No. 16-15372

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AILEEN RIZO,
Plaintiff-Appellee,

v.

JIM YOVINO, FRESNO COUNTY SUPERINTENDENT OF SCHOOLS,
ERRONEOUSLY SUED HEREIN AS
FRESNO COUNTY OFFICE OF EDUCATION,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of California

Case No. 14-cv-00423 AWI-MJS (Hon. Michael J. Seng, Magistrate Judge)

DEFENDANT-APPELLANT JIM YOVINO'S UNOPPOSED MOTION TO STAY THE MANDATE

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Defendant-Appellant Jim Yovino, the Fresno County Superintendent of Schools, respectfully moves the Court to stay its mandate pending the filing and disposition of his petition for a writ of certiorari. The limited en banc Court entered judgment on February 27, 2020. Absent a stay, the mandate must issue 21 days after that, on March 19, 2020. *See Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994) (en banc).* Plaintiff-Appellee Rizo does not oppose this request.

The Superintendent meets the requirements for a stay. The en banc majority acknowledged that its interpretation of the Equal Pay Act—that it categorically forbids employers from defending a pay disparity by reference to prior pay—conflicts with at least two other circuits' approach, *see Rizo v. Yovino*, __ F.3d __, 2020 WL 946053, at *7 (9th Cir. Feb. 27, 2020), and in fact that position conflicts with four other circuits' views as well, *see infra* 4–7. The Superintendent's forthcoming petition for certiorari will thus "present a substantial question." Fed. R. App. P. 41(d)(1). There is also "good cause" for a stay. *Id.* Rizo will suffer no harm from a brief pause, but absent one, the parties may be forced to endure potentially pointless litigation before the Supreme Court acts.

* *See* Fed. R. App. P. 41(b) (mandate must issue 7 days after the time for seeking rehearing en banc expires); Fed. R. App. P. 35(c) (the time for seeking rehearing en banc is the same as for panel rehearing); Fed. R. App. P. 40(a)(1) (14 days to seek panel rehearing); 9th Cir. R. 35-3 (authorizing "rehearing by the full court following a [limited] … rehearing en banc").

BACKGROUND

Rizo was hired as a "math Consultant" in 2009. ER 212. In keeping with the Fresno County Superintendent of Schools' policy at the time, her salary was determined in part by her salary at her prior school in Arizona—it incorporated a 5% raise from her prior salary, as well as an additional $600 stipend in light of her master's degree. ER 231, 448.

After Rizo learned that her salary was lower than some of her male colleagues', she filed suit, alleging that the disparity violated the Equal Pay Act. *See* 29 U.S.C. § 206(d)(1). The Superintendent moved for summary judgment, reasoning that the "differential [was] based on" a "factor other than sex" because it stemmed from Rizo's prior salary. *Id.*

The district court denied the Superintendent's motion for summary judgment, holding that reliance upon prior salary alone cannot justify a pay disparity. *See Rizo v. Yovino*, No. 14-cv-0423, 2015 WL 9260587, at *9 (E.D. Cal. Dec. 18, 2015). Upon certification, a panel of this Court vacated and remanded. *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017). Under *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), the use of prior pay alone may justify a disparity, but only if the use of prior salary "'effectuate[d] some business policy'" and was "'reasonabl[e] in light of [the employer's] stated purposes as well as other practices.'" *Rizo*, 854 F.3d at 1167 (quoting *Kouba*, 691 F.2d at 876–77).

The en banc Court vacated the panel decision and affirmed the district court's denial of summary judgment. The majority opinion was listed as having been joined by six judges, including Judge Reinhardt, the opinion's author, who had passed away almost two weeks earlier. It overruled *Kouba* and held that employers may never rely upon an employee's prior pay to support a pay disparity. *See Rizo v. Yovino*, 887 F.3d 453, 467–68 (9th Cir. 2018) (en banc). The Superintendent petitioned for a writ of certiorari, and the Supreme Court granted, vacated, and remanded because this Court had erroneously counted Judge Reinhardt's vote after his death. *See Yovino v. Rizo*, 139 S. Ct. 706, 708–10 (2019) (per curiam).

