No. 20-881

In The
Supreme Court of the United States

HUONG L. TRAN and RICHARD W. HAZEN,

Petitioners,

v.

CITY OF HOLMES BEACH, FLORIDA; CITY OFFICIALS in Official Capacity; FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION; DEPARTMENT OFFICIALS in Official Capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ITS DEPARTMENT OFFICIALS (CORRECTED)

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QUESTION PRESENTED
(as restated by Respondents)

Have the Petitioners presented sufficient "compelling reasons" to justify the granting of certiorari under this Court's Rule 10, where the decision of the Eleventh Circuit in the case below does not conflict with another Circuit's decision on the same important matter; it did not decide an important federal question conflicting with a decision of a state court of last resort; the Eleventh Circuit did not depart from accepted and usual course of judicial proceedings; where its decision is not of a state court of last resort; and, the court did not decide an important federal question in a way conflicting with other Supreme Court decisions?

Did the Eleventh Circuit act inappropriately when affirming the dismissal with prejudice of Petitioners' Third Amended Complaint for repeated assertions of "shotgun pleadings," which contained multiple counts that adopted allegations of preceding counts; where it was full of conclusory, vague and immaterial facts; and presented multiple claims against multiple defendants without sufficiently specifying which defendant is responsible and whether each such defendant was acting in an official capacity or individual capacity?

In any event, did the District Court or Eleventh Circuit deprive Petitioners of due process in dismissing their Second Amended Complaint with prejudice, where they had been apprised by the District Court beforehand of the complaint's deficiencies with suggestions on how to resolve them, and were given opportunities to correct the deficiencies?

LIST OF PARTIES

The Respondents, Florida Department of Environmental Protection ("FDEP"), is an agency of the State of Florida. In their Third Amended Complaint, Petitioners have also sued FDEP's unnamed "Department Officials" in "their official or individual capacity." However, James Martinello was listed by Petitioners in their Third Amended Complaint as FDEP's environmental manager, was sued in his official capacity.

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JURISDICTION

Petitioners timely filed their Petition for Writ of Certiorari on December 22, 2020. This Court's discretionary jurisdiction exists under 28 U.S.C. 1254(1) for consideration of this case for review. Notwithstanding, Petitioners have not arguably met the strict standards and criteria of this Court's Rule 10 nor demonstrated "compelling reasons" for this Court's exercise of this Court's jurisdiction. In any event, the FDEP Respondents deny that 28 U.S.C. §2403(b) would apply here as the State of Florida has not intervened in this case.

STATEMENT OF THE CASE
(as restated by Respondent)

As pointed out by the Eleventh Circuit below in *Tran v. City of Holmes Beach* et al, 817 Fed. Appx. 911, 912 (11th Cir., 2020), this case concerns "a treehouse the [Petitioners] built without a permit on their beachfront property." In 2011, the Code Enforcement Board of the City of Holmes Beach, Florida cited Petitioners and found them in violation for constructing their multi-story assembly structure on the City's coastal property without the necessary permits and "for failing to obtain a building permit prior to construction within the erosion control line setback."

Since then a decade of litigation has followed in Florida administrative proceedings and multiple state trial court and multiple state appellate court actions. More recently, Petitioners filed actions in the federal

district and circuit courts, as well as a previous petition for certiorari brought in 2017 to this Court.[1]

Petitioners' treehouse is an untypical structure. It's elevated about 10 feet above ground and partially relies on large Australian pine tree for support. Pilings driven into the ground also support the treehouse structure which are located within the setback from the erosion control line established by the State of Florida. In their petition, the Petitioners claim they had previously received verbal assurance from the City of Holmes Beach that the tree house "did not require" a permit; however, the City steadfastly denies their assertion. All of their contentions made in the multiple legal proceedings since 2011 focus on efforts to preserve the unauthorized structure and the City's efforts to enforce its codes relative to it.

