.

After some discovery, the County moved for summary judgment. Pet. App. 6a. By this phase of the litigation, it had conceded that it paid Ms. Rizo "less than her male counterparts for the same work." *Id.* However, the County argued that it was entitled to do so because its exclusive reliance on her prior salary to set pay for her current job produced a permissible wage gap based on "any other factor other than sex" under Section 206(d)(1)(iv). *See id.*

The district court thought petitioner was wrong. It reasoned that "a pay structure based exclusively on prior wages," such as SOP 1440, "is so inherently fraught with the risk – indeed, here, the virtual certainty – that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand." Pet. App. 84a. In light of the "across-the-board pay disparity between male and female educators," the

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"placed more females in the same or similar position in the same department higher on the salary schedule than males." Pet. App. 72.

This assertion confuses absolute numbers with the relevant measure, which is the relative step distribution within each gender. The absolute number of women receiving high-step salaries was higher than the absolute number of men receiving those salaries, because there were vastly more female employees. *See* RE 544-54.

district court explained that salary systems based exclusively upon prior pay "will perpetrate that disparity" and subvert the remedial objectives of the Equal Pay Act. *Id.* at 85a.

But the district court was uncertain as to the precedent within the Ninth Circuit regarding bare reliance on prior pay under the Equal Pay Act. Pet. App. 92a. It therefore certified a narrow question for interlocutory appeal: "[W]hether, as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary." *Id.* at 92a-93a.

4. A panel of the Ninth Circuit stated that under circuit precedent, past pay could constitute an affirmative defense for an otherwise illegal pay disparity under certain circumstances. An employer could "base a pay differential on prior salary so long as it showed" that it had "used the factor reasonably in light of its stated purpose and its other practices," and that it "effectuate[d] some business policy." Pet. App. 60a. The panel therefore directed the district court to consider petitioner's rationales for its exclusive reliance on Ms. Rizo's prior salary, and determine whether they justify the evident pay disparity. *See id.* at 61a.

5. The Ninth Circuit granted rehearing en banc before a panel of eleven judges. Pet. Ap p. 1a-2a; 9th Cir. R. 35-3.

The EEOC appeared as an amicus curiae in support of Ms. Rizo. Pet. App. 33a. It directed the court's attention to the interpretive guidance contained in its Compliance Manual, which "constitute[s] a 'body of experience and informed judgment' to which [courts] may resort for guidance,"

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449 n.9 (2003) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *See* EEOC C.A. Br. 13. Since 2000, the Compliance Manual has provided that "[p]rior salary cannot, by itself, justify a compensation disparity." EEOC Compliance Manual § 10-IV(F)(2)(g). In its brief to the Ninth Circuit, the EEOC argued that "because exclusive reliance on prior salary institutionalizes the disparity between what men and women earn on average, the practice undermines the purpose of the EPA." EEOC C.A. Br. 10-11.

All eleven judges agreed with respondent and the EEOC that petitioner's bare reliance on Ms. Rizo's former pay to set her salary did not constitute an affirmative defense within the meaning of Section 206(d)(1)(iv). Pet. App. 4a. The six-judge majority explained that Section 206(d)(1)(iv) can excuse a pay differential only when that differential is based on "legitimate" factors. Pet App. 13a. Such factors "must be job related," *id.*; that is, they must be "measure[s] of work experience, ability, performance, or any other job-related quality," *id.* at 25a.

According to the panel majority, prior salary, standing alone, is not a "legitimate" factor. Pet. App. 25a. Any relationship it has to job-related factors for a current job is "attenuated." *Id.* Thus, the majority directed that "[r]ather than use a second-rate surrogate that likely masks continuing inequities," the employer must "point directly to the underlying factors for which prior salary is a rough proxy" in order to "prove its wage differential is justified." *Id.* at 25a-26a.

The majority identified two principal bases for its conclusion. First, the majority focused on the text of

the Equal Pay Act, the "authoritative statement" of the law's meaning. Pet. App. 15a (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). It began its analysis by drawing on the canons of *noscitur a sociis* and *ejusdem generis*, which require interpreting the text of the fourth affirmative defense in light of the three specific affirmative defenses listed immediately before it. *Id.* at 13a. Thus, Section 206(d)(1)(iv) is limited to those factors that are "similar" to merit, seniority, and production – and accordingly reflect "legitimate, job-related reasons." *Id.* at 13a-14a; *see also id.* at 13a (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012)).

