

(ORDER LIST: 586 U.S.)

MONDAY, FEBRUARY 25, 2019

CERTIORARI -- SUMMARY DISPOSITIONS

17-5018 KLIKNO, STEVEN V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit in light of *Stokeling v. United States*, 586 U. S. \_\_\_\_ (2019).

17-8401 FRANKLIN, JIMMY L. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit in light of the position asserted by the Solicitor General in his brief for the United States filed on July 6, 2018.

17-8740 VAN SACH, JOSEPH V. UNITED STATES

17-9399 SHIELDS, ERNEST D. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit in light of *Stokeling v. United States*, 586 U. S. \_\_\_\_ (2019).

18-5213 BAKER, DAWN V. BERRYHILL, NANCY A.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of that court's opinion in *Washington v. Commissioner of Social Security*, 906 F.3d 1353 (CA11 2018).

18-6177 LIPSCOMB, TONY V. UNITED STATES

18-6369 BROWNING, LASHON V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit in light of *Stokeling v. United States*, 586 U. S. \_\_\_\_ (2019).

#### ORDERS IN PENDING CASES

18M103 HOM, JOHN C. V. UNITED STATES

The motion to direct the Clerk to file a petition for a writ of certiorari out of time under Rule 14.5 is denied.

18M104 GRIGSBY, PHILIP A. V. BALTAZAR, WARDEN

The motion for leave to proceed as a veteran is denied. Justice Gorsuch took no part in the consideration or decision of this motion.

17-1606 SMITH, RICKY L. V. BERRYHILL, NANCY A.

The motion for divided argument filed by the Solicitor General is granted, and the time is divided as follows: 15 minutes for petitioner, 15 minutes for the Solicitor General, and 30 minutes for Court-appointed *amicus curiae* in support of the judgment below.

18-315 COCHISE CONSULTANCY, ET AL. V. UNITED STATES, EX REL. HUNT

The motion of the Solicitor General for leave to participate

in oral argument as *amicus curiae* and for divided argument is granted.

**CERTIORARI GRANTED**

18-328 ROTKISKE, KEVIN C. V. KLEMM, PAUL, ET AL.

The petition for a writ of certiorari is granted.

**CERTIORARI DENIED**

17-5239 RAZZ, RODNEY L. V. UNITED STATES  
17-5543 DAVIS, JAMES L. V. UNITED STATES  
17-5745 PHELPS, JOHN T. V. UNITED STATES  
17-5772 CONDE, KENNETH R. V. UNITED STATES  
17-6026 WILLIAMS, ANTHONY B. V. UNITED STATES  
17-6054 EVERETTE, LATELLIS V. UNITED STATES  
17-6140 JONES, XAVIER V. UNITED STATES  
17-6276 MIDDLETON, JULIAN M. V. UNITED STATES  
17-6357 REEVES, EDWARD T. V. UNITED STATES  
17-6374 RIVERA, ARMANDO V. UNITED STATES  
17-6540 SHOTWELL, DESMOND V. UNITED STATES  
17-6664 MAYS, MICHAEL A. V. UNITED STATES  
17-6829 HARDY, BOBBY J. V. UNITED STATES  
17-6887 WRIGHT, BENJIE E. V. UNITED STATES  
17-6991 BAXTER, RUBIN D. V. UNITED STATES  
17-7140 PACE, KELVIN V. UNITED STATES  
17-7391 REPRESS, DARRYL V. UNITED STATES  
17-7563 COTTMAN, LESLEY W. V. UNITED STATES  
17-7716 GARCIA, DANIEL K. V. UNITED STATES  
17-7747 BEVERLY, NATHANIEL V. UNITED STATES  
17-7762 JACKSON, STEVEN V. UNITED STATES  
17-7952 WRIGHT, JAMES C. V. UNITED STATES

