No. 18-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Equal Pay Act permits employers to pay men and women different wages for the same work "where such payment is made pursuant 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). Is prior salary a "factor other than sex"?

2. May deceased judges continue to participate in the determination of cases after their deaths?

PARTIES TO THE PROCEEDING

Petitioner is Jim Yovino, the current holder of the office of Fresno County Superintendent of Schools, the office that makes hiring decisions for those employed by the Superintendent's Office. Respondent is Aileen Rizo. These parties were the only parties in the Ninth Circuit below.

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PETITION FOR A WRIT OF CERTIORARI

The Equal Pay Act requires "equal pay for equal work regardless of sex," subject to four exceptions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 190 (1974). The fourth, catchall exception authorizes disparities based on "any other factor other than sex." 29 U.S.C. § 206(d)(1). Section 206(d)(1)'s defenses apply both to Equal Pay Act claims and to pay-based Title VII sex-discrimination claims. *See* 42 U.S.C. § 2000e-2(h); *Washington Cty. v. Gunther*, 452 U.S. 161, 168–70 (1981).

This petition asks whether prior salary is a factor other than sex. That question has badly divided the circuits. Two say that employers may rely on prior pay. By contrast, the Ninth Circuit held below that employers may never rely on prior pay. In the middle, four circuits allow employers to rely on prior pay in limited circumstances: two allow employers to use prior pay so long as they have a legitimate business reason for doing so, while two others allow employers to use prior pay provided that they do so along with another sex-neutral factor.

Confusion over this important question of law is unacceptable. This Court should grant certiorari and reverse the Ninth Circuit's incorrect view.

OPINIONS BELOW

The district court's amended and superseding opinion (Pet. App. 63a–93a) is unreported but available at 2015 WL 9260587. The Ninth Circuit's now-vacated panel decision (Pet. App. 52a–62a) is reported at 854 F.3d 1161. The en banc Ninth Circuit's decision (Pet. App. 1a–51a) is reported at 887 F.3d 453.

JURISDICTION

The en banc Ninth Circuit entered judgment on April 9, 2018. Justice Kennedy extended the time in which to petition for certiorari until August 23, 2018, and the Chief Justice further extended the time in which to petition for certiorari until September 4, 2018. Petitioner filed before that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(d) Prohibition of sex discrimination

> (1) No employer having employees subject to any provisions of this section shall discriminate … between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (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: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Section 46 of Title 28 dictates the composition of appellate panels. It provides:

> 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 by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633) … .

STATEMENT

1. Between 1998 and 2015, the Fresno County Superintendent of Schools set new employees' salaries using their prior salaries. *See* Pet. App. 4a–5a; Excerpts of Record 538–39, *Rizo v. Yovino*, No. 16-15372 (9th Cir.) ("ER"). Under what came to be known as "Standard Operating Procedure 1440," the County Superintendent added five percent to each new employee's prior salary and, based on that figure, placed the employee on a corresponding "step" of the salary schedule. ER 534. The County Superintendent had good reasons for this policy: It ensured objectivity and consistency in pay decisions; it made favoritism impossible; it helped attract high-quality candidates by ensuring that new hires would get a raise if they accepted the County Superintendent's offer of employment; and it promoted the judicious use of public resources by curbing the prospect of overpaying in individual salary negotiations. ER 582.

The County Superintendent's policy applied to all employees. Take Jim Yovino, who now serves as Fresno County Superintendent of Schools. When he was hired as Deputy Superintendent in 2006, his starting salary was calculated by adding 5 percent to his prior salary and placing him in the corresponding step on the salary schedule for that position—Step 1, the lowest possible step. ER 581–82. His predecessor as Superintendent, Larry Powell, likewise started on Step 1 when he was hired as Deputy Superintendent in 2005. ER 584.

The policy did not favor either sex. In the decade after Yovino's hiring, the County Superintendent hired or promoted nine female administrators whom it placed on salary steps *higher than* Step 1, where Yovino began. The same is true for just three male administrators. ER 584. And throughout the policy's existence, the County Superintendent apparently deviated from it only once. When an employee in a 12-month position was promoted to an 11-month position, the County Superintendent placed him on Step 2 rather than Step 1 to avoid creating an annual salary loss for him. ER 535. (One female employee *may have* been placed on a step higher than she should have been, but her records were too incomplete to tell. ER 535.)

2. The County Superintendent applied the policy to Respondent Aileen Rizo when she was hired as a "math Consultant" in 2009. ER 212. Rizo had most recently worked as a middle school math teacher in Arizona. ER 268. In that position, she earned $50,630 for 206 days of work, plus a $1,200 stipend because she held a master's degree. ER 269. To her knowledge, "gender was [not] a factor in determin-

ing" her starting salary in that position, and she "assume[d]" that her salary there was based on sex-neutral factors such as "years of experience." ER 315–16.

Applying a five-percent raise to Rizo's daily rate left her below the low end of the County Superintendent's ten-step schedule for math consultants. *Id.* at 327. She thus started at Step 1, with an annual salary of $62,133 for 196 days of work and a $600 master's degree stipend. ER 231, 448; Pet. App. 4a–5a. That amounted to a raise of over twenty percent. ER 513.

3. Rizo realized her pay was lower than her colleagues' in 2012, when one mentioned that he had started at Step 9. ER 451. Rizo complained about the pay disparity to the County Superintendent's Human Resources department in August 2012. ER 535.

