No. 19-5267

In the Supreme Court of the United States

MICHAEL ST. HUBERT, PETITIONER

v.

UNITED STATES

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

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private

[1] Both parties received timely notice of amicus curiae's intention to file this brief and provided written consent to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents an issue pertinent to many criminal defendants who seek to apply this Court's rulings to their own cases. Because the Eleventh Circuit requires nearly identical factual circumstances to decide that this Court has overruled its prior precedent, numerous cases where defendants can demonstrate directly applicable intervening Supreme Court precedent are affirmed on the basis of outdated circuit law. By statute, second-or-successive habeas petitioners cannot seek this Court's review, and this Court is unlikely to review a direct appeal where it has so recently established the legal rule. Thus, criminal defendants in the Eleventh Circuit are unlikely to have a meaningful opportunity for a review of the merits of their appeals under the law at the time of their appeal absent repeated error correction by this Court. NACDL's members are all too familiar with the Eleventh Circuit's unyielding rule and the difficulty of applying new Supreme Court rationale on appeal. As a direct result of this rule, criminal defendants are sent to or held in prison without the merits of their case ever being considered

under current law. It is therefore of profound interest to amicus that the Eleventh Circuit consider intervening Supreme Court decisions for which the rationale is at odds with its own prior decisions.

SUMMARY OF THE ARGUMENT

It is emphatically the province and duty of the judicial branch to say what the law *is*, not what the law *was*. But in the Eleventh Circuit, petitioner and scores of other defendants like him have their cases decided on the basis of law otherwise recognized as repudiated by intervening precedent from this Court. Alone among the circuit courts, the Eleventh Circuit requires direct instruction from the Supreme Court to revisit its prior precedent; without it, rationale widely considered *clearly erroneous* in light of subsequent Supreme Court case law is still applied to defeat defendants' appeals.

Petitioner has ably explained the due process implications resulting from turning pro se second-or-successive (SoS) habeas petitions into binding decisions that foreclose merits review in all other cases. Amicus writes to emphasize an additional aspect of the first question presented on how the Eleventh Circuit's prior-panel-precedent rule deprives petitioner and similarly situated individuals of due process and sharply limits this Court's authority. Because the Eleventh Circuit's internal rules require Supreme Court precedent to be "directly on point" to allow reconsideration of its past case law, it takes a narrower view of Supreme Court rationale than does this Court. Where, as in this case, a court acknowledges that the Supreme Court's intervening rationale is "at odds with" its binding precedent and yet forecloses argument on the issue, a defendant's due process right to a meaningful appeal is violated. For this reason, and those in the petition, the Court should grant certiorari.

ARGUMENT

I. Review Is Warranted Because The Eleventh Circuit's Practice Is Impermissible

An appeal is not intended to be a "meaningless ritual"—instead, it is an occasion for an appellate court to perform its "primary function as an expositor of law." *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985); *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985); see also *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) ("[A]ppellate courts are to maintain control of, and to clarify, the legal principles."). The Due Process Clause requires that appellants be afforded "an *opportunity* . . . granted at a meaningful time and in a meaningful manner" for a hearing before the court of appeals. *Thomas* v. *Arn*, 474 U.S. 140, 155 (1985) (citation omitted). Yet the Eleventh Circuit's prior-panel-precedent rule makes appeals to that court "meaningless" precisely because it prevents the court from reviewing legal principles under current law as set forth by this Court, dooming defendants to petition vainly for discretionary review in order to receive the benefit of Supreme Court precedent.

To be sure, rules counselling restraint in overruling prior precedent are long-standing and serve vital purposes. See 1 William Blackstone, *Commentaries* *69 (2d ed. 1803) ("[I]t is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion * * *."). But rigidity for its own sake has never been the rule, and prior precedent must give way when by reason of a higher authority's decision it

can no longer be justified. Bryan A. Garner et al., *The Law of Judicial Precedent* 388 (2016) ("[S]tare decisis isn't an ineluctable doctrine to be applied with procrustean rigor."); see also *id.* at 38 (explaining the law-of-the-circuit's "obvious and common-sense caveat" that a panel may depart from prior panel precedent "when it has been repudiated or undermined by * * * an intervening Supreme Court decision").

