No. 18- _____

IN THE

Supreme Court of the United States

----------■----------

TOMAS LIRIANO CASTILLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

----------■----------

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

----------■----------

PETITION FOR A WRIT OF CERTIORARI

----------■----------

Joseph A. DiRuzzo, III
Counsel of Record
DiRuzzo & Company
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, Florida 33301
Office: (954) 615-1676
Fax: (954) 827-0340
Email: jd@diruzzolaw.com

QUESTIONS PRESENTED

Over a half-century ago this Court mentioned, but did not decide, if the conditions in the United States Territories and Possessions had changed so as to require Congress to establish Article III courts in the respective territories. *See Glidden Co. v. Zdanok,* 370 U.S. 530, 547-48 & n. 19 (1962).

And in *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015), this Court recently observed that:

> The [Administrative Procedures Act ("APA")] establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." § 551(5). "Rule," in turn, is defined broadly to include "statement [s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy." § 551(4).

135 S. Ct. at 1203.

The questions presented are:

1. Is Congress required to establish Article III courts in the United States Territories and Possessions?

2. Under the APA, and its definition of "rule making," is there an exception for republication of an agency rule that is editorial in nature, or is the republication subject to the statutory notice-and-comment requirements?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are the Petitioner, Tomas Liriano Castillo, and the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

INDEX TO THE APPENDIX iv

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 4

I. THIS COURT SHOULD ADDRESS WHETHER THE CONDITIONS IN THE UNITED STATES TERRITORIES AND POSSESSION HAVE SUFFICIENTLY CHANGED SO AS TO REQUIRE THAT ARTICLE III COURTS, AND NOT ARTICLE IV COURTS, BE ESTABLISHED IN CONFORMITY WITH ARTICLE III, SECTION 2. 4

II. THIS COURT SHOULD ADDRESS WHETHER THERE IS AN EXCEPTION TO THE APA'S NOTICE-AND-COMMENT REQUIREMENT FOR REPUBLICATION OF LEGISLATIVE RULES THAT ARE "EDITORIAL IN NATURE." 9

III. THIS CASE PRESENTS A GOOD VEHICLE. 13

CONCLUSION 14

INDEX TO THE APPENDIX

Appendix A: Judgment of the United States Court of Appeals
For the Third Circuit.....App. 001

Appendix B: Opinion of the United States Court of Appeals
For the Third Circuit.....App. 003

Appendix C: United States Court of Appeals for the
Third Circuit Denial of Petitioner's Petition for Rehearing En Banc.....App. 013

TABLE OF AUTHORITIES

Cases

Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828) 5

Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980) 12, 13

Birdman v. Office of the Governor, 677 F.3d 167 (3d Cir. 2012) 5

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 10

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) ..... i, 6, 8

Harris v. Boreham, 233 F.2d 110 (3d Cir. 1956) 7

Mendoza v. Perez, 754 F.3d 1002 (D.C. Cir. 2014) 12, 13

Mookini v. United States, 303 U.S. 201 (1938) 5

N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755 (4th Cir. 2012) 3, 11

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) ..... i, 10

Prometheus Radio Project v. F.C.C., 652 F.3d 431 (3d Cir. 2011) 12

*Shalala v. Guernsey Memorial Hospita*l, 514 U.S. 87 (1995) 10

Soto v. United States, 273 F. 628 (3d Cir. 1921) 7

Stern v. Marshall, 131 S.Ct. 2594 (2011) 4

United States v. Castillo, -- Fed. Appx. --, 2018 WL 3472030 (3d Cir. July 18, 2018) 1, 10

United States v. George, 625 F.2d 1081 (3d Cir. 1980) 5

United States v. Montanez, 371 F.2d 79 (2d Cir. 1967), *cert. denied*, 389 U.S. 884 (1967) 3, 9