Second, the majority found "further support[]" for its conclusion in both the "primary purpose" of the Equal Pay Act, Pet. App. 15a, and "the history of the legislative process" that produced it, *id.* at 10a. The purpose of the Act was to "eliminate long-existing 'endemic' sex-based wage disparities." *Id.* The court of appeals therefore found it "inconceivable" that Congress "would create an exception for basing new hires' salaries on those very disparities." *Id.*

In addition, Sections 206(d)(1)(i)-(iv) were added after employers voiced concern that the Act could disrupt their ability to use "bona fide job evaluation plans," in order to assess "the value of a particular job." Pet. App. 16a (citing *Corning Glass*, 417 U.S. at 200). The fourth affirmative defense responds directly to these concerns: Explaining what the defense would cover, the House Report listed "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, [and] differences based on experience, training, or

ability." *Id.* at 19a (quoting H.R. Rep. No. 88-309, at 3 (1963)). In light of the legislative record, the en banc panel found it "plain that the catchall exception" encompassed only "legitimate, job-related means of setting pay." *Id.* at 18a.

The opinion disclaimed any attempt to resolve the application of its general rule "under all circumstances." Pet. App. 12a. In particular, the majority expressly reserved the question "whether[,] or under what circumstances, past salary may play a role in the course of an individualized salary negotiation." *Id.*

Judge McKeown (joined by Judge Murguia) concurred. She described "Rizo's case [as] an easy one" – a "textbook violation" of the Equal Pay Act. Pet. App. 30a. Like the majority, Judge McKeown concluded that "prior salary alone is not a defense to unequal pay for equal work." *Id.* at 29a. In another case, prior salary might "provide a lawful benchmark for starting salary" if used "along with valid job-related factors." *Id.* at 32a. Here, however, "the majority correctly decide[d] the only issue squarely before the court." *Id.* at 29a.

Judge Callahan (joined by Judge Tallman) also agreed that "a pay system that relie[s] exclusively on prior salary is conclusively presumed to be gender based." Pet. App. 45a. Given "the history of pay discrimination and the broad purpose of the Equal Pay Act, prior pay by itself is not inherently a 'factor other than sex.'" *Id.* at 43a. Because, in this case, "the County based pay only on prior salary," the district court "properly denied it summary judgment." *Id.* at 48a. But like Judges McKeown and Murguia, Judges Callahan and Tallman thought there might be

occasions, particularly in the private sector, where "a pay system that uses prior pay as one of several factors deserves to be considered on its own merits." *Id.* at 45a; *see id.* at 38a.

Judge Watford filed a brief concurrence in the judgment. He pointed out that "even after controlling for education, work experience, and other factors," persistent gender pay disparities remain today "in virtually every sector of the American economy." Pet. App. 51a. These disparities are precisely what the Equal Pay Act was intended to combat. Because a woman's past pay is "highly likely" to "reflect, at least in part" this discrimination, *id.* at 51a, an employer can rely on past pay only if it can show that that past pay does not "perpetuate" precisely what the Act "was intended to outlaw," *id.* at 49a. In this case, petitioner had "failed" to make this showing. *Id.* at 51a.

REASONS FOR DENYING THE WRIT

I. The question whether reliance on an employee's prior salary, standing alone, can serve as an affirmative defense under the Equal Pay Act does not warrant this Court's review.

Petitioner asks this Court to "decide whether employers may consider prior salary." Pet. 10. But here the Ninth Circuit answered a narrower certified question: "[W]hether, as a matter of law under the [Equal Pay Act], 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary." Pet. App. 6a n.4.

The circuits that have addressed this question all agree that the answer is "No." The text and logic of Section 206(d) and this Court's decision in *Corning*

Glass Works v. Brennan, 417 U.S. 188 (1974), show why that answer is correct.

Moreover, contrary to the arguments of petitioner and its amici, this is not the right case for answering other, more sweeping questions about the ways in which employers set starting salaries. Most strikingly, in light of recent state legislation, the decision below does not even shape the future legal obligations of most employers in the Ninth Circuit.

A. The circuits agree that an employer cannot pay a woman less than her male counterparts solely on the basis of what she earned in her prior job.

The County claims that "[t]he circuits diverge on whether prior pay is a 'factor other than sex'" sufficient to establish an affirmative defense under Section 206(d)(1) of the Equal Pay Act. Pet. 10. The County is wrong. It confuses variations in the language the courts of appeals have used to explain their decisions with variations in outcome. All circuits agree that sole reliance on prior pay to set starting salaries does not qualify as an affirmative defense under Section 206(d)(1)(iv) when this policy results in women being paid less than men who do the same work. Thus, there is no "genuine conflict" here: On these facts, every court would reach the same conclusion. Stephen M. Shapiro et al., *Supreme Court Practice* 242 (10th ed. 2014).

As for any potential disagreement with respect to other uses of prior pay in setting salaries, this Court should "await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted).

1. Petitioner concedes that a policy of setting starting salaries based entirely on a worker's prior pay at another job would not qualify as an affirmative defense under Section 206(d)(1)(iv) in the Second, Sixth, Tenth, or Eleventh Circuits. Pet. 15-16.

