No. _____

In the Supreme Court of the United States

NAZIR KHAN, IFTIKHAR KHAN,
Petitioners,

v.

MERIT MEDICAL SYSTEMS INC., ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JONATHAN A. HERSTOFF
Counsel of Record
CAMILLE Y. TURNER
KAITLIN M. ABRAMS
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
jherstoff@haugpartners.com

Counsel for Petitioners

December 1, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Federal Rule of Civil Procedure 11(c)(2) provides that a motion for sanctions "must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." The Federal Circuit affirmed the grant of a motion for Rule 11 sanctions and the award of $95,966.90 in attorney fees against *pro se* litigants Nazir Khan and Iftikhar Khan (collectively "Khan"), despite the movants' undisputed failure to serve Khan with the motion for sanctions at any time prior to filing the motion.

The question presented is as follows:

Whether—in line with holdings from the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits—a motion for Rule 11 sanctions may be granted only if the motion is served more than 21 days before filing, as required by Rule 11(c)(2); or whether a Rule 11 motion may instead be granted despite the movants' failure to serve the motion prior to filing, as the Seventh and Federal Circuits have held.

PARTIES TO THE PROCEEDING

Petitioners are Nazir Khan and Iftikhar Khan, who were Plaintiffs-Appellants below.

Respondents who moved for Rule 11 sanctions are Defendant-Cross-Appellant Merit Medical Systems, Inc. and Defendants-Appellees Mountain Medical Physician Specialists, P.C., Clinton Atkinson, Kourosh Baghelai, Yvon R. Baribeau, Randal Bast, Pankaj Bhatnagar, George Blessios, Matthew J. Borkon, Victor Bowers, Robert S. Brooks, Matthew G. Brown, Robert Brumberg, Jason Burgess, Jeffrey Cameron, James W. Campbell, Tuan-Hung Chu, Abilio A. Coello, Jason Dew, Hector Diz-Luna, Ellen Dillavou, William Ducey, Ty Dunn, Amit Dwivedi, Todd Early, Luis G. Echeverri, Charles M. Eichler, Larry D. Flanagan, Lee Forestiere, Dennis Fry, Michael Gallichio, Eric Gardner, Joy Garg, Joseph Griffin, Brad Grimsley, Alok K. Gupta, Allen Hartsell, Thomas Hatsukami, Jon R. Henwood, Timothy C. Hodges, Stephen Hohmann, Robert Hoyne, Stephen Jensik, Blair Jordan, Fernando Kafie, Howard E. Katzman, John C. Kedora, Edward Kim, Michael Klychakin, Eric Ladenheim, Anne Lally, Chad Laurich, James D. Lawson, Damian Lebamoff, Heather LeBlanc, David B. Leeser, Gary Lemmon, Eddy Luh, Jeffrey Martinez, Jonathon R. Molnar, Robert Molnar, Sheppard Mondy, Edward Morrison, Raghu L. Matagnahalli, Ruban Nirmalan, William Omlie, Paul Orland, Gerardo Ortega, Herbert Oye, Boris Paul, Jeffrey Pearce, Heidi A. Pearson, Thomas Reifsnyder, Walter Rizzoni, James R. Rooks, Carlos Rosales, Thomas Ross, Allan Roza, Ignacio Rua, Marius Saines, Albert Sam, Angelo Santos, Howard L. Saylor, Andres

Schanzer, William Schroder, Stephen Settle, Murray L. Shames, Andrew Sherwood, Jeffrey Silver, Eugene Simoni, David Smith, Todd Smith, William Soper, Jeff Stanley, Gary Tannenbaum, William J. Tapscott, Chase Tattersall, W. Andrew Tierney, Gustavo Torres, Boulos Toursarkissian, Stephen Wise Unger, Alexander Uribe, Julio Vasquez, Jonathan Velasco, Benjamin Westbrook, Michael Willerth, Thomas Winek, Christopher Wixon, Peter Wong, and Virginia Wong.

