No. _____

In the
Supreme Court of the United States of America

Yency Nuñez,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented

Petitioner Yency Nuñez and the government agree that, although the Maritime Drug Law Enforcement Act makes proof of jurisdictional facts indispensable to a conviction, the record of Nuñez's MDLEA prosecution does not establish those facts. Under this Court's repeated holding that *all* facts (other than a prior conviction) necessary to a conviction are elements, Nuñez's conviction must be vacated. The Eleventh Circuit, however, affirmed the district court's denial of Nuñez's motion for vacatur. It reasoned that the circuit's "prior panel rule" compelled adherence to a 2002 circuit case, repudiated by other circuits, which held that the missing proof, despite being indispensable to the conviction, does *not* pertain to an offense element. The panel disregarded Nuñez's arguments without analysis because the court's prior panel rule precludes *any* argument challenging circuit precedent, even precedent that conflicts with this Court's constitutional holdings. The panel further held that the rule likewise "foreclosed" Nuñez's novel arguments challenging the rule itself.

The federal circuit courts are divided on these two important issues:

I. Given that it is undisputed that proof of jurisdictional facts is indispensable to an MDLEA conviction, does such proof pertain to an element of an MDLEA offense?

II. Does the Eleventh Circuit's "prior panel rule" (A) deny appellants due process of law on appeal by precluding all challenges to circuit precedent, even those raising well supported arguments never before considered or (B) violate Article III and the Due Process Clause by giving Supreme Court precedent unduly narrow scope and requiring circuit judges to stifle their independent judgment of an appeal's merits and defer to an earlier panel's holding, even when that precedent conflicts with this Court's holdings?

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

Yency Nuñez petitions this Supreme Court for a writ of certiorari to review the Eleventh Circuit Court of Appeals' judgment in *United States v. Nuñez*, No. 20-11955, which affirmed the judgment of the district court for the Southern District of Florida.

Opinions Below

A copy of the court of appeals' unpublished decisions on final and interlocutory appeal are appended. The district court's unpublished judgment is appended as well.

Basis for Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The district and circuit courts had jurisdiction under 28 U.S.C. § 2255. The Eleventh Circuit rendered its final decision on May 26, 2021, and denied rehearing *en banc* on July 29, 2021. This petition is timely.

Provisions of Law Involved

• Article III, § 1, of the U.S. Constitution provides in pertinent part: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

• The Constitution's Fifth Amendment Due Process Clause provides: "No person shall ... be deprived of life, liberty, or property, without due process of law ... ."

• The Constitution's Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

• Title 28 U.S.C. § 2255 provides in pertinent part:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * *

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * *

(f) A one-year period of limitation shall apply to a motion under this section.
...

* * *

• The Maritime Drug Law Enforcement Act provides in pertinent part:

46 U.S.C. § 70502. Definitions

(a) Application of other definitions. — The definitions in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to this chapter.

(b) Vessel of the United States. — In this chapter, the term "vessel of the United States" means —

(1) a vessel documented under chapter 121 of this title or numbered as provided in chapter 123 of this title;

(2) a vessel owned in any part by an individual who is a citizen of the United States, the United States Government, the government of a State or political subdivision of a State, or a corporation incorporated under the laws of the United States or of a State, unless —

(A) the vessel has been granted the nationality of a foreign nation under article 5 of the 1958 Convention on the High Seas; and

(B) a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States who is authorized to enforce applicable provisions of United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was sold to a person not a citizen of the United States, placed under foreign registry, or operated under the authority of a foreign nation, whether or not the vessel has been granted the nationality of a foreign nation.

(c) Vessel subject to the jurisdiction of the United States. —

(1) In general. — In this chapter, the term "vessel subject to the jurisdiction of the United States" includes —

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality under paragraph (2) of article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation if that nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel in the customs waters of the United States;

(E) a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States; and

(F) a vessel in the contiguous zone of the United States, as defined in Presidential Proclamation 7219 of September 2, 1999 (43 U.S.C. 1331 note), that —

(i) is entering the United States;

(ii) has departed the United States; or

(iii) is a hovering vessel as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401).

(2) Consent or waiver of objection. — Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under paragraph (1)(C) or (E) —

(A) may be obtained by radio, telephone, or similar oral or electronic means; and

(B) is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(d) Vessel without nationality. —

(1) In general. — In this chapter, the term "vessel without nationality" includes —

(A) a vessel aboard which the master or individual in charge makes a claim of registry that is denied by the nation whose registry is claimed;

(B) a vessel aboard which the master or individual in charge fails, on request of an officer of the United States authorized to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or individual in charge makes a claim of registry and for which the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

(2) Response to claim of registry. — The response of a foreign nation to a claim of registry under paragraph (1)(A) or (C) may be made by radio, telephone, or similar oral or electronic means, and is proved conclusively by certification of the Secretary of State or the Secretary's designee.

(e) Claim of nationality or registry. — A claim of nationality or registry under this section includes only —

(1) possession on board the vessel and production of documents evidencing the vessel's nationality as provided in article 5 of the 1958 Convention on the High Seas;

(2) flying its nation's ensign or flag; or

(3) a verbal claim of nationality or registry by the master or individual in charge of the vessel.

***

46 U.S.C. § 70503. Prohibited acts

(a) Prohibitions. — While on board a covered vessel, an individual may not knowingly or intentionally —

(1) manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance;

(2) destroy (including jettisoning any item or scuttling, burning, or hastily cleaning a vessel), or attempt or conspire to destroy, property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(a)); or

(3) conceal, or attempt or conspire to conceal, more than $100,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, or compartment of or aboard the covered vessel if that vessel is outfitted for smuggling.