Proliferation of State Court Actions

After conclusion of the initial 2011 Code Enforcement proceeding and quasi-judicial hearing, Petitioners were found in violation of numerous sections of the City's land development and building codes (case no. CE 11-12-225). In its final order, the City's Code Enforcement Board required Petitioners to obtain the necessary approvals or to remove the tree house.

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[1] In 2017, Petitioners filed their earlier petition for certiorari to this Court, essentially raising similar constitutional challenges for violation of the Florida Constitution. U.S. Supreme Court docket no. 17-603. On January 8, 2018, this Court denied certiorari.

Through their counsel, Petitioners appealed the order to the appellate division of Florida's Twelfth Judicial Circuit Court, Hazen, et al v. City of Holmes Beach, Case No. 2013-AP-000297.[2] The state court affirmed the findings of the Code Enforcement Board and rejected Petitioners' constitutional challenge to a section of the City's Land Development Code, claiming it to be "more restrictive" than Fla. Stat. Chap. 161 that governs beach & shore preservation. The circuit court further rejected as without merit Petitioner's equitable estoppel argument, which asserted that they were informed by the City's Building Official that a permit was "not required" for the tree house.

Thereafter, on October 16, 2014, Petitioners' counsel filed a petition for writ of certiorari (a discretionary writ) to Florida's Second District Court of Appeal ("Florida Second DCA"), further challenging the circuit court's order affirming the code enforcement order.[3] Hazen, et al v. City of Holmes Beach, Florida Second DCA Case No. 2D14-4833. The following year, on June 15, 2015, the Florida Second DCA rendered a denial per curium of the writ. From the denial per curium, Petitioners' counsel filed a motion for certification and written opinion. The motion was denied on July 22, 2015. Petitioners then followed with a motion

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[2] Petitioners are and were represented by the law firm of Icard Merrill Cullis Timm Furen & Ginsburg (Icard Merrill), presently a mid-size law firm of 33 lawyers based in Sarasota, Florida. See: https://icardmerrill.com/attorneys/

[3] Again, Petitioners were represented in Florida's Second DCA by Icard Merrill.

for rehearing filed on July 30, 2015, which was stricken as unauthorized on October 28, 2015.

In the meantime, on June 24, 2013, Petitioners' counsel filed an original action in Florida's Twelfth Judicial Circuit Court, Hazen, et al. v. City of Holmes Beach, et al., Case No. 2013-CA-4098.[4] An amended complaint was filed on May 17, 2019 after the City's motion for more definite statement was granted on April 29, 2019. A second amended complaint was filed on September 11, 2019, and the circuit court granted the City's partial motion to dismiss count III of the Second Amended Complaint on November 15, 2019. The third amended complaint filed on January 7, 2020 alleged: (1) that a City ordinance violated the single subject requirements of Art. III, Sec. 6, Fla. Const. and Section 166.041, Fla. Stat., and was therefore void; (2) that adoption of the same ordinance violated the procedural due process clause of the Constitution of the State of Florida and was therefore void; (3) that part of the City's code was unconstitutional on its face in violation of Petitioners' substantive due process rights and was therefore void; and, (4) that part of the City's code was unconstitutional on its face as being in direct conflict with the provisions of Sections 161.141 and 161.053, Fla. Stat. The case remains pending before the Twelfth Judicial Circuit to date.

On September 23, 2013, while the code enforcement matter was proceeding, Petitioners' counsel,

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[4] That case is still pending at this time, with David Levin of the law firm of Icard Merrill listed as counsel for Petitioners.

attempted to use the "citizen initiative" process contained in the City's charter to force a referendum of the City's voters—seeking to compel the City to issue a development order authorizing the tree house. In City of Holmes Beach v. Petitioners Committee et al., Twelfth Judicial Circuit Court Case No. 2013-CA-5990, the City filed a complaint seeking declaratory relief on September 23, 2013, against the petitioners' committee, Petitioner Richard Hazen, and Petitioner Huong Tran in her individual capacity and as the designated representative of the petitioners' committee. On August 15, 2016, the state court permanently prohibited Petitioners from submitting the proposed ordinance to the voters under the initiative provisions of the City's charter because Section 163.3167(8)(a), Fla. Stat., prohibits use of the initiative process regarding any development order.