The circuit rule applied below is that "when only the reasoning, and not the holding, of [an] intervening Supreme Court decision 'is at odds with that of our prior decision' there is 'no basis for a panel to depart from our prior decision.' " *United States* v. *St. Hubert*, 909 F.3d 335, 347 n.9 (11th Cir. 2018) (quoting *Atlantic Sounding Co.* v. *Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007)). Despite petitioner's protestations, the Eleventh Circuit asserted it remained bound by *In re Fleur*,[2] where the court had held that 18 U.S.C. 1951(a) (Hobbs Act robbery) contained the necessary elements of a crime of violence under 18 U.S.C. 924(c) because:

> Count 4 further charged Saint Fleur with, and Saint Fleur pled guilty to, committing robbery 'by means of actual *and* threatened force, violence, *and* fear of injury.' Thus, the elements of Saint Fleur's § 1951 robbery, *as replicated in the indictment*,

[2] It is worth emphasizing that in *Fleur*, the pro se petitioner's "argument" was thirty-six words long—shorter than the caption of this brief—and the petitioner was instructed not to cite cases or law, save for two lines for any "new rule of law." Application for Leave to File a Successive 28 U.S.C. § 2255 Mot. to Vacate, Set Aside, or Correct Sentence, *In re Fleur*, No. 16-12299 (11th Cir. May 9, 2016).

> require the use, attempted use, or threatened use of physical force 'against the person or property of another.'

824 F.3d 1337, 1341 (2016) (emphases added); compare 18 U.S.C. 1951(b)(1) ("by means of actual *or* threatened force, *or* violence, *or* fear of injury" (emphases added)).

Two weeks after *Fleur*, however, this Court made clear that *Fleur*'s mode of analysis in determining a crime's elements was error. In *Mathis* v. *United States*, the Court explained that "the court below erred in applying the modified categorical approach [and examining the indictment] to determine the means by which Mathis committed his prior crimes." 136 S. Ct. 2243, 2253 (2016). The Court instructed that the modified categorical approach "is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense." *Id.* at 2254. *Mathis* spoke in absolutes. *Id.* at 2253 (" '[T]he only [use of that approach] we have ever allowed,' we stated a few Terms ago, is to determine 'which *element[s]* played a part in the defendant's conviction.' " (alterations in original) (quoting *Descamps* v. *United States*, 133 S. Ct. 2276, 2283, 2285 (2013))). Yet the *St. Hubert* panel refused to reconsider *Fleur*'s holding in light of *Mathis*—even though *Fleur*'s reasoning centered on the language of Saint Fleur's indictment, not the statute—because *Mathis* "did not involve Hobbs Act robbery or attempted robbery, or the use-of-force clause in § 924(c)(3)(A), and thus [is] not clearly on point here." 909 F.3d at 347 n.9.

The Eleventh Circuit's distinction between the "reasoning" and "holding" of this Court's decisions to limit an intervening decision's reach is not one recognized by this Court. See *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66-67 (1996) ("We adhere * * * not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions."). To be sure, lower courts have tried to cabin Supreme Court rationale in the past to particular facts and claim their hands were bound by precedent, but this Court and history have corrected them. Compare, *e.g.*, *Holmes* v. *City of Atlanta*, 223 F.2d 93 (5th Cir. 1955) (affirming the district court's decision that it was bound by *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and its progeny because *Brown* v. *Board of Education*, 347 U.S. 483 (1954), did not affect the court's "separate-but-equal" precedent), with *Dawson* v. *Mayor of Baltimore City*, 220 F.2d 386, 387 (4th Cir. 1955) (per curiam) ("The combined effect of these decisions of the Supreme Court is to destroy the basis of the decision of [past precedent]."); see also *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) (mem.) (vacating the decision below and directing the court to "enter a decree for petitioners in conformity with" *Dawson*). The prior-panel-precedent rule's myopia would limit each case to its facts; something that this Court's members have made clear is not how our law works. See, *e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) ("Let us not quibble about the theoretical scope of a 'holding'; the modern reality, at least, is that when the Supreme Court of the federal system * * * decides a case, not merely the *outcome* of that decision, but the *mode of*

