NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

MATTHEW PRYOR,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does Congress' express "*Clarification* of Section 924(c) of Title 18, United States Code" in Section 403 of the First Step Act apply to a defendant convicted and sentenced prior to the enactment of the Act, but whose sentence has not yet been "imposed" because his case remains "pending" on direct review?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Matthew Pryor, No. 15-20404-Cr-Bloom (January 27, 2016)

United States Court of Appeals (11th Cir.):

United States v. Matthew Pryor, No. 16-10806 (August 5, 2020)

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PETITION FOR WRIT OF CERTIORARI

Matthew Pryor 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 case number 16-10806 in that court on August 5, 2020, 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 United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on August 5, 2020. This petition is timely filed pursuant to SUP. CT. R. 13.1 and the Clerk's Order extending petition deadlines due to COVID-19. 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 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

18 U.S.C. § 924. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 5 years;
> >
> > **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; . . .
>
> **(c)(1)(C)** In the case of a second or subsequent conviction under this subsection, the person shall –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 25 years; and
> >
> > **(ii)** if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

The First Step Act of 2018, Pub. L. No. 115-391, enacted on December 21, 2018, amended §924(c)(1)(C) in Title IV, Section 403 of the Act, entitled "Clarification of Section 924(c) of Title 18, United States Code," which provides:

(a) IN GENERAL. – Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

(b) APPLICABILITY TO PENDING CASES. – This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

STATEMENT OF THE CASE

An indictment issued against Mr. Pryor for the following crimes: **(1)** assault against a federal officer with use of a deadly weapon in violation of 18 U.S.C. §111(a) and (b); **(2)** discharging a firearm in connection with a crime of violence (i.e., count I) in violation of 18 U.S.C. §924(c)(1)(A)(iii); **(3)** carjacking in violation of 18 U.S.C. §2119; **(4)** brandishing a firearm in connection with a crime of violence (i.e., count 3) in violation of 18 U.S.C. §924(c)(1)(A)(ii); and **(5)** felon-in-possession of a firearm in violation of 18 U.S.C. §922(g). On October 5, 2015, Mr. Pryor pled guilty to the indictment charges without any plea agreement.

The United States Probation office prepared a Presentence Investigation Report ("PSI"). It found that Mr. Pryor was subject to the three strikes enhancement (18 U.S.C. §3559(c)) and the career offender guideline (U.S.S.G. §4B1.2) with respect to counts I-IV, and ACCA enhancement (18 U.S.C. §924(e)) with respect to count V. The prior predicates relied on for the §3559(c) enhancement were two Florida burglary of occupied dwelling and one Florida burglary of unoccupied dwelling convictions, Fla. Stat. §810.02. The prior predicates for the ACCA and career offender enhancements were the burglaries and one Florida resisting an officer with violence, Fla. Stat. §843.01. Based on these findings, the PSI recommended three consecutive terms of life.

Mr. Pryor filed objections to the PSI and a response to an enhancement under 18 U.S.C. §851/3559(c). Mr. Pryor also filed a motion for a downward variance and

departure. The government filed a sentencing memorandum which Mr. Pryor responded to.

Sentencing was held on January 22 and January 26, 2016, and additional pleadings were filed including Mr. Pryor's Notice of Filing Supplemental Authority *United States v. Lockett*, 2016 WL 240334 (11th Cir. 2016); and the government's filings of state court documents relating to Mr. Pryor's prior criminal history.

Ultimately, the court found that Mr. Pryor did not qualify for the three strikes enhancement or ACCA based on the failure of Mr. Pryor's burglary offenses to qualify as serious violent felonies/violent felonies under those enhancements pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015). However, pursuant to *United States v. Matchett*, 802 F.3d 1185 (2015), the court found that Mr. Pryor remained a career offender because *Johnson* did not apply to invalidate the career offender residual clause of the advisory guidelines, U.S.S.G. §4B1.2. The court also found that Mr. Pryor had two §924(c) convictions in the instant matter, and that the second §924(c) conviction in count 4 resulted in a 25-year sentence that was to be run consecutive to all other sentences.