The Second Circuit took this position in *Aldrich v. Randolph Central School District*, 963 F.2d 520 (2d Cir. 1992). There, a school "cleaner" brought suit on the basis that her all-female cohort made less than the district's all-male cohort of "custodians" despite the fact that both groups did the same work. *Id.* at 522-23. The district court granted the defendant's motion for summary judgment, holding that the pay differential was permissible under the Equal Pay Act because it was solely the product of a formally neutral civil service exam. *Id.* at 524.

On appeal, the Second Circuit held that the district was not entitled to summary judgment because "employers cannot meet their burden" under Section 206(d)(1)(iv) by pointing to "a gender-neutral classification system *without more." Aldrich*, 963 F.2d at 525 (emphasis added). Unless the school district could prove that the higher pay for custodians was "related to performance of the custodian's job" – that is, to the job for which the pay was being set – it would violate the Equal Pay Act to pay women less. *Id.* at 527. Reliance on the examination results alone did not "provide a valid factor-other-than-sex defense." *Id.* Likewise, an employer cannot rely on prior pay, a facially neutral factor, unless it shows that prior pay is "related to [the] performance" of an employee's current job. *Id.*

Petitioner admits that "[t]he Sixth Circuit applies the same rule" as the Second Circuit. Pet. 11. As that

court explained in *Beck-Wilson v. Principi*, 441 F.3d 353 (6th Cir. 2006), the "'factor other than sex' defense" operates as "a sort of hybrid between the seniority and merit defenses." *Id.* at 365-66. Thus, past salary can justify a pay differential only if it is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Id.* at 366 (quoting *Aldrich*, 963 F.2d at 525).

So too in the Tenth Circuit. The County cites *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015), as its example of the Tenth Circuit having "staked out yet another" position that "conflicts with both the Ninth Circuit and the Second and Sixth Circuits." Pet. 11. But had petitioner read the sentence immediately preceding those it plucks from *Riser*, it would have discovered that the Tenth Circuit allows reliance on a facially neutral policy only where any resulting difference in pay is rooted in "legitimate business-related differences in work responsibilities and qualifications *for the particular positions at issue*." *Id.* at 1199 (emphasis added). The source for this proposition? The Second Circuit's decision in *Aldrich*. *See id.* (citing *Aldrich*, 963 F.2d at 525).

In *Riser*, the defendant claimed it was entitled to pay a female employee 31% and 39% less than her two male counterparts, respectively, because of her past pay and "compensation data in the industry." *Riser*, 776 F.3d at 1198-99. The Tenth Circuit rejected that claim. *Id.* at 1199. Mirroring the decision in respondent's case, the Tenth Circuit concluded that "the EPA 'precludes an employer from relying solely upon a prior salary to justify [a] pay disparity.'" *Id.*

(quoting *Angove v. Williams-Sonoma, Inc.*, 70 Fed. Appx. 500, 508 (10th Cir. 2003)).

Finally, the Eleventh Circuit also agrees that an employer cannot establish an affirmative defense in an Equal Pay Act case "by resting on prior pay alone." *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995). Defendants face a heavy evidentiary burden to show that legitimate "business reasons reasonably explain the utilization of prior salary." *Id.* at 955-56 (internal alterations omitted) (quoting *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988)). Because the Eleventh Circuit has "consistently held that 'prior salary alone cannot justify [a] pay disparity' under the EPA," sole reliance on salary history does not absolve a defendant of liability. *Id.* at 955 (quoting *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 & n.9 (11th Cir. 1988)).

2. The Ninth Circuit's decision is entirely consistent with the decisions of the Second, Sixth, Tenth and Eleventh Circuits on the question presented here: Whether past pay alone can justify an otherwise illegal wage gap. As described above, the Ninth Circuit requires that an employer justify a differential in pay by "point[ing] directly to the underlying factors" connected to the individual's suitability for a particular job that "prove its wage differential is justified." Pet. App. 25a-26a; *see supra* pages 8-10. Employers cannot instead use past pay as "a second-rate surrogate" for the appropriate analysis. Pet. App. 25a. Here, because the County offered no evidence that Ms. Rizo's prior pay as a classroom teacher indicated anything about her qualifications for the job of math consultant, the Ninth Circuit held that the County was not entitled to summary judgment on

its affirmative defense; it could not rely on her past pay to justify its presumptively unlawful pay gap.[5]

Unlike petitioner, federal judges think the Ninth Circuit's position tracks the established consensus. A Texas district court referenced the decision here to show that "several circuits" hold that a past pay disparity cannot be the "sole justification" for wage inequality. *Duncan v. Tex. Health & Human Servs. Comm'n*, No. AU-17-CA-00023-SS, 2018 WL 1833001, at *4 n.3 (W.D. Tex. Apr. 17, 2018). Similarly, an Oklahoma district court cited the en banc opinion alongside in-circuit precedent for the proposition that prior pay, without more, cannot justify a pay disparity under Section 206(d)(1)(iv). *See Stice v. City of Tulsa*, No. 17-CV-0261-CVE-FHM, 2018 WL 3318894, at *4 (N.D. Okla. July 5, 2018).