United States v. Santiago, 23 F. Supp. 3d 68 (D.P.R. 2014) 8

Statutes

5 U.S.C. § 551 11

5 U.S.C. § 553 3

5 U.S.C. § 553(b) 2, 9, 12

5 U.S.C. § 553(b)(3)(A) 10

5 U.S.C. § 553(b)(3)(A) and (B) 2, 10

5 U.S.C. § 553(c) 2, 9

5 U.S.C. § 706(2)(D) 13

28 U.S.C. § 119 8

28 U.S.C. § 1254 1

48 U.S.C. § 1561 7

Other Authorities

38 Fed. Reg. 34,183, 34,188 (Dec. 7, 1973) 10

http://www.vid.uscourts.gov/sites/vid/files/SotomayorPressRelease.pdf 7

Rules

Supreme Ct. R. 10 13

Supreme Ct. R. 13.1 1

Supreme Ct. R. 13.3 1

Supreme Ct. R. 29.2 1

Supreme Ct. R. 30.1 1

Constitutional Provisions

U.S. CONST. art. III, § 2 ..... 1, 3

PETITION FOR WRIT OF CERTIORARI

Petitioner, Tomas Liriano Castillo, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The judgment of the United States Court of Appeals for the Third Circuit is reproduced in the Appendix herein at App. 001. The opinion of the United States Court of Appeals for the Third Circuit is unpublished and reported at *United States v. Castillo*, -- Fed. Appx. --, 2018 WL 3472030 (3d Cir. July 18, 2018), and is reproduced in the Appendix herein at App. 003. The denial of Petitioner's Petition for Rehearing *en banc*, issued on September 11, 2018, is not officially reported and is reproduced in the Appendix herein at App. 013.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's judgment was entered on July 18, 2018. A petition for panel rehearing and rehearing *en banc* was denied on September 11, 2018. The present petition is being filed by postmark on or before December 10, 2018. Supreme Court Rules 13.1, 13.3, 29.2, and 30.1. This Court properly has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. III, § 2 provides, in relevant part, that:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases

> affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Under the APA, "General notice of proposed rule making shall be published in the Federal Register[.]" 5 U.S.C. § 553(b).

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553(c).

This mandate applies to all agency rules except in the case of the following:

> [I]nterpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(3)(A) and (B).

INTRODUCTION

This case presents two disparate questions for this Court's consideration.

The first is a straightforward and important question affecting the United States citizens residing in the United States Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands, *viz.*: whether Article III courts are

required in the Territories and Possessions.[1] The decision below conflicts with the Second Circuit's opinion in *United States v. Montanez*, 371 F.2d 79, 84 (2d Cir. 1967), *cert. denied*, 389 U.S. 884 (1967), which recognized the constitutional infirmity of the enforcement of a national criminal statute by a non-Article III court.

The second question presented addresses an important issue as to whether the notice-and-comment requirement of the APA applies to republication of agency rules that are "editorial" in nature. The decision below conflicts with the Fourth Circuit's opinion in *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012), which held that the republication of an agency rule is subject to the notice-and-comment requirements of the APA.

STATEMENT

This case comes to this Court from the Court of Appeals' affirmance of the Petitioner's federal conviction in the District Court of the Virgin Islands. Petitioner was convicted for participating in a drug-trafficking conspiracy in violation of Title 21 of the United States Code. Petitioner timely appealed his conviction to the Court of Appeals attacking, *inter alia,* the constitutionality of a non-Article III court presiding over his case where the United States was a party, *see* U.S. CONST. art. III, § 2, and the failure of 8 C.F.R. § 100.4(a) to undergo the APA's notice-and-comment requirement, *see* 5 U.S.C. § 553.

[1] Congress has already made the district court in Puerto Rico an Article III court.

The Petitioner timely petitioned the Court of Appeals for panel rehearing and rehearing *en banc*. The request was denied. App. 013. The instant Petition for Writ of Certiorari ensues.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS WHETHER THE CONDITIONS IN THE UNITED STATES TERRITORIES AND POSSESSION HAVE SUFFICIENTLY CHANGED SO AS TO REQUIRE THAT ARTICLE III COURTS, AND NOT ARTICLE IV COURTS, BE ESTABLISHED IN CONFORMITY WITH ARTICLE III, SECTION 2.

Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch. *Stern v. Marshall,* 131 S.Ct. 2594, 2608 (2011) (internal quotation marks and citations omitted). "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Id.* at 2609.

> By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the clear heads and honest hearts deemed essential to good judges.

