No. _____

IN THE
Supreme Court of the United States

ERIC MALMSTROM,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Must a federal court of appeals adhere to the principle of stare decisis and abide by prior circuit precedent absent an intervening decision from this Court or a court of appeals sitting en banc?

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INTRODUCTION

This case squarely presents an important question concerning the binding nature of this Court's precedent—a question that has deeply divided the federal courts of appeals: Can a three-judge panel of a federal court of appeals overrule its own precedent absent an intervening decision from this Court?

Most courts of appeals permit a panel to overrule circuit precedent *only* if there is an intervening decision from this Court. See *United States v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013); *United States v. Green*, 722 F.3d 1146, 1149–51 (9th Cir. 2013); *Garrett v. Univ. of Ala. at Birmingham Bd. of Tr.*, 344 F.3d 1288, 1292 (11th Cir. 2003); *United States v. Wahi*, 850 F.3d 296, 302 (7th Cir. 2017); *United States v. Brooks*, 751 F.3d 1204, 1209–10 (10th Cir. 2014); *In re Zarnel*, 619 F.3d 156, 168–69 (2d Cir. 2010); *United States v. Young*, 580 F.3d 373, 379–81 (6th Cir. 2009); *Arecibo Cmty. Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 23 (1st Cir. 2001); *Kooritzky v. Herman*, 178 F.3d 1315, 1317–21 (D.C. Cir. 1999); *Etheridge v. Norfolk & Western Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 (3d Cir. 1985). In these courts, circuit precedent can give way to an opinion by a three-judge panel only when this Court's intervening decision "casts doubt on" that precedent. See *In re Zarnel*, 619 F.3d at 168; *accord Wojchowski v. Daines*, 498 F.3d 99, 106 (2d Cir. 2007).

In the case below, however, a three-judge panel of the Eighth Circuit Court of Appeals overruled prior circuit precedent, without any intervening authority from

this Court. The panel's decision undercuts stare decisis, a bedrock principle of the federal-court system.

This Court should grant review in this case to restore uniform application of stare decisis and because the court of appeals below erred. This petition squarely raises the question presented. Petitioner argued in the court of appeals that the panel should conform to prior circuit precedent as there was no intervening decision from this Court or an en banc court in the circuit. But rather than applying established precent, a three-judge panel of the court of appeals, in a per curiam opinion, issued a decision that contravened established circuit precedent. Pet App. 2a. By granting review in this case, this Court can resolve the court of appeals' split from sister circuits and reinforce the principle of stare decisis.

Opinion Below

The opinion of the U.S. Court of Appeals for the Eighth Circuit is reproduced in the appendix. See Pet. App. 1a–5a.

Jurisdiction

The court of appeals entered judgment on August 16, 2022. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statement of the Case

In 2017, Petitioner was convicted in the District of Maine of transmitting threatening interstate communications and was sentenced to 27 months of incarceration and three years of supervised release. On the eve of the expiration of

his custodial term, Petitioner was transferred from the Schuylkill Federal Correctional Institution to the Rochester Federal Medical Center. The government then filed a petition for civil commitment under 18 U.S.C. § 4246.

The magistrate judge issued a report and recommendation urging the district court to grant the petition, and the district court did so over Petitioner's objection. Specifically, Petitioner argued that the government had not met its burden of proving by clear and convincing evidence that Petitioner would be dangerous if released and that no suitable state placement exists. The district court overruled Petitioner's objections and issued an order adopting the magistrate judge's report and recommendation. In finding that the government had met its burden to prove that no suitable state placement existed, the district court applied a lower burden of proof—preponderance of the evidence.

On appeal, Petitioner, relying on *United States v. Ecker*, 30 F.3d 966, 970 (8th Cir. 1994), argued that the district court erred in applying a preponderance standard rather than a clear-and-convincing standard to the suitable-state-placement prong under § 4246. Petitioner acknowledged that *Ecker* was irreconcilable with the later-issued opinion of another court of appeals panel in *United States v. Wigren*, 641 F.3d 944, 946–47 (8th Cir. 2011). But Petitioner argued that *Ecker*, and not *Wigren*, was binding because there was no intervening decision from this Court or the en banc court. The court of appeals rejected Petitioner's argument. See Pet. App. 4a–5a. In doing so, the court *Ecker*'s holding that the clear-and-convincing standard applied was dicta. The court of appeals

therefore determined that district court did not err in applying the lower preponderance standard and finding that the government had met that standard.

Reasons for Granting the Petition

This Court should grant this petition. This petition raises a fundamental question of constitutional law concerning the principle of stare decisis and the relationship between this Court and the lower courts of appeals: When may a three-judge panel of a federal court of appeals overrule its precedent. Most federal courts require an intervening decision from this Court (or an en banc court of appeals to do so). The court below, however, did so without such an intervening decision. In doing so, the court of appeals split from its sister circuits. By granting review, this Court can resolve a longstanding circuit split and provide clarity where none exists.