3. Because petitioner admits that it could not have obtained summary judgment in any of the circuits already discussed, its claim of a circuit split turns entirely on how this case would be decided in the Seventh and Eighth Circuits. *See* Pet. 15-16. But these circuits would have reached the same conclusion as the others.

First, petitioner misstates the law in the Eighth Circuit. It relies exclusively on *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003). That case is inapposite, for reasons Congress explained in the Equal Pay Act's legislative history. *Taylor* involved a distinctive and permissible employment practice known as a "salary

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[5] Petitioner observes that "[i]n the Ninth Circuit, Rizo is entitled to summary judgment as to liability." Pet. 15. Whether Ms. Rizo, who has not yet moved for summary judgment, is entitled to it is a matter to be determined on remand.

retention policy." *Id.* at 716-17. Such policies enable employers to temporarily "transfer employees to other less demanding jobs" but "continue to pay them a premium rate in order to have them available when they are again needed" to resume their former responsibilities. *See* House Comm. on Education & Labor, H.R. Rep. No. 309, 88th Cong., 1st Sess., at 3 (1963). The wage gap at issue in *Taylor* was not attributable to the plaintiff's salary history; rather, it was a product of the fact that she and her male comparator usually performed different work. 321 F.3d at 716-17.

But when the Eighth Circuit considered a case more similar to Ms. Rizo's, it reached the same result as the Ninth Circuit. In *Drum v. Leeson Electrical Corp.*, 565 F.3d 1071 (8th Cir. 2009), a case ignored by petitioner, the defendant employer "attempt[ed] to justify" a plaintiff's salary "by highlighting her prior salaries." *Id.* at 1073. The Eighth Circuit rejected the employer's argument. It held that prior salary, without evidence of male employees' better "education, experience, or other qualifications," "fails to prove as a matter of law" that the discriminatory wage practices were "due to a factor other than sex." *Id.* District courts within the circuit follow that rule. *See Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871, 948 (D. Minn. 2014) ("[R]eference to the lower-paid employee's education, experience, or other qualifications is necessary to determine whether the reliance on prior salary for the higher-paid comparator is based on a factor other than sex.").

Petitioner would also lose in the Seventh Circuit. Here, too, petitioner overlooks the Circuit's foundational case construing Section 206(d)(1)(iv).

The Circuit's analysis in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987), provides two reasons why petitioner's policy would not constitute an affirmative defense under the Equal Pay Act in the Seventh Circuit.

First, the Seventh Circuit highlighted the risk of unjustifiable wage disparities when an employer looks to a worker's pay history with a "previous employer." *Covington*, 816 F.2d at 322-23. It distinguished this form of reliance on prior pay from one in which an employer looks to the salaries it paid its *own* workers. *Id.* at 322; *see also Schultz v. Dep't of Workforce Dev.*, 752 F. Supp. 2d 1015, 1030-31 (W.D. Wisc. 2010). This is because reliance on a prior employer's practices can unknowingly "perpetuate" the very wage disparities that the Equal Pay Act targets. *Covington*, 816 F.2d at 322. After all, "there are enormous difficulties involved in determining whether another business discriminated on the basis of sex." *Id.* at 323; *accord* Pet. App. 49a.

Ms. Rizo's case involves reliance on the salary she earned with a prior employer – precisely the kind of policy *Covington* warned about. And there is good reason to be concerned with that sort of reliance. Ms. Rizo's prior employer, Cartwright School District, was the defendant in at least one lawsuit alleging employment discrimination on the basis of sex. *See* Complaint at 2, 4-5, *Bailey v. Cartwright Sch. Dist.*, No. 2:11-cv-01432 (D. Ariz. July 19, 2011). While it is unclear whether Ms. Rizo's own pay at Cartwright was affected by sex discrimination, Fresno County was in no position to investigate or respond to that possibility. The risks of using external prior pay that *Covington*

presents would be at their highest in a situation like Ms. Rizo's.

Second, in *Covington*, the Seventh Circuit emphasized that there was "no evidence" that the employer's use of prior pay was "either discriminatorily applied or has a discriminatory effect." 816 F.2d at 322; *see also Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989); *EEOC v. Grinnell Corp.*, 881 F. Supp. 406, 412 (S.D. Ind. 1995) (denying summary judgment where a facially neutral prior-pay policy disproportionately "rewarded male employees").

By contrast, Ms. Rizo's case involves a policy that, while neutral on its face, systematically disadvantaged women. The County's own data show that, under SOP 1440, the average woman was placed more than two steps below the average man – corresponding to a pay disparity of over $5,000. *See supra* page 5 n.4. On these facts, the County could not satisfy *Covington*'s standard.[6]

The two Seventh Circuit cases petitioner cites, Pet. 12-13, hardly establish a conflict. *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904 (7th Cir. 2017), does not concern sole reliance on prior pay; rather, the defendant cited three separate bases for the challenged wage gap. *Id.* at 908. As for *Wernsing v.*

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[6] There was also evidence before the district court that the County "has deviated from the standards set forth in SOP 1440." Pet. App. 69a. For example, Mark Hamonds, like Ms. Rizo, "should have been placed at Step 1" under SOP 1440, but petitioner approved placing him at Step 2 instead. *Id.* 70a. His resulting starting salary was over $1,500 more per year than SOP 1440 would have dictated. *See* RE 448.

