

In the Supreme Court of the United States

TAUNO WAIDLA,

Petitioner,

v.

CHRISTOPHER PIERCE, WARDEN,

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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**CAPITAL CASE
QUESTION PRESENTED**

Whether the court of appeals acted within its authority when, upon the retirement of one member of a three-judge panel, a new panelist was appointed while a petition for rehearing was pending and the resulting panel vacated the previously filed opinion and filed a new one.

DIRECTLY RELATED PROCEEDINGS

United States Supreme Court:

Waidla v. California, No. 00-6257 (certiorari denied November 27, 2000).

Waidla v. California, No. 05-5114 (certiorari denied October 11, 2005).

United States Court of Appeals for the Ninth Circuit:

Waidla v. Davis, Nos. 18-99001, 18-99002 (judgment entered December 23, 2024; petition for rehearing en banc denied December 22, 2025) (this case below).

United States District Court for the Central District of California:

Waidla v. Ornoski, No. 2:01-cv-0650-AG (judgment entered December 18, 2017) (this case below).

California Supreme Court:

In re Waidla, No. S102401 (judgment entered April 5, 2025).

People v. Waidla, No. S020161 (judgment entered April 6, 2000).

In re Waidla, No. S076438 (judgment entered November 10, 1999).

Los Angeles County Superior Court:

People v. Waidla, No. A711340 (judgment entered March 8, 1991).

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STATEMENT

1. Petitioner Tauno Waidla was an Estonian who defected from the Soviet Army, received asylum in the United States, and was taken in by fellow refugees Viivi and Avo Piirisild at their home in North Hollywood. Pet. App. 69-70. When a dispute arose about whether the Piirisilds owed Waidla a car, he threatened to kill Avo and was told to leave. *Id.* Later, Waidla and his friend took advantage of Avo's absence to go to the Piirisilds' home, force entry, and kill Viivi with a hatchet. *Id.* at 71. They pawned her jewelry and used her credit card to fly to New York. *Id.* Her body was found two days later, with broken facial bones, multiple stab wounds, and signs of strangulation. *Id.*

The next month, Waidla was arrested near the Canadian border, carrying a loaded handgun. Pet. App. 73. He had a note in which he had anticipated dying with a gun that would prevent him from being "taken alive." *Id.* After waiving his constitutional rights, he admitted to killing Viivi. *Id.* at 74.

2. At trial, Waidla denied involvement in the murder and testified that he had been coerced by police to confess. Pet. App. 76, 244. He testified about the Soviet occupation of Estonia, including how poorly Baltic draftees such as himself were treated in the Soviet Army. *Id.* at 105. And he introduced into evidence an article he had written, which detailed conditions so harsh during Waidla's Soviet military service that "all [his] wish[es] to exist disappear[ed]." *Id.* at 77-78.

The jury found Waidla guilty of first degree murder. Pet. App. 68. The jury also found that he committed the murder during the commission of a robbery and a burglary, and that he had used a hatchet. *Id.*

The prosecutor did not present additional evidence at the penalty phase. Pet. App. 77. Nor did defense counsel, who told the court that he was relying on evidence that he had introduced at the guilt phase “in anticipation of not presenting further evidence at the penalty phase.” *Id.* at 298. The prosecution’s penalty-phase argument focused on “the horrific nature of the crime.” *Id.* at 79. Waidla’s counsel “principally pleaded for the jury’s mercy,” drawing attention to Waidla’s youth and lack of criminal history, and arguing that his having “no one who could testify to his character” showed “that he was ‘essentially alone in this world.’” *Id.* The jury returned a verdict of death. *Id.* at 80.

3. On direct appeal, the California Supreme Court affirmed the conviction and sentence. *See* Pet. App. 405. This Court denied certiorari. *Waidla v. California*, 531 U.S. 1018 (2000) (No. 05-5114).