Id. (internal quotation marks, citations, and ellipses omitted). Indeed, "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision making if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.*

"The District Court of the Virgin Islands derives its jurisdiction from Article IV, § 3 of the United States Constitution, which authorizes Congress to regulate the territories of the United States." *United States v. Gillette*, 738 F.3d 63, 70 (3d Cir.

2013). By operation of the 1984 amendments to the Revised Organic Act, the District Court of the Virgin Islands "now possesses the jurisdiction of an Article III District Court of the United States, though it remains an Article IV Court." *Birdman v. Office of the Governor*, 677 F.3d 167, 175 (3d Cir. 2012) (cleaned up).

While the District Court of the Virgin Islands is an Article IV court,

> it is not a court of the United States created under Article III, section 1. The fact that its judges do not hold office during good behavior and that the court is thus excluded from the definition of 'court of the United States' which is contained in 28 U.S.C. s 451 is confirmatory of this.

United States v. George, 625 F.2d 1081, 1088-89 (3d Cir. 1980). *See also Mookini v. United States*, 303 U.S. 201, 205 (1938) (holding that "vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States'").

The Petitioner asserted below that Article III, Section 2 required that the Government's prosecution of the Petitioner be before an Article III Court (which the District Court of the Virgin Islands is not).

In *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828) ("*Canter*"), one of this Court's earliest precedents addressing the Territories and Possessions,

> A cargo of cotton salvaged from a wreck off the coast of Florida had been purchased by Canter at a judicial sale ordered by a court at Key West invested by the territorial legislature with jurisdiction over cases of salvage. The insurers, to whom the property in the cargo had been abandoned by the owners, brought a libel for restitution, claiming in part that the prior decree was void because not rendered in a court created by Congress, as required for the exercise of admiralty jurisdiction under Article III. Chief Justice Marshall for the Court swept this objection aside by noting that the Superior Courts of Florida, which had been created by Congress, were staffed with judges appointed for only four years, and concluded that Article III did not apply in the

> territories: These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States.

Glidden, 370 U.S. at 544. However, the factual foundation for the reasoning in *Canter* no longer applies today. As this Court recognized in *Glidden*:

> *The reasons for this are not difficult to appreciate so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind*. The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government. This meant that courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State. But when the territories began entering into statehood, as they soon did, the authority of the territorial courts over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant number of territorial judges on its hands and no place to put them…. At the same time as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto. The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States, and the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was as fully recognized.

Id. at 545-46 (emphasis added).

But today, at least in the Virgin Islands, there is a local government established to assume the burden of local regulation, including courts staffed with

sufficient judges to handle general jurisdiction matters, i.e. the Virgin Islands Superior Court and Virgin Islands Supreme Court.

Also, today the federal government is large (some would say too large), the federal judiciary is no longer small, the roads are (or better said air travel is) highly functional,[2] mail is fast (or instantaneous with email and ECF electronic filing), and the Virgin Islands has no freedom to dispense with the separation of governmental powers[3] with the protections it affords the United States citizens residing in the territory. *See Soto v. United States,* 273 F. 628, 634 (3d Cir. 1921) (5th Amendment Due Process Clause applies in full to the Virgin Islands); 48 U.S.C. § 1561 (applying almost all of the Bill of Rights to the Virgin Islands). Simply stated, much has changed since the 1820's; accordingly, *Canter's* reach has been eroded over time.

This Court has recognized as much because,

> The touchstone of decision in all these cases [not requiring Article III protections] has been the need to exercise the jurisdiction then and there and *for a transitory period*. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding *has not been deemed controlling*.

---

[2] Indeed, the air travel is so good as to allow Justice Sotomayor to visit the Virgin Islands and attend District Court of the Virgin Islands' activities related to the 100th anniversary of the transfer of the Virgin Islands from Denmark to the United States. *See* http://www.vid.uscourts.gov/sites/vid/files/SotomayorPressRelease.pdf (last accessed December 7, 2018).

[3] *See Harris v. Boreham,* 233 F.2d 110, 114 (3d Cir. 1956) (Congress established tripartite system of government in the Virgin Islands).