Respondents who did not move for Rule 11 sanctions are Defendants-Appellees Hemosphere Inc., CryoLife Inc., Louis Elkins, Mark Grove, Javier Alvarez-Tostado, Siddarth Patel, Luis Sanchez, and Patrick Geraghty.

RULE 29.6 STATEMENT

Petitioners are not corporate entities.

STATEMENT OF RELATED PROCEEDINGS

- *Khan v. Hemosphere Inc. et al.*, No. 1:18-cv-05368, U.S. District Court for the Northern District of Illinois. Judgments entered May 16, 2019 and July 24, 2019.
- *Khan v. Merit Med. Sys. Inc.*, No. 19-2471, U.S. Court of Appeals for the Seventh Circuit. Appeal dismissed under Fed. R. App. P. 42(b) Sept. 16, 2019.
- *Khan v. Hemosphere Inc. et al.*, Nos. 19-1952 and 19-2394, U.S. Court of Appeals for the Federal Circuit. Judgment entered Aug. 13, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Nazir Khan and Iftikhar Khan (collectively "Khan") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's opinion is found at 825 F. App'x 762 (Fed. Cir. 2020) and reproduced at App. 1-22. The Seventh Circuit's order granting the motion to dismiss the appeal mistakenly filed in the Seventh Circuit is found at 2019 WL 7811331 (7th Cir. Sept. 16, 2019) and reproduced at App. 50-51. The district court's decisions are found at 2019 WL 2137378 (N.D. Ill. May 16, 2019) and 2019 WL 10947306 (N.D. Ill. July 15, 2019) and reproduced at App. 32-45 and App. 27-31, respectively. The district court's judgments are found at No. 1:18-cv-05368, ECF No. 136 (N.D. Ill. May 16, 2019) and No. 1:18-cv-05368, ECF No. 182 (N.D. Ill. July 24, 2019) and reproduced at App. 46-47 and App. 25-26, respectively.

JURISDICTION

The judgment of the Federal Circuit was entered on August 13, 2020. App. 1-22. On November 6, 2020, the Federal Circuit entered an order denying Khan's timely petition for rehearing. App. 48-49. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 11 and its accompanying Advisory Committee Notes are reproduced at App. 52-76. In 2007, the Rule 11 safe-harbor provision[1] at issue here was moved from Rule 11(c)(1)(A) to Rule 11(c)(2) as part of the general restyling of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 11 advisory committee's note to 2007 amendment. The 2007 amendment did not change the substance of Rule 11, which has remained the same since the 1993 amendment.

STATEMENT OF THE CASE

Khan, proceeding *pro se*, filed a patent-infringement suit in the United States District Court for the Northern District of Illinois against various entities and individuals for infringement of U.S. Patent No. 8,747,344, which is directed to an arteriovenous shunt. App. 2. Nazir Khan and Iftikhar Khan have exclusive rights to the '344 patent. App. 4. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1338(a). The defendants moved to dismiss on various grounds, including improper venue, insufficient service of process, lack of personal jurisdiction, and misjoinder. App. 6. Additionally, Merit Medical Systems Inc. and a subset of the defendants represented by Merit

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[1] The requirement in Rule 11(c)(2) that the movant serve a motion for Rule 11 sanctions more than 21 days before filing is referred to as the "safe-harbor provision." *See* Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment (referring to this requirement as a "safe harbor").

Medical Systems Inc.'s counsel (collectively "Merit") filed a motion for sanctions under Federal Rule of Civil Procedure 11, alleging that Khan's assertions with respect to venue and service of process were frivolous. App. 6. The district court granted the motions to dismiss and Merit's motion for Rule 11 sanctions. Relevant here, the district court ordered Khan to pay $95,966.90 in attorney fees as a sanction, even though Merit—in violation of the Rule 11(c)(2) safe-harbor provision—never served Khan with the Rule 11 motion at any time prior to filing, let alone more than 21 days before filing as required by Rule 11(c)(2). App. 6-8; App. 28; App. 43. The district court excused Merit's failure by: (i) pointing to a series of letters that Merit wrote to Khan in which Merit threatened to move for sanctions; and (ii) concluding that these letters "no doubt satisf[y]" the Rule 11(c)(2) safe-harbor provision. App. 43.

