No. _____

In the
Supreme Court of the United States of America

RICHARD SENESE JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented

I. Rather than applying this Court's precedents, the Eleventh Circuit held that its "prior panel rule" precluded it from reaching appellant's arguments. Unlike the Seventh Circuit, which follows *stare decisis*, the Eleventh Circuit deems its panel decisions unassailable, even by arguments never before considered. Later panels thereby avoid important questions, denying litigants due process and equal protection of law.

Does Article III give federal judges the power to decree that panel decisions are not only binding but issue-preclusive as well?

II. As the district court found, the government violated the Fourth Amendment by placing a global-positioning tracker on Richard Senese's boat with neither a warrant nor probable cause. The trial and appellate courts held the evidence thus seized was nonetheless admissible, reasoning that the authorities would probably have found Mr. Senese adrift on the open sea had they not deliberately disregarded his rights.

a. Did the court err in holding the evidence admissible on the basis of conjecture as to what the government might have done had it never installed the tracker?

b. Is the inevitable-discovery doctrine capable of reasoned application or does it primarily serve to encourage notorious and official disregard of the Fourth Amendment?

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Richard Senese Jr. respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in *United States v. Richard Senese Jr.*, No. 18-14275, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

Opinion Below

A copy of the decision of the court of appeals, affirming the judgment and commitment of the district court, is appended.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The decision of the Court of Appeals for the Eleventh Circuit was entered on January 8, 2020. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the Court's order of March 19, 2020, extending the usual deadline for such petitions. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which confers jurisdiction on the courts of appeals over all final decisions of the district courts.

Provisions of Law Involved

Article III, §§ 1 & 2, of the U.S. Constitution provide in pertinent part:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. 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.

The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

On February 20, 2018, Richard Senese Jr., a resident of South Florida, set off on his boat for a fishing trip to the Bahamas. The following day, while returning to West Palm Beach from Bimini, Mr. Senese's boat broke down. The U.S. Coast Guard found Mr. Senese adrift. The boat was towed by a commercial salvage company to a marina.

At the marina, the Coast Guard boarded and searched Mr. Senese's boat purportedly "because he had crossed in from a foreign country." The search was actually provoked by records showing that, a year earlier, the boat was trailered outside of a house owned by a supposed cocaine-smuggler whose brother-in-law supposedly once owned the boat.

The marina where the boat was taken would not allow Mr. Senese to leave the boat there while he retrieved his trailer. Having "few options," Mr. Senese allowed the authorities to tow his boat to the Lake Worth Coast Guard Station. While Mr. Senese took public transportation to his truck and trailer, Coast Guard officers, despite having found nothing suspicious and lacking both a warrant *and* probable cause, attached a global-positioning tracker to the boat in flagrant violation of this Court's recent precedent squarely holding that very act unconstitutional.

For the next four weeks, Coast Guard agents monitored Mr. Senese's boat's movements using the illegally installed tracker. Agent Manning testified that the location tracker could be used for a total of 48 hours, but that "use time" is spread over an indefinite period, enabling perpetual, unconstitutional monitoring for weeks or months on end. Over a span of 18 days, the government used the tracker 21 times but this sufficed to enable them

to continuously know where the boat was. At that rate—assuming, as the agent testified, that each ping of the tracker takes 30 seconds—the government could have continuously monitored Mr. Senese for more than *thirteen years*.[*]

Through this continuing illegality, the agents learned that, on March 6 and 16, Mr. Senese visited the home of a person supposedly suspected of having ties to drug trafficking and that he later made another trip to and from Bimini. The officers decided then to seize Mr. Senese and his boat without a warrant or probable cause.

Relying on information obtained through the illegal tracker, Coast Guard helicopters and boats deployed to intercept Mr. Senese at sea on March 18. When the Coast Guard reached the area pinpointed by the tracker, they discovered Mr. Senese's boat again adrift ten miles off the Florida coast. Mr. Senese waved his arms over his head signaling for help.