4. In state habeas proceedings, Waidla claimed that his trial counsel was ineffective for failing to investigate and present additional mitigation evidence. *See* Pet. App. 80-81 & n.4. The California Supreme Court summarily denied the claim on the merits. *Id.*

5. In Waidla’s federal habeas case, however, the district court granted relief on that claim. Pet. App. 238. The court held that it was unreasonable

for the California Supreme Court not to find deficient performance because trial counsel did not present evidence of Waidla's good behavior in pretrial custody, *id.* at 287-289, did not develop evidence on Waidla's background and upbringing, *id.* at 315-316, and did not present additional evidence about Waidla's harsh treatment in the Soviet Army, *id.* at 298-299.

The court also concluded that the California Supreme Court could not reasonably have determined that the deficiencies were nonprejudicial. Pet. App. 333. While the evidence at issue was not "as compelling as many of the epic horror stories that seem all too prevalent among capital murder defendants," the court believed it "might [have] humaniz[ed]" Waidla, by showing that "despite some hardships, [he] was raised by his extended family in a loving and secure environment, was well-liked . . . , did reasonably well in school and in sports, and exhibited absolutely no violent or antisocial behavior." Pet. App. 309.

6. The State appealed the grant of relief and Waidla cross-appealed on the denial of relief as to guilt.

a. A panel of the Ninth Circuit initially issued an opinion affirming the district court, joined by Judges Wardlaw and Watford. Pet. App. 175-236. The opinion noted that, after holding the California Supreme Court's decision unreasonable, the district court did not explicitly proceed to decide whether the ineffective assistance claim was meritorious under de novo review—a step that "typical[ly]" precedes the granting of federal habeas relief. *Id.* at 203 n.1.

The opinion explained, however, that the State had “forfeited” any objection that the district court had therefore erred by granting relief based on documentary evidence accompanying Waidla’s petition, rather than on the actual evidence admitted in a federal evidentiary hearing that took place prior to this Court’s decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Id.*

The court held that the California Supreme Court could not reasonably have found trial counsel’s performance to be effective, Pet. App. 193-204, or found the deficiencies nonprejudicial, *id.* at 206-211. With respect to prejudice, the opinion noted the jury’s lengthy deliberations, *id.* at 206, and explained that evidence of Waidla’s strong work ethic, his marksmanship as a teen, his photography skills, and his employment in jail awaiting trial might have countered the impression that he was entitled and parasitic. *Id.* at 207. Evidence of Waidla’s “pro-social nature,” “distaste for conflict,” and “peaceable disposition” could likewise have contributed to his mitigation. *Id.* at 208. And evidence about Waidla’s childhood and army experiences would have humanized him and demonstrated his ability to withstand hardships. *Id.* at 208-209. The court acknowledged that the resulting mitigation case would have been “modest.” *Id.* at 211; *see id.* (noting that Waidla’s social history “does not reveal facts that often support a finding of prejudice” and “good character evidence sometimes lacks persuasive force” in the face of brutal crimes). Nevertheless, the court concluded, the “crucial[]” question was whether “fairminded jurists could conclude that this mitigation evidence gives rise to a

reasonable probability that at least one juror would have voted differently,” which the court found to be the case. *Id.* at 211.

Judge Miller dissented, opining that Waidla had “not shown that it was unreasonable for the California Supreme Court” to reject his claims of deficient performance. Pet. App. 225.¹ In any event, Judge Miller continued, it was not unreasonable for that court to determine that there was no prejudice, given how “feeble” Waidla’s additional mitigation evidence would have been compared to the facts of the offense. *Id.* at 232; *see id.* at 231-236.

b. The State filed a petition for panel rehearing. *See* Pet. App. 160-174. The petition argued that the panel was wrong to view the State as having forfeited arguments about the impropriety of the district court granting relief based on the evidence submitted in support of Waidla’s petition rather than the evidence that was developed at the federal evidentiary hearing. *Id.* A judge who was not part of the original panel requested “notice of the panel’s vote.” *See id.* at. 5.