Based on its rulings, the Court found the following statutory penalties governed Mr. Pryor's convictions: (1) count I, violation of 18 U.S.C. §111(a), (b), a statutory maximum of 20 years; (2) count II, discharging a firearm in violation of 18 U.S.C. §924(c), a statutory minimum of 10 years and a statutory maximum of life; (3) count III, a violation of 18 U.S.C. §2119, a statutory maximum of 15 years; (4)

count IV, brandishing a firearm in violation of 18 U.S.C. §924(c), a minimum of 7 years, enhanced as a second §924(c) conviction for a minimum of 25 years and a statutory maximum of life; (5) count V, a violation of 18 U.S.C. § 922(g), a maximum of 10 years.

Based on its rulings, the court sentenced Mr. Pryor to 180 months as to counts I (18 U.S.C. §111(a) and (b)) and III (18 U.S.C. §2119), and 120 months as to count V (18 U.S.C. §922(g)), to run concurrent; 120 months as to count II (discharging a firearm 18 U.S.C. §924(c)) to run consecutive; and 300 months as to count IV (second 18 U.S.C. §924(c)) to run consecutive for a total of 600 months imprisonment.

The government appealed the sentence based on the court's denial of the §3559(c) enhancement. Mr. Pryor timely cross-appealed. The case was held in abeyance during the Supreme Court cases of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) and *Davis v. United States*, 512 U.S. 452 (June 24, 2019). The government dismissed its appeal after the Supreme Court issued its *Dimaya* decision. Consequently, Mr. Pryor's cross-appeal became the main appeal. On December 21, 2018, Congress passed the First Step Act of 2018, Pub. L. No. 115-391.

On appeal, Mr. Pryor challenged the stacking of his §924(c) convictions under the First Step Act. The Eleventh Circuit rejected Mr. Pryor's arguments and denied his cross-appeal. Mr. Pryor files this Petition for a writ of certiorari to challenge the Eleventh Circuit's decision.

REASON FOR GRANTING THE WRIT

This Court should grant the writ to determine whether 18 U.S.C. §924(c)(1)(C), as expressly "clarified" by Congress in Section 403 of the First Step Act of 2018, applies to a defendant convicted and sentenced prior to the enactment of the Act, but whose sentence has not yet been finally "imposed" because his case remains "pending" on direct review, because the issue is important and should be resolved for pipeline defendants.

The First Step Act of 2018, Pub. L. No. 115-391, enacted on December 21, 2018, expressly "clarifi[ed]" that the consecutive mandatory sentence under §924(c)(1)(C) applies only to a "violation of [§ 924(c)] that occurs *after* a prior conviction under [§924(c)] has become final." First Step Act of 2018, Pub. L. No. 115-391, at §403(a). Before the Act, when Petitioner was sentenced, a second §924(c) count of conviction in a single indictment required a 25-year mandatory minimum penalty to be imposed consecutive to the sentences for each other count of conviction. That was due to this Court's opinion in *Deal v. United States*, 508 U.S. 129 (1993), which interpreted the phrase "second or subsequent conviction" to mean each additional offense in the same case with no intervening final conviction. In light of Section 403 of the First Step Act, however, which was enacted to "*clarify*" that the stacking practice sanctioned by *Deal* was in fact a misapplication of Congress' original intent, the district court's 25-year consecutive sentence on Count 4 here was imposed in error.

Unlike any other provision in the First Step Act, Congress specifically titled Section 403 a "***Clarification*** of Section 924(c) of Title 18, United States Code."

(Emphasis added). And consistent with that "clarification," §403(b), entitled "Applicability to Pending Cases," provides that "the amendments made by this section . . . shall apply to any offense that was committed before the date of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]." While Petitioner was sentenced prior to the date of enactment, Congress' "clarification" applies to his "pending case" on direct review, because a sentence is not "final" (and is not finally "imposed") so long as a case is still "pending" on direct appeal. *See Griffith v. Kentucky*, 479 U.S. 314, 321 at n. 6 (1987) (holding in a criminal case that "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied").