Illinois Department of Human Services, 427 F.3d 466 (7th Cir. 2005), that case concerned a transfer between departments within a state government, *id.* at 467; *see also Schultz*, 752 F. Supp. 2d at 1030 (distinguishing *Wernsing*'s facts from the plaintiff's on this basis). *Wernsing* did not purport to disturb the distinction that *Covington* drew between internal transfers and external hires. 427 F.3d at 468; *see also Schultz*, 752 F. Supp. 2d at 1030-31. Indeed, Judge Easterbrook relied on *Covington* as a correct statement of the Seventh Circuit rule. *Wernsing*, 427 F.3d at 468. District courts within the circuit have therefore continued to reject bare reliance on prior pay from a different employer as justification for a wage gap. *Schultz*, 752 F. Supp. 2d at 1030.[7]

B. In the face of changes to state law, the legality of policies like SOP 1440 under the Equal Pay Act has only minimal practical importance.

1. Petitioner has already abandoned the very policy it asks this Court to uphold. *See supra* page 4 n.1.

Indeed, it had no choice. In 2016, the California Legislature amended state law to expressly forbid policies like SOP 1440. California Labor Code

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[7] It would be a mistake to read *Wernsing* too broadly. While there is some loose language in Judge Easterbrook's opinion to the effect that "sex discrimination" is forbidden by the Equal Pay Act only if it is "an intentional wrong," 427 F.3d at 469, restricting the Act to purposeful discrimination would contradict this Court's clear statements in *Corning Glass*, 417 U.S. at 205, and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007).

Section 432.3(a) now provides that an employer "shall not rely" on an applicant's "salary history information" in determining "what salary to offer an applicant." And Section 432.3(i) expressly requires that the California analogue to the Equal Pay Act, Cal. Lab. Code § 1197.5, not be "construed to allow prior salary, by itself, to justify any disparity in compensation" between men and women.

The 2016 legislation was tailor-made to reach policies like SOP 1440. In fact, its preamble cites Ms. Rizo's case by name as an example of the "problematic" practice of "relying on prior salary to set employees' pay rates" that California law now forbids. A.B. 1676 § 1(f), (b), 2015 Reg. Sess. (Cal. 2016). State law now precludes the County from using SOP 1440 or relying on it as a defense in future state Equal Pay Act claims. Thus, petitioner's practical stake in this case is limited entirely to Ms. Rizo's individual claim for retrospective damages.

Nor is the question presented important to most other employers within the Ninth Circuit. Since 2016, Oregon and Hawaii, like California, have prohibited reliance on prior pay in setting an employee's starting salary – making policies like SOP 1440 illegal in those states. *See* Recent Legislation, *Oregon Equal Pay Act of 2017*, 131 Harv. L. Rev. 1513, 1515-16 (2018); An Act Relating to Equal Pay, S.B. 2351, 29th Leg. Reg. Sess. (Haw. 2018). These states house the vast majority of Ninth Circuit businesses and residents. As petitioner and its amici acknowledge, employers subject to conflicting state and federal law "adopt whatever rule is most stringent." Pet. 19. For residents

of covered states, state law effectively controls employment practices based on prior pay.[8]

Nor are states within the Ninth Circuit the only jurisdictions that regulate the use of prior pay to set salaries. Massachusetts, Delaware, Puerto Rico, and several major cities have passed similar laws. *See* Recent Legislation, 131 Harv. L. Rev. at 1515-16. The stringency of state and local law now means that all employers operating in these jurisdictions will forgo practices like SOP 1440 regardless of how this Court answers petitioner's first question presented. That is likely to be increasingly true, since an additional twenty states and the District of Columbia have also been considering such legislation. *See id.* at 1516. For these employers, any review by this Court would do nothing more than "satisfy a scholarly interest," *Rice v. Sioux Mem'l Park Cemetery*, 349 U.S. 70, 74-75 (1955) (dismissing certiorari as improvidently granted because of subsequent state legislation).

2. In their effort to inflate this case's importance, petitioner and its amici ask this Court to determine whether employers may "ask about and rely on prior pay." Pet. 16. But that question is neither posed by this case nor in doubt under federal law: Of course they can.

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[8] According to the 2015 Statistics of U.S. Businesses, 70% of firms in the Ninth Circuit are located in California, Oregon, and Hawaii. *See* U.S. Census Bureau, *Statistics of U.S. Businesses: Historical Data* (2015), http://www.census.gov/programs-surveys/susb/data/tables.html. Similarly, 68% of residents live in covered states. *See* U.S. Census Bureau, *American FactFinder Custom Tables* (2016).