Because Judge Watford had retired and Judges Wardlaw and Miller were in disagreement “on the merits of the case itself,” they requested that a third judge be drawn to complete the panel. *See* Pet. App. 5. That request was pursuant to a Ninth Circuit General Order providing that “after a matter is

¹ Judge Miller explained that counsel’s performance was not deficient, given Waidla’s instruction to protect his family and friends in Estonia, the “powerful evidence of abuse” in the Soviet Army that had already been presented through Waidla’s testimony and article, and the weak persuasive value of Waidla’s behavior awaiting trial. *Id.* at 225-231.

under submission to a three-judge panel,” if a “judge becomes unavailable by reason of death, disability, recusal, or retirement” and “the remaining judges disagree,” “the Clerk shall draw a replacement judge.” Ninth Cir. Gen. Order 3.2(h). Judge Christen was drawn to complete the panel, and at her request the court held additional argument. Pet. App. 140.

c. The result was a new per curiam opinion, joined by Judges Miller and Christen. Pet. App. 63, 69 & n.1. The new opinion vacated the prior opinion, reversed the district court’s grant of habeas relief, and denied the rehearing petition as moot. *Id.* at 101-138. Without determining whether trial counsel’s performance was deficient, the opinion held that habeas relief was unavailable because the California Supreme Court could have reasonably concluded “that Waidla was not prejudiced.” *Id.* at 101.

Waidla’s new evidence paled next to the “horrific nature of [the] crime,” and none of it “could explain the shocking and unexpected nature of the attack against Viivi.” Pet. App. 108. Although Waidla had been separated from his parents as a child, he was raised by “a caring great-uncle,” “did well at school” and sports, and “excelled in marksmanship.” *Id.* at 102. Introducing those facts could have led jurors to decide that “Waidla’s premeditated murder of the woman who took him in and treated him like family . . . made him more morally culpable, not less.” *Id.* Fairminded jurists could have considered additional evidence on Waidla’s army experience to be cumulative or insufficient to make a difference, given what jurors already had from Waidla’s testimony and

article. *Id.* at 105. And the proffered evidence of Waidla’s behavior awaiting trial may not have been admissible, *id.* at 106-107, and was in any event insignificant compared to “the substantial aggravating evidence” of his violent attack on Viivi, *id.* at 105-108.

Judge Wardlaw dissented, relying on reasoning similar to that in the previous panel’s vacated opinion. Pet. App. 118-138.

d. Waidla filed a petition for rehearing en banc contesting the reconstituted panel’s ability to supersede the original opinion. The court denied the petition, with no judge requesting a vote but with Judge Wardlaw issuing an opinion concurring in the denial. Pet. App. 2-20. She acknowledged that the Ninth Circuit’s General Orders permitted the appointment of the new judge and permitted the reconstituted panel to reach a different result following that appointment. *Id.* at 2. However, she opined, the Ninth Circuit’s General Order governing such substitutions should be changed. *Id.* at 2-20.

ARGUMENT

Waidla contends that, when Judge Watford retired and the two remaining judges were in disagreement and requested a replacement panelist be drawn while the State’s rehearing petition was pending, it was error for the addition of a third panelist to result in a new opinion replacing a prior opinion in the case without the rehearing petition being granted. But in completing the panel with a new judge empowered to consider the case on par with the other panelists, the court of appeals followed longstanding principles of judicial procedure and violated no statute, rule, or judicial doctrine. The Ninth

Circuit’s General Order implicates no conflict among the courts of appeal. Nor is the question presented nearly as important as Waidla contends, given the confluence of extremely rare events that is necessary for it to arise. The petition for certiorari should be denied.