As explained, the County Superintendent had neutrally applied its policy to employees of both sexes for more than a decade when it hired Rizo. Indeed, one other female consultant had been hired at Step 8, a step higher than two male math consultants, and just one step below a fourth. ER 582–83, 565. Even though the Equal Pay Act does not create disparate-impact liability, the County Superintendent responded to Rizo's complaint to Human Resources by reviewing the initial salary placements of all management-level employees for sex-based disparities. According to its analysis, there were none; men and women shared the same average starting salaries. The County Superintendent repeated its analysis in 2013 and 2014, each time with the same result. ER 535–36. In 2012, both male and female consultants

had an average initial salary at Step 4; in 2013, the average initial salary for both was Step 5; and in 2014, it was again Step 4 for both sexes. ER 536.

Rizo sued Petitioner in state court, alleging that the County Superintendent's policy violated the Equal Pay Act, 29 U.S.C. § 206(d), Title VII, 42 U.S.C. § 2000e *et seq*., and California state-law prohibitions on sex discrimination. Petitioner removed the case to federal court, and moved for summary judgment. Petitioner argued that the disparity arose based entirely on the policy's consideration of prior salary; that prior salary is a "factor other than sex," § 206(d)(1); and that any wage disparity based on that factor was therefore permitted by the Equal Pay Act.

The District Court denied Petitioner's motion, reasoning that "a pay structure based exclusively on prior wages 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, even if motivated by a legitimate non-discriminatory business purpose." Pet. App. 84a–85a. Recognizing that its ruling implicated a circuit split and effectively resolved liability in Rizo's favor, the District Court certified its ruling for interlocutory appeal. Pet. App. 92a. The Ninth Circuit granted the petition for permission to file an interlocutory appeal. Pet. App. 54a.

4. A three-judge Ninth Circuit panel reversed. In *Kouba v. Allstate Insurance Co.*, the Ninth Circuit held that prior salary is a "factor other than sex"—and that employers may therefore consider it in setting wages—provided it is a reasonable means of ef-

fectuating some business policy. 691 F.2d 873, 875–77 (9th Cir. 1982). The panel held that *Kouba* applied equally to a case like Rizo's, where prior salary was the only factor used to justify a pay disparity. Pet. App. 59a. It thus remanded for the District Court to consider the reasonableness of the County Superintendent's business justifications for using its policy. Pet. App. 61a–62a.

Rizo sought and received en banc review. Pet. App. 94a. The en banc court unanimously rejected the panel decision, affirming the District Court's denial of summary judgment. Pet. App. 28a. But it divided 6-2-2-1 over the reasoning.

Judge Reinhardt, who died more than a week before the decision issued, wrote the majority opinion for himself and five others. According to a footnote, "[t]he majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death." Pet. App. 1a.

The majority held that, as "a general rule," prior pay cannot be a "factor other than sex." Pet. App. 12a. The court noted that the broad factor-other-than-sex exception in section 206(d)(1) follows three narrower exceptions, all of which "relate to job qualifications, performance, and/or experience." Pet. App. 13a. The majority concluded that the broad exception must be similarly limited, citing the *noscitur a sociis* and *ejusdem generis* canons. And because it determined that prior salary is "not a legitimate measure of work experience, ability, performance, or any other job-related quality," it held that prior salary does not qualify as a "factor other than sex." Pet. App. 25a. Any other conclusion, Judge Reinhardt reasoned, would be inconsistent with the Act's legis-

lative history, which he thought also showed Congress's desire to limit the catchall exception to "legitimate, job-related means of setting pay." Pet. App. 20a–21a.

The court acknowledged that it was parting ways with other circuits. It rejected the rule in the Second and Sixth Circuits—which allow employers to consider prior pay for "business-related" and "job-related" reasons—because allowing employers to consider such factors "would permit the use of far too many improper justifications for avoiding the strictures of the Act." Pet. App. 23a. It also criticized the position of the Tenth and Eleventh Circuits—that employers may consider prior pay, just not by itself—as a "distinction without reason." Pet. App. 27a. The majority then purported to reserve judgment on an unusual distinction of its own: using prior pay in "individualized salary negotiation[s]." Pet. App. 12a. It did not explain, however, why the analysis might differ in that scenario.

Five members of the court concurred only in the judgment. Judge McKeown, joined by Judge Murguia, would have held that prior salary cannot constitute the sole reason for a pay disparity between men and women, but may be considered as one of many factors. *See* Pet. App. 29a. Judge Callahan, joined by Judge Tallman, said that "'prior pay' is not inherently a reflection of gender discrimination," but that its use as the *sole* factor in determining salary should be "conclusively presumed to be gender based." Pet. App. 47a, 45a. Like Judges McKeown and Murguia, however, Judges Callahan and Tallman would have allowed the consideration of prior pay alongside other factors, so long as the employer

could show that any resulting differences in pay were not based on gender. Pet. App. 47a.

Judge Watford recognized that "past pay can constitute a 'factor other than sex'" under the Act. Pet. App. 49a. He reasoned, however, that "[i]f past pay … reflect[s] sex discrimination, an employer cannot rely on it to justify a pay disparity, whether the employer considers past pay alone or in combination with other factors." *Id.* In Judge Watford's view, it will be very difficult for employers to prove that an employee's prior pay does not "reflect[] sex discrimination": because "gender pay disparities persist" across the economy, it "remains highly likely that a woman's past pay will reflect, at least in part, some form of sex discrimination." Pet. App. 51a. Because Petitioner did not show that Rizo's "sector of the American economy"—schoolteachers, apparently—was entirely free from sex discrimination, Judge Watford concurred in the judgment. *Id.*

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The circuits have widely diverged about whether prior salary is a "factor other than sex" for purposes of the Equal Pay Act. Below, the Ninth Circuit held that it never is. By contrast, the Seventh and Eighth Circuits allow employers to rely on prior salary. And while four other circuits also allow the use of prior pay, they do so in limited circumstances—two allow it only when the employer has a good business reason, and two allow it only when prior pay is used together with another factor to explain a wage disparity. There should not be disagreement on this important question of federal law.