(b) Extension beyond territorial jurisdiction. — Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

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(e) Covered vessel defined. — In this section the term "covered vessel" means —

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States.

46 U.S.C. § 70504. Jurisdiction and venue

(a) Jurisdiction. — Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

(b) Venue. — A person violating section 70503 or 70508 of this title shall be tried in the district court of the United States for —

(1) the district at which the person enters the United States; or

(2) the District of Columbia.

***

46 U.S.C. § 70506. Penalties

(a) Violations. — A person violating paragraph (1) of section 70503(a) of this title shall be punished as provided in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960). However, if the offense is a second or subsequent offense as provided in section 1012(b) of that Act (21 U.S.C. 962(b)), the person shall be punished as provided in section 1012 of that Act (21 U.S.C. 962).

(b) Attempts and conspiracies. — A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503.

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Statement of the Case

After pleading guilty to one count of conspiring to violate the Maritime Drug Law Enforcement Act and receiving a 135-month sentence, Yency Nuñez filed an untimely *pro se* notice of appeal in the district court. The court appointed appellate counsel on November 10, 2016. Four days later, counsel notified the court and the prosecution that the conviction appeared defective because Nuñez's guilty plea did not establish every element of the crime. The MDLEA outlaws drug trafficking only "aboard a covered vessel," 46 U.S.C. § 70503(a), a term it specifically defines, *see* 46 U.S.C. §§ 70503(e) & 70502(c). Congress specified in the MDLEA that proof of a covered vessel is "not an element of an [MDLEA] offense," 46 U.S.C. § 70504(a), but this Court later interpreted the Sixth Amendment to mean that any fact (other than a prior conviction) needed to prove a crime is an element of that crime.

The parties now agree that the record of Nuñez's prosecution contains no proof of an MDLEA "covered vessel." However, for weeks after Nuñez pointed out the insufficiency, the government refused to say whether the conviction was valid and refused to waive a timeliness objection to Nuñez's appeal. With the deadline for seeking relief under 28 U.S.C. § 2255 looming, Nuñez voluntarily dismissed his appeal with the government's assent and brought this action on February 1, 2017. *See* DE1.

The government sought additional time to respond because it was still "trying to obtain documentation, including from the U.S. Coast Guard … ." DE8. Nuñez responded that, while the extension was unopposed, the court could not on collateral review receive new evidence needed to sustain the underlying conviction. *See* DE9. Granting the extension, the magistrate judge warned, "If the United States wishes for its response to refer to additional

evidence not already in the record, then it must file an appropriate motion (and Nuñez will have the opportunity to object in a more complete way)." DE10.

After months of stonewalling, the government's response finally admitted that the conviction was invalid. *See* DE11:20 n.9. It argued only that Nuñez's § 2255 motion should nonetheless be denied as procedurally barred. Nuñez replied that the government's failure to prove jurisdictional facts was an unwaivable defect, not subject to any procedural bar, and that he was entitled to immediate vacatur of the conviction. *See* DE12:2–3.

Nothing happened for months, despite Nuñez repeatedly notifying the court, pursuant to local rule, that the § 2255 motion was fully briefed. *See* DE13; DE14; DE15. Finally, Nuñez petitioned the Eleventh Circuit for mandamus and notified the district court. *See* DE16. Two days later, the magistrate judge set the § 2255 motion for hearing. *See* DE18.

At the § 2255 hearing on December 20, 2017, the government again admitted that the underlying record did not establish the necessary jurisdictional facts and moved *ore tenus* to "remand" the case so that it could present the missing proof. DE22:10–13. Nuñez responded that the court could only grant his § 2255 motion because no statute confers jurisdiction to supplement a closed criminal record. *See* DE22:15.

After two rounds of supplemental briefing, the magistrate judge issued a 40-page report that rejected the government's only basis for opposing vacatur, holding that jurisdictional claims are not subject to any procedural bar and recommending vacatur of Nuñez's convicion. *See* DE30:17–18. The report also denied the government's motion for a hearing and found that the United States contumaciously "(1) refused to explain in the criminal case whether there was jurisdiction; (2) waited nine months to make the request for

an evidentiary hearing; (3) initially advised (incorrectly) that an exhibit established sufficient facts for jurisdiction; (4) violated a Court Order requiring a motion to refer to new evidence; and (5) previously represented (in this very § 2255 case) that no additional fact-finding was necessary." DE30:1–2.

The district judge overruled the magistrate judge on May 9, 2018, and granted the government's "*ore tenus* motion for an evidentiary hearing on MDLEA jurisdiction ... ." DE37:4. Nuñez moved for reconsideration and oral argument or, alternatively, for the district judge to identify a federal statute conferring jurisdiction to take new evidence in a closed case. *See* DE38. The district judge denied the motion the same day without waiting for a response and without identifying a statute conferring jurisdiction. DE39.

Nuñez amended his petition for writ of mandamus, which the Eleventh Circuit had held in abeyance, requesting that the appellate court confine the district court to its limited jurisdiction and direct it to vacate Nuñez's conviction. In the district court, Nuñez moved to arrest further proceedings on double-jeopardy grounds. DE46. The district court denied the double-jeopardy motion, *see* A-39–A-40, and the Eleventh Circuit denied Nuñez's mandamus petition summarily, without analyzing the challenge to the district court's jurisdiction to take new evidence from the government, A-58.