1. a. The retirement of Judge Watford left the panel with two judges: enough to adjudicate matters on which they agreed, but not enough to decide issues on which they disagreed. *See Yovino v. Rizo*, 586 U.S. 181, 185-186 (2019) (in appellate panels, “two judges constitute a quorum” and are able to continue adjudicating matters related to the case until it is final, “provided, of course, that they agree”). As Waidla does not appear to contest, and as courts of appeal appear to universally recognize, until the mandate issues, a panel has authority to reconsider an original disposition that was erroneous.² Here, with the two assigned judges in disagreement, a third judge was drawn, *see* Pet. App. 5, and that judge participated with the others in exercising the

² *See, e.g., Charpentier v. Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007) (“Before our mandate issues, we have the power to alter or modify our judgment.”); *Carver v. Lehman*, 558 F.3d 869, 878-879 (9th Cir. 2009) (“Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel at the request of the parties pursuant to a petition for panel rehearing, in response to an internal memorandum from another member of the court who believes that some part of the published opinion is in error, or sua sponte by the panel itself.”); *United States v. Sanchez*, 3 F.3d 366, 366 (11th Cir. 1993) (where mandate has not issued, prior decision “is properly the subject of [panel’s] sua sponte reconsideration”); D.C. Cir. Internal Operating Proc., pt. XIII.B.1 (“[p]rior to . . . issuance of the Court’s mandate, a panel may reconsider or amend its decision” and order new or supplemental briefing and oral argument”).

panel's power by vacating an erroneous opinion and denying the rehearing petition as moot.

That procedure reflected both the court of appeals' General Orders and a fundamental principle: when a judge becomes unavailable during the pendency of a case, judicial power transfers to a new judge who assumes the prior judge's powers, including any power the prior judge would have had to reconsider past decisions. In *Life & Fire Insurance Co. of New York v. Wilson's Heirs*, 33 U.S. 291 (1834), for instance, a federal district judge heard evidence and entered judgment in the plaintiff's favor, but died without signing the judgment. *See id.* at 292-293. The judge who replaced him refused to sign the judgment. *Id.* His reasons were that he could neither "grant a new trial" on a judgment "not rendered by him," *id.* at 303, nor "sanction the judgment, by his signature" if "not acquainted with the facts and circumstances." *Id.* This Court held that in the absence of an order granting a new trial, the judge was required to complete the ministerial act of signing the judgment. *Id.* But the Court left no doubt that the judge was "mistaken" in supposing that a replacement judge has no power to "grant a new trial." *Id.* Notwithstanding the change in judges, "the court remains the same, and the charge of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties." *Id.* A new judge "as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done." *Id.*

Under those principles, the drawing and participation of Judge Christen here was proper. The mandate had not issued, so under longstanding principles of appellate law the panel had the power—even without any pending petition—to examine and correct potential errors in its original opinion. And the State’s rehearing petition—until eventually mooted by the new opinion—was pending for determination. Since neither of those things could happen with just two judges in disagreement, there was no error in substituting Judge Christen “as the successor of [her] predecessor,” with “the same powers” and a “right to act” “as fully as [her] predecessor could have done.” *Wilson’s Heirs*, 33 U.S. at 303.

b. Waidla’s primary argument to the contrary (Pet. 16-17) is that the substituted judge’s participation violated 28 U.S.C. § 46(c). That provision mandates that, except in en banc proceedings, cases in the regional courts of appeals “shall be heard and determined by a court or panel of not more than three judges.” *Id.* There was no violation here, since three judges were involved in the first argument and decision, and three in the final one. Indeed, it was Judge Watford’s inability to participate in the final decision that led to Judge Christen’s being drawn in replacement.

Waidla argues that since Judges Wardlaw and Miller were joined by Judge Watford in the first opinion, and Judge Christen in the second, the case was decided by a total of four judges. Pet. 14-17. But that creative math cannot be what Section 46 has in mind. Waidla’s interpretation would also mean that

once three judges have participated in “hear[ing]” a case, 28 U.S.C. § 46(c), no subsequent substitutions are possible. That would prevent the drawing of a third judge and reargument in the event of one judge’s post-argument unavailability even before any opinion issued. And Waidla’s interpretation would totally disable courts from deciding petitions for rehearing or altering opinions—even on uncontested grounds—if two members of the panel became unable to continue due to death, retirement, or recusal: a replacement would cause more than three judges to have “decide[d]” the case, but without a replacement the case could not proceed at all. *See id.* § 46(d) (quorum requires two judges). Congress could not have intended parties to be so inexplicably deprived of decisions on the merits—or to force courts to engage in en banc procedures for cases that would not otherwise merit that unusual and unwieldy treatment.