17-8272 BANNISTER, JEROME V. UNITED STATES  
17-8289 WRIGHT, IRAMM V. UNITED STATES  
17-8431 CASAMAYOR, DANIEL V. UNITED STATES  
17-8544 ROBINETT, SHANNON D. V. UNITED STATES  
17-8663 HALL, ANTHONY S. V. UNITED STATES  
17-8676 KING, ERNEST V. UNITED STATES  
17-8678 JACKSON, ANTHONY G. V. UNITED STATES  
17-8745 WILLIAMS, TREVOR V. UNITED STATES  
17-8766 DeSHAZIOR, EDWIN V. UNITED STATES  
17-8860 DAVIS, ISSAC V. UNITED STATES  
17-8951 LEWIS, CEFALO V. UNITED STATES  
17-9097 LEWIS, JAUMON R. V. UNITED STATES  
17-9128 JOYNER, KEENAN V. UNITED STATES  
17-9151 GODBEE, BURNETT V. UNITED STATES  
17-9353 WALKER, WILLIE V. UNITED STATES  
17-9378 DIEMER, DARYL V. UNITED STATES  
17-9589 HARRIS, KENNETH L. V. UNITED STATES  
18-192 J. B. R. V. UNITED STATES  
18-323 EVANS, SUZAN V. UNITED STATES, ET AL.  
18-340 IN-N-OUT BURGER V. NLRB  
18-566 MENENDEZ, HERIBERTO V. GARBER, MARSHALL  
18-578 PENDER, WILLIAM L., ET AL. V. BANK OF AMERICA, ET AL.  
18-642 ZUKERMAN, MORRIS E. V. UNITED STATES  
18-651 MONTGOMERY, JASON C. V. UNITED STATES  
18-674 MURPHY, JEDIDIAH I. V. DAVIS, DIR., TX DCJ  
18-680 HUSS, WARDEN V. ROBINSON, LOREN  
18-742 WASHINGTON, BRANDON V. ALABAMA  
18-773 SULLIVAN, DANIEL V. FREDERICK, MD, ET AL.

18-779 POWER INTEGRATIONS, INC. V. FAIRCHILD SEMICONDUCTOR INT'L  
18-783 BARONE, JOHN M. V. WELLS FARGO BANK, N.A.  
18-784 BUGG, ELDON V. HONEY, MARC, ET AL.  
18-785 ALSTON, ESHED V. ADMIN. OFFICE OF CTS., ET AL.  
18-786 BLAIR, GLENN V. McCLINTON, ANGELA, ET AL.  
18-792 SATTERLEE, RONALD L. V. MILLER-DEGASE, ALICIA  
18-800 SHAO, LINDA V. McMANIS FAULKNER, LLP  
18-802 DeHOOG, JAMES, ET AL. V. ANHEUSER-BUSCH InBEV, ET AL.  
18-812 TEAMSTERS LOCAL 210 V. SILVERMAN, LEON, ET AL.  
18-816 DAVIS, GAVIN B. V. UNITED STATES  
18-822 COHEN, STEVEN G. V. GRIEVANCE ADMINISTRATOR  
18-829 DAVIS, JOHN H. V. ANDERSON, JUDGE, ET AL.  
18-836 LUNA, PHIL M. V. FLORIDA  
18-844 CHAVEZ-JUAREZ, CESAR O. V. BARR, ATT'Y GEN.  
18-849 HTC CORPORATION V. 3G LICENSING, S.A., ET AL.  
18-871 JARMUTH, RONALD V. INT'L CLUB HOMEOWNERS ASSN.  
18-875 HILL, ALBERT G., ET AL. V. PBL MULTI-STRATEGY FUND, L.P.  
18-892 KIRSCH, MARK N. V. UNITED STATES  
18-904 KING LAW GROUP, PLLC, ET AL. V. M2 TECHNOLOGY, INC.  
18-914 BOVE, GERALD E. V. UNITED STATES  
18-919 DAVIES, ROBERT R. V. UNITED STATES  
18-924 BULLOCK, MICHAEL A. V. NORTH CAROLINA  
18-945 TLSL, INC. V. SNEAD, RANKIN, ET AL.  
18-960 NATIONWIDE BIWEEKLY ADM., INC. V. BMO HARRIS BANK, N.A.  
18-961 SWARTZ, MITCHELL B. V. PATENT AND TRADEMARK  
18-991 HUEBNER, LEVI V. MIDLAND CREDIT MANAGEMENT  
18-993 YOUNG ADULT INSTITUTE, INC. V. LEVY, JOEL M., ET AL.  
18-1002 DAVIS, CYNTHIA, ET AL. V. VALSAMIS, INC.