Thereafter, on September 8, 2016, Petitioners appealed the state circuit court's order to Florida's Second DCA. However, the following year, on May 3, 2017, the Second DCA issued its *per curium* affirmance of the circuit court's order. See: *Petitioners Committee et al., v. City of Holmes Beach*, 225 So.3d 853 (Fla. 2d DCA 2017). From there Petitioners filed a motion for rehearing *en banc* of the decision, which was denied by the Florida Second DCA on July 17, 2017.

Three months after that, on October 23, 2017, Petitioners' counsel filed the Petitioners' first Petition for Writ of Certiorari to this Court, docketed as Case No. 17-603, which raised federal due process and state constitutional claims. However, on January 8, 2018, after

the filing of a brief in opposition and a reply brief, this Court denied certiorari. See: *Petitioners Committee et al., v. City of Holmes Beach*, 138 S.Ct. 658 (2018).

On February 22, 2018, in City of Holmes Beach v. Hazen, et al, Twelfth Judicial Circuit Court Case No. 2018-CA-784, the City filed a petition for enforcement and injunctive relief concerning the code enforcement order that had been entered originally in July 2013 and affirmed on appeal in December 2015 and pursuant to Section 553.83, Fla. Stat., based on violations of the Florida Building Code. That case presently remains pending in the state circuit court.

Subsequently, on December 10, 2018, Petitioners filed a new case for a temporary injunction in the state court, this time against both the Florida Department of Environmental Protection as well as the City of Holmes Beach. Hazen et al v. City of Holmes Beach and Florida Department of Environmental Protection et al, Twelfth Judicial Circuit Court Case No. 2018-CA-5800. On March 25, 2019, Petitioners filed an amended verified complaint for negligence, violation of inalienable rights and other rights and petition for preliminary/ permanent injunctive relief and other relief; and then a second amended complaint on September 10, 2019.

However, the second amended complaint in Case No. 2018-CA-5800 was dismissed on December 11, 2020. This was followed by Petitioners' filing of their third amended complaint for relief and damages on January 29, 2021. In addition to various claims against the City of civil rights violations, Florida constitutional

violations and exceeding authority, the third amended complaint asserted three counts against Respondent Florida Department of Environmental Protection. This case, no. 2018-CA-5800, currently remains pending before the state circuit court.

Petitioners' Federal Court Claims

Next, on March 4, 2019, Petitioners filed their *pro se* federal complaint in the U.S. District Court for the Middle District of Florida, Tampa Division, against the City of Holmes Beach, various City officials and the Florida Department of Environmental Protection (Middle District of Florida Case No. 8:19-cv-00534 at Doc. 1). Their complaint asserted claims for violations of civil rights, conspiracy, Fifth and 14th Amendment, the Eighth Amendment, the First Amendment, the Supremacy Clause, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights per 42 U.S.C. §§ 1983, 1985 and 1986. Hazen et al v. City of Holmes Beach et al, Middle District of Florida Case No. 8:19-cv-00534. At that time there were also three other cases pending in the state courts seeking to validate the tree house.

Before any of the defendants responded to the federal complaint, Petitioners filed their amended complaint on March 4, 2019 against the City of Holmes Beach, the Florida Department of Environmental Protection, and "the City and State Officials" (Middle District of Florida Case No. 8:19-cv-00534 at Doc. 6). The amended complaint further identified other parties

defendant: the City Mayors, Chairs and Vice Chairs of the City Commission, City Commissioners, City Building Officials, Code Enforcement Officers and Code Enforcement Board, and Environmental Manager (Bureau of Beaches and Coastal Systems). The amended complaint also listed a Steve West of the FDEP who had "halted the nearly completed treehouse for further investigation (Middle District of Florida Case No. 8:19-cv-00534, Doc. 6 at pp. 5-6).