Waidla’s interpretation of Section 46(c) would raise additional concerns: It effectively freezes in time a *retired* judge’s vote on the merits—with no opportunity for that judge to be persuaded by the parties’ or other judges’ arguments. In *Yovino*, this Court rejected the practice of “counting . . . as a member of the majority” the vote of a judge who had cast his vote but died before issuance of a decision. *Yovino*, 586 U.S. at 186. Yet Waidla would have the previous vote of a retired judge effectively combined with one active judge to outweigh another active judge’s ability to correct flaws in a decision that was

still within the panel’s jurisdiction. That might raise questions under Section 46(c)—but what happened here does not.

And because the decision to appoint a substitute judge violated no express provision of Section 46, it lay within the court’s “wide latitude of discretion.” *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 259 (1953). This Court has eschewed interpretations of Section 46 that would “involve it unnecessarily in the internal administration of the Courts of Appeals.” *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1, 4 (1963). Thus, *Shenker* affirmed as “clearly within the scope of the court’s discretion” a circuit rule requiring an absolute majority of circuit judges to vote for review, rather than a majority of those participating in the vote. 374 U.S. at 4. And *Western Pacific* deemed it “quite clear” that courts of appeals have room to choose their own “administrative machinery” for en banc hearings. 345 U.S. at 250, 258. Similar reasoning applies to the decision here.

c. Waidla additionally contends (Pet. 17-21) that the court of appeals violated Federal Rule of Appellate Procedure 40(b)(1) because the original panel opinion had not “overlooked or misapprehended the relevant facts and legal standards as to the *Strickland* prejudice prong.” Pet. 20. But Waidla is relying on that rule’s requirements for the “[c]ontent of a [p]etition,” Fed. R. App. P. 40(b)(1). That provision (which the State’s petition complied with) is addressed to parties seeking rehearing, requiring that a “petition for panel rehearing must . . . state with particularity” the “point[s] of law that the

petitioner believes the court has overlooked or misapprehended.” *Id.* It does not purport to limit *courts’* ability to grant rehearing.³ And it does not address courts’ inherent ability to alter their opinions, with or without further briefing and argument, if they become aware of errors before the mandate issues. *See supra* p. 8 & n.2. In any event, the new opinion reflects the conclusion that the original opinion *did* misapprehend how federal habeas standards and *Strickland* applied to the facts of the case.

Similarly, there is no merit to Waidla’s contention that there was a violation of Rule 40 because the panel did not “address the [petition for rehearing] before proceeding with reargument.” Pet. 20. Under that rule, “[o]ral argument on whether to grant [a petition for rehearing] is not permitted.” Fed. R. App. P. 40(d)(5). But the court here did not use additional argument to decide “whether to grant” the petition. Instead, the result was a new decision which “moot[ed]” the petition for rehearing. Pet. App. 69 n.1. The panel’s power to order that additional argument did not depend on how it decided the petition for rehearing. *See supra* p. 8 n.2.

Finally, Waidla argues that rehearings should only occur, and an original decision be altered, if a judge who joined the original decision concurs. As

³ The Tenth Circuit, unlike the Ninth Circuit, has a local rule that directly regulates the court’s decision to grant panel rehearing. Tenth Cir. R. 40.1 (“Panel rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.”). Then-Judge Gorsuch considered and cited that local rule—not the federal rules—in explaining why he did not vote for panel rehearing in *Williams v. Jones*, 583 F.3d 1254, 1256 n.1 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc).