Glidden, 370 U.S. at 547-48 (emphasis added). *Canter* is not controlling here as the Federal Government's control over the Virgin Islands is not in a "transitory period" (unless one calls over a century of control transitory). As to the possible alternatives all one must do is look next door – to Puerto Rico.

"In 1966, President Lyndon Johnson signed Public Law 89–571, 80 Stat. 764, which transformed the territorial Article IV federal district court in Puerto Rico to a constitutional Article III one." *United States v. Santiago*, 23 F. Supp. 3d 68 (D.P.R. 2014); *see also* 28 U.S.C. § 119. The Congressional reasoning was:

> There does not appear any reason why the U.S. District Judges for the District of Puerto Rico should not be placed in a position of parity as to tenure with all other Federal Judges throughout our judicial system. Moreover, federal litigants in Puerto Rico should not be denied the benefit of judges made independent by life tenure from the pressures of those who might influence his chances of reappointment, which benefits the Constitution guarantees to the litigants in all other Federal Courts. These judges in Puerto Rico have and will have the exacting same heavy responsibilities as all other Federal district judges and, therefore, they should have the same independence, security, and retirement benefits to which all other Federal district judges are entitled.

Santiago, 23 F. Supp. 3d at 68-69 (internal citations ommitted).

This begs the obvious question that this Court should answer – why should the Virgin Islands (or any of the other Territories and Possessions) be any different? Do not the district judges of the other Territories have the exact same heavy responsibilities as all other district court judges? Further, are the current conditions not at least equal to, if not better than, Puerto Rico in 1966 when P.L. 89-517 was enacted? If the district court in Puerto Rico has Article III status the district court

in the other Territories should too, and this Court should accept review to answer these questions.

Indeed, a half-century ago, in addressing the potential constitutional infirmities, the Second Circuit observed that "[i]t is perhaps unfamiliar and even jarring to contemplate enforcement in Puerto Rico of national criminal statutes by judges with less than life tenure. Fortunately, that situation has been altered for the future by Congress." *Montanez*, 371 F.2d at 84. It should be likewise jarring that, in this case, the United States enforced criminal statutes under Title 21 of the United States Code against the Petitioner in a non-Article III Court.

Glidden's footnote 19 is of exceptional importance to the United States citizens residing in the Territories and Possessions, thus, this case should be heard by this Court to determine whether Article III courts are required to be established by Congress in the Territories and Possessions.

II. THIS COURT SHOULD ADDRESS WHETHER THERE IS AN EXCEPTION TO THE APA'S NOTICE-AND-COMMENT REQUIREMENT FOR REPUBLICATION OF LEGISLATIVE RULES THAT ARE "EDITORIAL IN NATURE."

Under the APA, "General notice of proposed rule making shall be published in the Federal Register[.]" 5 U.S.C. § 553(b).

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

5 U.S.C. § 553(c). This mandate applies to all agency rules except in the case of the following:

> [I]nterpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b)(3)(A) and (B).

"Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'" *Perez*, 135 S. Ct. at 1203 (quoting *Chrysler Corp. v. Brown,* 441 U.S. 281, 302–303 (1979)). This is in contrast to interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice – the exceptions to the notice-and-comment requirement. *See* 5 U.S.C. § 553(b)(3)(A). Interpretive rules are not subject to notice-and-comment because they "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez*, 135 S. Ct. at 1204 (quoting *Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 99 (1995)).

The Petitioner argued below that 8 C.F.R. § 100.4(a) failed to undergo the notice-and-comment procedure, but the Court of Appeals held that the rule was not subject to such requirement under the APA because "the republication of § 100.4 [wa]s editorial in nature, and [n]o changes [we]re made at th[e] time." *Castillo*, 2018 WL 3472030, at *4 (slip op. at p. 8) (quoting 38 Fed. Reg. 34,183, 34,188 (Dec. 7, 1973)) (internal quotation marks and citations omitted).

The decision below created an exception that is, at best, atextual, and, at worst, contrary to the comprehensive statutory scheme. For that reason alone, this Court

should accept review to consider whether there is a court-created "editorial in nature" exception to the APA's notice-and-comment requirement.