This case—which turns on that question—is an ideal vehicle for resolving the dispute. It also affords the Court an opportunity to resolve another important question: whether a court may count the vote of a judge who died before the case was determined.

I. THIS COURT SHOULD DECIDE WHETHER EMPLOYERS MAY CONSIDER PRIOR SALARY.

A. The circuits diverge on whether prior pay is a "factor other than sex."

1. The decision below holds that, with the *possible* exception of salaries set through "individualized negotiation[s]," prior pay is never a "factor other than sex" under the Equal Pay Act. *E.g.*, Pet. App. 10a ("[B]y relying on prior salary, the County fails as a matter of law to set forth an affirmative defense."); Pet. App. 12a ("[P]rior salary is not a permissible 'factor other than sex' within the meaning of the Equal Pay Act."); Pet. App. 27a ("[I]t is impermissible to rely on prior salary to set initial wages."). The Ninth Circuit's rule is stated absolutely: whether "alone or in combination with other factors," prior pay never qualifies as a "factor other than sex" for purposes of the Equal Pay Act. Pet. App. 3a.

Four circuits have held that prior pay sometimes counts as a "factor other than sex" and sometimes does not. But the details necessary for deciding that issue vary by circuit. In the Second Circuit, "employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral" system—such as prior pay—"without more." *Aldrich v. Ran-*

dolph Cent. School Dist., 963 F.2d 520, 525 (2d Cir. 1992). But they may rely on prior pay (or another such wage-setting system) so long as they "prove[]" that the system "is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Id.* Thus, while the Second Circuit recognizes that a factor like prior pay is "literally *a* factor other than sex," an employer cannot rely on it unless the employer can convince a court after the fact that its use of prior pay "has some grounding in legitimate business considerations." *Id.* at 527.

The Sixth Circuit applies the same rule. "[T]he Equal Pay Act's exception … does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason." *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006). So employers may not rely on a sex-neutral system (such as a system based on prior pay) to explain salary differentials unless they can identify court-approved "business-related" reasons for using that system. *Id.* at 366.

The Tenth and Eleventh Circuits have staked out yet another sometimes-you-can–sometimes-you-can't position, one that conflicts with both the Ninth Circuit and the Second and Sixth Circuits. They recognize that prior pay may qualify as a "factor other than sex." *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) ("[A]n individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex."); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("This court has not held that prior salary can never be used by an employer to establish pay."). But each

prohibits employers from relying on prior pay *alone* to justify a wage disparity. *See Riser*, 776 F.3d at 1199 ("[T]he EPA precludes an employer from relying solely upon a prior salary to justify pay disparity."); *Irby*, 44 F.3d at 955 ("While an employer may not … rest[] on prior pay alone, … there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay *and* more experience."). Therefore: In the Ninth Circuit, prior pay may not be used "alone or in combination with other factors," Pet. App. 2a; in the Second and Sixth Circuits, prior pay alone might suffice, so long as the employer has a good reason for relying on it; but in the Tenth and Eleventh Circuits, prior pay may be used, though only together with other factors. And whereas the Ninth Circuit left for another day the question whether its rule would apply in the context of "individualized salary negotiation[s]," Pet. App. 12a, *none* of these other circuits have even suggested that this context could make any difference.

Finally, the Seventh and Eighth Circuits have held that employers may use prior pay, even by itself, and have ruled in favor of employers at summary judgment for that reason. As Judge Easterbrook succinctly explained, the Equal Pay Act "forbids differences 'on the basis of sex' rather than differences that have other origins." *Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 468 (7th Cir. 2005). Because "[w]ages at one's prior employer are a 'factor other than sex,'" "an employer may use them to set pay consistently with the Act." *Id.*; *see also Lauderdale v. Ill. Dep't of Hum. Servs.*, 876 F.3d 904, 908 (7th Cir. 2017) ("[T]his court has repeatedly held that a difference in pay based on the

difference in what employees were previously paid is a legitimate 'factor other than sex.'"). Judge Easterbrook also explained why, contrary to other circuits' views, "[s]ection 206(d) does not authorize federal courts to set their own standards of 'acceptable' business practices" by scrutinizing employers' reasons for relying on prior pay. 427 F.3d at 468. "The Equal Pay Act forbids sex discrimination, an intentional wrong." *Id.* at 469. Under such a regime, "the employer may act for any reason, good or bad," so long as its decision is not based on "the prohibited criteri[on]." *Id.* A decision based on prior pay—like the one in Wernsing's case—is not. *See id.* at 467–68.

The Eighth Circuit agrees. "On its face, the EPA does not suggest any limitations to the broad catch-all 'factor other than sex' affirmative defense." *Taylor v. White*, 321 F.3d 710, 717 (8th Cir. 2003). And "salary retention policies"—which may perpetuate preexisting salary disparities by basing employees' current salary on prior salaries for other positions—"are not necessarily gender biased." *Id.* at 718. Thus, where an employer has and neutrally applies a salary retention policy, the employer is entitled to the Equal Pay Act's factor-other-than-sex defense, regardless of the "wisdom or reasonableness" of the employer's decision to do so. *Id.* at 719; *see id.* at 720–23 (granting summary judgment because the employer applied its neutral policy).