18-5092            ANDERSON, TYRONE V. UNITED STATES  
18-5232            PETTIS, CHARLES L. V. UNITED STATES  
18-5288            SERRANO, ROBERT V. UNITED STATES  
18-5384            RIVERA-RUPERTO, WENDELL V. UNITED STATES  
18-5612            SMITH, DETRICK C. V. UNITED STATES  
18-5838            SWOPES, HOSEA V. UNITED STATES  
18-5940            PEREZ, MOISES V. UNITED STATES  
18-6025            BORRERO, RENE V. UNITED STATES  
18-6092            ABLES, ROBERT D. V. UNITED STATES  
18-6257            McCRANIE, EDWARD D. V. UNITED STATES  
18-6410            McKINZY, MICHAEL V. GASTON, CARLETHA  
18-6411            REED, ENNIS V. CALIFORNIA  
18-6715            EDSTROM, CORTNEY J. V. MINNESOTA  
18-6727            STOJETZ, JOHN C. V. SHOOP, WARDEN  
18-6752            McGUIRE, DAVID V. OHIO  
18-6772            GRANT, DONOVAN V. UNITED STATES  
18-6781            FARR, JOAN E. V. CIR  
18-6813            GHOSH, RASH B. V. BERKELEY, CA  
18-6818            RANGEL, RUBEN V. CALIFORNIA  
18-7026            COATS, BRYAN V. UNITED STATES  
18-7099            RATUSHNY, RICHARD A. V. KAUFFMAN, SUPT., ET AL.  
18-7118            LYNCH, RICHARD E. V. FLORIDA  
18-7136            HANNA, MARK V. LeBLANC, SEC., LA DOC, ET AL.  
18-7137            MADRIGAL, JAMIE R. V. OHIO  
18-7146            SAGE, JONATHAN S. V. WASHINGTON  
18-7149            DANIELAK, MARY V. BREWER, WARDEN  
18-7151            MULHERN, CURTIS J. V. PENNSYLVANIA  
18-7155            PROVENCIO, ALFREDO V. LIZARRAGA, WARDEN

18-7157 MAYFIELD, CODY W. V. MARTIN, WARDEN  
18-7159 LAMAR, ANDREW M. V. O'DELL, JOHN  
18-7160 ARANOFF, GERALD V. ARANOFF, SUSAN  
18-7164 KNUTH, NATHAN D. V. ARP, JUDGE, ET AL.  
18-7165 JONES, DRAKILE L. V. MICHIGAN  
18-7168 WILLIAMS, MICHAEL D. V. SOTO, WARDEN  
18-7170 YANCEY, JONATHAN V. ALABAMA  
18-7171 YOUNG, ZURI S. V. VOONG, M., ET AL.  
18-7172 KEEN, TOMAS M. V. WASHINGTON  
18-7173 LOFGREN, KAREN V. HARDIN, TODD  
18-7174 EVERSON, SHAWNDELL V. NEW YORK  
18-7175 LIPSEY, CHRISTOPHER V. COURT OF APPEAL OF CA  
18-7179 TAYLOR, TREVILLE J. V. NEBRASKA  
18-7182 GATES, ROY D. V. TEXAS  
18-7202 SOTO, FIDEL R. V. CALIFORNIA  
18-7234 EDWARDS, ROBYN G., ET AL. V. GENE SALTER PROPERTIES, ET AL.  
18-7237 SAUNDERS, DIONE C. V. BERRYHILL, NANCY A.  
18-7244 MORALES, VIDAL L. V. UNITED STATES  
18-7250 JONES, DIANE S. V. SAMSON RESOURCES CORP., ET AL.  
18-7276 VEGA, JUAN FRANCISCO, ET AL. V. KAPUSTA, REBECCA  
18-7298 MOORE, NICOLE M. V. FLORIDA  
18-7311 WILKINS, KEENAN G. V. GONZALEZ, PAUL, ET AL.  
18-7337 MARTIN, GARY D. V. TERRY, ACTING WARDEN  
18-7354 JOHNSON, DERRICK L. V. BRADLEY, WARDEN  
18-7368 HOWARD, REDMOND V. McCREADY, DARYL, ET AL.  
18-7385 LE, CHENG V. UNITED STATES  
18-7394 BROWN, TORREY V. TANNER, WARDEN  
18-7395 WILFRED H. V. WEST VIRGINIA