Waidla notes (Pet. 26), *this* Court’s rules expressly provide that a rehearing petition cannot be granted except “at the instance of a Justice who concurred in the judgment or decision.” Sup. Ct. R. 44.1. The absence of anything similar in the Federal Rules of Appellate Procedure simply underscores that no similar requirement applies in the Circuits.

d. Lastly, Waidla raises entirely insubstantial arguments that the court of appeals “misapplied its own internal rules” (Pet. 28-31) and “violate[d] the law-of-the-circuit doctrine” (Pet. 31-33). Those would be unusual contentions for this Court to decide, since “[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties.” *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). And in any event, Waidla’s assertions are incorrect.

Waidla argues (Pet. 28) that once the opinion issued, the case was no longer “under” submission so Judge Watford’s retirement could not trigger Ninth Circuit General Order § 3.2(h). But Judge Watford retired “*after* [the case] was under submission to a three-judge panel,” as that provision specifies. *Id.* (emphasis added). The case was submitted at the original argument, and Judge Watford’s retirement came later.

And Waidla’s contention that the reconstituted panel “violate[d] the law-of-the-circuit doctrine” by issuing an amended opinion instead of considering itself bound by the previous opinion is nonsensical. Pet. 31-33. That reasoning would prevent any panel from ever reconsidering its prior decision in the same case—a power that panels clearly have. *See supra* p. 8 & n.2. In fact, there

was no conflict because when issuing its new opinion, the panel vacated the prior one. Pet. App. 69 n.1.

2. Waidla asserts that this case implicates a “split” between the Ninth and Federal Circuits—which allow substituted judges to participate in altering a decision—and the “majority” of other circuits, which he claims do not. Pet. 21, 26. But Waidla vastly overstates the evidence of any divergence.

a. As this case illustrates, Waidla is correct that the Ninth Circuit allows such substitutions—although the actual occasions for them have been exceedingly rare. *See infra* p. 20. Waidla is also correct that the Federal Circuit allows them. *See Novartis Pharms. Corp. v. Accord Healthcare, Inc.*, 38 F.4th 1013, 1018 (Fed. Cir. 2022), cert. denied, 143 S. Ct. 349 (2022) (No. 22-671).

But Waidla is wrong to portray those courts as anomalous. Several Circuits appear never to have confronted the issue. And at least four other Circuits explicitly allow the same procedure. The Second Circuit’s Internal Operating Procedures explain without limitation that “if for any reason a panel judge ceases to participate in consideration of [a] matter,” the two remaining judges may request the designation of a third judge. 2d Cir. Internal Operating Proc. E(b). The resulting three judges may reach a new decision. *See, e.g.*,

United States v. Desimone, 140 F.3d 457, 458 (2d Cir. 1998); *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230 (2d Cir. 1998).⁴

The Third Circuit’s Internal Operating Procedures explain that where “a judge assigned to a panel becomes unavailable for any reason, the chief judge in his or her discretion will decide whether to reconstitute the panel by naming a substitute.” 3d Cir. Internal Operating Proc. 12.1. That broad language contains no obvious exclusion if the unavailability occurs while rehearing determinations are pending. *See id.*

The Sixth Circuit likewise recognizes the ability to appoint replacement judges where the mandate has not issued—as happened in *Hodge v. Jordan*, 95 F.4th 393 (6th Cir. 2024). There, “[o]ne of the original panelists in the majority . . . took inactive status, and was replaced by another judge, who joined the original dissent to create a new majority contrary to the original majority opinion in this matter.” *Id.* at 403 (Siler, J., dissenting). Although the new opinion drew a dissent, that dissent took issue only with the new opinion’s merits—not the new judge’s participation. *Id.* Waidla wrongly suggests that *Hodge* should be ignored because the second panel’s decision was itself later superseded on rehearing en banc. Pet. 24 & n.9. But the en banc

⁴ As Waidla notes (Pet. 22), the Second Circuit chose to grant rehearing en banc where the death of one judge before the filing of a rehearing petition left the original panel members “divided” in *New York. ex rel. Abrams v. 11 Cornwell Co.*, 718 F.2d 22 (2d Cir. 1983) (en banc). But the en banc procedure was warranted by “the potentially recurring nature and significance of the [case’s] issue.” *Id.* at 24. The court did not imply that in other circumstances it would be improper to simply appoint a third judge.