The City filed a motion for a more definite statement, arguing that the amended complaint was a "shotgun pleading" since, among other deficiencies under *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313 (11th Cir. 2015), it failed to adequately identify the persons being sued and upon which counts or legal theories any such person was sued. The district court granted the motion, dismissed the amended complaint without prejudice as a "quintessential shotgun pleading," and permitted Petitioners to file a second amended complaint.

On May 9, 2019, Petitioners filed their second amended complaint, which added as a party the FDEP's "Environmental Manager" in his official capacity (Doc. 34 at p. 2). Subsequently both the City, the FDEP and their respective officials filed motions to dismiss the second amended complaint and/or motions for more definite statements (Docs. 36 and 40). The District Judge granted all defendants' motions, noting that the second amended complaint "remains a shotgun pleading," which is "arguably more confusing because it includes more causes of action and more

alleged facts about events that occurred many years ago regarding [Petitioners'] treehouse" (Doc. 42 at pp. 1-2). Moreover, the district court further pointed out that the latest complaint "still refers to Defendants largely in the collective so that it is unclear which act can be attributed to which Defendant," and was also "unclear what constitutional provisions provide the basis for the section 1983 violations." Dismissing the second amended complaint without prejudice, the district court warned that a Third Amended Complaint would be the Petitioners' final chance to amend (Doc. 42 at p. 4). The court even suggested that Petitioners seek legal advice on these matters.

Thereafter, on July 12, 2019, Petitioners filed their third amended complaint, which ran over twenty-five pages and 177 paragraphs (Doc. 47). The pleading expanded Petitioners' claims to include various City building officials as well as "other unnamed City officials," "[o]ther unnamed State Officials, in their official or individual capacity," and Mr. James Martinello in his official capacity as FDEP's Environmental Manager of the Bureau of Beaches and Coastal Systems, and "[o]ther unnamed anonymous persons, in their individual capacities" (Doc. 47 at pp. 1-2).

The FDEP and the City again moved to dismiss Petitioners' third amended complaint as a "shotgun pleading" (Doc. 47). In their motion, FDEP and its officials asserted as grounds for dismissal with prejudice that: the allegations are unduly vague, unclear, redundant and confusing, and so intertwined with claims and allegations against the City of Holmes Beach, or

allegations that claim interplay between the City and State agencies and officials, that the State Environmental Parties cannot frame a responsive pleading. Moreover, Petitioners' claims against "unnamed state officials" and "unnamed department staff" were so non-specific and unclear so as preclude a meaningful response to claims against those unnamed individuals, or to determine whether those persons were acting in their official or unofficial capacities. The uncertainty effectively frustrates the ability to assert qualified privileges for the benefit of those unnamed defendants who may be claimed to be individually or personally liable. The Second Amended Complaint is replete with allegations intermingling acts, claims and theories against personnel of the City of Holmes Beach and the State Environmental Parties, so as to be too unintelligible for drafting a response. That Petitioner's use of multiple counts that each adopt allegations of all preceding counts is replete with conclusory, vague and immaterial facts that are not obviously connected to specific claims and/or particular parties. By intertwining "taking" claims under both the Federal Constitution and State Constitution in connection with the City Ordinance, it is unclear whether Plaintiffs are asserting a taking, inverse condemnation or a declaratory action challenging the respective sources. That by incorporating multiple counts and their different professed theories, the Third Amended Complaint is overbroad and inconsistent with the designated titles of each of the Roman numeral counts. In the complaint's conclusion, its Demand for Relief section's mere notation of a "[g]rant for money damages" is inadequate to

tie such demand to any particular claim, theory or party, either named or unnamed.

Ultimately, the district court granted all respondents' motions on August 6, 2019, finding that the third amended complaint was still a "shotgun pleading" that "should be dismissed with prejudice because the legal claims remain impermissibly unclear" (Doc. 51). The district court's order went on to note that the third amended complaint would also be subject to dismissal based on the preclusive doctrines argued by the City.