Nuñez then appealed the denial of his double-jeopardy claim. *See* DE69. The magistrate judge held that, because the double-jeopardy claim was not frivolous, the appeal divested the district court of jurisdiction pending the interlocutory appeal. *See* DE73; DE82. The government did not appeal that holding. Instead, it argued on appeal that, although proof of jurisdictional facts is indispensable to an MDLEA conviction, those facts do not concern

an element of an MDLEA offense. Nuñez maintained that circuit precedent could not be reconciled with this Court's repeated holdings that any fact essential to a conviction (except a prior conviction) is an element of the offense.

Despite the district court's undisputed finding that the appeal was not frivolous, the Eleventh Circuit dismissed it as "not colorable." A-36. It reasoned that its "prior panel rule" precluded Nuñez from arguing on any basis whatsoever that proof of jurisdictional facts is an element of an MDLEA offense. A-36–A-37. Nuñez had anticipated that the court would rely (as it often does) on its prior panel rule and had briefed that rule's unconstitutionality. The government responded in detail to that argument in its brief, and Nuñez replied. The Eleventh Circuit, however, ignored these arguments without explanation, even though the court has never examined the prior panel rule's legality. The panel simply applied the very precedent Nuñez challenged, concluded it lacked jurisdiction to hear the appeal, and dismissed it without any consideration of the merits. *See* A-35–A-37. The court also rejected Nuñez's petition for rehearing *en banc* challenging the prior panel rule. *See* A-38.

At the start of the government's requested hearing on July 27, 2019, Nuñez's counsel asked the magistrate judge to identify its jurisdictional basis for the hearing, noting that the district judge had never identified a statute under which the court was proceeding. A-72. The magistrate judge failed to do so. A-74–A-75. The government's only witness was a Coast Guard lieutenant with no first-hand knowledge of any facts. He only summarized public records that he did not create. His testimony, comprising only testimonial hearsay, was meant to show that the vessel involved in the charged crime was intercepted in Panamanian waters

and that Panama consented—11 days after the fact—to the U.S. Coast Guard's interdiction. A-92. Nuñez raised a Confrontation Clause objection to this testimony. A-83–A-87.

Following the hearing, the magistrate judge issued a report that failed to identify any statutory basis for the evidentiary hearing, credited the witness's testimonial hearsay, and recommended that Nuñez's § 2255 motion be denied. *See* A-25–A-33. Nuñez's objections included that: (1) no federal statute conferred jurisdiction to take evidence necessary to sustain a long-finalized conviction; (2) the new evidence pertained to an element which could be proven to the bench; and (3) the proceeding violated the Double Jeopardy Clause. The district court rejected all his objections. *See* A-13–A-14.

Nuñez appealed. Again anticipating reliance on the prior panel rule to circumvent this Court's constitutional precedent, Nuñez re-briefed the rule's unconstitutionality along with his other contentions. Without hearing oral argument, the Eleventh Circuit held that circuit precedent allowed the district court to take new evidence of MDLEA jurisdictional facts years after Nuñez's conviction *See* A-9. The panel rejected Nuñez's arguments in a single paragraph comprising just two sentences. *See* A-10. The first sentence stated that the prior panel rule "foreclosed" any claim that circuit precedent conflicted with this Court's Sixth Amendment holdings. A-10. The second one stated: "Nuñez's arguments challenging the prior precedent rule itself are also foreclosed, because neither this Court sitting *en banc* nor the Supreme Court has overruled or undermined it to the point of abrogation." A-10. The opinion did not identify a single case holding that the prior panel rule is constitutional because none exists. Its first eight pages only recited inapt boilerplate on uncontested points. *See* A-1–A-8. The court denied Nuñez's petition for rehearing *en banc*. *See* A-11.

Reasons for Allowance of the Writ

I. Though other circuits have held that the Eleventh Circuit's stale MDLEA precedent conflicts with this Court's holdings, panel after Eleventh Circuit panel continues to blindly apply it, claiming an inability to analyze the conflict.

The parties to this § 2255 action agree (1) that proof of certain jurisdictional facts is indispensable to an MDLEA conviction, *see* 46 U.S.C. §§ 70503(a) & (e), 70502(c), and (2) that the prosecution failed to establish those facts in its prosecution of Yency Nuñez. Under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and its progeny, the missing proof pertained to an element. "Consistent with common-law and early American practice, *Apprendi* concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 570 U.S. 99, 111 (2013). Consequently, Nuñez was entitled to vacatur of his conviction. *See* 28 U.S.C. § 2255(b). The court of appeals, however, ignored the *Apprendi* line of cases and affirmed the denial of Nuñez's motion for vacatur, just as an earlier panel rebuffed his interlocutory appeal. *See* A-10, A-36–A-37. Both panels reasoned that the Eleventh Circuit's "prior panel rule" required unquestioning adherence to *United States v. Tinoco*, 304 F.3d 1088 (CA11 2002), despite its plain conflict with this Court's reaffirmations of *Apprendi*. *Tinoco* held that, despite *Apprendi*, the MDLEA's "jurisdictional requirement is not an element of a § [70503](a) substantive offense." 304 F.3d at 1111–12.

