No. 17-567

In the Supreme Court of the United States

G. HARRISON SCOTT, JOHNNY C. CROW, and SHARRY R. SCOTT,

Petitioners,

–v–

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

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

PETITION FOR REHEARING

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STATEMENT

On October 10, 2017, Petitioners filed a petition requesting a Writ of Certiorari to the Fifth Circuit Court of Appeals based upon, among others, the "deference" afforded to the FDIC Board in the interpretation of 12 C.F.R. § 215.4(a). The FDIC relying on *Bullion v. FDIC*, 881 Fed 2nd 1368 5th Circuit 1989, did not contest in its opposition.

The petition was distributed for Conference on February 16, 2018, February 23, 2018, and March 2, 2018. It was denied on March 5, 2018.

Petitioners hereby request a rehearing of the denial of their request for a Writ of Certiorari based upon an "intervening circumstance." Supreme Court Rule 44(2)

On February 21, 2018, this Honorable Court addressed the issue of Deference in *Digital Realty Trust, Inc., Petitioner v. Paul Somers*, No. 16-1276, wherein it ruled, "The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term."

ARGUMENT

This very same legal issue, Deference, was addressed at length in *Bullion v. FDIC*, 881 Fed 2nd, 5th Circuit 1989, wherein the FDIC Board interpreted "and" to be "or".

> "V. The Regulation O "More Than Normal Risk of Repayment" Violation
>
> Petitioners argue that the FDIC Board incorrectly overruled the ALJ's finding that the FDIC had failed to prove that the purchase of the bonds for the Sherwood Meadows Townhouses had a higher than normal risk of default in repayment or other unfavorable features. The critical statutory provision § 214.5(a) (correct number 215.4(a) states in relevant part:
>
> Terms and Creditworthiness. No member bank may extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person unless the extension of credit: (1) is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank, AND (emphasis added) (2) does not involve more than

the normal risk of repayment or present other unfavorable features.[1]

12 C.F.R. § 214.5(a)

The ALJ found that a § 214.5(a) violation required proof both that the loan involved preferential terms and also an abnormally high risk of default in repayment. Because the ALJ found that this loan was not handled any differently at the Bank than other similar loans, he found that the FDIC could not prevail on this issue as a matter of law. At best, the ALJ concluded that the FDIC proved that the Bank had unsound banking practices, but unsound banking practices was not the test under this section.

(3) The FDIC Board made its own contrary interpretation of the statute. We review the interpretation of the FDIC. Our deference is to the agency and not the ALJ. 12 U.S.C. § 1828(j)(4)(D); *Committee for an Independent, P-I v. Hearst Corp.*, 704 F.2d 467, 472-73 (9th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 236, 78 L.Ed.2d 228 (1983). As long as the FDIC's interpretation was rational and consistent with congressional intent, we will uphold it whether we view the ALJ's approach as better or not. *Chevron v. National Resources Defense*, 467 U.S. 837, 843-45, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984); *Bangor*

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[1] The ALJ, by means of an Order of Intended Ruling, which was never issued, precluded Petitioners from introducing any evidence contradicting "normal risk of repayment."

> *& A. R. Co. v. I.C.C.*, 574 F.2d 1096, 1110 (1st Cir.), *cert. denied*, 439 U.S. 837, 99 S.Ct. 121, 58 L.Ed.2d 133 (1978).
>
> (4) The FDIC Board read the language and structure of the statute to require either a showing of preferential terms, OR (emphasis added) of more than the normal risk of repayment or other unfavorable features to prove a violation of § 215.4(a). It found no indication in the statute limiting the section to a double requirement as the ALJ had found. We agree. The ALJ misread the conjunctive *"and"* in the statute. The *"and"* requires both no preferential terms and no more than normal risk of repayment. To accept the ALJ and petitioners' interpretation of the provision would protect banks from being charged with a violation of § 215.4(a) even though all their loans involved more than the normal risk of repayment.[2] This result would obviously defeat the intent of the provision.
>
> The Board then went on to decide if § 215.4(a)(2) had been violated.

Excerpts from Judicial Deference to Administrative Interpretations of Law, Duke Law Journal, January 24, 1989. The Honorable Antonin Scalia

> Five Terms ago, the Supreme Court issued its opinion in the case of *Chevron, U.S.A., Inc. v. NRDC*, which announced the principle that

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[2] To accept "and" as opposed to "or" "would protect banks from being charged with a violation of § 215.4(a)." The section relates to individuals not banks.

> the courts will accept an agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers.
>
> *Chevron* has proven a highly important decision. In the first three and a half years after its announcement, *Chevron* was cited by lower federal courts over 600 times.
>
> It is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law.
>
> Surely the law cannot be altered or affected by what the Executive thinks about it. I suppose it is harmless enough to speak about "giving deference to the views of the Executive" concerning the meaning of a statute.
>
> But to say that those views will be binding is a striking abdication of judicial responsibility.

This issue of Deference was resolved in *Digital Realty Trust, Inc.* and Petitioners are requesting a ruling in conformity.

CONCLUSION

It is respectfully submitted that there is no need for briefs and argument. The Court, in accordance with Supreme Court Rules 16(1) and 44(2) should grant a Summary Disposition as there is no statutory ambiguity that would warrant deference:

The statute's "and" is clear and conclusive.

Congress has directly spoken to the precise question at issue. *Chevron*, 467 U.S., at 842. The Court should not accord deference to the contrary view advanced by the FDIC. The statute's unambiguous "and," in short, precludes the FDIC from a more expansively interpretation.

The judgment of the Court of Appeals for the Fifth Circuit should be reversed, and the case remanded for further proceedings consistent with this opinion.

Respectfully submitted,

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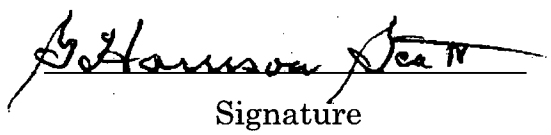
MARCH 27, 2018

RULE 44 CERTIFICATE

I, G. Harrison Scott, along with Johnny C. Crow and Sharry R. Scott, are petitioners pro se in Supreme Court Case Number 17-567. Pursuant to 28 U.S.C. § 1746, I do declare under penalty of perjury that the following is true and correct:

1. This petition for rehearing is presented in good faith and not for delay.

2. The grounds of this petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.



Signature

Executed on March 27, 2018