Eleventh Circuit Appeal

Thereafter Petitioners appealed to the U.S. Court of Appeal for the Eleventh Circuit (Doc. 56). In its opinion dated July 17, 2020, the Eleventh Circuit affirmed the district court and held that the district court did not abuse its discretion in dismissing the third amended complaint because it remained a shotgun pleading as per *Weiland*. See: *Tran v. City of Holmes Beach et al*, 817 Fed. Appx. 911 (11th Cir. 2020). The court remarked upon the district court's admonition to Petitioners to seek legal advice before filing their third amended complaint, and noted that Petitioners nevertheless filed it *pro se*. The third amended complaint still failed to give the defendants adequate notice of the claims against them and the grounds upon which each claim rested, a failing which the Eleventh Circuit described as follows:

> The Hazens' latest (and last) pleading does not specify what claims they are bringing

> against most of the named defendants. Eight of the nine counts in the third amended complaint are labeled as against the City, against the Department, or both. The one exception is Count VI, which does not name a defendant at all but instead alleges in the abstract that certain provisions of law are unconstitutional. None of the counts specify that the claims (if any) in them are against any of the officials named or referred to in the 'parties' section. The Hazens must be trying to bring some sort of claim against those officials because they named them as parties defendant. But they never say what those claims are and those parties as well as the Court are left to guess what they might be.—*Tran*, 817 Fed. Appx. at 914.

The Eleventh Circuit also rejected Petitioners' contentions that they had not been afforded a chance to fix their mistakes and had been subjected to a "heightened" pleading standard, remarking that Petitioners were given two chances to amend the pleading where only one was required and that there was "nothing heightened about application of the rule against shotgun pleading, which is based on Rule 8, Rule 10, and our precedent" 817 Fed. Appx. at 915. The Eleventh Circuit made no reference to and contains no holding concerning the application of any doctrines of finality under *Williamson County* or otherwise.

Related State & Federal Actions Since 2011

The Petitioners' treehouse has been the subject of eleven (11) distinct judicial or quasi-judicial proceedings, three (3) of which still remain pending. They are and have been represented by established counsel in a prominent law firm.[5] Petitioners have not been denied the ability to seek equal justice, relief, or secure their constitutional rights. Rather, they have been held to pleading standards developed, amended, and applied over many years to work substantial justice for *all* litigants, and those standards require that all persons being sued have adequate notice of the claims against them and the grounds upon which each claim rests. As Petitioners failed in three attempts to meet those standards, the district court below correctly dismissed their third amended complaint with prejudice, which was properly affirmed by the Eleventh Circuit. This case presents no criteria warranting review by certiorari.

[5] Petitioners are presently and have been represented in past years by attorney David Levin and the law firm of Icard Merrill.

REASONS FOR DENYING THE PETITION

PETITIONERS HAVE PRESENTED NO COMPELLING REASONS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI, AS THE ELEVENTH CIRCUIT'S SUBJECT DECISION IS NOT IN DIRECT CONFLICT WITH A DECISION OF ANOTHER CIRCUIT COURT ON THE SAME IMPORTANT MATTER; THE DECISION DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION CONFLICTING WITH A STATE COURT OF LAST RESORT; NOR DID IT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Supreme Court Rule 10 sets forth those considerations to be applied by this Court in selecting cases to be reviewed by certiorari. It is a matter of judicial discretion, not of right. Only for "compelling reasons" with a petition for certiorari be granted. Section (a) of Rule 10 identifies circumstances that may support review by certiorari in a federal case:

- A circuit court decision in conflict with another circuit court's decision on the same important matter; or,
- A circuit court has decided an important federal question with another in a way conflicting with a decision of a state court of last resort;
- A circuit court has so far departed from the accepted and usual course of judicial proceedings,

or sanctioned such departure, calling for the Court's supervisory power;

- A decision of a state court of last resort conflicting with a decision of another state court or U.S. Court of Appeal;
- A state court or U.S. Court of Appeal has decided an important federal question in a way conflicting with other Supreme Court decisions.

In this case, the Petitioners have not presented any "compelling reasons" to support the grant of certiorari in this case. Nor have the Petitioners demonstrated any direct conflict of the Eleventh Circuit's decision in the case below with other circuit court decisions. Rather, the Eleventh Circuit below had adhered to the paramount principal that defendants to a law suit must be given adequate notice of the particular claims against them.