Reasoning that circuit precedent precluded Nuñez's arguments, both panels refused to consider the circuit split over whether the MDLEA's "covered vessel" requirement limits the courts' subject-matter jurisdiction or only the statute's scope. The Eleventh Circuit, as well as the Fifth and D.C. circuits, maintain that MDLEA jurisdictional facts are "a

congressionally imposed limit on courts' subject matter jurisdiction, akin to the amount-in-controversy requirement contained in 28 U.S.C. § 1332." *United States v. de la Garza*, 516 F.3d 1266, 1271 (CA11 2008) (citing *Tinoco*, 304 F.3d at 1107); *see United States v. Miranda*, 780 F.3d 1185, 1192 (CADC 2015); *United States v. Bustos-Useche*, 273 F.3d 622, 626 (CA5 2001). The First Circuit, however, thought those circuits "leapt, we think too quickly, from the bare reference to jurisdiction to the assumption that Congress was talking about the subject-matter jurisdiction of the court." *United States v. Gonzalez*, 311 F.3d 440, 444 (CA1 2002). It held that the MDLEA jurisdictional facts posed a "routine question[] as to the reach and application of a criminal statute," just as many statutes ask whether the crime "'affects interstate commerce' or 'involved a federally insured bank[.]'" *Id.* at 443. The Ninth Circuit similarly held that whether a vessel is "covered" by the MDLEA is an element. "When [the MDLEA] jurisdictional inquiry turns on factual issues, such as the question where the vessel was intercepted ... , the jurisdictional inquiry *must* be resolved by a jury." *United States v. Perlaza*, 439 F.3d 1149, 1167 (CA9 2006). After a detailed review of these courts' analyses, the Second Circuit followed the First Circuit's reasoning. *United States v. Prado*, 933 F.3d 121, 145–51 (CA2 2019) (rejecting *Tinoco*, *Bustos-Useche*, and *Miranda*).

Whether the Eleventh Circuit's MDLEA precedent respects the Sixth Amendment is an important question because the government can prosecute the vast majority of MDLEA cases in any district it chooses. *See* 46 U.S.C. § 70504(b)(2). That allows it to circumvent *Apprendi* by forum-shopping MDLEA prosecutions to the Eleventh Circuit—which it seems to do. *See United States v. Cabezas-Montano*, 949 F.3d 567, 592 (CA11 2020) (holding that 49-day voyage to transport MDLEA defendants from Pacific Ocean to Florida did not

unreasonably delay initial appearance); *United States v. Aguino-Ramos*, 406 F.Supp.3d 1308, 1311 (SDAL 2019) (holding that 32-day voyage to transport MDLEA defendants from the Pacific Ocean to Alabama did not render confessions coerced).

This Court's intervention is necessary to resolve this important constitutional question. Despite the deepening circuit split, both panels in this case refused to consider any argument challenging *Tinoco.* Neither panel made any attempt to analyze the issue, holding that the prior panel rule precludes any challenge to circuit precedent. A-10; A-36–A-37. Both panels denied petitions for rehearing *en banc*, A-11; A-38, signaling that the circuit court will never address this circuit split. The second panel string-cited cases that purportedly "affirmed" *Tinoco*, suggesting that the court has previously reexamined its precedent in light of *Apprendi*'s progeny, A-7–A-8, but it never has. As in this and other cases, those decisions held only that the prior panel rule bars any and all challenges to *Tinoco*. *See United States v. Cruickshank*, 837 F.3d 1182, 1188 (CA11 2016) ("In this case, all of Cruickshank's arguments concerning the MDLEA are foreclosed by our prior precedent."); *United States v. Estupinan*, 453 F.3d 1336, 1339 (CA11 2006) ("Because only the Supreme Court or this Court sitting *en banc* can judicially overrule a prior panel decision, we must follow *Tinoco*."); *United States v. Rendon*, 354 F.3d 1320, 1328 (CA11 2003) ("[R]endon's *Apprendi* argument relating to his sentencing was resolved by *Tinoco* and is unavailing."); *see also, e.g.*, *Cabezas-Montano*, 949 F.3d at 587, 618–19; *United States v. Vargas*, 781 F. App'x 815, 823 (CA11 2019); *United States v. Mejia*, 734 F. App'x 731, 735 (CA11 2018). Thus, for 19 years and counting, the Eleventh Circuit has refused to even *consider* any argument challenging its precedent on this constitutional issue.

II. The Eleventh Circuit's prior panel rule denies countless litigants a meaningful appeal by precluding litigants from challenging circuit precedent and requiring its judges to follow it, even when it conflicts with Supreme Court holdings.

Following the Eleventh Circuit's routine practice of disregarding challenges to its precedent, two different panels refused in this case to consider the petitioner's arguments that circuit precedent conflicts with this Court's holdings defining the elements of a crime. Despite a circuit split on the precise issue raised, each panel concluded that the court's prior panel rule "foreclosed" any and all arguments challenging circuit precedent. A-10, A-36–A-37. Consequently, the petitioner's interlocutory and final appeals were both hollow proceedings, and his conviction was affirmed in direct contravention of this Court's constitutional holdings.

Every circuit but the Seventh has a prior panel rule that purports to take away a panel's ability to deviate from an earlier panel's holding, even a plainly erroneous one. "[W]e must follow a prior panel decision even if it had abysmal reasoning, put forward unworkable commands, engendered no reliance interests, lacked consistency with other decisions, and has been undermined by later developments." *Payne v. Taslimi*, 998 F.3d 648, 654 n.2 (CA4 2021); *see Matthews v. Barr*, 927 F.3d 606, 614 (CA2 2019); *United States v. Tavares*, 843 F.3d 1, 11 (CA1 2016); *Reilly v. City of Harrisburg*, 858 F.3d 173, 177 (CA3 2017); *United States v. Eason*, 829 F.3d 633, 641 (CA8 2016); *Volpicelli v. United States*, 777 F.3d 1042, 1043 (CA9 Cir. 2015); *Deckers Corp. v. United States*, 752 F.3d 949, 959 (CAF 2014); *United States v. Wilkerson*, 361 F.3d 717, 732 (CA2 2004); *United States v. Ruhe*, 191 F.3d 376, 388 (CA4 1999); *United States v. Brooks*, 161 F.3d 1240, 1247 (CA10 1998); *Gersman v. Group Health Association*, 975 F.2d 886, 897 (CADC 1992). The Eleventh Circuit's prior panel rule, however, uniquely makes circuit precedent not merely binding but *preclusive*.