analysis that it applies will thereafter be followed by the lower courts within that system * * *."); *cf. County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."). Examination of this Court's practices and precedent confirms that view.

Just last Term, this Court made clear that intervening Supreme Court case law can remove the binding effect of circuit precedent. In *Herrera* v. *Wyoming*, this Court examined the interpretation of a treaty with the Crow Indian tribe. 139 S. Ct. 1686 (2019). The Tenth Circuit had previously held, under reasoning derived from *Ward* v. *Race Horse*, 163 U.S. 504 (1896), that the Crow Indian treaty had been abrogated with the admission of Wyoming to statehood. *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982, 992-993 (10th Cir. 1995), cert. denied 517 U.S. 1221 (1996). Subsequent to *Repsis*, this Court decided *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), which "repudiated the reasoning on which the Tenth Circuit relied in *Repsis*." *Herrera*, 139 S. Ct. at 1697. When a Crow Tribe member sought to have the *Mille Lacs* reasoning applied to enforce his treaty right, Wyoming courts applied issue preclusion on the basis of *Repsis*. *Id.* at 1694. This Court vacated and remanded, explaining that "*Mille Lacs* upended both lines of reasoning in *Race Horse*," thereby "repudiat[ing] the reasoning" of *Repsis*, and adding that "a repudiated decision does not retain preclusive force." *Id.* at 1696-1698.

While *Herrera* involved issue preclusion as opposed to *stare decisis*, the principles are analogous. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1012 (2003). "Because * * * [*Mathis*] repudiated the reasoning on which the [Eleventh] Circuit relied in [*Fleur*], [*Fleur*] does not preclude" petitioner from re-litigating the legal question at issue. 139 S. Ct. at 1697. If the Tenth Circuit followed the Eleventh's rule, Herrera would be able to obtain relief in Wyoming's state court (because there would be no issue preclusion and Wyoming could decide the question anew), but not in federal court because of the prior-panel-precedent rule. But criminal defendants cannot choose their forum and so cannot seek out a different court to gain the benefit of this Court's reasoning.[3]

This Court's grant-vacate-remand order (GVR) practice further confirms that this Court's opinions affect more cases than just those directly implicated by their strict facts. The Court frequently vacates decisions for reconsideration in light of intervening Supreme Court precedent. See *Lawrence* v. *Chater*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting) (explaining that this Court regularly vacates and remands where "an intervening event (ordinarily a postjudgment deci-

[3] Inmates who transfer out of the Eleventh Circuit may be able to gain relief—and their freedom—based on Supreme Court precedent, but it is a difficult road. See, *e.g.*, *Lester* v. *United States*, 921 F.3d 1306, 1318 (11th Cir. 2019) (Martin, J., respecting the denial of rehearing en banc) (describing a Georgia prisoner who was transferred to Virginia and successfully received habeas relief that he would not have received in the Eleventh Circuit "based on *Chambers v. United States*, which overruled the Eleventh Circuit precedent" (internal citation omitted)).