The agents seized the boat and towed it to the Broward County Sheriff's Office dock in Port Everglades. While the boat was under tow, agents performed what the district court called a "standard, cursory border search" and found no evidence of crime. In the meantime, another agent interrogated Mr. Senese about his trip to the Bahamas. A warrantless search of Mr. Senese's cell phone also failed to produce anything incriminating.

At the Broward County station, Homeland Security agents disassembled Mr. Senese's boat and searched it using a drug dog. The agents uncovered cocaine onboard the boat. Mr. Senese was only then read his *Miranda* rights.

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[*]A rate of 21 pings, each of 30 seconds duration, over 18 days is a little less than six-tenths of a minute of tracker time expended per day. Assuming that rate held constant, the unlawful monitoring would continue for 4,937 days, or about 13½ years. Thus, the claimed limitation of 48 hours is no limitation at all.

On March 27, 2018, Mr. Senese was charged with attempting to import cocaine and possessing that same cocaine with the intent to distribute it. He moved to suppress all physical and testimonial evidence obtained through the illegal tracker. After a hearing, the district court agreed that the installation of the tracker violated clearly established Fourth Amendment law but nonetheless denied the motion, erroneously concluding that the evidence was admissible under the inevitable-discovery doctrine.

Mr. Senese entered a conditional guilty plea, preserving his right to appeal the denial of the motion to suppress. The district court sentenced him to 151 months in prison.

On appeal, Mr. Senese specifically argued that, notwithstanding the Eleventh Circuit's so-called "prior panel rule," the circuit court could not follow its own precedent without first ensuring that it was consistent with this Court's precedent, including *Nix v. Williams*, 467 U.S. 431 (1984). The appellate court disregarded Mr. Senese's arguments and mechanically applied its erroneous precedent, refusing to make any examination of whether that precedent is consistent with this Court's interpretation of the Fourth Amendment:

> On appeal, Senese begins by arguing that our decisions in *Brookins*, *Johnson*, *Jefferson* and elsewhere that apply the "reasonable probability standard" to the inevitable-discovery doctrine are inconsistent with *Nix*. However, *even if we were to believe that cases like these wrongly decided the issue*, we've specifically held that the reasonable probability standard is *not* inconsistent with *Nix*, and we are bound by that conclusion unless it is specifically overruled, which it has not been.

Appendix at A-8 (first emphasis added). Mr. Senese's arguments were thus never considered. He was denied a meaningful appeal as well as the Fourth Amendment's protection based on different arguments made by other parties in unrelated cases decided years earlier.

Reasons for Allowance of the Writ

I. The Eleventh Circuit's rule giving its panel decisions issue-preclusive effect exceeds Article III power, denies litigants due process and a meaningful appeal, and denies them equal protection of this Court's constitutional holdings.

The Eleventh, Fifth, and Sixth Circuits not only give their panel judgments binding effect, they also give them preclusive effect. Later panels are said to be "bound" by the first panel to rule on an issue, something that judges have no evident authority to decree and that leads to arbitrary and absurd results. For example, if a two-judge majority resolves an issue of first impression over another judge's dissent, those two judges' holding purportedly "binds" the three judges on the next panel, even if they unanimously agree with the dissenting judge. In this way, two circuit judges decide the same issue for two cases, notwithstanding the judgment of the *four* other judges involved. Worse, in these circuits the first panel's holding bars consideration of any later litigant's novel argument on the issue, no matter how convincing, unconstitutionally "requiring" circuit judges to ignore litigants' arguments, denying them a meaningful appeal. The Seventh Circuit, like this Court, avoids these substantial constitutional and practical problems by applying its precedents through traditional *stare decisis* analysis.