The "widespread employment practices" that petitioner invokes, Pet. 16, are left untouched by the Equal Pay Act unless and until they result in employees of one sex being paid less than employees of another. Thus, as long as employers do not violate the Act's requirement of equal pay for equal work, they are entirely free to use prior pay to assess a candidate's level of experience or skill. And employers may continue to use prior pay to "evaluate a candidate's pay expectations," to "identify the prevailing local rates" for a given position, or to screen for "candidates whose prior salary makes it unlikely they will accept" a particular role, *id.* at 16-18, as long as those practices do not introduce an illegal wage disparity between men and women.

In short, the Act does not go as far as petitioner and its amici imply – but state law does. These facts, in combination, limit the impact of any ruling by this Court on employers' choices moving forward.

C. The Court of Appeals' decision was correct.

The Ninth Circuit rightly concluded that an employer cannot pay a female employee less than her male counterparts solely because of her prior salary at a different job with a different employer. Such a policy does not qualify as "a differential based on any other factor other than sex" within the meaning of 29 U.S.C. Section 206(d)(1)(iv). The Ninth Circuit's holding follows straightforwardly from the text, history, and logic of the Equal Pay Act.

1. As a matter of statutory language, the Act's fourth affirmative defense protects employers only if the pay differential is "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). Petitioner ignores

completely the critical phrase "any *other* factor" in its construction of the statute. *Id.* (emphasis added). The Oxford English Dictionary provides a definition of the phrase "any other" that shows that it refers to a thing "specified or understood contextually." *Other*, Oxford English Dictionary (3d ed. 2004). Congress's use of this phrase therefore highlights the importance of where Section 206(d)(1)(iv) is situated – namely, (a) in a list of (b) affirmative defenses.

a. The canons of statutory construction on which the Ninth Circuit relied, *see* Pet. App. 13a, explain how to treat a general term that appears after a list of specific provisions. *Noscitur a sociis* stands for the principle that words are to be understood by the company they keep. *Ejusdem generis* applies this principle to general provisions following specific lists: "Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015) (plurality opinion) (alteration in original) (quoting *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)). Thus, in *Yates*, the plurality defined the statutory term "any tangible object" to mean an "object[] used to record or preserve information" because it followed the specifically enumerated terms "record" and "document." *Id.* at 1087.

b. Moreover, Section 206(d)(1)(iv) involves an affirmative defense. Words in a statute must be construed "with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*,

566 U.S. 93, 101 (2012)). In this statute, the phrase "any other factor" operates to identify an exception under which an employer can justify a pay disparity that would otherwise be illegal. *See Corning Glass*, 417 U.S. at 196-97. When "a general statement of policy is qualified by an exception," this Court "read[s] the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). This rule is especially strong in the context of the Fair Labor Standards Act, within which the Equal Pay Act is located. There, exceptions are "narrowly construed against the employers seeking to assert them." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 232 n.7 (2014) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).[9]

In light of the canons of *noscitur a sociis* and *ejusdem generis* and the narrow-construction rule for FLSA exceptions, the Ninth Circuit correctly limited the fourth affirmative defense to "legitimate, job-related factors." Pet. App. 10a. The first three affirmative defenses relate to an employee's current job. Seniority rewards the "heightened value" that employees accrue through "personal work

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[9] This Court should not rely on constructions of the phrase "any other" that appear outside the Fair Labor Standards Act. For example, in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 221-23 (2008), this Court interpreted the meaning of "any other" in the phrase "any other law enforcement officer" expansively. But that case involved the Federal Tort Claims Act, 28 U.S.C. § 2680(h). This Court has long held that, because the FTCA waives the government's sovereign immunity, such a waiver "will be strictly construed, in terms of scope, in favor of the sovereign." *Lane v. Peña*, 518 U.S. 187, 195 (1996). Accordingly, "any other" in the law enforcement proviso must be construed expansively in order to restrict the government's waiver.

experiences" over time. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 535 (1983). Merit rewards skills. And quality and quantity of production reward output. In this way, the three specific affirmative defenses enable an employer to pay more to an employee who has more to offer. The fourth affirmative defense should therefore also be limited to job-related factors, and petitioner has never explained why Ms. Rizo's prior pay indicates anything about her ability to perform the job for which petitioner hired her. Nor has petitioner explained why an affirmative defense like Section 206(d)(1)(iv) should be construed broadly to include factors unrelated to job performance.

2. Additionally, petitioner's reading would render the enumerated affirmative defenses surplusage. This Court has warned against interpretations that "render superfluous" another part of the statutory text. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012). In the context of a list containing both specific and general terms, this Court "will not read a 'catchall' provision" to create general terms "that would include those specifically enumerated." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 186 (2011). Petitioner is undeterred by this longstanding rule. Its construction of Section 206(d)(1)(iv) easily includes the three specifically enumerated defenses within the catchall because none of them – merit, seniority, or quantity or quality of production – involves considering sex as such. In petitioner's reading, the specifically enumerated exceptions are unnecessary. But rather than passing a statute with a single

exception, Congress enacted a statute with four. The Ninth Circuit was right to give Congress's choice meaning.