(a) Shotgun Pleadings have been Disfavored and Dismissed by the Federal Courts for Many Years.

Shotgun pleadings like the Petitioners' third amended complaint in this case are routinely denounced in federal courts around the country. See, e.g., *Vibe Micro v. Shabanets*, 878 F. 3d 1291, 1295 (11th Cir. 2018). Especially in the Eleventh Circuit, where shotgun pleadings have been condemned "for decades." *Nurse v. Sheraton Atlanta Hotel*, 618 Fed. Appx. 987, 990 (11th Cir. 2015) (citing *Davis v.*

Coca-Cola Bottling Co. Consol., 516 F.3d 955, 979 n.54 (11th Cir. 2008). Among other justifications for rejecting shotgun pleadings, the Eleventh Circuit has observed that "unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." *Anderson v. District Board of Trustees*, 77 F.3d 364, 367 (11th Cir. 1996).

The key characteristic of a shotgun pleading is that it "fail[s] to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests," which renders them disfavored and usually subject to dismissal. *Casavelli v. Johanson*, 2020 WL 7643170, at *13. A circuit-by-circuit or district-by-district recitation would belabor the point unnecessarily, but virtually every federal court in the country requires that defendants be put on adequate notice of the claims against them by prohibiting shotgun pleadings. See, *Sollberger v. Wachovia Securities, LLC*, 2010 WL 2674456, *4 (W.D. Ca. June 30, 2010) (dismissing as a shotgun pleading a nine count complaint with leave to amend only a single negligence count because "[t]his shotgun pleading style deprives Defendants of knowing exactly what they are accused of doing wrong"); *Ziemba v. Incipio Techs., Inc.*, 2014 WL 4637006, *4 (D. N.J. Sept. 16, 2014) (finding that grouping together of direct, contributory, and induced infringement claims into a single count "violates the

pleading standard and fails to provide each Defendant with adequate notice of the particular claim(s) being asserted against them and the specific grounds upon which such claim(s) rest"); *Schachter v. Sunrise Senior Living Mgmt., Inc.*, 2020 WL 1274601, at *6 (D. Conn. Mar. 16, 2020) (relying upon the Third Circuit Court of Appeals' decision in *Atuahene v. City of Hartford*, 10 F. Appx. 33, 34 (2d Cir. 2001) (emphasizing that rules of pleading require that a defendant be given fair notice of what the plaintiff's claim is and the ground upon which it rests).

In addition to the need for the proper administration of justice, the scarcity of judicial resources also justifies dismissal of actions where pleading standards are repeatedly ignored. "Filing a lawsuit is a serious matter, which often times results in significant consequences to the parties. And judicial resources are far too scarce to be exploited by litigants who, after being specifically advised about how to correct their errors and warned that failing to do so will result in dismissal with prejudice, continue in their recalcitrance." *Nurse*, 618 Fed. Appx. at 990-91 (citing *Wagner v. First Horizon Pharmaceutical Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006). That is precisely what occurred in this case below. Petitioners were cautioned explicitly about the defects in their pleading, yet failed to correct them and herein attempt to place the onus for doing so onto the district and circuit courts. While the Eleventh Circuit may have issued the bulk of the existing case law on shotgun pleadings, it is by no means alone in its rejection of them.

The Third Circuit also rejects the common shotgun pleading approach to complaints. For example, in *Opdycke v. Stout*, 233 Fed.Appx. 125, 126 (3d Cir., 2007), the court noted that "a 'shotgun complaint' usually creates 'a task that can be quite onerous for courts'." *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026, 1031 n.13 (3d Cir. 1988) ("We enunciate the standard for plaintiffs' prima facie case in order *to eliminate the all too common shotgun pleading approach* to these equal protection claims."); *see also Wright v. City of Phila.*, 2005 WL 3091883, at *11 (E.D. Pa. Nov. 17, 2005) (citing *Hynson* for the proposition that "[t]he Third Circuit . . . has a policy against plaintiffs using a 'shotgun pleading approach'). The Third Circuit has explained that requiring a plaintiff to plead with specificity "ha[s] a twofold purpose: 1) to weed out at an early stage frivolous claims and those that should be heard in state court, and 2) to provide the defendant with sufficient notice of the claims asserted." Hynson, 864 F.2d at 1031 n.13.

