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A Whole New Kind of Ghostwriting

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A Whole New Kind of Ghostwriting

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For better or worse, the Ninth Circuit has garnered a reputation over the last several years as one of the most frequently overturned Courts of Appeals in the country. ^[2] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn2) There is some evidence to support this claim, as the Ninth Circuit was reversed from 1994 to 2015 at a rate of 2.501 times per 1,000 appeals terminated; with the runner up (the Sixth Circuit) coming in at 1.732 reversals per 1,000 appeals terminated.^[3] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn3) Regardless of where you come down on that particular debate, it is fair to say that this time, the Ninth Circuit has truly outdone itself.

In a recent reversal, the United States Supreme Court vacated the Ninth Circuit's judgement in the case of *Rizo v. Yovino*. ^[4] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn4) The reason? The original case was decided by the Ninth Circuit on April 9, 2018, with an opinion written by the Honorable Judge Stephen Reinhardt. There was however, a slight problem with this: Judge Reinhardt had been dead since March 29, 2018.^[5] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn5) According to a per curiam opinion issued by the United States Supreme Court, that fact is enough to invalidate a lower court opinion.^[6] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn6)

The Ninth Circuit attempted to justify the counting of Judge Reinhardt's vote and his authoring of the opinion by arguing that prior to death, Judge Reinhardt had fully participated in the case and authored his opinion, and that voting was complete by the en banc court.^[7] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn7) In rejecting the opinion, the Supreme Court noted that it is generally understood that judges may change their vote all the way up to the opinion's release.^[8] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn8) Further, in order for a judge to participate in an en banc decision, the Supreme Court reasoned that the judge must be in regular active service when the opinion is issued.^[9] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn9) The Court went on to say that Judge Reinhardt, due to death, was not an active judge nor a senior judge, and thus was without power to participate in the decision when it was rendered.^[10] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn10) The Supreme Court succinctly summed up the issue in concluding their opinion, stating that "federal judges are appointed for life, not for eternity."^[11] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_edn11)

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^[2] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref2) Linda Qiu, *Does the Ninth Circuit Have the Highest Reversal Rate in the Country?*, *The New York Times*, Nov. 26, 2018.

^[3] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref3) *Oversight of the Structure of the Federal Courts: Hearing before the Subcomm. On Oversight, Agency Action, Federal Rights and Federal Courts Comm. On the Judiciary*, 115th Cong., 12-13 (2018) (Written Testimony of Brian Fitzpatrick, Professor of Law Vanderbilt Law School).

^[4] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref4) *Rizo v. Yovino*, 887 F.3d 453, (9th Cir. Cal., Apr. 9, 2018).^[5]

(applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref5)Yovino v. Rizo, 139 S.Ct. 706 (2019).

[6] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref6)Id.

[7] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref7)Rizo, 887 F.3d at 453, n* (9th Cir. Cal., Apr. 9, 2018).

[8] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref8)Yovino, 139 S.Ct. at 709 (2019).


[9] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref9)Id. (citing *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 687, 691 (1960)).

[10] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref10)Yovino, 139 S.Ct. at 709-710 (2019).

[11] (applewebdata://E216AC3A-5E47-4370-BEAF-A74E0FB043F2#_ednref11)Id. at 710.

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