The Federal Circuit affirmed. App. 15-18. The Federal Circuit recognized Khan's argument that the motion for sanctions should have been denied because "[Merit] did not serve [Khan] with the sanctions motion more than 21 days prior to filing it with the district court[,]" and that Merit therefore failed to comply with the Rule 11(c)(2) safe-harbor provision. App. 16-17. Nevertheless, the Federal Circuit concluded that "'a letter informing the opposing party of the intent to seek sanctions and the basis for the imposition of sanctions'" is "'sufficient for Rule 11 purposes[.]'" App. 17 (citing *Matrix IV, Inc. v. Am. Nat'l Bank & Tr. Co.*, 649 F.3d 539, 552-53 (7th Cir. 2011)); App. 15 (finding that the issue of Rule 11 sanctions is determined under the law of the regional circuit). Accordingly, the Federal

Circuit affirmed the district court's imposition of Rule 11 sanctions, and let stand the district court's award of $95,966.90 in attorney fees. App. 18.

REASONS FOR GRANTING THE WRIT

I. There Is an Acknowledged Circuit Split on Whether It Is Permissible to Grant a Motion for Rule 11 Sanctions when the Movant Has Failed to Comply with Rule 11(c)(2)

Under case law from the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, a motion for Rule 11 sanctions is barred if the movant fails to serve the motion at least 21 days before filing, as required by Rule 11(c)(2). Accordingly, had this case arisen in those circuits, Merit's motion for Rule 11 sanctions would have been denied. In sharp contrast, the Seventh and Federal Circuits have held that a Rule 11 motion may be granted despite the movant's noncompliance with Rule 11(c)(2). Therefore, the Federal Circuit upheld the grant of Merit's motion for Rule 11 sanctions, despite Merit's undisputed failure to comply with Rule 11(c)(2). Certiorari is warranted to resolve the circuit split on this important issue.

A. Under Case Law from the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, a Rule 11 Motion Is Barred if the Movant Fails to Comply with the Rule 11(c)(2) Safe-Harbor Provision

Multiple courts of appeals have held that a Rule 11 motion may not be granted if the movant fails to

comply with Rule 11(c)(2). As demonstrated below, the Rule 11 motion would not have been granted had this case arisen in the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, or Tenth Circuit.

For instance, the Sixth Circuit has held that a warning letter cannot, as a matter of law, trigger the Rule 11 safe-harbor period. *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764, 767-68 (6th Cir. 2014). In reaching this conclusion, the Sixth Circuit recognized that "the rule specifically requires formal service of a motion. The safe-harbor provision states that '[t]he *motion* must be served under Rule 5' at least twenty-one days before filing it with the court." *Id.* at 767 (quoting Fed. R. Civ. P. 11(c)(2)) (emphasis and alteration in original). The Sixth Circuit further explained as follows:

> [T]he word "motion" definitionally excludes warning letters, and our reading of the rule's plain language finds support in the Advisory Committee's Notes. In its gloss on the 1993 amendments, the Committee refers to letters as "informal notice" and recommends that attorneys send a warning letter as a professional courtesy "before proceeding to prepare and serve a Rule 11 motion."

Id. (citing Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment). The Sixth Circuit additionally explained that

> [p]ermitting litigants to substitute warning letters, or other types of informal notice, for a motion timely served pursuant to Rule 5

> undermines the[] goals [of Rule 11]. Whereas a properly served motion unambiguously alerts the recipient that he must withdraw his contention within twenty-one days or defend it against the arguments raised in that motion, a letter prompts the recipient to guess at his opponent's seriousness.

Id. at 767-68 (citing *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001)).