Of course, the Seventh and Eighth Circuits have noted that simply *citing* prior pay does not end an Equal Pay Act case. *See Wernsing*, 427 F.3d at 470; *Taylor*, 321 F.3d at 718. That is because employers cannot use prior pay to cover up their *own* sex dis-

crimination; if prior pay is simply "a pretext for a decision really made on prohibited criteria," the employer remains liable. *Wernsing*, 427 F.3d at 469; *Taylor*, 321 F.3d at 716 (examining whether the Army deployed its policy "as a mere pretext to hide gender-based wage discrimination"). And dicta in *Wernsing* suggests that if a plaintiff proves that her own prior pay was itself discriminatory, it may not be used to justify a wage differential. 427 F.3d at 470. Because Petitioner indisputably relied in good faith upon Rizo's prior pay when setting her salary, and because Rizo herself had no reason to believe that her salary in her prior position resulted from sex discrimination, *see* ER 315–16, Petitioner could not be held liable in the Seventh and Eighth Circuits. *See Wernsing*, 427 F.3d at 470–71; *Taylor*, 321 F.3d at 720–23.

2. Rizo acknowledged this circuit split in her petition for rehearing en banc. There, she wrote that the Seventh and Eighth Circuits have "reject[ed] the claim that sole reliance on prior salary violates the Equal Pay Act," Rehearing Pet. 7 n.3, while the Tenth and Eleventh Circuits forbid employers from basing compensation "*solely* on … new employees' prior wages for previous employers," *id.* at 1–2. The EEOC acknowledged the conflict in its briefing too. It urged the en banc court to adopt the Tenth and Eleventh Circuits' view that "prior pay alone cannot be considered a 'factor other than sex' within the meaning of the EPA." EEOC Rehearing Amicus 6. But it "recognize[d] that even if [the Ninth Circuit] adopt[ed]" that rule, doing so "w[ould] not entirely eliminate the circuit conflict" because "[t]he Seventh Circuit takes the position that 'prior wages are a 'fac-

tor other than sex.'" *Id.* at 12 (quoting *Wernsing*, 427 F.3d at 468).

The circuits themselves recognize their disagreement. The Ninth Circuit, for instance, expressly rejected the Seventh and Eighth Circuits' approach. *See* Pet. App. 21a & n.15; *see* Pet. App. 34a (McKeown, J., concurring) (the Seventh Circuit has "veered far off course"). It also rejected the Tenth and Eleventh Circuits' position, calling it a "distinction without reason." Pet. App. 27a. The other circuits have been similarly forthcoming. *See, e.g.*, *Taylor*, 321 F.3d at 720 (rejecting Eleventh Circuit's approach); *Wernsing*, 427 F.3d at 468 (rejecting the Second, Sixth, and Eleventh Circuit's approaches). This open split of authority will not resolve itself.

B. This case is a good vehicle for resolving this important question.

1. This case affords the Court an excellent opportunity to clear away the confusion. It is undisputed that, under the policy at issue, Rizo's pay—like her colleagues'—was "dictated" by her prior salary and her master's degree stipend. Pet. App. 4a–5a. And it is undisputed at this stage that the pay disparity is based only on her prior salary. Thus, whether prior pay qualifies as a factor other than sex will "resolve[] the issue of liability on [Rizo's] claims." Pet. App. 6a.

This case also highlights divergent answers to that question currently prevailing across the country. In the Ninth Circuit, Rizo is entitled to summary judgment as to liability. *See* Pet. App. 28a. The same would be true in the Tenth and Eleventh Circuits: because they prohibit employers from relying solely on prior pay, *see supra* 11–12, and because this case

has been litigated on the understanding that prior pay alone accounts for the disparity between Rizo's salary and her colleagues', Rizo would receive summary judgment in those circuits as well.

By contrast, Petitioner would have had a chance to prove his affirmative defense before a jury in the Second and Sixth Circuits. Petitioner gave business reasons for its policy: it avoids subjectivity and favoritism; encourages candidates to leave their present jobs; and saves taxpayer money. Pet. App. 58a. Under the Ninth Circuit's old rule—and under the Second and Sixth Circuits' current rule—those reasons were at least good enough to get to a jury, if not to absolve Petitioner without a trial. *See supra* 10–11; Pet. App. 61a–62a (vacating and remanding to consider these business justifications under *Kouba*).

And in the Seventh and Eighth Circuits, Petitioner would be entitled to summary judgment. Those circuits allow employers to rely on prior pay—at least so long as the plaintiff does not prove that the employer's actions are pretextual, or that her own prior salary was itself based on sex. *See supra* 12–13. There is no such proof here. Rizo admitted that *she* did not know whether her prior salary reflected sex discrimination, and she "assume[d]" that it reflected sex-neutral factors such as experience. ER 315–16. There is thus no reason to believe *Petitioner* knew that Rizo's salary embodied past discrimination and acted to reinforce that discrimination.

