

No. 25-7555

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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

There is no dispute that the circuits take different approaches to the replacement of a panelist in the event of a judge's retirement. While Respondent, in his Brief in Opposition (BIO), contends there exists a patchwork of different procedures in the circuits, Respondent does not dispute that many circuits would never have permitted what happened here—where, with no grant of rehearing, a fourth judge was placed on the panel to rehear and redecide a published decision granting penalty phase relief. The Ninth Circuit's outlier approach tips the scales in favor of any initial non-prevailing party, violates 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure (FRAP) 40, and ultimately risks erosion of trust in the federal judiciary.

Because multiple judges will inevitably reach different conclusions on some close applications of law to facts, if left uncorrected, the Ninth Circuit approach will continue to render the stability of an initial published decision dependent on the judges' continued availability post-publication.

The majority of circuits do not routinely appoint a fourth judge to reconsider and revise a decision without an initial finding that there are grounds for rehearing. Had the initial decision below been issued in the many circuits that comply with 28 U.S.C. § 46(c) and FRAP 40, Petitioner Tauno Waidla's death sentence would not have been reinstated. However, while the

Ninth Circuit’s variant approach here resulted in the reinstatement of a death penalty that a panel had found unconstitutional, this petition for certiorari is not about the death penalty. This petition is about procedures in some circuits that undermine the reliability and finality of appellate decisions.

I. Respondent does not dispute that the rehearing was not based on the PFR.

Respondent acknowledges that, after the issuance of a published opinion and one correction of that opinion, in response to a petition for panel rehearing (PFR), the Ninth Circuit appointed “a new judge empowered to consider the case on par with the other panelists.” (*See* BIO at 7.) Thus, without an adjudication of the PFR or a finding of grounds for panel rehearing, a fourth judge heard and decided the same case that three other judges had already decided. Based only on the new judge’s disagreement with the departed judge on an issue not raised in the PFR, this procedure changed the outcome and placed Waidla back on death row.

Respondent acknowledges that the reconstituted panel skipped over the step of evaluating the PFR. Instead, it held a new oral argument while a binding published opinion was still in place¹ and “did not use the additional

¹ As explained in Waidla’s petition for writ of certiorari, the initial decision in this case was binding on Ninth Circuit panels and lower courts

argument to decide ‘whether to grant’ the petition” for panel rehearing, but only to issue a “new decision which ‘moot[ed]’” the PFR. (BIO at 13.)

II. The existence of a circuit split is undisputed.

The procedures employed by the Ninth and Federal Circuits reflect a split from multiple other circuits that would not have submitted the matter for full rehearing by a reconstituted panel unless one of the judges who concurred in the original published decision found grounds for rehearing. Respondent fails to identify a single case outside of the Ninth Circuit in which the outcome of a published decision was changed by a reconstituted panel without a grant of rehearing and without the concurrence of a judge in the original majority.²

Respondent does not dispute that the Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits generally entrust the decision of whether to grant rehearing to the remaining two judges if one judge has become unavailable after a decision issues—even where the departing judge was in

from the day it was published and throughout the time that a fourth judge was hearing and redeciding the case. (Pet. at 29-30.)

² The one similar case outside of the Ninth Circuit involved a reconstituted panel that found a PFR to be meritorious *because of a material mistake of fact*, and then proceeded to reach a different result on the basis of an issue related to the subject matter of the PFR. *See Novartis Pharms Corp. v. Accord Healthcare, Inc.*, 38 F.4th 1013, 1018 (Fed. Cir. 2022).

the majority of a split opinion. (*See* Pet. at 23-25.)³

Respondent contends, however, that the circuit split is different than that posited by Waidla and Amici Curiae, and that a few additional circuits have procedures that might allow for a post-decision judicial replacement. (BIO at 15-17.) Even were this so, the circuit split would not be ameliorated; but Respondent’s analysis is mistaken:

Second Circuit - Respondent cites a Second Circuit procedure that permits judicial replacement if “a panel judge ceases to participate in consideration of the matter.” (2d Cir. Internal Operating Proc. E(b).) This language includes a temporal element—namely, that the matter is under “consideration” when the “panel judge ceases to participate in [that] consideration.” (*Id.*) In the Second Circuit, like in the Ninth, a published decision is not under consideration, because it “becomes binding precedent when it is decided.” *Cox v. DOJ*, 111 F.4th 198, 209 (2d Cir. 2024). The Second Circuit cases cited by Respondent involve the appointment of a *third* judge to address a PFR challenging the propriety of a two-judge panel

³ In a footnote, Respondent suggests the Fifth Circuit’s procedures may permit a post-decision replacement “if a judge recuses, or is disqualified” after participating in the original decision. (BIO at 18-19 n.7 (quoting 5th Cir. Internal Operating Proc., at 47).) It is unclear that the Fifth Circuit interprets its rule as Respondent does, and Respondent cites no examples of post-decision judicial replacement under that rule.

decision. *See United States v. Desimone*, 140 F.3d 457, 458 (2d Cir. 1998); *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 232 (2d Cir. 1998). Both PFRs were denied, and there was no re-decision. *See id.*

Third Circuit - Respondent interprets the Third Circuit procedures to afford the chief judge sole discretion about whether to replace a judge post-decision. (BIO at 16.) However, the cited procedural rule does not expressly refer to post-decision replacements. (*See* 3d Cir. Internal Operating Proc. 12.1(a)-(d).) As noted in the Brief of Retired United States Circuit Judges as Amici Curiae, after then-Judge Alito voted with the majority in a decision issued shortly before his elevation to this Court, the non-prevailing party's PFR was denied by a 1-1 vote, because "no judge who concurred in the decision" requested rehearing. *See Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197 (3d Cir. 2006) (published decision); *Ranke v. Sanofi-Synthelabo Inc.*, No. 04-4514 (3rd Cir. Feb. 28, 2006) (denial of rehearing, available at <https://tinyurl.com/yckpdd56>).

Sixth Circuit - Respondent focuses on *Hodge*, a death penalty case discussed in Waidla's petition. (*See* Pet. at 24 n.9.) As here, there were two panel decisions by differently constituted panels. *Hodge v. Plappert*, 136 F.4th 648, 657 (6th Cir. 2025) (en banc) (recounting procedural history). Unlike in the present case, in *Hodge*, rehearing was granted on a PFR. *Id.*

Respondent cites an additional Sixth Circuit case in which a replacement judge considered a PFR. *See Dye v. Hofbauer*, 111 F. App'x 363, 365 (6th Cir. 2004), *rev'd*, 546 U.S. 932 (2005). A member of the original panel's majority concurred in the grant of rehearing and reversal of the original decision. *Dye*, 111 F. App'x 365 (unanimous holding). Thus, had the *Dye* PFR been entrusted to the remaining original panelists, the result would have been the same.

D.C. Circuit - Respondent demonstrates an *intra*-circuit split exists here, highlighting the variant approaches taken in *Hodge v. Evans Fin. Corp.*, 823 F.2d 559 (D.C. Cir. 1987), where a new judge was appointed for rehearing, and in *Mexichem Fluor, Inc. v. EPA*, No. 15-1328 (D.C. Cir. Jan. 26, 2018), where a PFR was submitted to the remaining original panelists. (*See* Pet. at 22; Pet. App. P-406).)

Respondent's authorities suggest the circuits apply a patchwork of approaches, some of them internally inconsistent. These divergent and unpredictable approaches militate towards granting review.