Most federal courts of appeals have determined that the principle of stare decisis requires an intervening decision from this Court (or an en banc court) before a three-judge panel can overrule circuit precedent. In three courts of appeals—the Fifth, Ninth, and Eleventh Circuits—a panel can overrule circuit precedent only if it is clearly irreconcilable with this Court's intervening decision. See *United States v. Alcantar*, 733 F.3d 143, 145–46 (5th Cir. 2013); *United States v. Green*, 722 F.3d 1146, 1149–51 (9th Cir. 2013); *Garrett v. Univ. of Ala. at Birmingham Bd. of Tr.*, 344 F.3d 1288, 1292 (11th Cir. 2003). In other words, an apparent conflict between circuit precedent and an intervening decision from this Court is resolved by deferring to circuit precedent—unless the conflict is unequivocal. This is a "high standard," and it is not enough that the intervening decision merely "cast[s] doubt"

on the circuit precedent. *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011); *accord United States v. Dunn*, 728 F.3d 1151, 1156 (9th Cir. 2013).

And in eight courts of appeals—the First, Second, Third, Fourth, Sixth, Seventh, Tenth, and D.C. Circuits—a panel *must* overrule circuit precedent that is in any way irreconcilable with intervening authority from this Court. See *United States v. Wahi*, 850 F.3d 296, 302 (7th Cir. 2017); *United States v. Brooks*, 751 F.3d 1204, 1209–10 (10th Cir. 2014); *In re Zarnel*, 619 F.3d 156, 168–69 (2d Cir. 2010); *United States v. Young*, 580 F.3d 373, 379–81 (6th Cir. 2009); *Arecibo Cmty Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 23 (1st Cir. 2001); *Kooritzky v. Herman*, 178 F.3d 1315, 1317–21 (D.C. Cir. 1999); *Etheridge v. Norfolk & Western Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 (3d Cir. 1985). Thus, in these courts of appeal, a panel does not give special deference to circuit precedent. Instead, this Court's precedent is the law of the land and circuit precedent must be overruled so long as this Court's intervening decision "casts doubt" on it. See *In re Zarnel*, 619 F.3d at 168; *accord Wojchowski v. Daines*, 498 F.3d 99, 106 (2d Cir. 2007). As one court put it, "When an intervening Supreme Court decision unsettles [circuit precedent], it is the ruling of the Court that sits on 1 First Street that must carry the day." *Wahi*, 850 F.3d at 302.

Thus, most court of appeals have ruled that an intervening decision from this Court is required for a three-judge panel to contravene circuit precedent. These decisions make sense. The "federal court system" is a "hierarchy"—a hierarchy with

this Court at the top. *Hutto v. Davis*, 454 U.S. 370, 374 (1982). The Constitution established that hierarchy in Article III, which provides that "[t]he 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." U.S. CONST. art. III, § 1 (emphasis added). Thus, Article III creates a court that is "supreme"—this Court—which has superiority over the "inferior courts," the court of appeals. Article III, then, creates a hierarchal system of precedent, where the lower courts of appeals must follow decisions from this Court. See Evan H. Camiker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828–33 (1994). "There is no serious debate regarding this obligation[.]" Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 n.6 (1988); *accord* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994). The obedience that this obligation requires is absolute. "[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 may be." *Hutto*, 454 U.S. at 375. Indeed, this unbending adherence to *stare decisis* has led this Court to continually warn the lower federal courts against assuming that precedent from this Court is overruled; "it is this Court's prerogative alone," this Court has stated again and again, "to overrule one of its precedents." See, *e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

This bedrock constitutional principle of the federal-court system—that the lower federal courts must follow precedent no matter what—is entirely inconsistent with the court of appeals' opinion in this case. By ignoring circuit precedent without relying on intervening authority to do so, the opinion below is inconsistent with stare decisis and fosters "anarchy" within the lower federal courts. See *Hutto*, 454 U.S. at 375. Thus, if a court of appeals opinion is not "well-harmonized" with precedent, the Constitution obligates the court of appeals to harmonize it, not ignore it. See *Green*, 722 F.3d at 1150.

This case squarely raises the question presented. The lower court rejected Petitioner's contention that it follow prior circuit precedent as there was no intervening decision from this Court or an en banc court. See Pet. App. 4a–5a. Thus, this Court should grant review in this case, resolve the threshold issue of how a court of appeals should evaluate prior precedent, and then remand to the court of appeals for it to apply established circuit precedent to Petitioner's argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

November 14, 2022

Respectfully submitted,

Sarah Weinman