2. This split undermines the viability of a widespread employment practice. Employers often ask about and rely on prior pay in determining someone's salary. For instance, when "setting pay for internal candidates moving to new roles," one recent study of

compensation and benefits professionals at larger companies found that 89 percent of employers "rel[ied] on salary histories to evaluate a candidate's pay expectations," and 80 percent used that history "to determine what offer a candidate will find acceptable." Roy Maurer, Soc'y for Hum. Res. Mgmt., *Employers Split on Asking About Salary History*, (April 2, 2018), https://bit.ly/2naruoL. Employers also ask about and rely on prior pay when recruiting new employees. According to the same survey, nearly two-thirds of employers allow interviewers to ask about prior salary in jurisdictions that allow them to do so. *See id.*

This practice makes sense. Some employers—particularly smaller employers, those operating in niche markets, and those opening new positions—use prior salary "to determine how to pay fairly." Noam Scheiber, *If a Law Bars Asking Your Past Salary, Does It Help or Hurt?*, N.Y. Times (Feb. 16, 2018), https://nyti.ms/2C65i8H. Consider examples from the litigation surrounding Philadelphia's attempt to ban employers from asking about prior pay. Jacobsen Strategic Communications, for example, is a public relations company with roughly 30 employees. *See* Decl. of Susan Jacobsen, Dkt. 29-9, *Chamber of Commerce for Greater Phila. v. City of Philadelphia*, No. 2:17-cv-01548-MSG, ¶ 3 (E.D. Pa.). When it recruits candidates in new markets, it asks about and relies on prior pay to identify the prevailing local rates; as a small, growing business, it cannot afford to "pay for that analysis and research" from others. *Id.* ¶ 6(c). ESM Productions, a 20-person production company, faces related difficulties. There is "no fixed market for production crews"; prices instead "fluctu-

ate heavily based on the time of year and what other events are going on at the same time." Decl. of Christina Wong, Dkt. 29-15, in *Chamber*, ¶ 6. Here too, using prior salary makes sense because "the market price for a position is especially unclear." *Id.* ¶ 9. Employers in such situations often lack the resources to acquire in-depth studies of market rates (if such rates even exist), and use prior pay to solve the problem.

Larger companies confront similar issues. When Liberty Property Trust, a nationwide real estate company, created a new position of Vice President Program Manager, it was "unsure of the prevailing market wage" for positions like it. Decl. of Heidi Cunningham, Dkt. 29-6, in *Chamber*, ¶ 9(c). By asking about prior salary, Liberty realized that its proffered salary was below market rate and adjusted its offer. *Id.*

Employers put prior salary to other uses as well. Bittenbender Construction, for instance, operates in an industry where "all companies have essentially the same positions and titles." Decl. of Emily Bittenbender, Dkt. 29-3, in *Chamber*, ¶ 9(a). By asking about and relying on prior pay, Bittenbender can identify those candidates who, despite having the same job title and duties as everyone else, have a "high level of experience or skill" as reflected in their prior salary. *Id.* Other employers, such as the executive recruiting firm Diversified Search, ask about and rely on prior salary to trim the considerable costs associated with finding new hires, as employers do not want to waste their time or others' recruiting candidates whose prior salary makes it unlikely they will accept. *See* Decl. of Judith M. Von Seldeneck,

Dkt. 29-12, in *Chamber*, ¶ 7. Indeed, the reasons for using prior pay vary about as widely as the kinds of employers in the country. *See, e.g.*, Decl. of Keith S. DiMarino, Dkt. 29-7, in *Chamber*, ¶ 11(b) (DocuVault Delaware Valley uses prior commissions to gauge an applicant's sales ability, something "critical to [its] business model"); Decl. of Anna L. Mikson, Dkt. 29-10, in *Chamber*, ¶ 10(b) (FS Investments uses wage history to "craft[] a competitive and individualized compensation package" for "senior executive[]" candidates).

As it stands, though, companies are subject to a welter of different standards about the use of prior pay. In this setting, many must adopt whatever rule is most stringent; according to one survey, 46% "adopt policies to comply with the strictest laws in their region." NPR, *More Employers Avoid Legal Minefield by Not Asking About Pay History* (May 3, 2018), https://n.pr/2KCnec6. Because that rule is now the Ninth Circuit's total ban, many businesses must ignore prior salary entirely, lest it come back to haunt them in litigation in the country's most populous circuit. This Court, not that one, ought to determine the law on this issue nationwide.

C. Prior salary is a "factor other than sex" under the Equal Pay Act

In addition to deepening an entrenched, important circuit split, the Ninth Circuit wrongly limited employers' ability to rely on prior pay.

1. Prior salary is a factor other than sex.

The Equal Pay Act generally requires employers to pay equal wages for equal work; employers may not

"discriminate … on the basis of sex by paying wages to employees … at a rate less than the rate at which [they] pay[] wages to [similarly situated] employees of the opposite sex." 29 U.S.C. § 206(d)(1). But the Act allows such differentials where "such payment is made pursuant 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." *Id.*; *see also* 42 U.S.C. § 2000e-2(h) (incorporating the Equal Pay Act's defenses into analogous Title VII claims).

The question here is whether a wage differential based on the employees' prior salaries is "a differential based on any other factor other than sex." To ask that question is to answer it. "In common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007). It therefore "has the same meaning as the phrase 'because of.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). As this Court has explained, that phrase "mean[s] 'by reason of; on account of.'" *Id.*; *see also, e.g.*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (Title VII's anti-retaliation provision "require[s] proof that the desire to retaliate was the but-for cause of the challenged employment action" because it makes it unlawful to take action against an employee "because" of his protected activities). Accordingly, a wage disparity is "based on" sex only if sex is "the 'reason' that the employer" paid male and female workers differently. *Gross*, 557 U.S. at 176. If the wage disparity stems from any other source, the employer is not liable; the disparity is based on a "factor other than sex."

A system that determines current pay based on prior pay is permissible under these straightforward provisions. By definition, the *reason* for wage disparities in such a system is the employees' wages in their former positions, not their sex. But as just explained, wage disparities justified on grounds *other* than sex are "based on any other factor other than sex" for purposes of the Act. Disparities based on prior pay thus fall outside the statute's reach.