In concluding that a motion for Rule 11 sanctions is barred when the movant fails to comply with Rule 11(c)(2)—and adopting the view of the Second, Third, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits—the Sixth Circuit recognized that the Seventh Circuit has "espoused the opposite stance[.]" *Penn*, 773 F.3d at 768 (citing *Nisenbaum v. Milwaukee Cty.*, 333 F.3d 804, 808 (7th Cir. 2003)). However, the Sixth Circuit rejected the Seventh Circuit's approach because the Seventh Circuit had "decline[d] to address any of the textual or policy concerns" associated with allowing a motion for Rule 11 sanctions to be granted in the absence of compliance with Rule 11(c)(2). *Penn*, 773 F.3d at 768. The Sixth Circuit further noted that "other circuits roundly criticize the [Seventh Circuit] decision's cursory reasoning." *Id.* (citing *In re Pratt*, 524 F.3d 580, 587-88 (5th Cir. 2008); *Roth v. Green*, 466 F.3d 1179, 1193 (10th Cir. 2006)).

The Ninth Circuit has similarly held that a warning letter is insufficient to trigger the Rule 11 safe-harbor provision. *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998). There, the defendant (Imageware) served the plaintiff's attorney (Carlsen) with a letter, explaining

the deficiencies of the complaint and stating that a Rule 11 motion for sanctions would be filed if the complaint was not dismissed. *Id.* at 709. Carlsen responded to the letter, "demanding that Imageware 'stop threatening sanctions.'" *Id.* Imageware then filed a motion to dismiss and stated that the complaint was so clearly deficient that sanctions were warranted. *Id.* Next, the district court dismissed the complaint, and noted that it would retain jurisdiction to consider any motion for sanctions. *Id.* Imageware then sent Carlsen another letter, putting Carlsen on notice that Imageware would seek sanctions. *Id.* A month later, Imageware filed the motion for sanctions, which the district court granted under Rule 11. *Id.*

The Ninth Circuit reversed. *Id.* at 710-11. Although the Ninth Circuit recognized that it was "abundantly clear" that Imageware had given "repeated notice" of the complaint's shortcomings, Imageware "did not follow the procedure required by Rule 11(c)(1)(A) for an award of sanctions upon its motion." *Id.* at 710. Relevant here, although "Imageware had given multiple warnings to [Barber] about the defects of [the] claim[,]" the safe-harbor was not triggered because "[t]hose warnings were not motions . . . and the Rule requires service of a motion." *Id.* The Ninth Circuit noted that the requirement of a motion "was deliberately imposed, with a recognition of the likelihood of other warnings." *Id.* Indeed, the Ninth Circuit noted that the 1993 amendment to Rule 11 specifically requires a motion—rather than a warning letter—to trigger the safe-harbor provision:

> To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Id. (quoting Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment). Accordingly, the Ninth Circuit recognized that "[i]t would therefore wrench both the language and purpose of the amendment to the Rule to permit an informal warning to substitute for service of a motion." *Id.*

The Tenth Circuit has also reversed the imposition of Rule 11 sanctions where the moving party failed to serve the motion more than 21 days before filing. *Roth v. Green*, 466 F.3d 1179 (10th Cir. 2006). There, although the moving party served warning letters well before filing the motion, the motion itself was not served before filing. *Id.* at 1192. The Tenth Circuit therefore reversed the imposition of sanctions, recognizing that "the plain language of subsection (c)(1)(A) requires a copy of the actual motion for sanctions to be served on the person(s) accused of sanctionable behavior at least twenty-one days prior to the filing of that motion." *Id.* The Tenth Circuit further noted that warning letters "are supplemental to, and cannot be deemed an adequate substitute for,

the service of the motion itself." *Id.* It further explained as follows:

> The reason for requiring a copy of the motion itself, rather than simply a warning letter, to be served on the allegedly offending party is clear. The safe harbor provisions were intended to "protect[] litigants from sanctions whenever possible in order to mitigate Rule 11's chilling effects, formaliz[e] procedural due process considerations such as notice for the protection of the party accused of sanctionable behavior, and encourag[e] the withdrawal of papers that violate the rule without involving the district court...." 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1337.2, at 722 (3d ed. 2004). Thus, "a failure to comply with them [should] result in the rejection of the motion for sanctions...." *Id.* at 723.