Moreover, the decision below conflicts with a decision from the Fourth Circuit Court of Appeals, which addressed this specific issue when analyzing the definition applied to "rule making" in the APA: an "agency process for formulating, amending, or repealing a rule[.]" 5 U.S.C. § 551. As the Fourth Circuit stated,

> [A] definition of the term "formulating" . . . is "to reduce to or express in or as if in a formula," or to "put into a systematized statement or expression." *See* Webster's Third New International Dictionary 894 (1986). Notably absent from this definition is any requirement of originality or novelty in the substance or text of the subject matter expressed. Thus, under this definition of "formulating," it is immaterial whether the rule at issue was newly drafted or was drawn from another source.

N. Carolina Growers', 702 F.3d at 765.

Furthermore, logic dictates that a republication (incorporating no new changes) of a rule must fall under the "formulating" definition of the APA. If Congress did not want a republication of an agency rule to be subject to notice-and-comment requirements, it would not have required such rules to ever be republished. Excepting the republication of a rule from the notice-and-comment requirements (for any reason, including those that are "editorial in nature") would frustrate the purposes of such requirements by eliminating the right of the public to voice concerns over undesirable effects of the originally published rules or over future detrimental effects due to a change in circumstances.

This rationale aligns with decisions from the Courts of Appeals:

> [A] reviewing court asks whether the purposes of notice and comment have been adequately served. . . . Among the purposes of the APA's notice and comment requirements are (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

Prometheus Radio Project v. F.C.C., 652 F.3d 431, 449 (3d Cir. 2011) (citing cases from the D.C. and Ninth Circuits).

Agencies are not powerless to enact rules without subjecting them to the notice-and-comment procedures: "rules of agency organization, procedure, or practice" are specifically exempt under the APA without need for the agency to show good cause. 5 U.S.C. § 553(b). "'Procedural rules,' the general label for rules falling under this exemption, are 'primarily directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights [or] interests of affected parties.'" *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (quoting *Batterton v. Marshall,* 648 F.2d 694, 702 n. 34 (D.C. Cir. 1980) (alteration in original)).

The D.C. Circuit Court of Appeals has clearly explained this rationale:

> Congress provided this exemption from the normal rulemaking procedures "to ensure that agencies retain latitude in organizing their internal operations." Procedural rules "do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency."

Id. (quoting *Batterton*, 648 F.2d at 707) (alteration in original). Indeed, courts do not take the vastly different treatment regarding the procedural requirements lightly: "[t]he exception for procedural rules is narrowly construed, and cannot be applied

where the agency action trenches on substantial private rights and interests." *Id.* (quoting *Batterton*, 648 F.2d at 708) (internal quotation marks omitted).

8 C.F.R. § 100.4(a) was clearly a "rule" under the APA because it created legal (and, by necessary implication, illegal) ports of entry to the United States and its territories and, consequently, as rightly determined by the Fourth Circuit, a republication of a rule is subject to the notice-and-comment requirements of the APA. The statutory scheme is clear that a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law[.]" 5 U.S.C. § 706(2)(D). Here, the decision below conflicts with the plain text of the statute, a decision of the Fourth Circuit, and the Court of Appeal's own extant published jurisprudence; therefore, it merits reconsideration by this Court. *See* Supreme Ct. R. 10.

III. THIS CASE PRESENTS A GOOD VEHICLE.

This case squarely presents both questions presented as both were raised before the trial court and before the Court of Appeals. Both issues have been meticulously preserved.

As to the first question presented, as appeals from the non-Article III courts are only heard by the Ninth and Third Circuits, respectively, no further consideration by the Courts of Appeals would aid in allowing the issue to develop as only this Court can expand upon footnote nineteen of the *Glidden* decision.

As to the second question presented, the Court of Appeals' "republication" exception to the APA's notice-and-comment requirement creates a hole in the

statutory scheme that this Court should address to eliminate the existing circuit-split.

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

By: /s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III Date: 2018.12.07 17:03:08 -05'00'

Joseph A. DiRuzzo, III
Counsel of Record
DiRuzzo & Company
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, Florida 33301
Office: (954) 615-1676
Fax: (954) 827-0340
Email: jd@diruzzolaw.com

Dated: Dec. 7, 2018