The application of FSA §403 to cases still pending on direct appellate review is confirmed by the legislative history. Senator Mike Lee, one of the primary sponsors of what became Section 403, explained that he first became aware of the problem created by this Court's interpretation of §924(c)(1)(C) in *Deal* when a defendant named Weldon Angelos was sentenced to 55 years in the District of Utah. Senator Lee stated: "Because Mr. Angelos had a gun on his person at the time of these transactions, because of the way he was charged, and *because of the way some of these provisions of law have been interpreted-including a provision of law in 18 USC, section 924(c)*-Mr. Angelos received a sentence of 55 years in prison." 162 Cong. Rec.

S5045-02, 162 Cong. Rec. S5045-02, S5049 (July 13, 2016) (emphasis added). Senator Lee recognized that *Deal*'s interpretation as applied to Mr. Angelos was cruel, arbitrary and capricious: "What on Earth was this judge thinking? How could such a judge be so cruel, so arbitrary, so capricious as to sentence this young man to 55 years in prison for selling three dime-bag quantities of marijuana?" *Id*. "The judge didn't have a choice," and indeed "took the unusual-the almost unprecedented, almost unheard of-step of issuing a written opinion prior to the issuance of the sentence, disagreeing with the sentence the judge himself was about to impose." *Id*. at S5049-50. The judge stated: "This is a problem. This young man is about to receive a sentence that is excessive under any standard. It is a longer sentence than he would have received had he engaged in many acts of terrorism or kidnapping." *Id*. at S5050. "But, the judge said: This is a problem I cannot address. This is a problem I am powerless to remedy. Only Congress can fix this problem. " *Id*. at S5050. Section 403 of the First Step Act fixes the problem, by clarifying that that the majority in *Deal* was wrong and §924(c)(1)(C) has been applied erroneously for years, inconsistent with Congress' original intent.

The application of FSA §403 to cases still pending on direct appellate review is also confirmed by the text of the statute. This application does *not* hinge upon any single term in the text, but rather on the significance of all of the terms Congress chose to include in this remedial provision together. This Court has consistently emphasized that no statutory term can exist in a vacuum; that a term takes its

meaning from the surrounding statutory text and context; and that indeed, the same term may have different meanings in different statutes as a result of different contexts and different legislative intent. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *Curtis Johnson v. United States*, 559 U.S. 133, 139-40 (2010) ("context determines meaning;" citing *Leocal*); *United States v. Castleman*, 572 U.S. 157 (2014) (construing the same "physical force" language differently than in *Curtis Johnson*, due to different context).

Construing the word "imposed" in §403(b) in its broader statutory context here – especially in light of its statutory title -- is consistent with the longstanding general rules of statutory construction. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of doubt about the meaning of a statute.") (citation and internal quotation marks omitted); *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991) (agreeing with the government that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); *Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the intent of the legislature is the title of the act"); *United States v. Wellington*, 889 F.2d 575, 577 (5th Cir. 1989) ("[i]n the face of ambiguity, we will consider a section heading enacted by Congress in conjunction with the statutory text to "come up with the statute's clear and total meaning"); *United States v. Marek*, 238 F.3d 310, 321 (5th Cir. 2001) (" . . . [A]ny lingering doubt

regarding the statute's meaning is laid to rest by the title of the section").