sion of this Court) has *cast doubt* on the judgment rendered by a lower federal court or a state court concerning a federal question" (emphases altered)). For example, this Court vacated and remanded *Guevara* v. *United States*, 136 S. Ct. 2542 (2016) (mem.), "for further consideration in light of *Mathis*," even though the case involved the divisibility of a controlled-substance statute under the Sentencing Guidelines and was foreclosed by binding circuit precedent. See *United States* v. *Guevara*, 619 F. App'x 648, 649 (9th Cir. 2015), vacated and remanded by 136 S. Ct. 2542 (2016). Because this Court viewed *Mathis* as "reveal[ing] a reasonable probability that the decision below rest[ed] upon a premise that the lower court would reject if given the opportunity," *Lawrence*, 516 U.S. at 167 (per curiam), it believed its opinion affected the law. But in the Eleventh Circuit, GVRs can be dead letters. In *Beckles* v. *United States*, 135 S. Ct. 2928 (2015), this Court vacated the Eleventh Circuit's decision and remanded the case "for further consideration in light of *Johnson* v. *United States*." In response, the Eleventh Circuit held that it remained bound by its pre-*Johnson* precedent, explaining that "*Johnson* says and decided nothing about career-offender enhancements under the Sentencing Guidelines." *Beckles* v. *United States*, 616 F. App'x 415, 416 (11th Cir. 2015). Beckles did not receive consideration of his claim under post-*Johnson* law until this Court granted certiorari and provided a post-*Johnson* rationale. *Beckles* v. *United States*, 137 S. Ct. 886 (2017).

Finally, this Court has often called decisions issued on the basis of rationale in an analogous, but not directly on point, case plainly erroneous. See, *e.g.*, *Hutto* v.

Davis, 454 U.S. 370, 372-373 (1982) (per curiam) (reversing a circuit court for "fail[ing] to heed our decision" where an intervening case had "implicitly disapproved" of prior panel precedent); *Pennsylvania* v. *Goldhammer*, 474 U.S. 28, 29 (1985) (summarily reversing because "[t]he Pennsylvania Supreme Court's rationale is inconsistent with the rationale of the holding of this Court in [*United States* v.] *DiFrancesco*"). In *Grady* v. *North Carolina*, 135 S. Ct. 1368 (2015), this Court summarily reversed the North Carolina Court of Appeals, which had distinguished *United States* v. *Jones*, 565 U.S. 400 (2012), as a criminal case and held itself bound by prior precedent. The opinion vacated the decision below because its "theory is inconsistent with this Court's precedents." *Grady*, 135 S. Ct. at 1370; see also *Martinez* v. *Illinois*, 572 U.S. 833, 843 (2014) (summarily reversing the Supreme Court of Illinois, which had relied on its earlier precedent, where it "r[an] directly counter to our precedents").

Any circuit-court procedural rule that limits the opportunity for a meaningful appeal must be "a reasonable response" to justifications for the limitation. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 244 (1993). But the justifications behind the Eleventh Circuit's prior-panel-precedent rule cannot suffice with respect to changes in the law from this Court that directly conflict with past precedent. See *id.* at 249 ("[T]he justifications advanced for dismissal * * * generally will not apply."). As shown above, this Court presumes that when it speaks, the lower courts will examine and distinguish rationales as appropriate. An appellate court "must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when

rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). The Eleventh Circuit's practice violates due process because it refuses to engage with the necessary implications of Supreme Court decisions, resting instead unthinkingly on past precedent. To be sure, "it may be difficult at the margins to discern whether a particular legal shift warrants an exception to" *stare decisis*, but "this is not a marginal case." *Herrera*, 139 S. Ct. at 1698. Petitioner should be afforded the opportunity for a meaningful appeal under the law as it stands during his appeal.

II. The Eleventh Circuit's Standard Is Inconsistent With All Other Circuits

Each of the circuits—with the exception of the Eleventh Circuit—has fashioned a rule that allows prior panel precedent to be reviewed on the basis of an intervening Supreme Court case when the *rationale* of its prior precedent is clearly erroneous. While circuit courts "strive to maintain a consistent body of jurisprudence," they also "recognize the overriding principle that '[a]s an inferior court in the federal hierarchy, [appellate courts] are, of course, compelled to apply the law announced by the Supreme Court as [they] find it on the date of [their] decision." *United States* v. *Tann*, 577 F.3d 533, 541 (3d Cir. 2009) (first alteration in original) (citation omitted); *United States* v. *Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) ("'[W]e must—as a lower federal court—apply all pertinent Supreme Court precedent,' including precedent that overrules * * * Circuit decisions." (alteration in original) (internal citation omitted)). To that end, circuit courts' application of