A. The Eleventh Circuit's "prior panel rule" uniquely precludes *all* challenges to circuit precedent—even novel, well supported ones—with no analysis of their merit, denying countless litigants a meaningful appeal.

The Eleventh Circuit uniquely bars its panels from considering any challenge whatsoever to circuit precedent, even one raising novel, well supported arguments. Under that court's prior panel rule, all published holdings must be followed regardless of the arguments the parties presented or the authorities the panel considered.

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

Cohen v. Office Depot, 204 F.3d 1069, 1076 (CA11 2000). While giving its own precedent a far broader scope than due process permits, the Eleventh Circuit gives this Court's holdings the narrowest possible application. The court maintains that its precedent can be changed only by the rarity of an *en banc* or Supreme Court decision *directly* on point. *See United States v. Kaley*, 579 F.3d 1246, 1255 (CA11 2009) ("In addition to being squarely on point, ... the intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel."); *United States v. Archer*, 531 F.3d 1347, 1352 (CA11 2008) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point."). This enlargement of its precedent's force and diminution of this Court's make the Eleventh Circuit's prior panel rule a uniquely radical and unconstitutional departure from *stare decisis*.

Justice Sotomayor questioned in a recent habeas case whether the Eleventh Circuit violates due process by according its decisions preclusive force. "The Eleventh Circuit has published several of its orders denying permission to file a second or successive petition, and determined that *all* future litigants (including those on direct appeal) are bound to the holdings of these orders unless and until the *en banc* Eleventh Circuit or this Court says otherwise." *St. Hubert v. United States*, 140 S.Ct. 1727, 1728 (2020) (dissenting from denial of certiorari). The Court in *St. Hubert* may not have appreciated that the Eleventh Circuit gives its decisions preclusive effect not only in successive habeas cases but in *all* civil and criminal appeals—even when its precedent conflicts with this Court's. *See, e.g.*, *United States v. Golden*, 854 F.3d 1256, 1257 (CA11 2017) ("[S]ome members of our court have questioned the continuing validity of *Turner* in light of cases like *Descamps v. United States*, 570 U.S. 254 (2013). But even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it."); *Spaho v. United States Attorney General*, 837 F.3d 1172, 1181 (CA11 2016) ("Under our prior panel precedent rule, it is irrelevant to us whether *Donawa* is correct, or whether the panel in *Donawa* actually considered all possible issues, theories, and arguments. What matters to us is what *Donawa* decided."); *Tippitt v. Reliance Standard Life Insurance Co.*, 457 F.3d 1227, 1234 (CA11 2006) ("[A] prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel.").

The Eleventh Circuit thus will not entertain *any* argument challenging circuit precedent, even (as in this case) when its precedent cannot be reconciled with this Court's. This Court has squarely held that giving court rulings such preclusive effect violates due process. *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 168 (1999).

While *stare decisis* limits even a binding precedent's reach according to the points and authorities presented and considered, *see Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia dissenting, collecting cases), the Eleventh Circuit's prior panel rule makes its holdings decisive arbitrarily, unconstrained by their underlying rationale. Issues are conclusively decided for all litigants based on the first arguments briefed to the court, regardless of what arguments or authorities were overlooked. Mistakes propagate unencumbered by logic or law. Not only does one panel after another continue applying even plainly erroneous precedent, as this case shows, but the trial courts do as well. Wary of being overruled, district judges quickly learn to emulate the appellate court in giving short-shrift to this Court's holdings. When facing a conflict between Supreme Court and Eleventh Circuit precedent, district courts openly give circuit precedent priority: "'[T]he mere reasoning of the Supreme Court is no basis for this Court to depart from clear circuit precedent.'" *Doe v. Celebrity Cruises, Inc.*, 389 F.Supp.3d 1109, 1113 (SDFL 2019) (approvingly quoting *Gener v. Celebrity Cruises, Inc.*, 2011 WL 13223518 at *2 (SDFL 2011)).

The Eleventh Circuit's prior panel rule thus "runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)). It directly conflicts with this Court's holdings that it violates due process to preclude argument from someone who "has not had a 'full and fair opportunity to litigate' the claims and issues settled" in an earlier case. *Richards*, 517 U.S. at 797; *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940). Those "decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Taylor*, 553 U.S. at 898.

Justice Sotomayor was hopeful that the circuit would "address a procedural due process claim" challenging its rule "in an appropriate case." *St. Hubert*, 140 S.Ct. at 1728. The briefs in this case highlighted her clear suggestion, but two separate panels ignored Nuñez's due process challenge, A-10, A-36–A-37, and the court denied both his petitions for rehearing *en banc*, A-11, A-38. Typically, Eleventh Circuit panels do not even mention that an appellant has challenged the rule. *See, e.g.*, *Cabezas-Montano*, *supra*, *cert. denied sub nom. United States v. Guagua-Alarcon*, 141 S.Ct. 814 (2020); *United States v. Senese*, 798 F. App'x 499 (CA11 2020), *cert. denied*, 141 S.Ct. 306 (2020). This may be the only case, in fact, in which a panel gave a reason for ignoring a challenge to the circuit's issue-preclusive prior panel rule: "Nuñez's arguments challenging the prior precedent rule itself are also foreclosed, because neither this Court sitting *en banc* nor the Supreme Court has overruled or undermined it to the point of abrogation." A-10. Plainly, the Eleventh Circuit is totally unreceptive to any "procedural due process challenge to its practices," *St. Hubert*, 140 S.Ct. at 1728, and change can come only from this Court.