III. *Life & Fire* is inapposite.

The foundation of Respondent's argument rests on a case nearly two centuries old concerning repayment of a mortgage on real property and enslaved people, where the trial court found that, if payment was not made by the specified date, "said slaves and movable property . . . shall be sold

according to law, to satisfy the judgment in the premises.” *Life & Fire Ins. Co. v. Heirs of Wilson*, 33 U.S. 291 (1834). (See BIO at 9-10.) This case was cited infrequently by this Court only during the first hundred years after its promulgation, and then primarily as to its discussion of the role of mandamus. See *United States ex rel. Arant v. Lane*, 249 U.S. 367, 371 (1919) (last case from this Court citing *Life & Fire*). *Life & Fire* speaks to a legal question irrelevant to the matter presented by Waidla. Furthermore, *Life & Fire* provides support for Waidla’s contention that a new jurist is not to represent an agent of chaos: “It is the duty of the successor to perfect and carry into effect all acts begun by his predecessor, and pending in the court at the time of his appointment.” *Id.* at 302

The action adjudged in *Life & Fire* commenced in 1826, when the financier of the mortgage on property and enslaved people sued for repayment. *Life & Fire*, 33 U.S. at 302. A district judge issued a judgment for the plaintiff; but Louisiana law required a waiting period of three days before the judgment could be signed and effectuated, to allow for legal cause for a new trial to be raised. *Id.* The three days passed, then two and a half more years, and then the judge on the case died, leaving the judgment unsigned and the case decided but in legal limbo. *Id.* Years after the death of the judge, plaintiffs moved for the new presiding judge to sign the judgment. *Id.* The presiding judge refused, stating he would not “pronounce on the rights of the

parties whose cause I have never heard.” *Id.* This Court directed “the district judge to sign the judgment, agreeably to the prayer of the plaintiffs.” *Id.* at 304. As the Court found, “[t]he judgment may be erroneous, but this is no reason why the judge should not sign it.” *Id.*

Respondent relies on the Court’s finding that the replacement judge had the power to grant a new trial, though he chose not to wield it. *Life & Fire*, 33 U.S. at 304. While *Life & Fire* is foundational in the creation of Federal Rules of Civil Procedure, Rule 63, setting the terms for replacement of a trial judge it has no precedential value in the context of an appellate court that has issued a decision, where appointment of a new judge is unnecessary for the completion of the court’s work.

Here, the factual record was settled; the difference between a sentence of life or death was based on a variant legal opinion as to application of the same facts to the well-settled legal standard. Respondent’s application of *Life & Fire* is misguided. The reliability of the appellate process is paramount, and “the change of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties.” *Id.* at 303.

Respondent’s application of *Life & Fire* rests on the incorrect premise that a ruling on the PFR or *sua sponte* amendment by the Court could not “happen with just two judges in disagreement.” (BIO at 10.) Here, all steps necessary before issuance of the mandate could have been performed without

the appointment of a new judge, as would have happened in many other circuits. Even before Judge Watford's retirement, the original panel could *and did* correct an error in the first opinion. (See Pet. at 3 n.2.) Following his retirement, the two remaining judges could have decided the PFR and, had they concluded there were any additional errors in the published decision, published another amendment. We know what the outcome of this process would have been. In the revised opinion, Judges Miller and Wardlaw each adhered to their original analysis of this case and *did not* conclude any modification was required. Even with the addition of a new judge, the ultimate ruling reflects the views of both Judge Wardlaw and Judge Christen that the PFR lacked merit. (See Pet. at 34; Pet. App. D-113.)

Respondent, as the non-prevailing party in the original decision, naturally prefers a scheme that affords a non-prevailing party a replacement judge to rehear and redecide the case. Nothing in *Life & Fire* entitles the non-prevailing party in an appeal to this fortuitous second look by a fourth judge.

IV. 28 U.S.C. § 46(c) prohibits the addition of a fourth judge to redecide a case while the decision of the original three-judge panel remains operative.

Section 46(c) of title 28 of the U.S. code is unambiguous: "Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered."

Respondent asserts: “There was no violation here, since three judges were involved in the first argument and decision, and three in the final one.” (BIO at 10.) In Respondent’s view of 28 U.S.C. § 46(c), the Ninth Circuit was free to adopt a procedure that allowed for multiple serial adjudications of Respondent’s petition by differently constituted panels of three judges before issuance of the mandate—each time without grounds for grant of rehearing as to the earlier decision—and the final of these multiple panels would control the outcome.