The three circuits mentioned maintain that only the *en banc* court or this Court can consider any new arguments on a question of law once a panel has decided it. Under the extreme position these circuits have recently taken, circuit precedent controls even if the litigants before the first panel raised completely different, weaker arguments. *See Spaho v. United States Attorney General*, 837 F.3d 1172, 1181 (CA11 2016) ("Under our prior panel

precedent rule, it is irrelevant to us whether *Donawa* is correct, or whether the panel in *Donawa* actually considered all possible issues, theories, and arguments. What matters to us is what *Donawa* decided."). The rule applies even if the first panel misinterpreted this Court's precedent. *See Darrah v. City of Oak Park*, 255 F.3d 301, 309 (CA6 2001) ("Whether this was a proper reading of [*Albright v. Oliver*, 510 U.S. 266 (1994)] is not our place to say, for '[a] panel of this Court cannot overrule the decision of another panel.'"). It does not matter if the first panel failed to realize that this Court implicitly overruled the earlier panel's reasoning. *See Thompson v. Dallas City Attorney's Office*, 913 F.3d 464, 468 (CA5 2019) ("To be clear, a panel's interpretation of a Supreme Court decision is binding on a subsequent panel even if the later panel disagrees with the earlier panel's interpretation."); *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (CA5 2001) ("[O]ur panel opinion in *Little Lake* binds us on the issue of Act 315's alleged discrimination against the United States, despite its reversal by the Supreme Court."). Even when a Supreme Court decision *does* abrogate circuit precedent, the "prior panel rule" is said to both authorize and require *ignoring* this Court's holdings: "While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision *must be clearly on point*." *See, e.g.*, *United States v. Archer*, 531 F.3d 1347, 1352 (CA11 2008) (*emphasis added*).

The "prior panel rule" distorts and calcifies the law and by making plainly erroneous circuit court rulings impervious to persuasive, logical arguments. For example, the Eleventh Circuit refused in this case, as it has for 36 years, to apply the inevitable-discovery doctrine

approved in *Nix v. Williams*, 467 U.S. 341 (1984), and applied its own inconsistent version of that doctrine, entirely disregarding Mr. Senese's arguments:

> On appeal, Senese begins by arguing that our decisions in *Brookins*, *Johnson*, *Jefferson* and elsewhere that apply the "reasonable probability standard" to the inevitable-discovery doctrine are inconsistent with *Nix*. However, even if we were to believe that cases like these wrongly decided the issue, we've specifically held that the reasonable probability standard is not inconsistent with *Nix*, and we are bound by that conclusion unless it is specifically overruled, which it has not been.

Appendix at A-8. The Eleventh Circuit ignored this Court's authority even though Mr. Senese specifically argued that under no circumstances could circuit precedent trump Supreme Court precedent. *See United States v. Gallo*, 195 F.3d 1278, 1284 (CA11 1999) ("[O]ur prior precedent is no longer binding ... if it is in conflict with existing Supreme Court precedent."); *Wilson v. Taylor*, 658 F.2d 1021, 1034–35 (CA5 Unit B 13 Oct 1981) (holding that a panel that did not consider Supreme Court precedent does not bind a later panel, which must apply Supreme Court precedent). The court of appeals ignored these older authorities and applied its newer, completely preclusive version of the "prior panel rule" to nullify the force of *Nix* as well as *Utah v. Strieff*, 136 S.Ct. 2056 (2016), and *Jones v. United States*, 565 US 400 (2012), in this case.

The avowed purpose of the "prior panel rule," at least in the Eleventh Circuit, is in fact to freeze the development of the law and foreclose consideration of better arguments that a future litigant might make. The Eleventh Circuit adopted the former Fifth Circuit's "prior panel rule" in a run-of-the-mill prison lawsuit that did not require such a sweeping ruling. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (CA11 1981) (*en banc*). The court openly

confessed that enshrining the rule in an opinion was necessary to ensure that newly appointed judges felt bound by the decisions of the court's then-members: "An informal consensus [among individual judges] not given the imprimatur of judicial decision could be upset by changes in the composition of the court." *Id.* at 1210. In this way, the development of the law is severely inhibited by making newer judges believe their brethern on the same court can strip them of their Article III authority and duty to decide cases based on the law *as declared by this Court*. *See, e.g.*, *United States v. Golden*, 854 F.3d 1256, 1257 (CA11 2017) ("[S]ome members of our court have questioned the continuing validity of *Turner* in light of cases like *Descamps v. United States*, 570 U.S. 254 (2013). But even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it."); *United States v. Fritts*, 841 F.3d 937, 942 (CA11 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."). Of course, a judges' pact to abandon their independent judgment is no less illicit or unconstitutional for being overt rather than clandestine.