B. The circuits that rely on the prior panel rule rather than *stare decisis* unconstitutionally deprive litigants of the full benefit and effect of this Court's holdings and routinely inflict admitted miscarriages of justice.

Most circuits have adopted the prior panel rule, which decrees that one panel's holding "binds" later panels until it is overruled by that court *en banc* or this Court. Both are such extraordinarily rare events that they cannot be relied upon to keep the law rational, predictable, and fair—particularly given the circuit courts' vast civil and criminal jurisdiction. *See* Fed. R. App. P. 35(a) ("An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered ... ."). The Seventh Circuit is the only one not to claim that its panel decisions

bind subsequent panels. It develops its precedent, as this Court does, using traditional principles of *stare decisis*. "While we are not absolutely bound by the holdings in our prior decisions and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision, we are obliged to give considerable weight to [our prior] decisions . . . ." *United States v. Walton*, 255 F.3d 437, 443 (CA7 2001); *accord Santos v. United States*, 461 F.3d 886, 891 (CA7 2006).

The nuanced *stare decisis* doctrine reliably ensures that this Court's holdings supersede conflicting circuit precedent. There is, after all, but "one Supreme Court." U.S. Const. art. III, § 1. In contrast, the prior panel rule falsely postulates that circuit and Supreme Court holdings carry equal weight—both are "binding"—making it unfairly hard for litigants to persuade the lower courts to hew to this Court's interpretation of the law.

Equating circuit and high court precedent offers judges a way around analyzing whether a Supreme Court case that is not exactly on point abrogates earlier circuit precedent or whether an earlier panel misinterpreted this Court, as in this case. The prior panel rule's effect is thus always to narrow this Court's holdings. The Eleventh Circuit exacerbates this constitutional defect by expressly directing its panels to follow Supreme Court precedent only when it *directly* overrules circuit precedent. *See, e.g.*, *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (CA11 2008) ("Even if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision."). But every circuit that makes Supreme Court precedent and circuit precedent equally "binding" unconstitutionally and needlessly bars its panels from giving this Court's holdings their full force and effect, depriving litigants of the

equal protection of the law as authoritatively interpreted by this Court. *See, e.g.*, *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1085 (CA8 2009) ("Whatever the merit of these contentions [that circuit and Supreme Court precedent conflict], they challenge the decision of a prior panel, and must therefore be addressed to the court *en banc*.").

This is especially true in circuits, such as the Eleventh, Fifth, and Sixth, which require their panels to adhere even to circuit precedent that plainly misinterpreted and misapplied a Supreme Court case. These circuits do not merely equate circuit and Supreme Court precedent; they allow their panels to *overrule* this Court—and then command all future panels to repeat that error over and over. *See Thompson v. Dallas City Attorney's Office*, 913 F.3d 464, 468 (CA5 2019) ("To be clear, a panel's interpretation of a Supreme Court decision is binding on a subsequent panel even if the later panel disagrees with the earlier panel's interpretation."); *United States v. Fritts*, 841 F.3d 937, 942 (CA11 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."); *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (CA6 2001) ("Whether this was a proper reading of [Supreme Court precedent] is not our place to say, for 'a panel of this Court cannot overrule the decision of another panel.'"). That is what happened in this case. *Tinoco* misinterpreted *Apprendi*, and the Eleventh Circuit has refused to reconsider that error for nearly two decades and counting. *See supra* at 12–13.

Because it authorizes ignoring the holdings of the "one Supreme Court," the rule leads some judges to concur in unlawful, unjust, or unconstitutional holdings on the ground that circuit courts are helpless to do anything about their mistakes but repeat them. Rather than deciding each case on the merits according to law, these judges believe a judicially invented

rule requires them to suspend their independent judgment and acquiesce in miscarriages of justice. *See, e.g., United States v. Lee*, 886 F.3d 1161, 1165 (CA11 2018) (Jordan concurring in affirming a 15-year sentence although circuit precedent "failed to conduct the analysis commanded by the Supreme Court, and did not consider or apply relevant Florida case law"); *Golden*, 854 F.3d at 1257 (Pryor concurring "because I agree that as a panel we remain bound to follow" circuit precedent despite tension with intervening Supreme Court holdings), *cert. petition challenging prior panel rule denied*, 138 S.Ct. 197 (2017); *Wynne v. Renico*, 606 F.3d 867, 875 (CA6 2010) (Martin concurring "as this panel is bound by the decisions of a prior panel, no matter how illogical, I must concur."); *Cipollone v. Liggett Group*, 893 F.2d 541, 583 (CA3 1990) (Gibbons concurring "only because this panel is bound by what I believe to be an erroneous opinion of the Court."), *rev'd in part*, 505 U.S. 504 (1992).