decision likewise disagreed with the second panel opinion only on the merits, stating no disagreement with the substitution process. *See Hodge v. Plappert*, 136 F.4th 648, 657-658 (6th Cir. 2025) (en banc). Nor is *Hodge* the only case where the Sixth Circuit has allowed the replacement of a retired panelist before the mandate issued, with the reconstituted panel amending the original opinion. *See Dye v. Hofbauer*, 111 F. App'x 363, 363-364 (6th Cir. 2004).⁵

Finally, published D.C. Circuit precedent reflects that a new judge may be assigned to decide a petition for rehearing after a member of the original three-judge panel becomes unavailable, even if the resulting judgment differs from the prior one. *See Hodge v. Evans Fin. Corp.*, 823 F.2d 559 (D.C. Cir. 1987); *id.* at 571 (MacKinnon, J., dissenting in part and concurring in part) (noting those procedural developments without objecting to them).⁶

⁵ This Court granted certiorari and reversed the resulting judgment on the merits, but without questioning the acknowledged replacement of an unavailable panelist. *Dye v. Hofbauer*, 546 U.S. 1, 2-3 (2005).

⁶ Waidla points to and attaches an unpublished order, in a different D.C. Circuit case, noting that after a panelist's retirement a petition for panel rehearing was "denied as the current panel is equally divided." Pet. App. 406; *see* Pet. 22. But that brief statement contains no indication of an inability to draw a third judge. It may as well reflect a discretionary decision, given that the full Court had simultaneously denied en banc review and multiple judges were recused. *See Order, Mexichem Fluor, Inc. v. EPA*, No. 15-1328 (Jan. 26, 2018) (denying petitions for en banc review and noting that Judges Millett and Katsas did not participate).

b. In arguing that some courts follow a contrary rule, Waidla relies largely on cases in which there was no reason to empanel a third judge as a tie-breaker, because the two judges who remained from the original panel agreed. Pet. 23-24. For instance, in *Delgado v. Dep’t of Justice*, 979 F.3d 550, 552 n.* (7th Cir. 2020), where “[t]hen-Circuit Judge Barrett was a member of the original panel but did not participate in consideration of the petition for panel rehearing,” the two remaining panelists issued a unanimous amended opinion. *See Delgado v. Dep’t of Justice*, 966 F.3d 556 (7th Cir. 2020). And Waidla’s other cases likewise feature apparent agreement—or at least no sign of disagreement. *See, e.g., Jaroslawicz v. M&T Bank Corp.*, 925 F.3d 605, 6065-606 (3d Cir. 2019) (noting “remaining judges[.]” vote to grant rehearing); *Murray v. NBC, Inc.*, 35 F.3d 45 (2d Cir. 1994); *Doebereiner v. Sohio Oil Co.*, 893 F.2d 1275, 1276 & n.* (11th Cir. 1990); *United States v. Prout*, 529 F.2d 999 (5th Cir. 1976).⁷ Such cases do not mean that those courts would have refrained from impaneling a third judge in the case of disagreement on the case’s outcome.⁸ Nor do they mean that a request for a third colleague would have been rejected if made by both remaining judges, as happened here.⁹

⁷ Waidla (Pet. 23) cites a Fifth Circuit rule specifying that “[p]etitions for rehearing of panel decisions are reviewed by panel members only.” Fifth Cir. R. 40.2. But that says nothing about panel *substitutions*—it simply clarifies that petitions that do not seek en banc rehearing are not circulated to the full (continued...)