horizontal *stare decisis* must "leave[] room for courts to balance their respect for precedent against insights gleaned from new developments, and to make informed judgments as to whether earlier decisions retain preclusive force." *Carpenters Local Union No. 26* v. *U.S. Fid. & Guar. Co.*, 215 F.3d 136, 142 (1st Cir. 2000) (citation omitted); *cf. Miller* v. *Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (explaining that the objective of maintaining consistency across a circuit "must not be pursued at the expense of creating an inconsistency between our circuit decisions and the reasoning of state or federal authority embodied in a decision of a court of last resort"). Yet the Eleventh Circuit alone has foreclosed its panels from striking this balance and, in doing so, deprives criminal defendants of their right to a meaningful appeal governed by the law as it stands when their appeals are decided. The court's outlier status underscores the unreasonableness of its position.

To be clear: no circuit other than the Eleventh requires that a prior panel decision be "overruled to the point of abrogation by the Supreme Court" for a subsequent panel to reconsider the prior decision. That standard, as applied in the Eleventh Circuit, requires a Supreme Court decision to be nearly identical to the case being considered by a panel before that panel is permitted to apply the law as it stands on the date of the appeal. See *United States* v. *Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) ("In addition to being squarely on point, * * * the intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel."). As a result, the Eleventh Circuit's rule is meaningfully different than those of the other circuits.

Although the other circuits "differ in how much the earlier decision must be undermined before it can be overruled," see Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev. L.J. 787, 797 n.74 (2012), they all embrace an exception to the general rule that permits subsequent panels to reconsider panel precedent on the basis of intervening Supreme Court decisions.[4] For example, three circuits allow subsequent panels to overrule prior panel precedent when it is "inconsistent" with an intervening Supreme Court case. *Cox* v. *Dravo Corp.*, 517 F.2d 620, 627 (3d Cir. 1975) (en banc), cert. denied 423 U.S. 1020 (1975); *Lucido*, 612 F.3d at 876; *McCullough* v. *AEGON USA, Inc.*, 585 F.3d 1082, 1085 (8th Cir. 2009). And under a slightly different articulation of the standard, the Second, Third, and Eighth Circuits reconsider prior panel decisions when an intervening Supreme Court decision "casts doubt" on prior precedent. *Union of Needletrades, Indus. & Textile Emps.* v. *INS*, 336 F.3d 200, 210 (2d Cir. 2003); *In re Krebs*, 527 F.3d 82, 87 (3d Cir. 2008); *Patterson* v. *Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997).

The Ninth and Tenth Circuits specifically contemplate that subsequent panels should reconsider prior

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[4] The Seventh Circuit takes a different approach than other circuits, permitting one panel to overrule another so long as the subsequent panel circulates the proposed opinion to the active members of the court "and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted." 7th Cir. R. 40(e); see generally *United States* v. *Reyes-Hernandez*, 624 F.3d 405, 412-413 (7th Cir. 2010). This rule allows subsequent panels even more opportunity to reconsider prior precedent on the basis of intervening Supreme Court authority.

precedent where an intervening Supreme Court decision is "clearly irreconcilable" with or "contradicts" the *rationale* of the prior precedent. *United States* v. *Brooks*, 751 F.3d 1204, 1209-1211 (10th Cir. 2014); *Miller*, 335 F.3d at 892-893; *United States* v. *Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011).

Several other formulations of the standard have also been offered across the circuits, such as whether intervening Supreme Court authority "conflicts with" prior panel precedent, *Karns* v. *Shanahan*, 879 F.3d 504, 514-515 (3d Cir. 2018), whether prior precedent is "untenable" in light of intervening Supreme Court authority, *Hoffman* v. *Hunt*, 126 F.3d 575, 584 (4th Cir. 1997), cert. denied 523 U.S. 1136 (1998), or whether prior precedent is "undermined" by the intervening Supreme Court decision, *United States* v. *Williams*, 155 F.3d 418, 421 (4th Cir.), cert. denied 525 U.S. 1058 (1998).