Among them was then-Judge Gorsuch, who sat on a Tenth Circuit panel hearing a challenge to circuit precedent holding that knowledge of one's felon status is not an element of being a felon in possession of a firearm. The panel affirmed the conviction, despite noting that circuit law conflicted with two Supreme Court cases decided 18 years earlier, *Staples v. United States*, 511 U.S. 600 (1994), and *United States v. X-Citement Video*, 513 U.S. 64 (1994). *United States v. Games-Perez*, 667 F.3d 1136, 1141 (CA10 2012). Justice Gorsuch concurred, stifling his own considered judgment that doing so was contrary to the law as settled by this Court: "Our duty to follow precedent sometimes requires us to make mistakes. Unfortunately, this is that sort of case." *Id.* at 1142. Any hope that his opinion would spur the circuit to consider the issue *en banc* was dashed, and Judge Gorsuch lamented the court's failure to do justice: "When the case was before the panel, I was bound by [precedent] and

forced by my duty to precedent to countenance its injustice." *United States v. Games-Perez*, 695 F.3d 1104, 1116 (CA10 2012) (Gorsuch dissenting from denial of rehearing *en banc*). Seven years later, Justice Gorsuch was in the majority when this Court disapproved *Games-Perez* expressly and held that *Staples* and *X-Citement Video* meant that knowledge of felon status is an element of the offense. *Rehaif v. United States*, 139 S.Ct. 2191, 2197–98 (2019).

Games-Perez and *Rehaif* expose how the prior panel rule dilutes this Court's authority as the supreme and final arbiter of federal legal questions. Like the Tenth Circuit in *Games-Perez*, the Eleventh Circuit relied on its prior panel rule in *Rehaif*. *See United States v. Rehaif*, 888 F.3d 1138, 1144 (CA11 2018). It held that the rationale of *Staples* and *X-Citement Video* (as well as other Supreme Court cases) did not apply because neither directly addressed the precise statutory question before the court. *Id.* at 1146–47. This Court was thus forced to use its scarce resources to apply its own precedent to a slightly different context, while in the intervening years countless defendants were denied the benefit of this Court's constitutional holdings. In this way, the prior panel rules give Supreme Court decisions artificially narrow reach at litigants' expense. Had the Tenth Circuit followed *stare decisis*, Justice Gorsuch could have persuaded his colleagues to do justice in *Games-Perez*.

In addition to narrowing this Court's holdings, the prior panel rule entrenches circuit splits on important issues, forcing this Court to resolve them. Recently, this Court corrected the Tenth Circuit's rote application of its precedent holding that the General Railroad Right-of-Way Act of 1875 created novel fee interests rather than easements. *See Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 101–02 (2014). Dutifully noting that three other courts disagreed with its precedent, the Tenth Circuit panel claimed it had no power to fix it:

"Though we recognize that the Seventh Circuit, the Federal Circuit and the Court of Federal Claims have concluded that the United States did not retain any reversionary interest in these railroad rights-of-way, we are bound by our precedent." *United States v. Brandt*, 496 Fed. App'x 822, 825 (CA10 2012). This happened even though the Seventh Circuit had detailed the flaws in the Tenth Circuit precedent's reasoning. *See Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799, 803–04 (CA7 2011). Likewise, in this case, the Eleventh Circuit again refused to revisit *Tinoco*, despite the deepening circuit split over the elements of an MDLEA violation. *Stare decisis*, in contrast, provides no excuse for summarily dismissing arguments that other federal appellate courts have found persuasive.

Many people, including the petitioner, still suffer the identical "grave injustice" that Justice Gorsuch noted in *Games-Perez*: "People sit in prison because [circuit] case law allows the government to put them there without proving a statutorily specified element of the charged crime." *Games-Perez*, 695 F.3d at 1116. Other litigants suffer other, equally grave wrongs—from having criminal sentences wrongly doubled to having class actions wrongly dismissed—when circuit precedent is given primacy over this Court's holdings. *See, e.g.*, *Lee*, 886 F.3d at 1165 (vacating district court's seven-year sentence and requiring imposition of a 15-year sentence relying on admittedly erroneous circuit precedent); *Smith v. GTE Corp.*, 236 F.3d 1292, 1301–02 (CA11 2001), and *H&D Tire and Automotive-Hardware v. Pitney Bowes*, 227 F.3d 326, 329–30 (CA5 2000) (both adhering to a 1978 Fifth Circuit case to preclude aggregation of punitive damages for class certification in conflict with Supreme Court holdings). These injustices are inflicted solely for the sake of a concocted rule of judicial convenience lacking any legal foundation.

No circuit court has ever articulated how it has the power to give its panel decisions binding, much less preclusive, force in all later appeals. To be sure, courts have the inherent power "to fashion rules to govern their own procedures," *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 99 (1993), but a rule that purports to require a particular rule of decision for future cases is substantive, not procedural. Indeed, as this Court has explained, our common law system presupposes that each judge on an appellate panel brings her independent judgment to bear on the questions the parties raise:

> The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition.

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 831 (1986) (Brennan concurring). The prior panel rule breaks our system. Rather than a frank discussion of whether circuit precedent is flawed, judicial deliberations are sidetracked by the question of whether the judges are duty bound *not* to consider the merits of the arguments presented, no matter the injustice.

The prior panel rule thus allows circuit judges to invade each other's jurisdiction. Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy … ." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995); *see also Erickson v. United States*, 264 U.S. 246, 249 (1924) ("Jurisdiction is power to decide the case either way, as the merits may require."). A case is binding, as *Plaut* implies, not because a court decrees it is but by virtue

of having issued from a reviewing court. Thus, Eleventh Circuit decisions bind district courts in Florida, Georgia, and Alabama but not Colorado, Connecticut, or California. Likewise, no district court can bind any other because district courts do not hear appeals from other district courts. Each district judge exercises professional judgment independently from every other district judge. "The structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction." *Dhalluin v. McKibben*, 682 F. Supp. 1096, 1097 (DNV 1988). No reason has ever been given for why circuit judges, unlike district judges, can bind each other. *See Dunbar v. Henry Du Bois' Sons Co.*, 275 F.2d 304, 306 (CA2 1960) ("Judge Clark believes that in a proper case a panel of this court may frankly state its disagreement with a decision of another panel and refuse to be bound thereby.").