On remand, the en banc majority again held that the Equal Pay Act's catchall defense covers only "job-related" factors and that "[p]rior pay—pay received for a different job—is necessarily not a factor related to the job for which an EPA plaintiff must demonstrate unequal pay for equal work." *Rizo*, 2020 WL 946053, at *7. The majority acknowledged that its decision departed from the Seventh Circuit's position, and it was "not persuaded to follow" the Eighth Circuit's approach either. *Id.* at *7–8. Two separate concurrences pointed out that, by refusing to *ever* allow an employer to rely upon prior pay, the majority's position also brought this Court into conflict with decisions from the Second, Sixth, Tenth, and Eleventh Circuits. *See id.* at *14 (McKeown, J., concurring); *id.* at *18–19 (Callahan, J., concurring).

ARGUMENT

This Court will stay its mandate pending a petition for a writ of certiorari when the "petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(1). Given the acknowledged circuit split and the lack of any harm from a brief pause, this Court should stay the mandate.

I. THE CIRCUIT SPLIT CREATED AND EXACERBATED BY THE MAJORITY'S DECISION PRESENTS A SUBSTANTIAL QUESTION

The "substantial question" standard is not onerous. It does not require courts to conclude that the applicant is likely to succeed on the merits. Instead, "the applicant must show a reasonable probability that four justices will vote to grant certiorari and a reasonable possibility or 'fair prospect' that five justices will vote to reverse the circuit court's judgment." 20A Moore's Federal Practice - Civil § 341.14[2]; *see also, e.g.*, *United States ex rel. Chandler v. Cook County*, 282 F.3d 448, 450 (7th Cir. 2002) (Ripple, J., in chambers) (similar). The Superintendent meets both subparts of this test.

1. There is—at least—a reasonable probability that the Supreme Court will grant certiorari in this case, which already attracted the Court's attention. "The single most important factor for granting certiorari petitions … is a split within the circuits that have considered the issue below." *Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 746 (11th Cir. 2004) (mem.) (internal quotation marks and citation omitted); *see also* Sup. Ct. R. 10(a) (listing conflict among the circuits as

the first reason for certiorari). The en banc majority acknowledged that its categorical ban on the use of prior pay conflicted with the Seventh Circuit's diametrically opposed view that employers may rely upon prior pay—and prior pay alone—to justify a disparity. *See Rizo*, 2020 WL 946053, at *7; *Wernsing v. Dep't of Human Servs.*, 427 F.3d 466, 468 (7th Cir. 2005) (Easterbrook, J.) ("Wages at one's prior employer are a 'factor other than sex'" that an "employer may use … to set pay consistently with the Act.").

Other circuits share the Seventh Circuit's view. In *Spencer v. Virginia State University*, the Fourth Circuit upheld a grant of summary judgment in the employer's favor because a difference stemming from two male coworkers' "previous salaries" was "based on a factor other than sex." 919 F.3d 199, 202–03 (4th Cir. 2019). This was not "dicta." *Rizo*, 2020 WL 946053, at *11 n.14. Instead, it was an alternative holding that "even if" the plaintiff had adequately demonstrated equal work, her claim still failed in light of this "non-sex-based explanation for the pay disparity." *Spencer*, 919 F.3d at 206, 207; *see Rizo*, 2020 WL 946053, at *14 (McKeown, J., concurring) (putting the Fourth and Seventh Circuits together); *see also United States v. Ford*, 703 F.3d 708, 711 n.2 (4th Cir. 2013) (alternative holdings are binding). The Eighth Circuit has similarly held that "salary retention policies" fall within the Act's "broad catch-all 'factor other than sex' affirmative defense." *Taylor v. White*, 321 F.3d 710, 717–718 (8th Cir. 2003). While the

Eighth Circuit checks to make sure that the employer actually had and neutrally applied such a policy, where it did, the employer prevails, regardless of the "wisdom or reasonableness" of the employer's decision to use such a policy. *Id.* at 719. The en banc majority's rule is quite different. *See Rizo*, 2020 WL 946053, at *7 (declaring that the majority was "not persuaded to follow" this approach).