Notably, six circuits also explicitly reject the notion that intervening Supreme Court authority must directly abrogate the prior precedent for the later panel to overrule the prior decision: "[T]he intervening Supreme Court authority need not be precisely on point, if the legal reasoning is directly applicable." *Northeast Ohio Coal. for the Homeless* v. *Husted*, 831 F.3d 686, 720-721 (6th Cir. 2016); *United States* v. *Tavares*, 843 F.3d 1, 11 (1st Cir. 2016) (holding that a later panel can reconsider binding precedent where intervening Supreme Court authority, "although not directly controlling, nevertheless offers a sound reason" to reconsider the prior panel's rationale (citation omitted)); *Union of Needletrades Indus. & Textile Emps.*, 336 F.3d at 210 ("[T]he intervening decision need not address the pre-

cise issue already decided by [the c]ourt."); *Miller*, 335 F.3d at 900 ("[I]ssues decided by the higher court need not be identical in order to be controlling."); *Brooks*, 751 F.3d at 1209-1210 ("The question * * * is not whether an intervening Supreme Court case is on all fours with our precedent, but rather whether the subsequent Supreme Court decision *contradicts* or *invalidates* our prior analysis."); *Troy* v. *Samson Mfg. Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014).

The Fifth Circuit's standard comes closest to that of the Eleventh Circuit, but even the Fifth Circuit recognizes that "when the Supreme Court '"expressly *or implicitly*" overrules one of [the court's] precedents, [a panel has] the authority and obligation to declare and implement this change in the law,'" *Stokes* v. *Sw. Airlines*, 887 F.3d 199, 204 (5th Cir. 2018) (emphases altered) (citation omitted); *United States* v. *Short*, 181 F.3d 620, 624 (5th Cir. 1999), cert. denied 528 U.S. 1091 (2000), thereby allowing a subsequent panel to assess whether an intervening Supreme Court decision "changes the law," even if only implicitly.

It is therefore apparent among the other circuits that lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'" *Miller*, 335 F.3d at 900 (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)). The Eleventh Circuit's application of its prior-panel-precedent rule, on the other hand, forecloses consideration of the Supreme Court's mode of analysis, which means that panels in the Eleventh Circuit cannot reconsider prior precedent to account for the current state of the law—thereby violating criminal defendants' due process right to a meaningful appeal.

While the other circuits articulate various standards, they *all* provide a method for revaluating prior precedent on direct review based on intervening Supreme Court authority. The Eleventh Circuit is alone in prioritizing consistency over the right to a meaningful opportunity to be heard on appeal.

III. The Problem Is Important, Recurring, And Squarely Presented

Without this Court's intervention, the Eleventh Circuit will continue to deploy its severe prior-panel-precedent rule to affirm criminal convictions and lengthy sentences without meaningfully considering their legality. In direct criminal appeals like petitioner's, the Eleventh Circuit refuses to reach the merits of appellants' arguments, instead affording preclusive effect to prior panel decisions that were decided under law recognized as erroneous under intervening Supreme Court precedent and published under procedures that forgo the hallmarks of the adversarial process, including briefing on the merits and the ability to seek further review.

In this case, petitioner argued that Hobbs Act robbery is not categorically a crime of violence under 18 U.S.C. 924(c)(3)(A). The Eleventh Circuit concluded it could not consider the merits of that argument in light of its prior precedent in *Fleur*, which had already concluded that Hobbs Act robbery is categorically a crime of violence. *United States* v. *St. Hubert*, 909 F.3d 335, 346 (2018). But *Fleur*'s conclusion hinged on the court's review of the defendant's indictment for *means*, not *elements* (see *In re Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016))—a mode of analysis that is squarely

foreclosed by *Mathis*. As a result of the Eleventh Circuit's prior-panel-precedent rule, the court has never entertained whether *Mathis* required a different outcome than the one in *Fleur*, aside from a passing reference in a footnote. *St. Hubert*, 909 F.3d at 347 n.9. And *Fleur* itself, like numerous other published decisions on SoS petitions, was decided without briefing or argument by the parties.