Nor can it be maintained that Article III grants judicial independence to courts rather than judges. On the contrary, the judiciary's collective independence from the other branches is the byproduct of each judge's ability to decide her assigned cases independently: "Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign." *Chandler v. Judicial Council*, 398 U.S. 74, 136 (1970) (Douglas dissenting); *see also In re McBryde*, 117 F.3d 208, 223 (CA5 1997) (holding that every Article III judge has a constitutional interest "in deciding [his or her assigned] cases free from the specter of interference, except by the ordinary process of appellate review ... ."); *Hastings v. Judicial Conference*, 770 F.2d 1093, 1106–07 (CADC 1985) (Edwards concurring) ("[T]he guarantee of independence runs to individual judges as well as to the judicial branch.").

It makes no difference whether circuit judges are happy to follow the prior panel rule. Judges have no power to relinquish their duty to weigh the parties' arguments. Courts of mandatory jurisdiction must decide the substantial questions that parties present. "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008); *accord United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020). A corollary to this is that judges have no power to relinquish their duty to decide cases and instead defer to an opinion they adjudge legally wrong. "We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)). Federal judges "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. ... Questions may occur which we would gladly avoid; but we cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

The *en banc* Fourth Circuit has in fact acknowledged that one panel has no power to bind another—but nonetheless required all its panels to follow the earliest decision on a given issue, regardless of its deficiencies in reasoning or research:

> While we recognize that *a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel*, we believe that, as a matter of prudence, a three-judge panel of this court should not exercise that power. Accordingly, we conclude that when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that *must be followed*, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court.

McMellon v. United States, 387 F.3d 329, 334 (CA4 2004) (*en banc*) (emphases added). The

en banc Eighth Circuit has since followed suit and abandoned its earlier practice of allowing panels to resolve intracircuit conflicts by choosing the best reasoned circuit precedent. *See Mader v. United States*, 654 F.3d 794, 800 (CA8 2011) (*en banc*). In contrast to this arbitrary choice, *stare decisis* deals with intracircuit conflicts by requiring judges to apply the *best*, not the most dated, reasoning. Judge Niemeyer pointed this out in dissent, explaining that *stare decisis* is preferable to slavish adherence to precedent:

> As a matter of judicial power, ... such a rule cannot be required. In addition, such a rule, properly considered as a discretionary rule, is not even desirable, in that it forces courts to apply *stare decisis* in a narrow and mechanical way, without all of the doctrine's permutations and well-established exceptions.

McMellon, 387 F.3d at 355.

There is no truth to the rationalizations that courts sometimes offer to justify the prior panel rule. The idea, for example, that the "prior precedent rule ... is essential to maintaining stability in the law," *Walker v. Mortham*, 158 F.3d 1177, 1188 (CA11 1998), was refuted in the very case that propounded it. As the court noted, "[W]e are faced with two conflicting lines of precedent. In deciding which line of precedent to follow, we are, ironically, faced with two conflicting lines of precedent." *Id.* Obviously, the prior panel rule does nothing to eliminate intracircuit conflicts, which are nearly always the result of oversight.

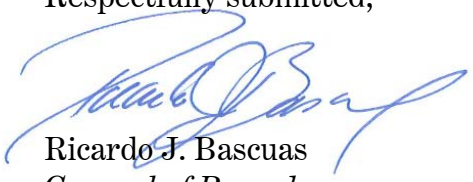
The Seventh Circuit acknowledges the reality that such oversights are inevitable and that *stare decisis* allows them to be addressed when identified. "Panels of three appellate judges establish rules for the approximately 100 judicial officers of this circuit, and for the approximately 22 million persons living within its boundaries. Some of these decisions are bound to be erroneous, or at least to depart from those the many other judges who are not

on a given panel would have reached." *Gacy v. Welborn*, 994 F.2d 305, 310 (CA7 1993). In contrast, the prior panel rule posits an irrational reverence for precedent that interferes with the courts' fundamental tasks of doing justice and developing the law along rational and predictable lines.

As cases like this one and *Games-Perez* show, the prior panel rule empowers federal appellate courts to disregard appellants' well supported legal arguments and even to ignore this Court's holdings. The circuits that have adopted this rule have usurped power that Article III does not grant and deprived appellants due process by denying them both a meaningful opportunity to be heard and the equal protection of this Court's holdings. In contrast, *stare decisis* accords circuit precedent all the respect it deserves while giving full force and effect to this Court's holdings and thereby ensuring the reasoned and fair resolution of appeals. The circuits' widespread but unquestioned and unjustified reliance on the prior panel rule for deciding countless civil and criminal appeals merits this Court's examination. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

WHEREFORE a writ of certiorari should issue to examine whether the prior panel rule is an unconstitutional departure from *stare decisis* that impairs the proper functioning of the federal judicial hierarchy and the adversarial process.

Respectfully submitted,



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No. _____

In the
Supreme Court of the United States of America

Yency Nuñez,

Petitioner,

v.

United States of America,

Respondent.

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

Certificate of Service

I certify that on 27 October 2021, copies of Yency Nuñez's Petition for Writ of Certiorari, the Motion for Leave to Proceed *In Forma Pauperis*, and this Proof of Service were served by electronic mail upon the United States Attorney for the Southern District of Florida, 99 NE Fourth Street, Miami, Florida, 33132, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C., 20530-0001.

Respectfully submitted,

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