* * *

This is not the first time this Court has encountered assertions that “the Ninth and Federal Circuits are alone” in permitting a newly assigned judge to participate in deciding rehearing petitions when a prior panelist becomes unavailable. Pet. 27. Similar claims of an “entrenched and lopsided circuit conflict” were made just four Terms ago. See Pet. for Writ of Certiorari at 18, *Novartis Pharm. Corp. v. HEC Pharm. Co.*, No. 22-671 (Jan. 18, 2023); see also Amicus Br. of Retired U.S. Circuit Judges, *Novartis Pharm.*, *supra*, at 11 (Feb. 21, 2023). This Court denied certiorari without relisting. See 143 S. Ct. 1748 (2023). There was no conflict then, and there is none now.

court. In fact, in the Fifth Circuit, “if a judge recuses, or is disqualified, he or she immediately notifies the other members of the panel, and arrangements are made for a substitute judge.” 5th Cir. Internal Operating Proc., at 47.

⁸ As Waidla notes (Pet. 22-23), a Third Circuit order in *Lara v. Comm’r Pennsylvania State Police*, 130 F.4th 65, 66 (3d Cir. 2025), denied panel and en banc rehearing with “no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing.” But it is not clear that the remaining panel members were divided—the order does not specify whether Judge Restrepo voted for panel rehearing or only en banc rehearing. The Third Circuit’s Internal Operating Procedures, on their face, give the Chief Judge discretion to appoint a third judge. See *supra* p. 16. The decision not to do so in *Lara* may reflect a lack of any request by the remaining panelists, or the sentiment of the full court as revealed in the en banc poll. In Waidla’s case, both remaining panelists requested that a third judge be drawn. Pet. App. 4.

⁹ In one Eleventh Circuit case, a petition for rehearing was denied after a judge’s retirement, with no third judge being added. But the order does not reflect whether either remaining judge wished for a third colleague to be added—and before the mandate issued, the prior decision was superseded because the panel of two judges dismissed the entire case as moot. See Order, *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.*, No. 12-10793 (Nov. 18, 2013); Order, *Fluor*, *supra* (Nov. 26, 2013).

3. Finally, there is no truth to Waidla’s hyperbole that the decision below will cause “gross judicial inefficiency, open the floodgates to judge-shopping, and diminish the reliability and legitimacy of all the Ninth Circuit’s opinions, with potential ripple effect on the authority of all federal courts of review.” Pet. 35. Those who have criticized the Ninth Circuit’s practice point to only five occasions where the situation has arisen in that court. Br. Ret. Judges 15; *see* Pet. App. 7-8. And the occasions for other Circuits to employ the procedure have also been quite rare. *See supra* pp. 15-16. That is not surprising. The question for which Waidla seeks review arises only upon a confluence of rare events. A member of the panel must (1) become unavailable, (2) between an opinion’s issuance and the mandate, with (3) the remaining panelists in disagreement. And even then, Waidla’s concerns arise only if the new panelist’s view differs from those of the judge she replaced. Such circumstances will be infrequent, to say the least.¹⁰

Of course, if policy reasons did counsel in favor of an express, nationwide rule for these infrequent occurrences, a clear path exists to provide one. The Judicial Conference’s Advisory Committee on Appellate Rules is empowered to recommend rule changes that could cover cases like this—such as amending

¹⁰ *See* Fed. R. App. P. 41(b) (mandate issues seven days after deadline to file rehearing petition or disposal of petition, unless court shortens or extends that time); Fed. R. App. P. 40(d)(1) (petitions for rehearing generally due within 14 days); John McCloud, *In Pursuit of Quality: Amplifying Panel Effects on the United States Courts of Appeals*, 110 Cornell L. Rev. 219, 224 (2025) (“The vast majority of decisions issued by the Courts of Appeals are unanimous, with dissenting opinions accompanying only 10% of decisions.”).

the Federal Rules of Appellate Procedure to include a counterpart to this Court’s requirement that a petition for rehearing “will not be granted except . . . at the instance of a Justice who concurred in the judgment or decision.” Sup. Ct. R. 44.1. The fact that no such change has been recommended—or evidently even proposed—underscores the unimportance and rarity of Waidla’s issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

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