18-7397 BREEDEN, JACKIE V. KELLEY, DIR., AR DOC  
18-7404 LAAKE, JOHN V. TURNING STONE RESORT CASINO  
18-7410 KOTT, WALTER A. V. VANNOY, WARDEN  
18-7412 KENNEDY, KEITH V. LA DOC  
18-7427 DAUD, ABDIRAHMAN Y. V. UNITED STATES  
18-7430 FARAH, MOHAMED A. V. UNITED STATES  
18-7436 AASE, JEFFREY N. V. SCHNELL, COMM'R, MN DOC  
18-7440 WHITMAN, CHRISTOPHER V. UNITED STATES  
18-7443 THORNTON, WALLACE V. UNITED STATES  
18-7445 GEORGE, LENNIS A. V. KENT, WARDEN  
18-7447 LEMON, CHRISTOPHER E. V. UNITED STATES  
18-7452 GARCIA-CARILLO, HERMINIO V. UNITED STATES  
18-7454 ST. VALLIER, TYSHAUN V. UNITED STATES  
18-7456 SEBERT, JONATHAN V. UNITED STATES  
18-7462 JOHNSON, WILLIAM A. V. UNITED STATES  
18-7468 JONES, ROBERT C. V. PALMER, WARDEN, ET AL.  
18-7473 ALBRIGHT, WILLIAM D. V. KANSAS  
18-7498 HALL, EDDIE V. TERRIS, WARDEN  
18-7522 KENNEDY, FREDDIE B. V. UNITED STATES  
18-7523 JAMES, CHARLES V. KRUEGER, WARDEN  
18-7537 SALDIERNA, FELIX R. V. NORTH CAROLINA  
18-7550 REYES-RUIZ, MARBIN R. V. UNITED STATES  
18-7556 HORTON, MICHAEL J. V. DUCART, WARDEN  
18-7562 ISAIAH, DONALD J. V. JONES, SEC., FL DOC  
18-7565 FULLER, MICHAEL V. EPPINGER, WARDEN  
18-7578 HOWARD, JEFFREY T. V. UNITED STATES  
18-7579 PRICE, DAVID L. V. UNITED STATES  
18-7585 GAY, LEMUEL V. UNITED STATES

18-7587 HUDSON, BIVEN V. UNITED STATES  
18-7588 ODOM, FRANK V. UNITED STATES  
18-7593 SANCHEZ, RICHARD M. V. UNITED STATES  
18-7598 MORRIS, CAROL J. V. UNITED STATES  
18-7600 HOLT, JOHNATHAN V. UNITED STATES  
18-7602 DEMERSON, PERCY E. V. UNITED STATES  
18-7605 DIAZ, DANIEL V. UNITED STATES  
18-7607 WHITE, BRUCE V. UNITED STATES  
18-7609 ALSTON, MERLIN V. UNITED STATES  
18-7615 BACON, MICHAEL A. V. UNITED STATES  
18-7619 MORRIS, MICHAEL S. V. UNITED STATES  
18-7623 GOOLSBY, JAMES V. UNITED STATES  
18-7638 WILLIAMS, JOHN T. V. UNITED STATES  
18-7644 BENITEZ, CARLOS V. KEY, SUPT., AIRWAY HEIGHTS  
18-7654 FAUSNAUGHT, STEVEN V. UNITED STATES  
18-7662 LEWIS, NOLAN V. UNITED STATES  
18-7664 GREER, JOHN F. V. UNITED STATES  
18-7666 VASQUEZ, ROWY D. V. UNITED STATES  
18-7667 TAYLOR, MARION V. VANNOY, WARDEN  
18-7713 GRIMSLEY, DARNELL V. MCGINLEY, SUPT., ET AL.