Today, this "rule" makes judicial decisions not just binding but *preclusive* because no argument that contradicts the earlier panel's resolution of the issue can be entertained, even if the argument is both novel and persuasive. *See Linebery v. United States*, 512 F.2d 510, 510 (CA5 1975) ("The decision in *Vest* being dispositive of all issues presented on this appeal, it is unnecessary for us to reconsider the merits of that holding."). This is extraordinary as issue preclusion normally applies only when an issue was earlier resolved "'*between the same parties*.'" *Bravo-Fernandez v. United States*, 137 S.Ct. 352, 357 (2016); *see also Cromwell v.*

Sac County, 94 U.S. 351, 354 (1876) ("[T]he determination of a question directly involved in one action is conclusive as to that question in a second suit *between the same parties* ... ."). This not only gives court decisions force and effect beyond the facts and arguments considered in the case, it gives them the effect of statutes.

For any group of circuit judges—by agreement, judicial decree, or otherwise—to declare panel decisions binding on other panels or preclusive as to all future litigants is unconstitutional. First, it usurps legislative power by giving court judgments statutory force. Also, it abandons the independent judgment *indispensable* to the judicial function, allowing legal errors to multiply unchecked—precisely what appellate courts exist *to prevent*. Finally, because it makes legal errors impervious to any argument whatsoever, it deprives appellants of a meaningful appeal and denies them equal protection of law by deciding appeals on arbitrary grounds.

Article III confers no power on judges to "declare" a precedent binding. Whether precedent is binding is a functional inquiry. A trial judge doing his work oblivious to the holdings of the reviewing court is going to find himself inundated by remanded cases. This practical reality of the common law system, together with the need to foster predictability in the law, is what makes a reviewing court's decisions binding, regardless of how persuasive they are. That explains why no federal district court binds any other; district courts have no appellate jurisdiction over other Article III courts. *See Dhalluin v. McKibben*, 682 F. Supp. 1096, 1097 (DNV 1988) ("The structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny

another district judge his or her lawful jurisdiction."). Likewise, the Eleventh Circuit's decisions bind district courts in Florida, Georgia, and Alabama, but not Colorado, Connecticut, or California, because an appeal to the Eleventh Circuit lies only from the three Southern states. The Eleventh Circuit can no more bind its own judges than it can the judges of the Northern District of California. That power exceeds the Article III power to decide cases and is not at all necessary to that task, as this Court and the Seventh Circuit show.

Not surprisingly, the "prior panel rule" has no legal pedigree or source of authority, despite its ubiquity in federal reports. No federal court decision explains how Article III gives circuit judges (though not district judges) the power to bind one another. Article III mentions neither district or circuit judges. Earlier decisions suggested that power in fact does not exist by calling this supposed "rule" a mere "policy" or "practice." *See, e.g.*, *Puckett v. Commissioner of Internal Revenue*, 522 F.2d 1385, 1385 (CA5 1975) ("We understand the policy and practice of this Court to be that a rule of law announced by one panel, will not be overruled or set aside by another panel ... ."); *Manning v. M/V Sea Road*, 417 F.2d 603, 610 n.10 (CA5 1969) ("It is this Court's firm practice that one panel cannot overrule another panel's decision."). Whether practice or rule, its unconstitutional purpose has always been to neuter judges who might otherwise apply their own independent judgment to the arguments the parties raise:

> [T]he prior panel precedent rule is not dependent upon a subsequent panel's appraisal of the initial decision's correctness. Nor is the operation of the rule dependent upon the skill of the attorneys or wisdom of the judges involved with the prior decision—upon what was argued or considered. Unless and until the holding of a prior decision is overruled by the Supreme Court or by the *en banc* court, that holding is the law of this Circuit regardless of what might have

> happened had other arguments been made to the panel that decided the issue first.