Likewise, the Tenth Circuit has remarked that "[t]he law recognizes a significant difference between notice pleading and 'shotgun' pleading." *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989) (affirming dismissal of shotgun RICO complaint because it "failed to state a claim under any conceivable matching of allegations"); Hart v. Salois, 605 Fed.Appx. 694, 701 (10th Cir, 2015) (dismissal affirmed where "plaintiff fail[ed] to show how district court abused discretion in concluding his shotgun pleading contravened Rule 8's notice pleading standard"); See

also: *Pola v. Utah*, 458 F. App'x. 760, 762 (10th Cir. 2012) (affirming the dismissal of a complaint that was "incoherent, rambling, and include[d] everything but the kitchen sink"); *McNamara v. Brauchler*, 570 F. App'x 741, 743 (10th Cir. 2014) (allowing shotgun pleadings to survive screening "would force the Defendants to carefully comb through [the documents] to ascertain which . . . pertinent allegations to which a response is warranted"). District courts in the tenth circuit have observed that shotgun pleadings are "pernicious" because they "unfairly burden defendants and courts" by shifting onto them "the burden of identifying plaintiff's genuine claims and determining which of those claims might have legal support." *D.J. Young Publishing Co., LLC v. Unified Gov't of Wyandotte County*, 2012 WL 4211669, at *3 (D. Kansas, September 18, 2012).

The Fourth Circuit agrees. "[T]he use of shotgun pleadings in civil cases is a ubiquitous problem, making it particularly important for district courts to undertake the difficult, but essential, task of attempting to narrow and define the issues before trial." *McLean Contracting Co. v. Waterman S.S. Corp.*, 277 F.3d 477, 480 (4th Cir. 2002).

Similarly, the Fifth Circuit has taken a strong position against the use of shotgun pleadings. For example, in *Alexander v. Global Tel*, 816 Fed.Appx. 939, 941 (5th Cir., 2020), the Fifth Circuit recently affirmed the dismissal of claims made by a group of plaintiff-inmates asserted in their fourth amended complaint, where the district court had been previously

"encourag[ing] the inmates 'to avoid the pitfalls of shotgun pleadings'." As the district judge had already given the inmates two previous opportunities to correct these deficiencies, the district court dismissed the fourth amended complaint with prejudice. 816 Fed.Appx. at 942. In *Ducksworth v. Rook*, 647 Fed.Appx. 383, 385 (5th Cir., 2016), the Fifth Circuit affirmed the dismissal of Section 1983 civil rights claims where "the complaint's 'shotgun pleadings' came close to warranting sanctions." And in *Kelly v. Huzella*, 71 F.3d 878 at *4 (5th Cir., 1995), the court declined to reverse an $11,000 sanctions award against the appellant "for bringing a frivolous suit against [a defendant] as part of a 'shotgun pleading' strategy."

In like manner, the Sixth Circuit in *Lee v. Ohio Educational Association*, 951 F.3d 386, 393 (6th Cir, 2020) had also affirmed the dismissal of a plaintiff's seven claims which were all contained within a single sentence, thereby failing to separate each of her causes into separate counts. The court found that the complaint was a "shotgun pleading" violating Rule 10(b). See also: *Wilson v. 5 Choices*, 776 Fed.Appx. 320, 322 (6th Cir, 2019) (Sixth Circuit affirmed district court's denial of proposed third amended complaint where district judge had "concerns about 'shotgun pleadings' and the failure to identify which defendant allegedly did what.")

The *Lee* court also cited the Seventh Circuit case of *Cincinnati Life v. Beyrer*, 722 F.3d 939, 947 (7th Cir., 2013), where the Seventh Circuit had held that "one

count of complaint which raised five causes of action, was impermissible 'kitchen sink' pleading."