3. Petitioner cannot escape the meaning of the text by selectively resorting to legislative history. Petitioner quotes language from a House Committee Report for the proposition that courts should construe Section 206(d)(1)(iv) broadly. Pet. 26. But it leaves out the Report's very next sentence, which provides specific examples of practices that would fall within that provision. Every example that the Report provides involves a factor related to the employee's current job that would easily satisfy the Ninth Circuit's test. *See supra* page 9 (listing the factors).

Far from serving the purposes of the Equal Pay Act, petitioner's reading would have rendered the Act a dead letter on the day it was passed. In 1963, women's wages averaged less than two thirds of men's. 109 Cong. Rec. H9199 (daily ed. May 23, 1963) (statement of Rep. Green). If prior pay could have justified a wage differential, the Act would have simply enshrined the persistent "wage differentials" it was designed to "correct." Pub. L. 88-38 § 2(a).[10]

4. Contrary to petitioner's argument, prior pay is not a job-related factor. *Cf.* Pet. 24. Petitioner is simply wrong to claim that prior pay is a good stand-in for a worker's "qualification[s], experience, and performance," *id.* – all the more so when, as here, a worker is moving into a different job. For example,

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[10] The gap persists today. On average, "the median weekly earnings of full-time workers in the '[e]ducation, training, and library occupations'" – Ms. Rizo's field – "are $1,140 for men and $897 for women." Pet. App. 75a n.6.

under petitioner's view, a law firm could pay a male first-year associate, whose pre-law school job was at a consulting firm, $190,000 per year while paying a female first-year associate, who worked her way through law school as a waitress, the minimum wage. This cannot be the law. Under the Equal Pay Act, deviations from equal pay require a tangible relationship to differences in what the plaintiff and opposite sex comparators are doing *now*.

Ms. Rizo's situation offers a powerful rebuttal to the claim that prior salary alone can legitimately explain why a female worker is being paid less than her male colleagues. Ms. Rizo had better qualifications and more experience than her male comparators. *See* Pl. Br. in Opp'n to Summ. J. at 8. Nonetheless, the County assigned her a starting salary over $10,000 lower than the salary it gave them. *See* RE 448.

5. Petitioner candidly concedes that it seeks to transform the Equal Pay Act into a statute that prohibits a wage gap only if it rests either explicitly on sex or on an ostensibly neutral criterion that is pretextual in fact – that is, a statute "focus[ed] on discriminatory intent." Pet. 21; *see also* Pet. 23 (calling the Equal Pay Act "an intentional discrimination provision").

Petitioner's argument flouts this Court's longstanding construction of the Equal Pay Act as a statute that does not require "proof of intentional discrimination." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007); *see also Corning Glass*, 417 U.S. at 205. And petitioner offers no argument for why this Court should revisit that question.

The Ninth Circuit was therefore correct in unanimously rejecting petitioner's claim that it could

pay Ms. Rizo $10,000 less per year for performing exactly the same job as her male colleagues solely on the basis of her prior salary in a different job for a different employer hundreds of miles away.

II. This case does not raise petitioner's second question presented.

The premise of petitioner's second question is that a "deceased judge[]" somehow "continue[d] to participate in the determination" of this case after he died. Pet. i. This premise defies reason. Judge Reinhardt's "participation" in this case occurred entirely during his lifetime. That the decision was not publicly announced prior to his death does not change its validity.

A. Nothing about the composition of the en banc panel requires this Court's review.

1. Petitioner does not question the legal force of the Ninth Circuit's "final" judgment. Pet. 33. It is wise not to: "[S]ettled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified." *Nguyen v. United States*, 539 U.S. 69, 82 (2003); *see also New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674, 686 (2010). Thus, even if one vote were discarded, the continued presence of ten other Article III judges on the en banc panel would more than meet the requirement for quorum.[11] Having conceded that the judgment below is binding, petitioner's second

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[11] An en banc panel has quorum if it is composed of the "majority of the number of judges authorized to constitute a court or panel thereof." 28 U.S.C. § 46(d). The Ninth Circuit uses eleven judge panels when sitting en banc, so quorum is met as long as six authorized judges are empaneled. *See* 9th Cir. R. 35-3; *see also* Act of Oct. 20, 1978, § 7, Pub. L. No. 95-486, 92 Stat. 1629.

question presented amounts to nothing more than an academic inquiry: Nothing about the answer to that question would change the outcome of this case. *Cf.* Pet. 33.