This approach runs afoul of fundamental due process guarantees, which require that "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971). The Eleventh Circuit's treatment of the issue, which was decided without adversarial testing, can hardly be considered "meaningful." See *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1232-1233 (2018) (Gorsuch, J., concurring in part and concurring in judgment) ("[T]he crucible of adversarial testing is crucial to sound judicial decisionmaking. We rely on it to 'yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.'" (citation omitted)).

Thus, regardless of whether the Eleventh Circuit on occasion applies intervening Supreme Court precedent in some cases, the "practical effect" of the court's prior-panel-precedent rule—reaffirmed and applied in *this* case—is to deny the petitioner and similarly situated individuals their right to a meaningful hearing on the law as it exists at the time of their appeal. *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985).

While the Eleventh Circuit's problematic application of its prior-panel-precedent rule here is

particularly marked, petitioner's case is by no means unique. Numerous other individuals seeking review of their sentences on the merits of the Hobbs Act robbery question have been turned away on the basis of *Fleur*.[5] And, under its prior-panel-precedent rule, the Eleventh Circuit will never meaningfully engage with that question, despite the court's prior acknowledgements that Hobbs Act robbery may encompass conduct that is not categorically a crime of violence. See, *e.g.*, Order at 6, *Davenport* v. *United States*, No. 16-15939 (11th Cir. Mar. 28, 2017) (Martin, J.); *In re Hernandez*, 857 F.3d 1162, 1165 (11th Cir. 2017) (Martin, J., joined by Jill Pryor, J., concurring in result). Furthermore, *St. Hubert* has now compounded *Fleur*'s error by extending its holding to attempted Hobbs Act robbery, meaning that an additional class of individuals will also be caught in the due process morass effected by the prior-panel-precedent rule. See, *e.g.*, *Hylor* v. *United States*, 896 F.3d 1219 (11th Cir. 2018), cert. denied 139 S. Ct. 1375 (2019). Petitioner asks only that the merits of his claim be considered on the basis of the law as it stood at the time of his appeal.

Beyond the Hobbs Act robbery question, and as outlined in the pending certiorari petition in *Valdes Gonzalez* v. *United States*, No. 18-7575 (filed Jan. 18, 2019), the Eleventh Circuit has published several binding orders holding that various other offenses—

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[5] See, *e.g.*, *United States* v. *Becker*, 762 F. App'x 668, 674 (11th Cir. 2019) (per curiam); *United States* v. *Wiles*, 723 F. App'x 968, 969 (11th Cir. 2018); *King* v. *United States*, 723 F. App'x 842, 844 (11th Cir.), cert. denied 138 S. Ct. 2592 (2018); *United States* v. *Grace*, 711 F. App'x 495, 503 (11th Cir. 2017), cert. denied 138 S. Ct. 1295 (2018).

and, after *St. Hubert*, attempted offenses—qualify as "crimes of violence" under 18 U.S.C. 924(c) or the Sentencing Guidelines, or as "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B). As members of the Eleventh Circuit have recognized, many of these decisions, like *Fleur*, were wrongly decided in haste. See *Ovalles* v. *United States*, 905 F.3d 1231, 1268-1273 (11th Cir. 2018) (en banc) (Martin, J., dissenting) (discussing examples), abrogated by *United States* v. *Davis*, 139 S. Ct. 2319 (2019). Yet the Eleventh Circuit has relied on those decisions to decide dozens of appeals over the last two years. See No. 18-7575 Pet. at 15-17. Furthermore, as the *Valdes* petition aptly points out, the binding effect of the court's decisions will undoubtedly impact charging practices, plea bargaining, and sentencing exposure.