Indeed, in Respondent’s view, such an unbridled do-over framework *already exists* in the Third Circuit where, according to Respondent, the chief judge of the Third Circuit has boundless discretion to replace an unavailable judge, and therefore has the option to serially replace retiring or otherwise newly unavailable panelists until one of the reconstituted panels reaches the chief judge’s preferred result. (*See* BIO at 16.)⁴ If a chief judge of the Third Circuit were to interpret that court’s procedures as Respondent urges, such interpretation would raise grave concerns about a single judge’s unfettered control over the finality of published decisions, and would render meaningless 28 U.S.C. § 46(c)’s command that cases “shall be heard and determined by a

⁴ As Respondent points out, a circuit court may extend the time to issue the mandate. (BIO at 20 n.10; *see also* Fed. R. App. P. 41(b).)

court or panel of not more than three judges.”⁵

A better reading of 28 U.S.C. § 46(c) is that it places *an actual numeric limit* on the number of judges who will issue a panel decision on an individual appeal absent grounds for panel rehearing or unless the case is heard en banc. Enforcing 28 U.S.C. § 46(c) does not burden the courts or the parties, but does eliminate the windfall relitigation that Respondent received in his appeal here. In the event that panel rehearing is warranted, the original decision is vacated and a new judge can be appointed if necessary for the case to be reheard by a panel of three.⁶

⁵ Fortunately, the Third Circuit appears to interpret its own procedures quite differently than Respondent does. Neither party has located any case in which the Third Circuit has appointed a replacement judge after issuance of a final decision, either to weigh in on a PFR or to redetermine the case in full. The cited procedures detail how the chief judge will “[g]enerally . . . exercise his or her discretion” to appoint a replacement panelist depending on how close the panel is to filing its opinion, and the list of procedural postures in which the chief judge may exercise this replacement power *does not include* cases in which the panel has already issued its opinion. (See 3d Cir. Internal Operating Proc. 12.1.)

⁶ Respondent asserts that such enforcement of 28 U.S.C. § 46(c) would prevent the appointment of a judge to replace an unavailable panelist “in the event of one judge’s post-argument unavailability even before any opinion issued.” (BIO at 10-11.) But this strawman is built on a misreading of 28 U.S.C. § 46(c)’s requirement that, absent en banc hearing, “[c]ases and controversies shall be *heard and determined* by a court or panel of not more than three judges[.]” 28 U.S.C. § 46(c) (emphasis added). Here, the term “heard” refers to the judicial activity of hearing a case, not to the specific event of oral argument—an event that is not required in every case. See *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1309 (2d Cir. 1971) (rejecting the argument that the term “heard” in 28 U.S.C. § 46(c) means a quorum of the

V. Rule 40 limits the Ninth Circuit’s ability to rehear cases.

In entering a new decision and denying Respondent’s PFR as moot after nineteen months during which the initial decision was binding law, the Ninth Circuit avoided squarely addressing whether the conditions for rehearing were met, namely the existence of “point[s] of law or fact that the petitioner believes the court has overlooked or misapprehended.” Fed. R. App. P. 40(b)(1)(A). Unquestionably, Respondent failed to persuade the court that the issue raised in the PFR met this standard. (*See* Pet. at 33-35.) Nowhere in the replacement decision does any judge express the view that any of the three original panelists “overlooked or misapprehended” any “point[s] of law or fact.” Instead, the original panel and the replacement panel looked at, and fully apprehended, the exact same points of law and fact; but Judge Watford and Judge Christen reached different conclusions as to the application of law to fact. This disparity may occur when different jurists attempt faithfully to apply the same legal standards to the same facts; but it does not meet the standard for panel rehearing under FRAP 40(b)(1).