Roth, 466 F.3d at 1192 (alterations in original). The Tenth Circuit recognized that the Seventh Circuit has held otherwise, but found the Seventh Circuit's analysis "unpersuasive" because, among other things, the Seventh Circuit provided "no analysis of the language of Rule 11(c)(1)(A) or the Advisory Committee Notes[.]" *Id.* at 1193 (citing *Nisenbaum*, 333 F.3d at 808).

The Second, Third, Fourth, Fifth, and Eighth Circuits have similarly recognized that compliance with the Rule 11 safe-harbor period is a prerequisite to granting a motion for Rule 11 sanctions. *See Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory*, 682 F.3d 170, 175-76 (2d Cir. 2012) ("An

informal warning in the form of a letter without service of a separate Rule 11 motion is not sufficient to trigger the 21-day safe harbor period."); *Gordon v. Unifund CCR Partners*, 345 F.3d 1028, 1030 (8th Cir. 2003) (reversing the imposition of Rule 11 sanctions where, among other things, the movant "did not serve a prepared motion on Appellant prior to making any request to the court"); *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389 (4th Cir. 2004) (en banc) (recognizing that Rule 11 "imposes mandatory obligations upon the party seeking sanctions, so that failure to comply with the procedural requirements precludes the imposition of the requested sanctions"); *In re Pratt*, 524 F.3d 580, 586-88 (5th Cir. 2008) (finding that sanctions were precluded under Federal Rule of Bankruptcy Procedure 9011—which contains the same safe-harbor provision as Rule 11—where the movant served only warning letters, but not the actual motion, prior to filing); *In re Miller*, 730 F.3d 198, 204-05 (3d Cir. 2013) (reversing the imposition of sanctions under Federal Rule of Bankruptcy Procedure 9011 where the movant did not comply with the requirements of the safe-harbor provision). The Fifth Circuit expressly rejected the Seventh Circuit's holding in *Nisenbaum*, explaining that "the Seventh Circuit did not address the language of Rule 11, the Advisory Committee Notes to the Rule, or any other Rule 11 jurisprudence" and concluding that "[b]ecause the Seventh Circuit provided little analysis and cited no authority for its holding, the propriety of its holding has been called into doubt on more than one occasion." *Pratt*, 524 F.3d at 587-88 (citations omitted).

B. The Seventh and Federal Circuits Have Held that a Rule 11 Motion Can Be Granted Despite the Movant's Noncompliance with the Rule 11(c)(2) Safe-Harbor Provision

The Seventh Circuit and the Federal Circuit—contrary to the reasoning of the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits—have held that a motion for Rule 11 sanctions may be granted even when the movant has failed to comply with the safe-harbor provision. For example, in one case arising in the Seventh Circuit, the district court denied a motion for Rule 11 sanctions because the movants "sent [the sanctioned party's lawyer] a 'letter' or 'demand' rather than a 'motion.'" *Nisenbaum v. Milwaukee Cty.*, 333 F.3d 804, 808 (7th Cir. 2003). The Seventh Circuit vacated and remanded, concluding that "any noncompliance" with the Rule 11 safe-harbor "was technical[,]" and that the "[d]efendants ha[d] complied substantially with Rule 11(c)(1)(A) and are entitled to a decision on the merits of their request for sanctions under Rule 11." *Id.* The Seventh Circuit therefore remanded the case for further proceedings with respect to Rule 11 sanctions. *Id.* at 811. The Seventh Circuit has subsequently reaffirmed its "substantial compliance" standard. *McGreal v. Vill. of Orland Park*, 928 F.3d 556, 558-59 (7th Cir. 2019) (affirming the grant of a motion for Rule 11 sanctions despite the movant's noncompliance with Rule 11(c)(2), and concluding that the movant's emails and letters were sufficient to meet the Seventh Circuit's "substantial compliance" theory); *N. Ill. Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 884-89 (7th Cir.