The petitions for writs of certiorari are denied.

17-6271 JAMES, ROBERT L. V. UNITED STATES  
17-6577 ORR, RICHARD A. V. UNITED STATES  
17-8739 DORVILUS, MAURICE V. UNITED STATES  
17-9469 GARCIA, PHILLIP A. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

18-551 PHILIP MORRIS USA INC. V. JORDAN, ELAINE  
18-552 PHILIP MORRIS USA INC. V. BROWN, MARY  
18-621 R.J. REYNOLDS TOBACCO, ET AL. V. PARDUE, MARY F.  
18-649 R.J. REYNOLDS TOBACCO, ET AL. V. SEARCY, CHERYL  
18-653 PHILIP MORRIS USA INC. V. McKEEVER, VICKIE  
18-654 PHILIP MORRIS USA INC., ET AL. V. RICHARD BOATRIGHT, ET UX.

The petitions for writs of certiorari are denied. Justice Kavanaugh took no part in the consideration or decision of these petitions.

18-798 BLAUCH, JOANNA J. V. COLORADO

The motion of petitioner to defer consideration of the petition for a writ of certiorari is denied. The petition for a writ of certiorari is denied.

18-897 R.J. REYNOLDS TOBACCO CO. V. NALLY, MARLENE

18-898 R.J. REYNOLDS TOBACCO CO. V. JOHNSTON, BARBARA J.

The petitions for writs of certiorari are denied. Justice Kavanaugh took no part in the consideration or decision of these petitions.

18-900 ZODHIATES, PHILIP V. UNITED STATES

The motion of Foundation for Moral Law for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

18-7448 FOXX, CHARLES V. UNITED STATES

18-7453 STERLING, COREY K. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Sotomayor, with whom Justice Ginsburg joins, dissenting from the denials of certiorari: I dissent for the reasons set out in

*Brown v. United States*, 586 U. S. \_\_\_\_ (2018) (Sotomayor, J., dissenting).

18-7495 BOYD, WILLIE E. V. QUINTANA, WARDEN

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

18-7608 WHITNEY, JAMES E. V. CHANCELLOR, BLAKE H.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

18-7614 JACOBY, MICHAEL V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

18-7656 GARCIA, ARMANDO V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

#### **HABEAS CORPUS DENIED**

18-7681 IN RE ERASMO AGUINAGA

The petition for a writ of habeas corpus is denied.

#### **REHEARINGS DENIED**

17-8786 DEVEAUX, DIN V. CALDWELL, WARDEN

17-8963 HERBERT, RICHARD V. CVS PHARMACY, ET AL.

17-9058 CARTER, KENNETH E. V. BERRYHILL, NANCY A.

17-9108 HURD, DALE R. V. LIZARRAGA, WARDEN

17-9144 HONISH, MARK F. V. UNITED STATES

17-9322 HAFFER, GRETCHEN A. V. NEW HAMPSHIRE

17-9563 INGRAM, CURTIS C. V. DIAZ, SEC., CA DOC  
18-223 IN RE CHRISTOPHER DAWSON  
18-375 ALEXANDER, DANIEL H. V. BAYVIEW LOAN SERVICING, LLC  
18-458 PELLEGRINI, LILLIAN V. FRESNO COUNTY, CA, ET AL.  
18-598 CHIEN, ANDREW V. CLARK, ANDREW K., ET AL.  
18-683 STARK, BRADLEY C. V. UNITED STATES  
18-5128 IN RE GIGI FAIRCHILD-LITTLEFIELD  
18-5886 MITCHELL, DWIGHT V. TAYLOR, WILSON, ET AL.  
18-6160 CARMODY, KEVIN R. V. BD. OF TRUSTEES, ET AL.  
18-6230 SHOATE, HARVEY L. V. LEWIS, WARDEN  
18-6294 WALCOTT, STEVEN A. V. TERREBONNE PARISH JAIL, ET AL.  
18-6298 FRATTA, ROBERT A. V. DAVIS, DIR., TX DCJ  
18-6326 COXE, TERRY A. V. WHITE, SUPT., WA  
18-6354 JOSSIE, CHERYL L. V. CVS PHARMACY  
18-6383 KULICK, ROBERT J. V. REIN, STEVEN  
18-6507 BROWN, ALICE V. DEL NORTE COUNTY, CA, ET AL.  
18-6647 SHARMA, KIRAN V. UNITED STATES  
18-6654 IN RE GARY R. DEBOLT