This remains true even if, as the Ninth Circuit asserted, prior pay is correlated with sex—indeed, even if, *unlike* here, *supra* 3–6, it is directly correlated with sex in a particular case. Imagine a pharmaceutical company that pays more to sales reps with a B.S. in physics than to those with a B.A. in English—an indisputable "factor other than sex." Now suppose a male rep who studied Chaucer gets paid less than a woman who studied Newton. He might be able to show that, in fact, his pay was *affected* by sex; for instance, he could prove that his alma mater's science departments preferred female candidates and that this preference forced him into the humanities. But he cannot show that his pay was "based on" sex—it was "based on" educational attainment, a sex-neutral factor that does not transform into a sex-based one simply because the two are correlated. Only if the company used field of study as a *pretext* to pay male employees less would the Equal Pay Act intervene.

This textual conclusion derives additional strength from the Equal Pay Act's focus on discriminatory intent rather than disparate impact. The Equal Pay Act was "designed differently" than Title VII. *Gunther*, 452 U.S. at 170. Unlike that statute, Congress

"confine[d] [its] application" to disparate treatment—that is, "to wage differentials attributable to sex discrimination"—through the catchall defense. *Id.* at 170; *see id.* at 171 ("[C]ourts and administrative agencies are not permitted to substitute their judgment for the judgment of the employer … who [has] established and applied a bona fide job rating system, so long as it does not discriminate on the basis of sex."). Of course, this is not to say that the Equal Pay Act mirrors Title VII's disparate-treatment provisions in every respect. Unlike a Title VII plaintiff, an Equal Pay Act plaintiff need not "pro[ve] … intentional discrimination"; she can prevail if she proves a wage disparity and the employer provides no defense. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007), *superseded by statute on other grounds*, Pub. L. No. 111-2 (2009). But once an employer invokes the Act's general defense, liability turns on whether the disparity is "based on" sex or something else, *see Gunther*, 452 U.S. at 170–71, the hallmark question of disparate-treatment liability.

An Equal Pay Act claim based on prior pay is, at best, a disguised disparate-impact claim. Indeed, the Ninth Circuit admitted as much. It rejected Petitioner's (and *Gunther*'s) explanation that the Equal Pay Act's catchall defense incorporates disparate-treatment principles. *See* Pet. App. 8a. And it grounded its rejection of prior pay as a "factor other than sex" in large part on the effects that using prior pay allegedly has on women. *See, e.g.*, Pet. App. 10a (prior pay "perpetuate[s] … the pervasive discrimination at which the Act was aimed"); Pet. App. 27a ("perpetuates … gender-based assumptions about the value of work"). But even if prior pay and sex corre-

lated perfectly, this reasoning would be mistaken. The Equal Pay Act does not cover "practices that are fair in form, but discriminatory in operation." *Gunther*, 452 U.S. at 170 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). Instead, it attacks only "sex-based wage discrimination." *Id.* at 171.

2. Arguments to the contrary are not persuasive.

Under the Equal Pay Act's plain text, and in keeping with its status as an intentional discrimination provision, prior pay is thus a "factor other than sex." There are only two other possibilities. Prior salary might never be a "factor other than sex," as the Ninth Circuit held. Or, prior salary might sometimes, but not always, count as a "factor other than sex," as the Second, Sixth, Tenth, and Eleventh Circuits have held (in varying ways). Neither of these alternatives is correct.

The Ninth Circuit rule. Literally speaking, prior pay must be a "factor other than sex"; it is different than sex, and it is the basis for some employees' differential wages. To defend its contrary conclusion, then, the Ninth Circuit had to explain why "any … factor other than sex" does not really mean "*any* … factor other than sex." In its attempt to do so, the court reasoned that section 206(d)(1)'s specific exceptions—for "systems of seniority, merit, and productivity"—all "relate to job qualifications, performance, and/or experience." Pet. App. 13a. From that, it concluded that section 206(d)(1)'s "more general exception" should be similarly limited to cover only "legitimate measure[s] of work experience, ability, performance," and "other job-related qualit[ies]." Pet. App. 13a–14a, 25a (invoking the *noscitur a sociis* and

ejusdem generis canons); Pet. App. 14a–20a (discussing legislative history designed to prove the same point). Because the majority believed that prior salary "is not a legitimate measure of work experience, ability, performance, or any other job-related quality," it held that prior salary is not a "factor other than sex" as that phrase is properly construed. Pet. App. 25a.

That argument fails. *First*, in the context of section 206(d)(1)—a provision that forbids sex discrimination in the wage context—the most obvious common feature of the first three exceptions is that each is sex-neutral. Otherwise, they have little in common. (Merit-based systems and seniority-based systems, for example, are typically viewed as opposites.) Given that chief commonality, section 206(d)(1)'s catchall should be construed exactly as Petitioner and its plain language suggest: it should cover any factor that is sex-neutral, as prior salary is.

Second, even if the first three exceptions were each similarly related to "job qualifications, performance, and/or experience," that would not justify the Ninth Circuit's holding about prior salary. Prior salary *is* related to qualification, experience, and performance since more qualified, experienced, and high-performing employees tend to make more. Indeed, employers' actions demonstrate as much. If prior pay were as disconnected from qualifications, performance, and experience as the Ninth Circuit suggests, it would be remarkable that "many employers both public and private" give "lateral entrants a salary at least equal to what they had been earning." *Wernsing*, 427 F.3d at 467. So even if the Ninth Circuit were right to cabin "any other factor other than

sex" to those factors that meet these criteria, prior salary would comfortably qualify.