Moreover, the background legal landscape confirms that clarifying amendments to *criminal statutes* apply to cases on direct appeal – even where the amendment works to the detriment of the defendant. *See United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2013) (noting with significance that Congress titled its 2004 amendment to murder-for-hire statute "clarification of definition"); *United States v. Monroe*, 943 F.2d 1007, 1015-16 (9th Cir. 1991) (1988 amendment to 18 U.S.C. §1956(a)(2), the money laundering statute was intended to "clarify Congressional intent;" noting "[t]hat amendment and its legislative history, though not controlling, are entitled to substantial weight in construing the earlier law"); *United States v. Taleb-Jedi*, 566 F.Supp.2d 157 (E.D.N.Y. July 23, 2008) (recognizing, in prosecution for providing material support to Iranian dissident organization, that a "clarifying amendment" that redefined the term "material support and resources" applied retroactively and did not violate the prohibition on *ex post facto laws*); *United States v. Godinez*, 1995 WL 549020, at *7 (N.D. Ill. 1995) (unpublished) (finding, based on legislative history and the policy of the Illinois legislature at the time of amendment to sentencing enhancement statute, that it was clarifying, and therefore, applied retroactively to defendant on direct appeal without any *ex post facto* problem).

Clarifying amendments to criminal statutes are also applicable by analogy to civil cases and criminal sentencing guidelines. In civil contexts, lower courts have

long applied a clearly-clarifying statutory amendment to cases pending on direct appeal. *See Brown v. Thompson*, 374 F.3d 253, 259-60, 261 n.6 (4th Cir. 2004) (applying Medicate Prescription Drug, Improvement and Modernization Act of 2003 to a case on direct appeal, since that Act "merely clarified" prior law; noting with significance that Congress "formally declared" the amendment was "clarifying" in its title); *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1057 (9th Cir. 2002) (holding it "well-established that the enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; in legal theory it simply states the law as it was all the time, and no question of retroactive application is involved. Where an amendment to a statute is remedial in nature and merely serves to clarify the existing law, the Legislature's intent that it be applied retroactively may be inferred"); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[I]f the amendment clarifies prior law rather than changing it, no concerns about retroactive application arise and the amendment is applied to the present proceeding as an accurate restatement of prior law").

This same rule of applying clarifying amendments is uniformly applied in the analogous context of sentencing guideline amendments. While parties can and often do dispute whether a Guideline amendment is clarifying or substantive *if* the Sentencing Commission *does not* state that the amendment was intended to be clarifying, *see United States v. Descent*, 292 F.3d 703, 708 (11th Cir. 2002), where the

Commission *does* specifically designate an amendment to the Guidelines as "clarifying," the amendment applies without question to cases on direct appeal "regardless of the sentencing date." Every circuit in this country follows this rule,[1] reasoning that "clarifying amendments do not represent a substantive change in the Guidelines, but instead "provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline." *Descent*, 292 F.3d at 707-08.

While this Court has rejected the suggestion that a statute is "clarifying" if there is no textual indication in that regard, or any possible ambiguity in the prior statutory language, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 647-48 (2005), here Congress specifically designated only *one* section of the First Step Act – the amendment to § 924(c)(1)(C) – as a "clarification" of the prior statutory provision, in the title to Section 403, without any similar designation in the titles of other sections. And "where Congress includes particular language in one section of a

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1 *See, e.g., United States v. Godin*, 522 F.3d 133, 135 (1st Cir. 2008) (noting that where the Sentencing Commission has not specifically made an amendment "retroactively applicable," it would not be applicable to defendants whose sentences have become "final" because it "is no longer subject to review on direct appeal in any court;" however, in the "peculiar" posture of a case where the "pending appeal has not yet resulted in a final disposition," a clarifying amendment may be applied); *United States v. Perdono*, 1927 F.2d 111, 116-17 (2nd Cir. 1991); *United States v. Remoi*, 404 F.3d 789, 795 (3rd Cir. 2005); *United States v. Deigert*, 916 F.2d 916 (4th Cir. 1990); *United States v. Maseratti*, 1 F.3d 330, 340 (5th Cir. 1993); *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016); *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11th Cir. 2016); *United States v. Caballero*, 936 F.2d 1292, 1922 & n. 8 (D.C. Cir. 1991).

statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Moreover, this Court has long held that a repeal of a criminal statute while an appeal is pending, including any "repeal and re-enactment with different penalties ... [where only] the penalty was reduced," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), must by applied by the court of appeals, absent "statutory direction ... to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The "statutory direction" in this case, far from suggesting that a "contrary" presumption should govern, states expressly that the amendments "shall apply to any offense that was committed before the date of enactment of this Act." First Step Act of 2018, Pub. L. No. 115-391, at §403(b). This language also confirms that the general federal "saving statute," 1 U.S.C. 109 (1871), which states that the repeal of a statute does not extinguish a penalty incurred under such statute unless the repealing Act so provides, cannot bar the application of Section 403 here.