The petitions for rehearing are denied.

Per Curiam

**SUPREME COURT OF THE UNITED  
STATES**

**JIM YOVINO, FRESNO COUNTY SUPERINTENDENT  
OF SCHOOLS v. AILEEN RIZO**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–272. Decided February 25, 2019

PER CURIAM.

The petition in this case presents the following question: May a federal court count the vote of a judge who dies before the decision is issued?

A judge on the United States Court of Appeals for the Ninth Circuit, the Honorable Stephen Reinhardt, died on March 29, 2018, but the Ninth Circuit counted his vote in cases decided after that date.\* In the present case, Judge Reinhardt was listed as the author of an en banc decision issued on April 9, 2018, 11 days after he passed away. By counting Judge Reinhardt’s vote, the court deemed Judge Reinhardt’s opinion to be a majority opinion, which means that it constitutes a precedent that all future Ninth Circuit panels must follow. See *United States v. Caperna*, 251 F.3d 827, 831, n. 2 (2001). Without Judge Reinhardt’s vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the en banc panel who were still living when the decision was filed.

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\*In *Altera Corp. v. Commissioner*, 2018 WL 3542989 (CA9, July 24, 2018), decided four months after Judge Reinhardt died, his vote was initially counted as one of the two judges in the majority. A footnote in the opinion stated: “Judge Reinhardt fully participated in this case and formally concurred in the majority opinion prior to his death.” *Id.*, at \*1, n. \*\*. Later, however, the court vacated the opinion and issued an order reconstituting the panel. *Altera Corp. v. Commissioner*, 898 F.3d 1266 (CA9 2018). No similar action was taken in this case.

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Although the other five living judges concurred in the judgment, they did so for different reasons. The upshot is that Judge Reinhardt’s vote made a difference. Was that lawful?

## I

Aileen Rizo, an employee of the Fresno County Office of Education, brought suit against the superintendent of schools, claiming, among other things, that the county was violating the Equal Pay Act of 1963, 77 Stat. 56–57, 29 U. S. C. §206(d). The District Court denied the county’s motion for summary judgment, and the Ninth Circuit granted the county’s petition for interlocutory review. A three-judge panel of the Ninth Circuit vacated the decision of the District Court based on a prior Ninth Circuit decision, *Kouba v. Allstate Ins. Co.*, 691 F. 2d 873 (1982), that the panel “believed it was compelled to follow.” 887 F. 3d 453, 459 (2018) (en banc). The court then granted en banc review “to clarify the law, including the vitality and effect of *Kouba*.” *Ibid.* Like other courts of appeals, the Ninth Circuit takes the position that a panel decision like that in *Kouba* can be overruled only by a decision of the en banc court or this Court, see *Naruto v. Slater*, 888 F. 3d 418, 421 (2018), and therefore a clear purpose of the en banc decision issued on April 9 was to announce a new binding Ninth Circuit interpretation of the Equal Pay Act issue previously addressed by *Kouba*. The opinion authored by Judge Reinhardt and issued 11 days after his death purports to do that, but its status as a majority opinion of the en banc court depends on counting Judge Reinhardt’s vote.

The opinions issued by the en banc Ninth Circuit state that they were “Filed April 9, 2018,” and they were entered on the court’s docket on that date. A footnote at the beginning of the en banc opinion states:

“Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority

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opinion and all concurrences were final, and voting was completed by the en banc court prior to his death.” 887 F. 3d, at 455, n. \*.