Respondent contends that FRAP 40(b)(1) only limits the contents of the PFR itself, not the court’s scope of action. He attempts to contrast the Ninth

court must hold oral argument). Replacement of a panelist after oral argument and before decision does not violate 28 U.S.C. § 46(c) because it does not lead to a decision by more than three judges.

with the Tenth Circuit, which “has a local rule that directly regulates the court’s decision to grant panel rehearing”—implying that the Ninth Circuit is unregulated. (BIO at 12-13 & n.3.) Respondent is incorrect. The Ninth Circuit reads Rule 40(b)(1) as a constraint on the *court’s* ability to rehear and redetermine cases. The second panel was bound by that court’s prior holding that its “authority under Rule 40 . . . extends only to those situations in which [the court] ha[s] ‘overlooked or misapprehended’ a ‘point of law or fact.’” *United States v. Mageno*, 786 F.3d 768, 774 (9th Cir. 2015) (quoting Fed. R. App. P. 40(a)(2), later renumbered as Rule 40(b)(1)(A)). Respondent’s effort to ignore the procedural constraints on panel rehearing, thus, fail.

VI. The Court should apply a plain reading interpretation of Ninth Circuit General Order 3.2(h).

General Orders section 3.2(h) provides:

If, after a matter is under submission to a three-judge panel, a judge becomes unavailable by reason of death, disability, recusal, or retirement from the Court, the remaining two judges may—if in agreement—decide the matter as a quorum pursuant to 28 U.S.C. § 46(d), or shall request the Clerk to draw a replacement judge.

Here, Judges Wardlaw and Miller never determined whether they agreed on the pending PFR. Instead, because they “disagreed on the merits of the case itself, [they] formally requested that the clerk’s office draw a new judge[.]” (Pet. App. A–5.) This practice is typical in the Ninth Circuit when a PFR is filed and a judge in the majority is unavailable; but the practice has

been repeatedly questioned from within the circuit. *Carver v. Lehman*, 558 F.3d 869, 880-81 (9th Cir. 2009) (Reinhardt, J., concurring in the judgment); *Perez v. City of Roseville*, 926 F.3d 511, 526 (9th Cir. 2019) (Malloy, J., dissenting).

Although the Ninth Circuit describes such judicial replacements as occurring pursuant to General Order 3.2(h), they are out of compliance with its terms, which only provide for replacement “after a matter is under submission.” Respondent does not dispute this case was no longer “under submission” when the Ninth Circuit appointed a new judge. (See BIO at 14.) Respondent contends that the word “after” as used in General Order 3.2(h) allows appointment in any case that *was ever previously* “under submission.” In other words, Respondent reads the phrase “after a matter ***is under submission***” to mean “after a matter ***is or was once under submission***.” (BIO at 14.) This interpretation is unreasonable.

The judges who have analyzed this phrase have applied its plain-language meaning and have concluded that the Ninth Circuit misapplies General Rule 3.2(h) when it appoints a new judge after publication of a decision. See *Perez*, 926 F.3d at 527 (Malloy, J., dissenting) (“Because this case was not under submission when Judge Reinhardt died, General Order 3.2(h) is not applicable.”); (Pet. App. A–11 (Wardlaw, J., agreeing with Judge Malloy’s analysis of General Order 3.2(h) in *Perez*).)

Respondent's reading of General Order 3.2(h) as providing for the replacement of a judge anytime after a case was once under submission, if correct, would cause the Ninth Circuit to promptly replace panelists who become unavailable, even while a case is on review in this Court. However, this is not the practice. *See United States v. Fabian-Baltazar*, 931 F.3d 1216, 1216 n.* (9th Cir. 2019) (unavailable judges replaced only "[f]ollowing remand from the United States Supreme Court"). Judges Malloy and Wardlaw correctly concluded that General Order 3.2(h) does not support the Ninth Circuit's practice of appointing a new judge after a case is decided.

CONCLUSION

Because the circuits are split regarding how procedural rules apply when jurists leave the court, and because such variation implicates the reliability and finality of appellate review, Waidla respectfully requests that this Court vacate the decision of the second panel to review his capital case and grant his petition for certiorari.

Respectfully submitted,

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