In addition to its erroneous textual reasoning, the Ninth Circuit relied heavily on what it regarded as the overarching purpose of the Equal Pay Act: "to put an end to historical wage discrimination against women." Pet. App. 11a. "At the time of the passage of the Act," the court reasoned, "an employee's prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other." Pet. App. 12a. Thus, "Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials." *Id.* To effectuate that "clear intent and purpose," the Court refused to interpret the factor-other-than-sex provision to permit "setting employees' starting salaries on the basis of their prior pay." Pet. App. 11a.

The Ninth Circuit is wrong that, under Petitioner's view, employers setting salaries the day after the passage of the Act could have used discriminatory prior pay without fear of liability. As explained, employers may not use prior pay as a pretext for reinforcing discrimination, and there would have been *at least* a jury question about pretext in such circumstances.

Moreover, even if those employers might not be held liable, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). To the contrary, deciding which "competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent sim-

plistically to assume that whatever furthers the statute's primary objective must be the law." *Id.* at 526. When it came to the Equal Pay Act, Congress arrived at a legislative compromise that broadly permits disparate salaries so long as they are based on "*any* other factor other than sex." 42 U.S.C. § 206(d)(1) (emphasis added). Its reasons for doing so are irrelevant. As this Court explained just last Term, courts may not "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have intended." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) (internal quotation marks omitted).

In any event, the legislative history shows that Congress meant what it said when it exempted disparities based on "any … factor other than sex." Per the House Committee Report:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has also been included.

House Comm. on Equal Pay Act of 1963, H.R.Rep. No. 88-309 (1963), *reprinted in* 1963 U.S.C.C.A.N. 687, 689. Petitioner's reading fully accords with the House Committee's understanding that the factor-other-than-sex exclusion would constitute a "broad general exclusion."

Finally, the Ninth Circuit's reservation of the question whether "past salary may play a role in the course of an individualized salary negotiation," Pet.

App. 12a, transforms its analysis from misguided to inexplicable. Drawing that distinction would be inconsistent with everything else in the majority's opinion. If "prior salary" is not a "factor other than sex" because it does not "relate to job qualifications, performance, and/or experience," Pet. App. 13a, why would the negotiation context change anything? If prior salary is inherently a sex-based consideration, so that allowing employers to consider it would undermine Congress's goal of ending sex discrimination, how does it cease to be inherently sex-based during negotiations? And what in the statutory text or legislative history suggests that this distinction matters? These questions have no answers, which is perhaps why the Ninth Circuit did not give any. Nothing could logically stop the Ninth Circuit from expanding its already broad rule to individual negotiations, and there is no need to pretend otherwise. And even if the Ninth Circuit's rule were somehow kept from spreading to the context of individual negotiations, it would still be based on a misreading of the Equal Pay Act for all the reasons just discussed, and would still create a new branch in a deeply entrenched circuit split.

The Other Alternatives. In four other circuits, prior salary is sometimes, but not always, a "factor other than sex." These circuits have provided no good reason for their positions.

Consider first the circuits that allow the use of prior pay where the employer has "legitimate business reasons" for doing so. *Aldrich*, 963 F.2d at 526; *accord Beck-Wilson*, 441 F.3d at 365. These circuits defend their view on grounds much like the Ninth Circuit's—that the Act's "statutory history" suppos-

edly shows that "Congress intended for a job classification system to serve as a factor-other-than-sex defense … only when the employer proves that the job classification system … is rooted in legitimate business-related differences." *Aldrich*, 963 F.2d at 525; *see Beck-Wilson*, 441 F.3d at 365. These circuits are mistaken for the same reason as the Ninth Circuit: the Act's text and legislative history demonstrate that "any" means "any."

Nor is it coherent to hold that prior pay can be a factor other than sex only if it is used along with other factors. Prior salary either is or is not a "factor other than sex." Whether prior salary is considered together with other factors cannot affect that interpretive question. As the Ninth Circuit put it below, these courts have adopted a "distinction without reason," one that "cannot [be] reconcile[d] with the text or purpose of the Equal Pay Act." Pet. App. 27a.

* * *

There should be one, uniform answer to the important question whether the Equal Pay Act permits employers to base wages on prior pay. Because there is not, and because the Equal Pay Act permits employers to consider prior salary, this Court should grant certiorari and reverse the decision below.

II. THIS COURT COULD ALSO CLARIFY THE ADDITIONAL QUESTION WHETHER DECEASED JUDGES CAN DECIDE CASES.

This case also offers the Court a chance to provide guidance on another question: If a judge dies after argument but before the case is decided, may his vote continue to be counted?

A. The Ninth Circuit's practice is impermissible.

28 U.S.C. § 46 dictates the composition of appellate panels. It reads in relevant part:

> 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 by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible … .

28 U.S.C. § 46(c).

The Court addressed this statute in *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685 (1960). There, it held that the Second Circuit violated section 46(c) by permitting a judge who sat on the en banc panel but who retired before the decision to join an opinion. *See id.* at 686–87. At the time, the statute did not permit senior circuit judges to participate in en banc cases—it required that cases and controversies be "determined" by "active" circuit judges. *See* 28 U.S.C. § 46(c) (1958). The Court reasoned that a "case or controversy is 'determined' when it is decided." *American-Foreign*, 363 U.S. at 688. Since the retired judge ceased to be active upon his retirement, the case was decided with one non-active judge, thereby violating the statute.