## II

The Ninth Circuit did not expressly explain why it concluded that it could count Judge Reinhardt’s opinion as “[t]he majority opinion” even though it was not endorsed by a majority of the living judges at the time of issuance, but the justification suggested by the footnote noted above is that the votes and opinions in the en banc case were inalterably fixed at least 12 days prior to the date on which the decision was “filed,” entered on the docket, and released to the public. This justification is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent.

As for judicial practice, we are not aware of any rule or decision of the Ninth Circuit that renders judges’ votes and opinions immutable at some point in time prior to their public release. And it is generally understood that a judge may change his or her position up to the very moment when a decision is released.

We endorsed this rule in *United States v. American-Foreign S. S. Corp.*, 363 U. S. 685 (1960), which interpreted an earlier version of 28 U. S. C. §46(c), the statutory provision authorizing the courts of appeals to hear cases en banc. The current version of this provision permits a circuit to adopt a rule allowing a senior circuit judge to sit on an en banc case under certain circumstances, but at the time of our decision in *American-Foreign S. S. Corp.*, this was not allowed. Instead, only active judges could sit en banc. See 28 U. S. C. §46(c) (1958 ed.).

In *American-Foreign S. S. Corp.*, Judge Harold Medina was one of the five active judges on the Second Circuit when the court granted a petition for rehearing en banc. After briefing was complete but before an opinion issued,

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Judge Medina took senior status. When the en banc court issued its decision, the majority opinion was joined by Judge Medina and two active Circuit Judges; the two other active Circuit Judges dissented. We vacated the judgment and remanded the case, holding that “[a]n ‘active’ judge is a judge who has not retired ‘from regular active service,’” and “[a] case or controversy is ‘determined’ when it is decided.” 363 U. S., at 688. Because Judge Medina was not in regular active service when the opinion issued, he was “without power to participate” in the en banc decision. *Id.*, at 687, 691; cf., *id.*, at 691–692 (Harlan, J., dissenting).

Our holding in *American-Foreign S. S. Corp.* applies with equal if not greater force here. When the Ninth Circuit issued its opinion in this case, Judge Reinhardt was neither an active judge nor a senior judge. For that reason, by statute he was without power to participate in the en banc court’s decision at the time it was rendered.

In addition to §46(c), §46(d) also shows that what the Ninth Circuit did here was unlawful. That provision states:

“A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.”

Under §46(c), a court of appeals case may be decided by a panel of three judges, and therefore on such a panel two judges constitute a quorum and are able to decide an appeal—provided, of course, that they agree. Invoking this rule, innumerable court of appeals decisions hold that when one of the judges on a three-judge panel dies, retires, or resigns after an appeal is argued or is submitted for decision without argument, the other two judges on the panel may issue a decision if they agree. See, e.g., *United States v. Allied Stevedoring Corp.*, 241 F. 2d 925, 927 (CA2 1957); *Murray v. National Broadcasting Co.*, 35 F. 3d 45,

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47 (CA2 1994); *Singh v. Ashcroft*, 121 Fed. Appx. 471, 472, n. (CA3 2005); *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F. 3d 307, 309, n. (CA5 1999); *Clark v. Metropolitan Life Ins. Co.*, 67 F. 3d 299, n. \*\* (CA6 1995); *Kulumani v. Blue Cross Blue Shield Assn.*, 224 F. 3d 681, 683, n. \*\* (CA7 2000). See also *Nguyen v. United States*, 539 U. S. 69, 82 (2003) (“[S]ettled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified.”). With the exception of one recent decision issued by the Ninth Circuit after Judge Reinhardt’s death but subsequently withdrawn, see *supra*, at 1 n., we are aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time.

\* \* \*

Because Judge Reinhardt was no longer a judge at the time when the en banc decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.

We therefore grant the petition for certiorari, vacate the judgment of the United States Court of Appeals for the Ninth Circuit, and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SOTOMAYOR concurs in the judgment.