2017) (analyzing whether the particular warning letters that the movant for Rule 11 sanctions had served satisfied the Seventh Circuit's "substantial compliance" standard, but ultimately reversing the imposition of sanctions for failure to meet the standard); *Matrix IV, Inc. v. Am Nat'l Bank & Tr. Co. of Chi.*, 649 F.3d 539, 552-53 (7th Cir. 2011) (finding that a letter can be sufficient to meet the Seventh Circuit's "substantial compliance" standard, while ultimately concluding that the district court correctly denied sanctions because the conduct that was the subject of the motion did not violate Rule 11).

Here, the Federal Circuit affirmed the district court's grant of Merit's motion for Rule 11 sanctions despite Merit's undisputed failure to serve Khan with the motion at any time prior to filing—let alone more than 21 days before filing as required by Rule 11(c)(2). Indeed, the Federal Circuit noted Khan's argument that "sanctions are inappropriate because the defendants violated Rule 11(c)(2), which prohibits the filing of a sanctions motion 'if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.'" App. 16-17 (quoting Fed. R. Civ. P. 11(c)(2)). Nevertheless, the Federal Circuit affirmed the district court's grant of Rule 11 sanctions, concluding—under the Seventh Circuit's substantial-compliance standard—that Merit's letters could take the place of the motion required by Rule 11(c)(2). App. 16-17.

II. The Federal Circuit's Decision Is Incorrect

The Federal Circuit's affirmance of the district court's decision to grant the motion for Rule 11 sanctions—despite Merit's undisputed noncompliance with Rule 11(c)(2)—flouts the plain language of Rule 11, the Advisory Committee Notes to the 1993 amendment, and this Court's precedents. As this Court has recognized, the Federal Rules are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). The unambiguous language of Rule 11(c)(2) requires that a motion for Rule 11 sanctions be served more than 21 days before filing. Fed. R. Civ. P. 11(c)(2) (providing that a motion for sanctions "must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets"). The Federal Circuit's affirmance of the sanctions award—despite Merit's undisputed failure to serve the motion on Khan at any time prior to filing—improperly disregards the plain mandate of Rule 11(c)(2).

The Advisory Committee Notes to the 1993 amendment to Rule 11 further confirm that: (i) service of the Rule 11 motion itself must be effected more than 21 days before filing the motion with the district court; and (ii) warning letters cannot take the place of the motion. Indeed, the Advisory Committee Notes

expressly distinguish between a warning letter and a formal motion. Specifically, they explain as follows:

> To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment. It is inconsistent with Rule 11 to find—as the Federal Circuit concluded—that a letter can satisfy Rule 11(c)(2)'s requirement of a motion. *Cf. Hall v. Hall*, 138 S. Ct. 1118, 1130 (2018) (quoting *United States v. Vonn*, 535 U.S. 55, 64 (2002)) ("Advisory Committee Notes are 'a reliable source of insight into the meaning of a rule.'"). This is especially true, given that the Advisory Committee drew a specific distinction between letters and motions, and concluded that only service of the motion itself can trigger the safe-harbor period. Accordingly, because it is undisputed that Merit never served Khan with the Rule 11 motion before filing, the Federal Circuit erred in affirming the Rule 11 sanctions award.