This is an *a fortiori* case. When Judge Reinhardt died, he left "regular active service" as a federal judge. So when the Ninth Circuit "determined" this case or controversy, its en banc panel consisted of a judge not "in regular active service" or otherwise eligible to participate. Indeed, the facts here are more striking than in *American-Foreign*, because Judge Reinhardt (unlike the judge in *American-Foreign*) wrote the majority opinion.

In addition to this statutory problem, there is a constitutional one. Courts alone may exercise the "judicial Power" of the United States—the power to "render dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Those courts are to be staffed with life-tenured judges appointed by the president and confirmed by the Senate. *See Benner v. Porter*, 9 How. (50 U.S.) 235, 244 (1850). These judges "shall hold their Offices *during good Behaviour*, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their *Continuance in Office*." U.S. Const. art. III, § 1 (emphasis added). The italicized phrases indicate what would anyway be obvious: Article III judges retain their power only during life. Upon death, they are no more an Article III judge than is any other non-Article III actor. By permitting these judges to participate in the determination of cases and controversies—by allowing those judges to share in the exercise of judicial power—the Ninth Circuit is violating Article III.

B. Courts take inconsistent approaches to counting the votes of deceased judges.

This Court does not count the votes of justices who pass away before a decision. *See, e.g.*, *J.W. Frellsen*

& Co. v. Crandell, 217 U.S. 71, 75 (1910) ("This opinion, including the preliminary statement, was prepared by our Brother Brewer, and had been approved before his lamented death. *It was recirculated and again agreed to*, and is adopted as the opinion of the court." (emphasis added)). For example, this Court did not indicate Justice Scalia's vote in any decision published after his death.

At the appellate level, the only decision addressing the issue is *Mayor & City Council of Baltimore v. Mathews*, 571 F.2d 1273 (4th Cir. 1978) (per curiam). There, the Fourth Circuit held that it could not count the vote of a judge who died "before the dissenting and concurring opinions were written and before the court's decision was announced." *Id.* at 1276. Its reasoning is thin, and consists entirely of a "cf." citation to *American-Foreign*, apparently endorsing the analysis in the previous subsection.

The only other guidance comes from the courts' inconsistent practices. Lower courts faced with this situation sometimes draw a replacement judge for the panel. *See, e.g.*, *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1018 n* (9th Cir. 2000). Sometimes they decide the case with a two-judge quorum. *See, e.g.*, *Christie v. Comm'r of Soc. Sec. Admin.*, 489 F. App'x 581, 582 n.* (3d Cir. 2012). But other times, they continue to count the vote cast before the judge's death. *See, e.g.*, *United States v. Woods*, 159 F.3d 1132, 1133 n.1 (8th Cir. 1998) ("Judge Kelly died on October 21, 1998. This opinion is consistent with the vote he cast at conference on this case.").

Recently, the Ninth Circuit has embraced this last approach, albeit inconsistently. In at least two cases, it has counted the votes of a judge who died before

the decision was issued. *See, e.g.*, Pet. App. 1a; *Hernandez v. Chappell*, 878 F.3d 843, 845 n.** (9th Cir. 2017). In both, the deceased judge's vote was necessary to form the majority. Yet the Ninth Circuit has not recognized the votes of the same deceased judges when their votes were irrelevant to the outcome. *See, e.g.*, *Smith v. Pennywell*, — F. App'x —, 2018 WL 3454412, at *1 n.* (9th Cir. July 18, 2018); *United States v. Shaw*, 885 F.3d 1217, 1217 n.* (9th Cir. 2018). Even the Ninth Circuit's apparent practice of counting only dispositive votes is inconsistently applied; in *Altera Corp. & Subsidiaries v. Commissioner of Internal Revenue*, — F.3d —, 2018 WL 3542989, at *1 n.** (9th Cir. July 24, 2018), the court at first included the dispositive vote of Judge Reinhardt, who died four months earlier, before *sua sponte* substituting Judge Graber for Judge Reinhardt and withdrawing the opinion "to allow time for the reconstituted panel to confer," *Altera Corp. v. Comm'r of Internal Revenue*, — F.3d —, 2018 WL 3734216, at *1 (9th Cir. Aug. 7, 2018).

C. The Court can consider this issue while simultaneously resolving the first question presented.

The improper composition of the Ninth Circuit en banc panel creates no barrier to reaching the first question presented. The Court indisputably has jurisdiction to address it. For one thing, all parties here have Article III standing, since there remains an active dispute over Rizo's entitlement to relief under the Equal Pay Act. The federal courts have jurisdiction over this Equal Pay Act case under 28 U.S.C. § 1331. And while the Ninth Circuit was improperly constituted, it had jurisdiction to hear the

appeal under 28 U.S.C. § 1292(b). It issued a final judgment, and this court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

So Judge Reinhardt's vote poses no vehicle problem. But it does allow the Court, if it chooses, to address two important issues at once, including one—the eligibility of deceased judges to participate in a decision—that arises only infrequently. Nothing prevents the Court from resolving both questions, which present independent grounds for reversal. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (holding that the D.C. Circuit erred both in finding a lack of probable cause and in denying qualified immunity); *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (challenges to execution protocol failed for two independent reasons).

It would make particularly good sense to reach both questions here. The Ninth Circuit's judgment likely would not change after a remand for consideration by a properly staffed en banc court; the judgment against Petitioner was unanimous. And the first question involves an important, recurring issue in employment law, one that divided the circuits even before the Ninth Circuit intervened. The Court should eliminate that confusion even if it also prohibits deceased judges from determining pending cases.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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