This case presents an ideal vehicle for review. The Eleventh Circuit squarely addressed the point that it will not revisit its past precedent on the basis of a conflict in reasoning. *St. Hubert*, 909 F.3d at 347 n.9. Furthermore, absent a grant of certiorari, the only avenue of relief for defendants bound by stale precedent will be individualized reversals en banc or in this Court. *United States* v. *St. Hubert*, 918 F.3d 1174, 1190 (11th Cir. 2019) (W. Pryor, J., respecting the denial of rehearing en banc).[6] But a ruling from this Court establishing that a meaningful opportunity for an appeal requires that an appellate court *at some point*

[6] This is particularly true where the court has "reheard only one out of [its] more than 10,000 panel orders en banc, despite [its] unique decisional approach that is 'fraught with hazard and subject to error.'" *St. Hubert*, 918 F.3d at 1198 n.4 (Wilson, J., dissenting) (citations omitted).

considered the merits of a claim under current law would give this Court's precedents their proper deference.

Moreover, the issues raised in petitioner's case, by virtue of being a direct appeal, provide the only mechanism for this Court to provide due process protections to SoS petitioners whose petitions on the basis of intervening Supreme Court precedent are unreviewable and will thus never appear before this Court. See 28 U.S.C. 2244(b)(3)(E).

Respondent may argue that any error is harmless, because Hobbs Act robbery may be a crime of violence without looking at the indictment. But petitioner (and amicus) disputes that conclusion, as the crime includes extortionate acts that involve only injury to intangible property and was historically understood as such. Petitioner and amicus could present argument on the point, but it would serve only to show what petitioner was denied below: an opportunity to have the merits of his claim considered under current law. As the law in the Eleventh Circuit stands, Hobbs Act robbery is a crime of violence because one man's indictment contained facts that showed violence: clear error under intervening precedent. The Eleventh Circuit should itself decide the question on the merits.

The prior-panel-precedent rule is a procedural directive intended to promote certainty in the law and the efficient use of judicial resources. As applied in the Eleventh Circuit, however, the only certainty the rule guarantees is that individuals are foreclosed from raising meritorious challenges to their convictions and sentences as established under intervening Supreme

Court decisions. They are further deprived of a meaningful appeal when they are bound by decisions issued without the procedural safeguards that define our adversarial system of justice. The court's out-of-hand rejection of properly raised arguments without the opportunity to be heard strikes at the "core of due process." *LaChance* v. *Erickson*, 522 U.S. 262, 266 (1998). And the Eleventh's Circuit's approach, unique among the circuit courts, means that an individual's "liberty can depend as much on geography as anything else." *Lester* v. *United States*, 921 F.3d 1306, 1319 (2019) (Martin, J., respecting the denial of rehearing en banc). The Eleventh Circuit cannot use internal procedural rules to insulate itself from its obligations to uphold fundamental due process guarantees. Rather, those "[p]rocedural rules of course must yield to constitutional * * * requirements." *Joseph* v. *United States*, 135 S. Ct. 705, 705 (2014) (Kagan, J., respecting the denial of certiorari).

This case presents this Court with an opportunity to articulate a principled line that will align the Eleventh Circuit with the other circuit courts: where intervening Supreme Court rationale conflicts with prior panel precedent, due process requires the ability to argue the merits under the law at the time of appeal. That line can respect the supervisory powers and judicial acumen of the circuit courts, for "arguments may be made one way or the other whether the present case is distinguishable" from the intervening case, and can also avert "anarchy * * * prevail[ing] within the federal judicial system." *Hutto* v. *Davis*, 454 U.S. 370, 375 (1982) (per curiam). But the Eleventh Circuit's current prior-panel-precedent rule fails to comport with

the minimum guarantees of due process, particularly as applied to orders on SoS petitions, and bucks the authority of this Court. It cannot be left to stand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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