Additionally, the Ninth Circuit opposed shotgun pleadings in *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir., 2011), where "the district court made clear in an order that plaintiffs must amend their 'shotgun pleading' to state clearly how each and every defendant is alleged to have violated plaintiffs' legal rights." However, the plaintiffs filed a second amended complaint that didn't do so and was dismissed with prejudice. Accordingly, the Ninth Circuit affirmed the dismissal with prejudice, noting that plaintiffs already had three bites at the apple.

In this case, the district court's dismissal of Petitioners' third amended complaint conformed with the accepted and usual course of judicial proceedings, as did the Eleventh Circuit Court's affirmance of the dismissal. Shotgun pleadings of the kind filed by Petitioners are roundly rejected by district courts and circuit courts because they fail to place defendants on proper notice of the claims against them, result in uncontrolled dockets and unbridled discovery, and further tax the already stressed resources of the federal judicial system. Review of this matter is not warranted under these circumstances.

(b) Dismissal with Prejudice is the Accepted and Usual Course of Proceedings when Pro Se Plaintiffs are Given Notice of Pleading Defects and an Opportunity to Correct Them, but Repeatedly Fail to Do So.

Dismissal of the Petitioners' third amended complaint with prejudice under the circumstances that are presented in this case conformed entirely with the accepted and usual course of judicial proceedings. Federal courts for many years have dismissed complaints with prejudice, or affirmed such dismissal, when plaintiffs have been given reasonable opportunities to amend their pleadings to meet the required standards, even when such plaintiffs proceed without counsel.

In dismissing a shotgun complaint, a district court must give the plaintiff "one chance to remedy such deficiencies." See, e.g. *Vibe Micro*, supra, 878 F.3d at 1295. As the Eleventh Circuit Court noted in its opinion, though, Petitioners here proceeded *pro se* and complained that the district court had not afforded them the "extra leeway" accorded to such litigants. However, the 11th Circuit rejected Petitioners' argument, writing that "[t]he court did give them that much leeway and more . . . the district court did not demand that [Petitioners], as *pro se* litigants, submit an artfully drafted or flawless complaint, just one that gave fair notice to the people the complaint mentioned about

who was a defendant and what the claim or claims against them was or were." *Tran v. City of Holmes Beach*, 817 Fed.Appx. at 915. The holding was in lock-step with other courts considering similar issues.

The First Circuit has held similarly in *Kuehl v. F.D.I.C.*, 8 F.3d 905, 908 (1st Cir.1993) (affirming dismissal with prejudice of *pro se* plaintiffs' amended complaint where plaintiffs failed to follow magistrate judge's instructions), as has the Ninth Circuit. *Destfino v. Reiswig*, 630 F.3d 952, 958–959 (9th Cir. 2011) (upholding a district court dismissal with prejudice after plaintiff repeatedly plead "shotgun pleadings" based on pleading multiple defendants generally because "[p]laintiffs had three bites at the apple, and the court acted well within its discretion in disallowing a fourth"). Likewise, the Fifth Circuit recognized that a court may dismiss a *pro se* complaint with prejudice when the plaintiff "is fully apprised of [the] complaint's potential insufficiency and [has been] given [an] opportunity to correct any insufficiencies." See: *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998).

Petitioners here were cautioned two times on the pleadings' deficiencies and "shotgun" form. But instead of correcting them, they essentially made them worse. As the Eleventh Circuit noted in issuing its opinion, the district court afforded Petitioners two opportunities to correct their complaint, "twice as many chances as are required." 817 Fed.Appx. at 915-916. Again, the Eleventh Circuit Court is not alone in controlling its dockets in this fashion, and the case does not warrant

review under any standard articulated by this Court's Rule 10 or otherwise.

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondents Florida Department of Environmental Protection, its Department Official(s) and Environmental Manager respectfully request this Honorable Court to DENY the Petition for Writ of Certiorari.

Respectfully submitted,

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