This conflict alone would likely be enough to compel certiorari, but the disagreement goes even further. The en banc majority's refusal to allow the use of prior pay in *any* circumstance—even when justified on business grounds, or when used in conjunction with another factor—puts this Circuit apart from every other circuit to consider the issue. The Second and Sixth Circuits, for example, allow employers to use prior pay so long as they prove that their decision to do so "has some grounding in legitimate business considerations" in that particular case. *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 527 (2d Cir. 1992); *see Beck-Wilson v. Principi*, 441 F.3d 353, 366 (6th Cir. 2006) (allowing employers to use any factor adopted for "business-related" reasons); *Rizo*, 2020 WL 946053, at *14 (McKeown, J., concurring) (recognizing the Second Circuit's position); *id.* at *19 (Callahan, J., concurring) (same). The en banc majority did not try to distinguish these cases—indeed, it overruled *Kouba*, whose lead these other courts followed. *See id.* at *10.

By prohibiting any use of prior pay, the en banc majority's decision also conflicts with those circuits that allow employers to rely upon prior pay so long as they do so in conjunction with other factors. *See Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995); *see also Rizo*, 2020 WL 946053, at *14 (McKeown, J., concurring) (calling out this conflict with the Tenth and Eleventh Circuits). While the en banc majority claims that these cases "uniformly rely on those other factors to excuse wage differentials," *id.* at *11 (majority op.), that is not the rule the cases set forth. *See, e.g.*, *Riser*, 776 F.3d at 1199 ("[A]n individual's former salary can be considered in determining whether pay disparity is based on a factor other than sex."); *Irby*, 44 F.3d at 955 ("This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense.").

In short, this Court no longer allows employers to rely upon prior pay in any case, three other courts virtually always allow them to do so, and four other courts sometimes allow that practice and sometimes reject it, depending on circumstances that vary by circuit. It is hard to imagine a clearer case for certiorari.

2. There is also a fair prospect that five justices will take Judge Easterbrook's side in this debate, not the en banc majority's. The Equal Pay Act allows employers to rely upon three specifically enumerated sex-neutral justifications for a pay disparity, followed by a broadly phrased exception for disparities "based on

any other factor other than sex." 29 U.S.C. § 206(d)(1). The Supreme Court has already recognized that this is a "general catchall provision," *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), and that it allows employers to set pay using any factor—in good "judgment" or poor—"so long as it does not discriminate on the basis of sex," *Washington County v. Gunther*, 452 U.S. 161, 171 (1981). From those basic principles, the permissibility of using prior pay becomes obvious: whether or not prior pay is *correlated* with sex, it is certainly not the same thing as sex, so using prior pay to explain a disparity uses a "factor other than sex."

This reading gives full effect to each word of the statute, including the "other" preceding "factor other than sex" in the catchall exemption. Without that "other," the statute would wrongly suggest that the enumerated exemptions—for "seniority system[s]," "merit system[s]," and "system[s] which measure[] earnings by quantity or quality of production"—are somehow "based on … sex." Reading the catchall literally—that is, to cover "any other factor other than sex"—thus gives full meaning to that "other" while correctly recognizing what unites the specific exemptions with the catchall: they all allow disparities not "based on … sex." And even if the Act's catchall exemption *could* somehow be read to cover only "job-related" factors other than sex, the use of prior pay would qualify, because it is (at least) as "job-related" as a seniority system. Employers rely upon prior pay in part because it provides concrete information about an employee's

value to his former employer, information that may be hard to come by in a world where everyone's recommendations and resumes look increasingly the same.