Cohen v. Office Depot, Inc., 204 F.3d 1069, 1076 (CA11 2000).

No legal theory justifies the belief that Article III judges have the power to oust the jurisdiction of other Article III judges and bar them from entertaining novel arguments on old questions and deciding the cases that come before according to their own judgment. "Jurisdiction is power to decide the case either way, *as the merits may require*." *Erickson v. United States*, 264 U.S. 246, 249 (1924) (emphasis added). It is the "power to declare the law." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). That power belongs not only to federal courts but to individual federal judges: "[T]he guarantee of independence runs to individual judges as well as to the judicial branch." *Hastings v. Judicial Conference*, 770 F.2d 1093, 1106–07 (CADC 1985) (Edwards, J., concurring); *see also Chandler v. Judicial Council*, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting) ("Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign."); *In re McBryde*, 117 F.3d 208, 223 (CA5 1997) (holding that every Article III judge has a constitutional interest "in deciding [his or her assigned] cases free from the specter of interference, except by the ordinary process of appellate review ... .").

Appellate panels have three judges to get three independent views on how the case should be resolved, and no judge has any discretion either to thwart another judge's exercise of judgment or to withhold his own judgment in deference to that of others. Judging requires more than mechanically applying bare holdings. It requires analyzing substantial arguments

that those holdings should be reconsidered for reasons not brought to the earlier panel's attention. "Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting).

While the Seventh Circuit applies its precedent through traditional *stare decisis* analysis, the other circuits have "prior panel rules" that violate the Constitution. *See United States v. Eason*, 829 F.3d 633, 641 (CA8 2016) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel."); *Volpicelli v. United States*, 777 F.3d 1042, 1043 (CA9 Cir. 2015) ("As a three-judge panel, we are bound by those decisions unless they're 'clearly irreconcilable' with intervening higher authority."); *Deckers Corp. v. United States*, 752 F.3d 949, 959 (CAF 2014) ("In this Circuit, a later panel is bound by the determinations of a prior panel .. ."); *United States v. Wilkerson*, 361 F.3d 717, 732 (CA2 2004) ("Indeed, were we the first panel to rule on this type of sufficiency-of-the-evidence challenge, we might well reach a different conclusion."); *United States v. Ruhe*, 191 F.3d 376, 388 (CA4 1999) ("In any event, as a simple panel, we are bound by prior precedent from other panels in this circuit ... ."); *United States v. Brooks*, 161 F.3d 1240, 1247 (CA10 1998) ("This panel is bound by the cases set out above absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court."); *Gersman v. Group Health Association*, 975 F.2d 886, 897 (CADC 1992) ("Whatever the clean-slate merits of the government's construction, we as a panel are not at liberty to adopt it: circuit precedent demands a categorical approach ... and one panel cannot overrule another.").

The Seventh Circuit shows that a "prior panel rule" is not at all necessary by adhering, as this Court does, to traditional principles of *stare decisis*: "While we are not absolutely bound by the holdings in our prior decisions and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision, we are obliged to give considerable weight to [our prior] decisions ... ." *United States v. Walton*, 255 F.3d 437, 443 (CA7 2001) (citations and quotation marks omitted); *accord Santos v. United States*, 461 F.3d 886, 891 (CA7 2006); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (CA7 1987). This is the only constitutional and correct approach because it confines judges to their Article III function of deciding only the arguments the parties present. *See United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020) ("'[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'"). Federal Rule of Appellate Procedure 35 supports this because it provides that *en banc* review exists "to secure or maintain uniformity of the court's decisions," which would be unnecessary if the first panel to consider an issue could bind all subsequent panels.