The majority approach—taken by the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits—is consistent with the text of Rule 11(c)(2) and the Advisory Committee Notes to the 1993 amendment to Rule 11. In contrast, "[a] substantial

compliance approach ignores the plain language of the FRCP and the Advisory Committee Notes." Julian Viksman, *Adding to the List: The Latest Development in the Anomalous Seventh Circuit Substantial Compliance Approach*, 59 B.C. L. Rev. E-Supplement 409, 424 (2018). As a leading treatise on civil procedure correctly explained,

> Note that informal notice—rather than formal service—of a potential violation is insufficient to trigger the beginning of the twenty-one day safe harbor period. The Advisory Committee Note explains that although informal notice does not trigger the safe harbor period, it usually is expected that informal notice will be given before a party prepares and serves a formal motion under Rule 11 for sanctions.

5A Arthur R. Miller et al., *Federal Practice & Procedure* § 1337.2 (4th ed. Oct. 2020 update); *see also* Dennis Crouch, *R. 11 Sanctions and Serving "the Motion"*, PATENTLYO (Oct. 1, 2020), https://patentlyo.com/patent/2020/10/sanctions-serving-motion.html (concluding that the language of Rule 11 requires the motion to be served prior to filing). Simply put, permitting a letter to take the place of the "motion" required by Rule 11(c)(2)—as the Federal Circuit did here—"prompts the recipient [of the letter] to guess at his opponent's seriousness[.]" *Penn*, 773 F.3d at 768.

Indeed, the Sixth Circuit's concern that notice by letter may cause "the recipient to guess at his opponent's seriousness" is well-illustrated here. In particular, after being served with a letter from Merit, Khan interpreted it as an intimidation tactic, rather

than as an attempt to bring a serious concern to Khan's attention. Fed. Cir. Dkt. No. 67 at SAppx229. This is unsurprising, given that Khan was proceeding *pro se* and was not trained or experienced in the nuances of the Federal Rules of Civil Procedure. Had a formal Rule 11 motion been served as required by Rule 11(c)(2), Khan would not have had to guess as to Merit's seriousness, especially considering Merit's previous history in this litigation of threatening, but not moving for, sanctions. Fed. Cir. Dkt. No. 67 at SAppx208. Merit's failure to comply with Rule 11(c)(2) is fatal to its motion for sanctions, and the Federal Circuit erred in concluding otherwise.

In sum, the Federal Circuit's adoption of the Seventh Circuit's substantial-compliance approach "undermines the policy goals of Rule 11 and ignores the plain language of the rule." Viksman, 59 B.C. L. Rev. E-Supplement at 426. This Court should grant certiorari to review the Federal Circuit's atextual interpretation of Rule 11.

III. This Case Is the Proper Vehicle to Decide This Recurring and Important Issue

This case is an excellent vehicle to decide the question presented. The Federal Circuit recognized the argument that Merit failed to comply with Rule 11(c)(2), but nevertheless concluded that the grant of Rule 11 sanctions could stand. App. 16-17. Accordingly, the question is cleanly presented here.

Proper interpretation of Rule 11 is an important issue. Although this Court has not yet had occasion to

interpret Rule 11 since the safe-harbor provision was added in 1993, this Court has previously granted certiorari to clarify the scope of Rule 11. *See Willy v. Coastal Corp.*, 503 U.S. 131 (1992) (analyzing whether Rule 11 sanctions may be imposed where the district court lacks subject-matter jurisdiction); *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533 (1991) (analyzing whether Rule 11 imposes a standard of objective reasonableness); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (analyzing whether Rule 11 sanctions may be imposed after a stipulation of dismissal, deciding the appropriate standard of appellate review, and determining whether attorney fees may be imposed as a Rule 11 sanction); *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120 (1989) (determining whether Rule 11 permits the imposition of sanctions against a law firm). It is equally important that the Rule 11 safe-harbor provision be interpreted properly and uniformly amongst the circuits. This Court should grant certiorari to resolve the circuit split concerning the proper interpretation of Rule 11(c)(2).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAUG PARTNERS LLP

Jonathan A. Herstoff, Esq.
Counsel of Record
Camille Y. Turner, Esq.
Kaitlin M. Abrams, Esq.
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
jherstoff@haugpartners.com

Counsel for Petitioners
Nazir Khan and Iftikhar Khan