Here, there is no "statutory direction" in the First Step Act that would bar application of the reduced penalty structure to cases on direct appeal. To the contrary, Congress indicated its intent that Section 403 be applied to pipeline cases, by expressly titling Section 403 "Clarification of Section 924(c)," and addressing applicability of that "clarification" to "pending" cases in §403(b). Its statement in §403(b) that the amendment shall apply to any offense committed before the date of

enactment if a sentence for the offense has not been "*imposed*" as of such date – read in conjunction with "pending cases" and Congress' intent to "clarify" its original intent – indicates that Congress intended its now-clarified language to apply to cases on direct appeal, but not to those on collateral review.

Other precedent shows that where Congress has enacted a new law prohibiting prosecution for certain conduct, this Court has upheld the new law to defendants previously convicted of such conduct if they are still challenging their convictions on direct appeal, even if Congress did not mention direct appeal in the enactment. *Hamm v. City of Rock Hill*, 379 U.S. 306, 308, 317 (1964). In *Hamm*, the Court vacated the convictions of defendants who had staged "sit-ins" at lunch counters that refused to provide services based on race. After the defendants were convicted of trespass, but before their convictions became final on direct review, Congress passed the Civil Rights Act of 1964, which prohibited prosecution for their conduct. In applying the new Civil Rights Act to vacate these defendants' convictions, the Court traced the rule requiring such a result to *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), where Chief Justice Marshall had explained over 150 years earlier:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the 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.

Hamm, 379 at 312-13. The "reason for the rule," the Court said in *Hamm*, is that "'[p]rosecution for crimes is but an application or enforcement of the law, and, if the prosecution continues, the law must continue to vivify it.'" *Id.* at 313 (quoting *United States v. Chambers*, 291 U.S. 217, 226 (1934)). That principle "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose," and is to be "read wherever applicable as part of the background against which Congress acts," even where Congress made no allusion to the issue in enacting the new law. *Id.* at 313-14.

This Court in *Hamm* declined to find that the general "saving statute," 1 U.S.C. §109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a *greater* schedule of penalties was held to abate the previous prosecution." *Id.* at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id.* Here, Section 403 substitutes a *lesser* schedule of penalties: a sentence of 7 years for a sentence of 25 years, which does not abate the "prosecution" at all. Where, as here, the law merely "clarifies" Congress' original intent that a lesser sentence be imposed – thus confirming that the law has been misapplied for years, there are strong reasons to apply such a law to pipeline cases, not yet final.

Even if a different reading of Congress' use of the words "pending," "imposed," and "clarification" together in §403 were possible, such a reading should be rejected

based upon the rule of lenity which requires laws to be interpreted in favor of the defendants subject to them. *Moskal v. United States*, 498 U.S. 103, 107 (1990); *United States v. Santos*, 553 U.S. 507, 514-14 (2008) (plurality opinion); *Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.).

Should the Court harbor any doubt over resolution of this issue, Petitioner respectfully requests that the Court resolve it in favor of lenity, vacate his sentence and remand this case to the district court for resentencing under the First Step Act. *See Burns v. Hein*, 419 U.S. 989 (1974) (vacating judgment, and remanding case to district court for reconsideration in light of Department of Agriculture's clarifying amendment to its regulations). At the very least, the Court should grant this petition, vacate the judgment, and remand Petitioner's case to the court of appeals for reconsideration under the FSA §403.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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