Time-honored *stare decisis* principles foster a more predictable jurisprudence than one built on mistakes propagating unchecked. While *stare decisis* entails rational, principled analysis, the "prior panel rule" abandons logic for the sake of an illusory "stability" that sacrifices justice for litigants and rationality in the law. There is no truth to the rationalization that the "prior precedent rule ... is essential to maintaining stability in the law." *Walker v. Mortham*, 158 F.3d 1177, 1188 (CA11 1998). It does little to obviate intra-circuit conflicts. *See, e.g., id.* ("In deciding which line of precedent to follow, we are, ironically, faced with two

conflicting lines of precedent."). Judges do not have the luxury of avoiding legal issues for the sake of collegiality or anything else. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. ... Questions may occur which we would gladly avoid; but we cannot avoid them."). They have no discretion to deny a litigant a meaningful appeal by refusing to consider substantial arguments for reconsidering precedent. *See Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.").

The "prior panel rules" virtually guarantee the arbitrary resolution of cases and development of the law. Issues are decided on the basis of the first arguments to reach the court, whether formulated by a seasoned or inexperienced lawyer, whether in a complicated or simple case, whether the stakes are high or low. At least some circuits admit that the rule fosters an arbitrary, nonsensical, and unprincipled jurisprudence, all to completely foreclose having to revisit an issue once decided. *See, e.g.*, *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (CA11 2006) ("Tippitt's argument that we should not be bound by *Levinson* because this point was not really argued in that case runs afoul of our decisions that a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel."); *see Davis v. Estelle*, 529 F.2d 437, 441 (CA5 1976) ("One panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent."). This Court should grant certiorari to stop this unconstitutional, irrational, and harmful basis for deciding legal questions.

II. The circuit courts have erroneously interpreted the inevitable discovery doctrine as license to judicially ratify even flagrant disregard of Fourth Amendment rights on the basis of conjecture.

The Eleventh Circuit did not analyze whether its understanding of the inevitable discovery doctrine is consistent with this Court's articulation of the doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). It would seem overwhelmingly likely that circuit precedent equating a "reasonable probability" that the evidence would have been discovered lawfully is incompatible with *Nix*'s emphasis on literal inevitability, emphasized by the detailed description of the lawful search that took place simultaneously with an unlawful interrogation. *See id.* at 449–50. The opinion leaves little doubt that inevitability is a stricter standard than a reasonable probability: "On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found." *Id.*

The court of appeals avoided analyzing this issue by erroneously disclaiming the power to reconsider its own precedents. *See* Part I, *supra*. As a result, it affirmed a conviction secured only through the deliberate and flagrant disregard of this Court's constitutional holdings by police officers, who placed an illegal tracking device on Mr. Senese's boat. *See Jones v. United States*, 565 U.S. 400, 404 (2012). Both the trial and appellate courts excused the violation on the ground that there was a "reasonable probability" that routine patrols would have found Mr. Senese adrift on the open sea if there had been no tracking device to

follow to his exact location. *See* Appendix A-8. This is exactly the type of speculation that fails to demonstrate that discovery of the contraband was "inevitable":

> [The inevitable-discovery doctrine] does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. Rather, "independent" or "inevitable" discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply in the absence of) the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one.

Hudson v. Michigan, 547 U.S. 586, 616 (2006) (Breyer, J., dissenting) (citations omitted).

Other circuits have adopted similar rationales that enable them to take the word *inevitable* less than literally. Like the Eleventh Circuit, the Fifth, Seventh, and Eighth circuits all ask whether there is a "reasonable probability" that the evidence might have been discovered without disregarding the Constitution. *See, e.g.*, *United States v. Delva*, 922 F.3d 1228, 1245 (CA11 2019); *United States v. Allen*, 713 F.3d 382, 387 (CA8 2013); *United States v. Ochoa*, 667 F.3d 643, 650 (CA5 2012). The First, Second, and Tenth Circuits ask what *could* have happened rather than what necessarily *would* have happened, despite the constitutional violation. *See, e.g.*, *United States v. Heath*, 455 F.3d 52, 60 (CA2 2006) (affirming a conviction based on evidence seized during an illegal arrest based on a convoluted train of hypothetical suppositions about what reasonable officers might have inferred had they behaved legally); *United States v. Cunningham*, 413 F.3d 1199, 1203 (CA10 2005) (affirming a conviction based on illegally seized evidence after a prosecutor told police officers that they had not yet developed probable cause to support a warrant and they then effected a search without one);