2. Unable to assail the judgment, petitioner quibbles instead with the first line of the opinion – specifically, the words "Reinhardt, Circuit Judge." Pet. App. 2a. Set aside, for a moment, that this Court "does not review lower courts' opinions, but their *judgments*." *Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) (emphasis in original). Set aside also that "each Court of Appeals is vested with a wide latitude of discretion to decide for itself" just how the power to review cases en banc "shall be exercised." *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 259 (1953). There remains a serious flaw in petitioner's objection: The Ninth Circuit here did exactly what this Court once did when faced with similar circumstances following the death of a Justice.

Justice Brewer died after the Court had heard and voted on *J.W. Frellsen & Co. v. Crandell*, 217 U.S. 71 (1910), but before a judgment was entered and announced publicly. *Id.* at 75. Nonetheless, his fully-completed draft was "adopted as the opinion of the court." *Id.* And he was given express attribution for the "opinion, including the preliminary statement." *Id.* This Court simply included a short addendum noting that the opinion had been fully written – and joined by all the other Justices – prior to Justice Brewer's "lamented death." *Id.*

Here, the Ninth Circuit took exactly the same approach. It explained that Judge Reinhardt had fully participated in the case, and "authored this opinion" in the period "[p]rior to his death." Pet App. 1a n.*. The

footnote also clarified that his opinion and "all concurrences were final, and voting was completed prior to his death." *Id.* Petitioner's sole retort is that in *Frellsen*, the opinion was "recirculated and again agreed to" after Justice Brewer had died. Pet. 31 (quoting *Frellsen*, 217 U.S. at 75). Petitioner does not explain why this distinction is significant, because it cannot. The footnote here informs the public that the Ninth Circuit followed a procedure parallel to the recirculation in *Frellsen*. By signing onto the footnote, the ten remaining members of the en banc panel indicated their continued adherence to their earlier positions.

Petitioner's attack on the Ninth Circuit's opinion is perverse. If it were improper for the Ninth Circuit to issue the opinion in the form that it did, then the remedy would seem to be to take Judge Reinhardt's name off the list of judges who sat on the en banc panel. But that would mean that the opinion that appears on pages 2a to 28a of the Petition Appendix would no longer be an opinion of the court announcing a binding rule for future cases. Reaching petitioner's first question presented would therefore do nothing more than "give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163 (1923). That is not why this Court grants certiorari. *Id.* [12]

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[12] The opinion would not declare a binding rule because it would have the support of only five of ten judges. Under the rules of *Marks v. United States*, 430 U.S. 188, 193 (1977), and *Bradley v. Henry*, 518 F.3d 657, 658 (9th Cir. 2008), this Court would therefore have to parse the four opinions below to determine what rule garnered a majority of the judges' votes.

B. A judge's participation in a case ends when he has voted and finalized his opinion.

In any event, the facts of this case do not present any question as to whether deceased judges can "participate in a decision." Pet. 33. Since the time of *Marbury v. Madison*, our law has recognized that when a high government official completes performance of an official act, that act remains valid even if he leaves office before his bureaucratic staff performs any final ministerial functions required to promulgate it. 1 Cranch (5 U.S.) 137, 158-59 (1803).

A clerk entering a finalized opinion is a canonical example of a ministerial task. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232-33 (1958); *Comm'r v. Estate of Bedford*, 325 U.S. 283, 286 (1945). There is no disagreement among the circuits on this matter. *See, e.g.*, *United States v. Hunt*, 513 F.2d 129, 137 (10th Cir. 1975); *Forstner Chain Corp. v. Marvel Jewelry Mfg. Co.*, 177 F.2d 572, 576 (1st Cir. 1949).

Thus, a judge's death or resignation will not vitiate an opinion once it is final – that is, once an opinion "evidences the judge's intention that it shall be his final act in the case." *F. & M. Schaefer Brewing Co.*, 356 U.S. at 234. This Court does not require that a judge perform any "peculiar formal act" to signify the end of his participation in a case, provided that his

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Because the concurrences took different approaches to explaining precisely why petitioner's policy did not satisfy Section 206(d)(1)(iv), it is not entirely clear what the narrowest grounds would be. And figuring that out is hardly an appropriate use of this Court's time.

intention is sufficiently clear. *United States v. Hark*, 320 U.S. 531, 534 (1944).

This approach makes sense. Under petitioner's logic, if a judge were to suffer a heart attack after sending her opinion to the clerk's office, mere seconds before the clerk entered the opinion onto the public docket, the entire case would have to be heard anew. This cannot be right. Requiring a new proceeding on facts like these would be an absurd waste of judicial resources, and deeply unfair to the parties.

Here, the Ninth Circuit, on the basis of its knowledge of facts that petitioner does not dispute, explained that the opinions, concurrences, and voting were all "final" prior to Judge Reinhardt's death. Pet. App. 1a n.*. All that remained was for the Clerk of the Ninth Circuit to "prepare, sign, and enter the judgment." Fed. R. App. P. 36. Because these tasks are purely ministerial, Judge Reinhart's participation in the case was complete before he died.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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