Given these strong textual indicators, it is little wonder that three circuits have adopted the Superintendent's position. Yet there is more support still. The Act's legislative history demonstrates that Congress meant what it said when it broadly exempted disparities based on any "factor other than sex." *See* 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 ("As it is impossible to list each and every exception, the broad general exclusion has been also included."). It is no answer to say that the use of prior pay might in some instances unknowingly reinforce preexisting sex-based disparities that Congress sought to eliminate. The statute's *enumerated* exceptions could each have the same effect in some cases, and "no legislation pursues its purposes at all costs" anyway, *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). This is particularly true of the Equal Pay Act, which (unlike Title VII) "confine[s] the application" to disparate treatment—that is, "to wage differentials attributable to sex discrimination." *Gunther*, 452 U.S. at 170. At the very least, given these arguments, there is a fair prospect that five Justices might read the statute like the Fourth, Seventh, and Eighth Circuits read it.

II. THERE IS GOOD CAUSE TO PAUSE THESE PROCEEDINGS WHILE THE SUPREME COURT MAKES ITS DECISION

There is also good cause for a stay under Rule 41(d)(2). This Court has often stayed its mandate where, in light of the strong likelihood of certiorari, there was no reason to subject the parties (and the district court) to additional, potentially needless litigation until the Supreme Court acted on the losing side's petition. For example, in *Varjabedian v. Emulex Corp.*, this Court created a circuit split in rejecting Emulex's motion to dismiss the merger-related claim against it. *See* 888 F.3d 399 (9th Cir. 2018). At Emulex's request, it stayed the mandate so that Emulex would not have to endure the cost of litigation until the Supreme Court resolved its petition. *See* Dkt. 77 in No. 16-55088, *Varjabedian v. Emulex Corp.* (9th Cir. Sept. 14, 2018). And in *Gomez v. Campbell-Ewald Co.*, the court reiterated its place in an acknowledged circuit split regarding when an offer of judgment moots a case. *See* 768 F.3d 871 (9th Cir. 2014). At Campbell-Ewald's request, this Court stayed its mandate while the Supreme Court considered the petition so that the parties would be spared from potentially needless litigation. *See* Dkt. 54 in No. 13-55486, *Gomez v. Campbell-Ewald Co.* (9th Cir. Oct. 24, 2014). Other examples abound. *See, e.g.*, Dkt. 49 in No. 17-56324, *CFPB v. Seila Law LLC* (9th Cir. Jun. 18, 2019) (staying mandate pending filing of a petition regarding the constitutionality of the CFPB's removal provisions); Dkt. 58 in No. 15-55727, *Briseno v. ConAgra Foods, Inc.* (9th Cir. Mar. 2, 2017) (staying mandate pending

filing of a petition on acknowledged circuit split regarding class certification); Dkt. 88 in No. 14-10037, *United States v. Nosal* (9th Cir. Dec. 20, 2016) (staying mandate pending petition on a controversial question about the Computer Fraud and Abuse Act).

The same approach makes sense here. Absent a stay of the mandate, this lawsuit will proceed before the district court on remand while the Superintendent's petition remains outstanding; Rizo will presumably file a guaranteed-to-succeed motion for summary judgment, and the parties will litigate hotly contested issues surrounding damages. Yet if the Supreme Court grants certiorari and reverses, the Superintendent will receive summary judgment in his favor, rendering any litigation that took place a waste of time. On the other side of the scale, Rizo faces no harm from a brief pause while the Supreme Court considers the Superintendent's petition. If the Supreme Court denies certiorari, she will be able to recover whatever damages she is entitled to under the en banc majority's decision, just a few months later than she may have initially hoped.

CONCLUSION

For the reasons given above, the Court should stay its mandate pending the filing and disposition of the Superintendent's petition for a writ of certiorari.

Dated: March 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will send notification to all counsel of record.

Dated: March 9, 2020

/s/ Shay Dvoretzky
Shay Dvoretzky