United States v. Silvestri, 787 F.2d 736, 742 (CA1 1986) (affirming the use of illegally seized evidence reasoning that discovery can be inevitable even if "the legal process for discovering the evidence" had not been "set in motion at the time of the illegal discovery."). The Third Circuit asks whether evidence would "ultimately or inevitably" through "routine police procedures" when those same supposedly routine procedures were flouted. *United States v. Stabile*, 633 F.3d 219, 246 (CA3 2011) ("The Government can meet its burden by establishing 'that the police, following routine procedures, would inevitably have uncovered the evidence.'").

As Justice Breyer's dissent in *Hudson* suggests, there is no shortage of appellate decisions that could be cited in support of the proposition that the inevitable-discovery doctrine does not lend itself to principled application. Justice Brennan's dissent made just that point in *Nix* when he observed, "The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule." 467 U.S. at 459. While Justice Brennan, joined by Justice Marshall, argued only for a heightened clear-and-convincing evidence standard, the truth is that the logical problems inherent in the inevitable-discovery doctrine are unlikely to be fixed by a tweaked standard. Constitutional violations will only multiply if they can be ratified on the basis of hypothetical, after-the-fact rationalizations shaped by lawyers.

This case was prosecuted only because law enforcement agents took it upon themselves to blatantly ignore this Court's ruling in *Jones*. The district court and the court of appeals gave that fact no consideration. Instead, the disposition of the case revolved around

what might have happened if these agents had respected the constitutional rights of Mr. Senese while he was under investigation.

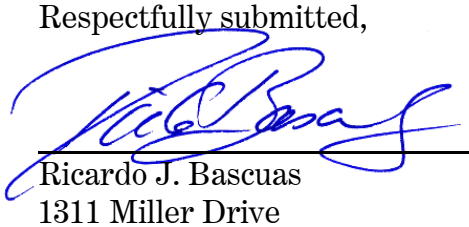
Concrete cases and controversies are not and cannot be justly resolved on the basis of what hypothetically could have happened rather than what actually *did* happen. Adjudication on the basis of hypothetical facts is in fact disfavored in *every* legal context—save when the police trample on Fourth Amendment rights. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 781 (1982) (Stevens, J., concurring) ("Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication."); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) ("For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'"); *Government & Civic Employees Org. Comm., CIO v. Windsor*, 353 U.S. 364, 366 (1957) ("Another policy served by [the doctrine of constitutional avoidance] is the avoidance of the adjudication of abstract, hypothetical issues. Federal courts will not pass upon constitutional contentions presented in an abstract rather than in a concrete form."). In fact, the same year *Nix* was decided, this Court held that a challenge to the denial of a defendant's motion to preclude mention of his prior conviction was too conjectural because he chose not to testify after his motion was denied. *Luce v. United States*, 469 U.S. 38, 41–42 (1984) ("Any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative."). If it is unknowable whether a prosecutor would impeach a testifying defendant with his prior conviction, it is much less

knowable what the Coast Guard would have done had it adhered to *Jones* instead of cavalierly violating Mr. Senese's rights.

The inevitable-discovery doctrine serves only to undermine the Fourth Amendment's protection of people and their effects. It is unique in all of constitutional law in that it relies on hypothetical scenarios to excuse deliberate, even flagrant official disregard of fundamental rights. The courts of appeals have proven that they are individually and severally incapable of applying it with fidelity to the constraints set out in *Nix*. This Court should grant certioari to reformulate or repudiate the doctrine.

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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